

IN THE SUPREME COURT OF OHIO

John H. Hutchings, et al.,
Appellants,
v.
David R. Childress, et al.,
Appellees.

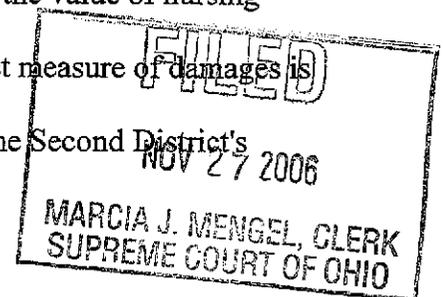
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:
: ON APPEAL FROM THE
: DELAWARE COUNTY COURT
: OF APPEALS, FIFTH
: APPELLATE DISTRICT
:
: COURT OF APPEALS
: CASE NO. 05CAE05-031
:

06-2183

NOTICE OF CERTIFIED CONFLICT

On January 8, 1999, Nancy Hutchings suffered a brain injury in an automobile collision which has left her with permanent injuries including severe cognitive deficits. On April 7, 2005, a Delaware County jury returned a verdict for Nancy Hutchings in the amount of \$255,000 and a verdict for her husband, John Hutchings, in the amount of \$20,000 on Mr. Hutchings' loss of consortium claim. Although the trial court allowed appellants to present evidence of the income they lost because Mr. Hutchings stayed home to care for his injured wife, the trial court subsequently refused to instruct the jury on this element of appellants' damages. There was no dispute at trial that appellants' lost income was the direct and proximate result of the injuries Nancy Hutchings suffered in the January 8, 1999 automobile crash.

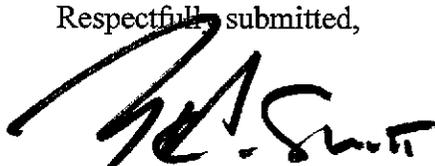
On November 17, 2006, the Fifth District Court of Appeals held that appellants could not recover these costs. The Court further held that its decision was directly in conflict with the July 15, 2005 opinion from the Second District Court of Appeals in *Depouw v. Bichette* (2nd Dist. 2005), 162 Ohio App.3d 336, 2005-Ohio-3695. In *Depouw*, the Second District held that (1) a tortfeasor can be required to compensate the injured party for the value of nursing services provided by family members without charge and (2) the correct measure of damages is the husband's lost wages, not the cost of hiring outside nursing care. The Second District's



opinion, therefore, enables a spouse to assume responsibility for caring for an injured spouse without suffering an income loss due to the negligence of another.

Thus, injury victims residing in the Fifth District do not have the same measure of damages as injury victims residing in the Second District. As a result of this conflict, the Fifth District Court of Appeals has certified the following issue to the Ohio Supreme Court for review and consideration: "whether spouses can recover the income lost due to one spouse caring for another or whether they may only recover the cost to hire outside home health care." Copies of the Fifth District's Opinion and Judgment Entry in this case and the Second District's Opinion in *Depouw v. Bichette* are attached hereto.

Respectfully submitted,



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Attorneys for Appellants
John and Nancy Hutchings

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Certified Conflict was served upon the following counsel of record, by ordinary U.S. mail, postage prepaid, this 27th day of November, 2006:

A. Scott Norman Esq.
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987 South High Street
Columbus, Ohio 43206

Attorney for Appellees
David R. Childress and
Central Ohio Paintball, Inc.



COURT OF APPEALS
 DELAWARE COUNTY, OHIO
 FIFTH APPELLATE DISTRICT

Court of Appeals
 Delaware Co., Ohio
 I hereby certify the within be a true
 copy of the original on file in this office.
 Jan Antonoplos, Clerk of Courts
~~John~~ Deputy

JOHN H. HUTCHINGS, et al.	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiffs-Appellants	:	Hon. W. Scott Gwin, J.
	:	Hon. John F. Boggins, J.
-VS-	:	
	:	Case No. 05CAE05-031
DAVID R. CHILDRESS, et al.	:	
	:	NUNC PRO TUNC
Defendants-Appellees	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil Appeal from Delaware County
Common Pleas Court, Case No. 03 CV-H-01-019

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiffs-Appellants

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COURT OF APPEALS
 DELAWARE COUNTY, OHIO
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 JAN ANTONOPLIOS
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 THE NUNC PRO
 TUNC OPINION

Boggins, J.

{¶1} This is an appeal and a cross-appeal from an entry of judgment against defendants-appellees in the amount of \$275,000.00, dated April 25, 2005, following a trial by jury.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 8, 1999, Appellants/Cross-Appellees John and Nancy Hutchings were injured in a motor vehicle collision. Appellee/Cross-Appellant David Childress, an employee of Appellee/Cross-Appellant, Central Ohio Paintball, Inc., was driving a company truck and failed to stop at a stop sign at the intersection of Glick Road and Memorial Drive. Nancy Hutchings was in the front passenger seat. Childress crashed into the passenger side of the Hutchings' van causing Nancy Hutchings to strike her head and suffer a closed head injury later diagnosed as a traumatic brain injury (TBI).

{¶3} Appellants filed a Complaint in the Delaware County Court of Common Pleas alleging personal injuries, loss of services and consortium and naming David R. Childress and Central Ohio Paintball, Inc. as defendants.

{¶4} This matter was tried before a jury on April 5, 6 and 7, 2005.

{¶5} The following facts were presented at trial:

{¶6} In 1991, John Hutchings began working for Advest as an investment broker. Nancy, who also had a securities license, joined him full-time in this business. She handled the paperwork and administered duties for the business for eight years before her injury. According to John Hutchings, before Nancy was injured she "ran the

household the same way she ran the office ... she just took care of it . . . I took care of the clients and Nancy took care of just about everything else."

{¶7} Appellants' tax returns show that both John and Nancy Hutchings received compensation from Advest.

{¶8} According to Appellants, after the accident, Nancy Hutchings' ability to perform her previous duties at home and work was severely compromised. As a result, John Hutchings performed many of the tasks Nancy previously managed. John spent most of the first six weeks after the crash at home taking care of Nancy and working out of the house. He took time away from work to care for Nancy. He has attended more than one hundred doctors' appointments with Nancy since her injury. He has taken over her household duties and comes home for lunch regularly to check on her. As a result, John testified he "suffered an income loss because of the accident."

{¶9} Nancy returned to work and earned income for the years 1999, 2000, 2001, 2002, 2003 and 2004.

{¶10} Appellants' expert economist, John F. Burke, Ph.D., testified in support of Appellants' claim for lost income based on the time John Hutchings spent taking care for his wife.

{¶11} Dr. Burke opined that John Hutchings would earn a good income in the future, but that he would have been able to earn significantly more income but for the changes in his work time caused by his wife's injuries. According to Dr. Burke, if John Hutchings works until his Social Security retirement age of 66 and 8 months, he will have lost \$2,296,000.00 that he otherwise would have earned but for Nancy Hutchings' injuries. If Mr. Hutchings works until his work-life expectancy, approximately age 62, the

income lost will be \$1,775,000.00. Dr. Burke also calculated John's past lost income component as \$288,659.00 and advised the jury that this figure is included in each of his total lost income calculations.

{¶12} Joint tax returns were also admitted in support of such claim.

{¶13} The jury returned a verdict and signed an interrogatory awarding damages to Nancy Hutchings in the total amount of \$255,000. The jury also returned a general verdict awarding damages of \$20,000 to John Hutchings for loss of consortium. The trial court entered judgment on April 25, 2005 for a total verdict against the defendants in the amount of \$275,000.

{¶14} The trial court's Judgment Entry included the following language:

{¶15} "The Court further granted defendants' request not to instruct the jury on plaintiffs' claim for John Hutchings' lost income resulting from the injuries suffered by Nancy Hutchings."

{¶16} Appellants filed their notice of appeal on May 25, 2005, limiting their appeal "to the Trial Court's decision not to instruct the jury that it could award plaintiffs the income relating to John Hutchings that was lost as a result of his wife's injuries."

{¶17} Appellees filed a Notice of Cross-Appeal on June 6, 2005

{¶18} The following errors are assigned for review:

ASSIGNMENTS OF ERROR

APPELLANTS

{¶19} "I. THE TRIAL COURT ERRED BY (A) GRANTING DEFENDANTS' REQUEST NOT TO INSTRUCT THE JURY ON THE LOST INCOME OF JOHN HUTCHINGS AS A COMPONENT OF PLAINTIFFS' DAMAGES RESULTING FROM

THE INJURIES SUFFERED BY NANCY HUTCHINGS, AND (B) REFUSING TO SUBMIT PLAINTIFFS' REQUESTED INTERROGATORY TO ESTABLISH THE JURY'S AWARD OF COMPENSATORY DAMAGES ATTRIBUTABLE TO NANCY HUTCHINGS' INJURIES FOR PAST AND FUTURE LOST INCOME OF JOHN HUTCHINGS."

CROSS-APPELLANTS

{¶20} "I. THE TRIAL COURT ERRED BY FAILING TO ISSUE AN INSTRUCTION TO THE JURY IN REGARD TO MITIGATION OF DAMAGES.

{¶21} "II. THE TRIAL COURT ERRED BY DIRECTING A VERDICT FOR PLAINTIFFS INSTRUCTING THE JURY THAT CENTRAL OHIO PAINTBALL WAS RESPONSIBLE FOR DAVID CHILDRESS' ACTIONS.

{¶22} "III. IT WAS ERROR FOR THE COURT TO DENY EVIDENCE THAT THE PLAINTIFFS BRAIN TUMOR TO BE SUBMITTED TO THE JURY WHERE PLAINTIFF ALLEGED A TRAUMATIC BRAIN INJURY AS A RESULT OF THE ACCIDENT AND SHE SUSTAINED SYMPTOMS CONSISTENT WITH BOTH DIAGNOSIS AND RECEIVED SOCIAL SECURITY DISABILITY BENEFITS FOR THE VERY SYMPTOMS PLAINTIFFS ALLEGED WERE CAUSED BY DEFENDANTS.

I.

{¶23} In their sole assignment of error, Appellants argue that the trial court erred in failing to give an instruction to the jury informing them that they could make an award for lost income for John Hutchings. We disagree.

{¶24} Appellant argues that the jury should have been allowed to consider the issue of the wages John Hutchings lost as a result of staying home and providing care to his wife.

{¶25} Upon review of the record, we find that John Hutchings' only claim was one for loss of consortium based on his wife's personal injuries. He did not make a claim for any personal injuries of his own.

{¶26} Spousal consortium has been defined as "society, services, sexual relations and conjugal affection which includes companionship, comfort, love and solace." *Clouston v. Remlinger Oldsmobile Cadillac, Inc.* (1970), 22 Ohio St.2d 65, 258 N.E.2d 230.

{¶27} A plaintiff who suffers bodily injury due to the negligence of a tortfeasor and is unable to engage in gainful employment as a result suffers a direct loss from that inability to work, which is compensable in money damages. The reasonable measure of those damages is the value of wages that the injured person did not earn.

{¶28} Evidence was presented to the jury with regard to the lost wages of Nancy Hutchings, the loss services of Nancy Hutchings along with the cost of hiring a live-in domestic to perform the household chores which Nancy Hutchings can no longer perform.

{¶29} With regard to Mr. Hutchings claim that he should be compensated for his lost wages resulting from the care he provided to his wife, we agree with the trial court and the other appellate districts in this State that find that the jury cannot consider and award damages for Mr. Hutchings' lost wages resulting from the gratuitous nursing care

he provided to his wife. *Griffen v. Cincinnati Realty Co.* (1913), 27 Ohio Dec. 585; *Bowe v. Bowe* (1903), 26 Ohio C.C. 409.

{¶30} We find Appellant's reliance on *Henson v. Andre*, (1982) Tenth Dist. App. No. 82AP-84, to be misplaced. In *Henson*, both the husband and wife operated a family business. When the husband was unable to work at such family business because of his injuries, the wife was required to hire someone to help. In *Henson*, unlike the case sub judice, the injured party (the husband) did not seek recovery of lost wages or damages for impairment of his earning capacity. The trial court, based on these specific set of facts, allowed the cost of the extra help needed to replace the husband as part of the wife's claim for loss of consortium.

{¶31} We find said case to not be applicable to the present case in that Appellants did not operate a "family business" within the meaning of the type of business considered by the *Henson* court. Furthermore, in the instant case, Appellant Nancy Hutchings did make her own claim for lost wages.

{¶32} We do not find that the trial court erred in not allowing the jury to consider Mr. Hutchings' lost wages resulting from his inability to work as such loss was not necessarily a probable consequence of Nancy Hutchings' injuries. Such lost wages were not a loss that Nancy Hutchings necessarily suffered as the direct result of the defendant's negligence.

{¶33} Appellant's sole assignment of error is overruled.

CROSS-APPEAL

I.

{¶34} In their first assignment of error, Cross-Appellants maintain that the trial court erred in failing to instruct the jury with regard to mitigation of damages. We disagree.

{¶35} Upon review of the transcript, it appears that the request for an instruction on mitigation related to John Hutchings' claim for lost wages:

{¶36} Mr. Norman: "Your Honor, I know that O.J.I. has an instruction for mitigation of damages. Could we ask that that be included?"

{¶37} The Court: "I haven't heard anything as to what they could have done differently to mitigate damages.

{¶38} Mr. Norman: "Well, in this particular case, he's alleging that he lost a significant amount of income because he was going home to be with his wife, spending time to go home and watch her as opposed to having somebody else pop in and make sure she had lunch. I think that's certainly something the jury could think about and consider, or travel. So he could still continue to conduct his business. You're talking about a man who is alleging to this jury that he went from \$380,000 or \$350,000 worth of income to \$75,000 because he had to go home and be with his wife." (T. at 312).

{¶39} As the trial court did not allow the jury to consider Mr. Hutchings' lost wages, the issue of mitigation of same is moot.

{¶40} Furthermore, Appellees/Cross-Appellants never raised mitigation as an affirmative defense prior to the close of trial.

{¶41} Mitigation is an affirmative defense to a claim. *Young v. Frank's Nursery & Crafts, Inc.* (1991), 58 Ohio St.3d 242, 569 N.E.2d 1034. "Affirmative defenses, other than those specified in Civ.R. 12(B), are waived if not raised in a pleading, pursuant to Civ.R. 8(C), or an amended pleading, pursuant to Civ.R. 15." *Schumar v. Kopinsky* (August 30, 2001), Cuyahoga App. No. 78875.

{¶42} Cross-Appellants' first assignment of error is overruled.

II.

{¶43} In its second assignment of error, Cross-Appellants argue that the trial court erred in by directing a verdict as to the liability of Central Ohio Paintball for David Childress' actions. We disagree.

{¶44} A review of the record supports the trial court's finding that:

{¶45} "The whole time this case has been pending the first time and the period of time this case has been pending this time and all the multiple pre-trial hearings we've had, never was that issue ever addressed. In fact, it always has been consistent, the only issues for consideration are probable cause – proximate cause for the injuries and the extent of damages." (T. at 13).

{¶46} Even Appellees/Cross-Appellants' own pre-trial statement, docketed on January 14, 2002, states as follows:

{¶47} "I. Statement of Facts

{¶48} "This case arises from a vehicle collision which occurred on January 8, 1999 at the intersection of Glick Road and Muirfield Drive in Dublin, Delaware County, Ohio. Liability is not an issue.

{¶49} "II. Issues of Fact

{¶50} "Nature, extent and proximate cause of Plaintiff's damages.

{¶51} "III. Issues of Law

{¶52} "None anticipated."

{¶53} Based on the foregoing, Appellees/Cross-Appellants cannot now be heard to argue that liability was an issue.

{¶54} Appellees/Cross-Appellants' second assignment of error is overruled.

III.

{¶55} In their third assignment of error, Appellees/Cross-Appellants argue that the trial court erred by denying Cross-Appellants the right to present evidence on the issue of Appellant's brain tumor. We disagree.

{¶56} At the pre-trial hearing in this matter, counsel for Appellees/Cross-Appellants and counsel for Appellant/Cross-Appellee both advised the trial court that there were no doctors, on either side that could attribute the cause of any of Nancy Hutchings' problems to her brain tumor. (Pre-trial T. at 8, 10).

{¶57} In fact, in support of the motion in limine, Appellant/Cross-Appellee had the opinion of neurosurgeon stating that none of her symptoms were caused by the brain tumor. (Pre-trial T. at 10).

{¶58} We therefore find that the trial court did not err in precluding evidence concerning the existence of Nancy Hutchings' brain tumor.

{¶59} Cross-Appellants' third assignment of error is overruled

{¶60} Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed.

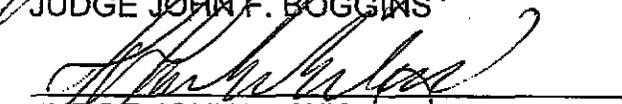
By: Boggins, J.

Wise, P.J. and

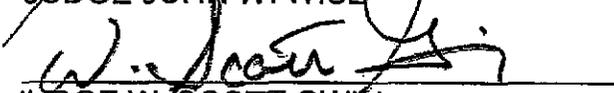
Gwin, J. concurs.



JUDGE JOHN F. BOGGINS



JUDGE JOHN W. WISE



JUDGE W. SCOTT GWIN

Court of Appeals
Delaware Co., Ohio

I hereby certify the within be a true
original on file in this office.
IN THE COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT
J. Antropius, Clerk of Courts
E. M. Oline Deputy

JOHN H. HUTCHINGS, et al.
Plaintiffs-Appellants

Vs.

DAVID R. CHILDRESS, et al.
Defendants-Appellees

Case No. 05CAE05-031

JUDGMENT ENTRY

COURT OF APPEALS
DELAWARE COUNTY, OHIO
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{¶1} This matter came before the Court on Appellants John and Nancy Hutchings' Motion to Certify a Conflict to the Supreme Court of Ohio, filed August 3, 2006, Appellee's Memorandum Contra, filed August 21, 2006, and Appellant's Reply Brief, filed August 23, 2006.

{¶2} Appellants argue that this Court's decision is in conflict with a decision from the First Appellate District: *Depouw v. Bichette* (2005), 112 Ohio App.3d 358. Appellants move this Court to certify the following issue:

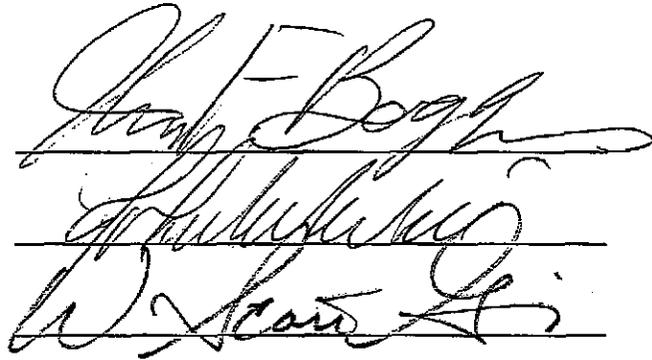
{¶3} "Whether spouses can recover the income lost due to one spouse caring for another or whether they may only recover the cost to hire outside home health care."

{¶4} Upon review of *Depouw* supra, we find that our decision in the case sub judice is in conflict with same.

{¶5} Accordingly, we sustain the Motion to Certify the record for conflict with the First Appellate District, and submit the following issue to the Ohio Supreme Court for review and final resolution:

{¶6} "Whether spouses can recover the income lost due to one spouse caring for another or whether they may only recover the cost to hire outside home health care."

{¶7} Appellee's Motion to Certify a Conflict is sustained.



JUDGES

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162 Ohio App.3d 336, 833 N.E.2d 744, 2005 -Ohio- 3695
(Cite as: 162 Ohio App.3d 336, 833 N.E.2d 744)

C

Depouw v. Bichette Ohio App. 2 Dist., 2005.
Court of Appeals of Ohio, Second District,
Montgomery County.
DEPOUW et al., Appellees,
v.
BICHETTE et al., Appellants.
No. 20893.

Decided July 15, 2005.

Background: Plaintiff motorist and her husband brought claims for negligence and loss of consortium against defendant motorist, relating to automobile accident. The Court of Common Pleas, Montgomery County, No. 2003 CV 02408, entered judgment on jury's verdict awarding wife \$29,825.08 in damages for negligence, including \$2,500.08 in wages lost by husband when he took time away from work so he could provide nursing care for wife, plus \$5,000 for husband's loss-of-consortium claim. Defendant appealed.

Holdings: The Court of Appeals, Donovan, J., held that:

- (1) a tortfeasor can be required to compensate the injured party for the value of nursing services provided by family members without charge, and
- (2) correct measure of damages was husband's lost wages, not cost of hiring outside nurse.

Affirmed.

Grady, J., filed a dissenting opinion.
West Headnotes
[1] Damages 115 ⇨ 15

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k15 k. Nature and Theory of Compensation. Most Cited Cases

If one is injured due to another's tortious wrong, he should be compensated for all of the damages that he has suffered. Restatement (Second) of Torts § 920A comment.

[2] Damages 115 ⇨ 37

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k35 Pecuniary Losses

115k37 k. Loss of Earnings or Services. Most Cited Cases

The jury may allow as damages for negligent conduct such reasonable amount as it may find that the plaintiff lost, as earnings, as the direct and natural result of the defendant's negligence, taking into consideration all the evidence concerning the plaintiff's age and physical condition before the injury, and the character of the plaintiff's employment.

[3] Damages 115 ⇨ 46

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k41 Expenses

115k46 k. Necessity of Actual Payment or Legal Liability. Most Cited Cases

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A tortfeasor can be required to compensate the injured party for the value of nursing services provided by family members without charge.

[4] Damages 115 ↪99

115 Damages

115VI Measure of Damages

115VI(A) Injuries to the Person

115k99 k. Loss of Earnings, Services, or Consortium. Most Cited Cases

The value of wages lost by a spouse due to caring for an injured spouse, rather than the cost of hiring an outside nurse to render the care, is the appropriate measure of damages, in a negligence action, where the spouse provides nursing care without charge.

[5] Husband and Wife 205 ↪3(.5)

205 Husband and Wife

205I Mutual Rights, Duties, and Liabilities

205k3 Personal Rights and Duties

205k3(.5) k. In General. Most Cited Cases

Husband and Wife 205 ↪5

205 Husband and Wife

205I Mutual Rights, Duties, and Liabilities

205k5 k. Services and Earnings of Wife.

Most Cited Cases

Spouses in Ohio have a duty to financially support each other and share their income with each other. R.C. § 3103.03(A).

[6] Damages 115 ↪37

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k35 Pecuniary Losses

115k37 k. Loss of Earnings or Services. Most Cited Cases

Husband's gratuitous nursing care for his injured wife caused a personal loss to wife, so that wife was entitled to recover, as damages in negligence action

against third party relating to automobile accident, the value of wages lost by husband due to caring for wife for 12 days; husband had statutory duty to use his salary to support wife, and husband's use of vacation time to care for wife caused the couple to lose a financial benefit. R.C. § 3103.03(A).

[7] Damages 115 ↪37

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k35 Pecuniary Losses

115k37 k. Loss of Earnings or Services. Most Cited Cases

Husband's nursing care for injured wife was warranted, so that wife was entitled to recover as damages, in negligence action, the value of wages lost by husband due to caring for wife; wife was unable to go to the bathroom herself, dress herself, or feed herself.

****745** Christopher J. Snyder, for appellees.

Suzanne P. Brumbaugh, for appellant Jessica B. Bichette.

DONOVAN, Judge.

***337 *162** Jessica Bichette is appealing the judgment of the Montgomery County Common Pleas Court that allowed a jury award to the plaintiff, Megan Depouw, for her husband's lost wages.

***338 {¶ 2}** Jessica Bichette and Megan Depouw were involved in a car accident in April 2001 in Kettering, Ohio. Mrs. Depouw was injured in the accident and was taken to the hospital. After an examination, Mrs. Depouw was released from the hospital with her left arm in a sling, her right arm in a cast, and a fractured collarbone. At the time of the accident, Mr. Depouw was at a hockey game. The police contacted him, and he left the game to go to the hospital. Over the next 11 days, Mr. Depouw took vacation leave from work in order to stay home with Mrs. Depouw and care for her. Mr. Depouw testified that he stayed home to care

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(Cite as: 162 Ohio App.3d 336, 833 N.E.2d 744)

for Mrs. **Depouw** because she needed help bathing, going to the bathroom, and other tasks.

{¶ 3} Nearly two years after the accident, the **Depouws** filed a complaint against **Bichette** for negligence and loss of consortium due to the accident. Although **Bichette** admitted negligence, she did dispute the nature and extent of Mrs. **Depouw's** injuries and whether her negligence was the proximate cause of those injuries. At trial, Mrs. **Depouw** sought as part of her damages her husband's lost wages incurred as a result of his taking time off work to care for her. Mr. **Depouw** testified that he had missed 98 hours, the equivalent of approximately 12 days of work, because of the accident. As a result of those lost hours, Mr. **Depouw** testified, he lost wages of \$2,787.12. Moreover, Mr. **Depouw** stated that his income is shared with his wife. Mrs. **Depouw's** lost wages were not considered by the jury because she had already been compensated for her lost income by **Bichette's** insurer.

{¶ 4} When the matter was submitted to the jury, the jury interrogatory for Mrs. **Depouw's** claim contained a blank line captioned "Loss of Thomas **Depouw's** Income." Defense counsel repeatedly objected**746 to the inclusion of this section in the jury interrogatory, but the trial court overruled the objections. The jury returned a verdict for Mrs. **Depouw** in the amount of \$29,825.08 and \$5,000 for Mr. **Depouw's** loss-of-consortium claim. The jury interrogatory revealed that \$2,500.08 of Mrs. **Depouw's** damage award was for income lost as a result of Mr. **Depouw's** taking time off work to care for his spouse.

{¶ 5} **Bichette** is now appealing the judgment of the trial court in overruling her objection and allowing the jury to consider as a part of Mrs. **Depouw's** damages the lost income incurred by her husband. **Bichette** raises the following assignment of error.

{¶ 6} "The trial court erred in permitting the jury to consider a husband's lost wages as a component of damages in his wife's personal injury claim."

{¶ 7} **Bichette** argues that Mrs. **Depouw** cannot

recover for her husband's lost wages, as they were not actually and personally incurred by her. We disagree.

*339 [1][2] {¶ 8} In Ohio, if one is injured due to another's wrong, he should be compensated for all of the damages that he has suffered. Restatement of the Law 2d, Torts (1979), Section 920A, Comment *b*; *Robinson v. Bates*, 160 Ohio App.3d 668, 2005-Ohio-1879, 828 N.E.2d 657. "The jury may allow as damages such reasonable amount as it may find that the plaintiff lost, as earnings, as the direct and natural result of the defendant's negligence, taking into consideration all the evidence concerning the plaintiff's age and physical condition before the injury, and the character of the plaintiff's employment." 30 Ohio Jurisprudence 3d (2004), Damages, Section 40, citing *Mikula v. Balogh* (1965), 9 Ohio App.2d 250, 38 O.O.2d 311, 224 N.E.2d 148.

{¶ 9} Few cases in Ohio have dealt with the situation in which damages were sought by an injured family member who received gratuitous nursing care from another family member. *Griffen v. Cincinnati Realty Co.* (1913), 27 Ohio Dec. 585; *Cincinnati Omnibus Co. v. Kuhnell* (1884), 9 Ohio Dec.Rep. 197; *Bowe v. Bowe* (1903), 26 Ohio C.C. 409; *Rouse v. Riverside Methodist Hosp.* (1983), 9 Ohio App.3d 206, 9 OBR 355, 459 N.E.2d 593; *Howard v. McKittrick* (July 2, 1987), Franklin App. No. 87AP-148, 1987 WL 13837. In *Griffen* and *Bowe*, the courts found that the injured party could not recover for the nursing services provided by a family member or for family members' lost earnings. However, in the *Kuhnell* decision, the court held that a mother could recover the value of the nursing care she provided to her injured son even though she could not recover the value of what she could have earned working outside the home.

[3] {¶ 10} The position in *Griffen* and *Bowe*-that nothing may be recovered for the gratuitous nursing services of family members-has clearly been abandoned in favor of the *Kuhnell* determination that the wrongdoer should at least be required to compensate the injured party for the value of the nursing services even if they were provided without charge by family members. *Rouse*, *supra*; *Howard*,

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supra. *Rouse* examined a situation in which a mother rendered extraordinary nursing services to her daughter, who had been injured in an act of medical negligence. The appellate court determined after a review of several similar cases in other states that the majority of the jurisdictions have found that a parent may recover for the value of nursing services provided to an injured child. *Id.*, at 211, 9 OBR 355, 459 N.E.2d 593. In particular, the *Rouse* court cited *Scanlon v. Kansas City* (1935), 336 Mo. 1058, 81 S.W.2d 939. The **747 *Scanlon* court had determined that the “measure of his recovery is the reasonable value of the services rendered as care and nursing,” even if the family member lost no wages in caring for the injured party. *Id.* at 1068, 81 S.W.2d 939. The *Rouse* court found that Ohio courts should “allow a parent to recover from the wrongdoer the reasonable value of the care or attendance which he himself renders to his child as the result of a negligent injury.” *340 *Rouse*, 9 Ohio App.3d at 212, 9 OBR 355, 459 N.E.2d 593. Nursing services rendered gratuitously by a family member are recoverable as a collateral source, just as the value of nursing services could be recovered if the injured party had health insurance that paid for the services. *Howard*, supra (finding that an adult child could recover from the wrongdoer for the value of the nursing care she received without charge from her mother).

{¶ 11} We recognize that a majority of state and federal courts that have addressed the situation in which a spouse provides nursing care for an injured plaintiff, often losing wages as a result, have determined that the value to be awarded as damages is the cost of hiring an outside nurse to render the care, not lost wages. *Heritage v. Pioneer Brokerage & Sales, Inc.* (Alaska 1979), 604 P.2d 1059; *Rodriguez v. Bethlehem Steel Corp.* (1974), 12 Cal.3d 382, 115 Cal.Rptr. 765, 525 P.2d 669; *Strand v. Grinnell Auto. Garage Co.* (1907), 136 Iowa 68, 113 N.W. 488; *W. Union Tel. Co. v. Morris* (1900), 10 Kan.App. 61, 61 P. 972; *Jackson v. United States* (E.D.Ark.1981), 526 F.Supp. 1149; *Redepinning v. Dore* (1972), 56 Wis.2d 129, 201 N.W.2d 580; *Adams v. Erickson* (C.A.10, 1968), 394 F.2d 171; *Beckert v. Doble* (1926), 105 Conn. 88, 134 A. 154; *Byrne v.*

Pilgrim Med. Group, Inc. (1982), 187 N.J.Super. 386, 454 A.2d 920; *Van House v. Canadian N. Ry. Co.* (1923), 155 Minn. 65, 192 N.W. 496; *Kaiser v. St. Louis Transit Co.* (1904), 108 Mo.App. 708, 84 S.W. 199; *Salida v. McKinna* (1891), 16 Colo. 523, 27 P. 810; *Kotsiris v. Ling* (Ky.1970), 451 S.W.2d 411; *Britton v. Dube* (1958), 154 Me. 319, 147 A.2d 452; *Howells v. N. Am. Transp. & Trading Co.* (1901), 24 Wash. 689, 694-695, 64 P. 786.

[4] {¶ 12} However, a few courts have found that the value of wages lost by a spouse from caring for an injured party may be recoverable from the wrongdoer. *Kerns v. Lewis* (1929), 249 Mich. 27, 227 N.W. 727 (holding that husband could recover wages lost while caring for his injured wife for six months); *Pullman Palace-Car Co. v. Smith* (1890), 79 Tex. 468, 14 S.W. 993 (finding that a lower court did not err in awarding damages based on a husband's lost salary while caring for his injured wife); *Keeth v. State* (La.App.1993), 618 So.2d 1154 (finding that a wife could recover loss of earnings suffered while caring for her injured spouse).

{¶ 13} In the instant case, *Bichette* urges this court to align itself with the majority view that the injured party, Mrs. *Depouw*, cannot recover Mr. *Depouw's* lost wages, but rather can recover only the amount it would have cost to hire a home health-care aide. Ohio courts in *Rouse*, *Kuhnell*, and *Howard* have stated that an injured child receiving care from his or her parent could receive as damages the value of the nursing services freely given by the parent. Although the amount the parties received in those cases was the value of the nursing services, not the amount of lost wages, the plaintiffs in *Rouse* and *Howard* did *341 not make an argument for receiving the value of lost wages, and *Kuhnell* was decided long before women routinely worked outside of the home. Thus, Ohio has not firmly established itself with the majority position that the only permissible damage award for care provided by a **748 family member is the cost of the nursing care as if provided by an outsider. A review of the factual situation in this case leads this court to the conclusion that the minority viewpoint is correct and that Mrs. *Depouw* should be able to

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recover for her husband's lost wages.

{¶ 14} When an individual is injured by the negligence of another and requires assistance with basic daily functions, it is not unreasonable for a spouse to prefer the assistance of a loved one over a total stranger, especially for a brief period such as in this case. As a consequence of **Bichette's** negligence, the marital income of the **Depouws** was reduced as a result of **Mr. Depouw's** lost wages.

[5][6] {¶ 15} Mrs. **Depouw** disputes **Bichette's** claim that she did not personally incur a loss as a result of her husband's providing care. Mrs. **Depouw** argues that her husband's wages were joint income and thus her loss as well. R.C. 3103.03(A) provides that "[e]ach married person must support the person's self and spouse out of the person's property or by the person's labor. If a married person is unable to do so, the spouse of the married person must assist in the support so far as the spouse is able." This statute indicates that spouses in Ohio have a duty to financially support each other and share their income with each other. Therefore, in the instance of a married couple, the loss of one spouse's wages due to care of an injured spouse is a financial loss to the injured spouse as well as the noninjured spouse. **Mr. Depouw** had a duty to use his salary to support Mrs. **Depouw**. Thus, Mrs. **Depouw** correctly asserts that when **Mr. Depouw** took off work to care for her, she, as his spouse, lost income for which she could be compensated. Although **Mr. Depouw** used vacation leave for the time he was away from work, this was still a loss of a financial benefit to the couple. We agree that family income was lost as a result of Mrs. **Depouw's** care, and their financial resources clearly would have been reduced by compensating an outside nurse.

[7] {¶ 16} The amount an injured party must spend for nursing care and services needed due to the injury is owed by the wrongdoer. If a family member chooses to render those services, the injured party should be reasonably compensated for those services to the extent that they reduce marital income. In this case, the evidence supports the jury's determination that Mrs. **Depouw** required basic care. **Mr. Depouw** testified that she was

unable to go to the bathroom, dress herself, or feed herself. Clearly, **Mr. Depouw** was entitled to provide the needed care for his wife. Moreover, **Bichette** as the wrongdoer should not be able to benefit from the fact that Mrs. **Depouw** had a spouse willing to provide the care to her. **Bichette's** negligent actions caused Mrs. **Depouw's** injuries and *342 the need for nursing care. Therefore, she is responsible for the loss of income to the **Depouws**. We cannot agree with **Bichette** that **Mr. Depouw** could choose not to stay and care for his injured wife himself but had to hire an outsider to come in and care for her. In particular, in a situation such as this, where **Mr. Depouw** was absent from work for only 12 days, we cannot say that he was wrong to care for his spouse rather than hire a nurse. Considering the small amount of time **Mr. Depouw** was off work and the fact that **Bichette** was responsible for Mrs. **Depouw's** injuries and her need for nursing care, we cannot say that the trial court erred in permitting the jury to consider **Mr. Depouw's** lost wages without limiting the award to the cost of home health care. **Bichette's** assignment of error is without merit and is overruled.

**749 {¶ 17} The judgment of the trial court is affirmed.

Judgment affirmed.

FREDERICK N. YOUNG, J., concurs.

GRADY, J., dissents.

FREDERICK N. YOUNG, J., retired, of the Second Appellate District, sitting by assignment.

GRADY, Judge, dissenting.

{¶ 18} I respectfully dissent from the decision of the majority and would instead reverse and vacate that part of the trial court's judgment that awarded Megan Depouw money damages in the amount of the wages that the jury found that Thomas Depouw lost while he stayed at home to care for Megan Depouw's injuries.

{¶ 19} In the complaint the plaintiffs filed, Thomas Depouw pleaded a claim for loss of consortium. He made no claim for his lost wages. Megan Depouw alleged that she had "incurred medical expenses in an amount not yet determined,

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and lost income in amounts as not yet determined, and may continue to suffer such losses in the future.”

{¶ 20} Megan Depouw was employed outside the home. She was unable to work due to her injuries, and she lost wages she would have earned but for her inability to work. However, she was compensated for her own lost wages by the tortfeasor's insurer. The record suggests that it was not until the day of trial that defendant learned that Megan Depouw intended to offer evidence of Thomas Depouw's lost wages to prove her own lost-income claim. Defendant then made an oral motion in limine to exclude that evidence, arguing that it was not evidence of a loss that Megan Depouw had suffered “directly.”

*343 {¶ 21} The trial court overruled defendant's motion. The court reasoned that the wages Thomas Depouw lost while he stayed at home to care for his wife are “a loss to the family,” adding that “the jury will [have] to decide whether the care [he gave his wife] was necessary, for Mr. Depouw to stay at home or not.”

{¶ 22} Thomas Depouw testified concerning the debilitating and painful nature of the bodily injuries his wife suffered, explaining that he stayed home from work to care for her as a result. He testified that he missed “98 hours or 12.25 days of work total.” He stated that the total amount of wages he lost as a result was \$2,787.12. The evidence was admitted by the court over defendant's further objections.

{¶ 23} Defendant renewed her objection to the claim for Thomas Depouw's lost wages in connection with the jury instructions the court proposed to give. The court overruled the objection, and in its instruction to the jury, the court stated:

{¶ 24} “You will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiff for the actual injury proximately caused by the negligence of defendant.

{¶ 25} “In deciding this amount, you will consider

the nature and extent of the injury, the effect upon physical health, the pain and suffering experienced, the ability or inability to perform usual activities, *Tom Depouw's loss of income*, and the reasonable costs of necessary medical and hospital expenses incurred.

{¶ 26} “From these, you will determine what sum will compensate the plaintiff for her injury to date.” (Emphasis added.)

{¶ 27} In addition, the court submitted a special interrogatory to the jury pursuant to Civ.R. 49(B), which set out six forms of damages the jury could find that Megan Depouw suffered “as a direct result of the **750 defendant's negligence,” allowing a separate award for each. One of these was “(4) Loss of Thomas Depouw's wages.” The jury entered \$2,500.08 as the amount of its award on that claim. The total of all damages the jury awarded Megan Depouw was \$29,825.08. Thomas Depouw was awarded \$5,000 on his claim for loss of consortium.

{¶ 28} Civ.R. 9(G) states: “When items of special damage are claimed, they shall be specifically stated.” The Rules Advisory Committee Staff Notes define special damages as “a damage measurable by proof of market value or out of pocket expense.” The amount of the wages that Thomas Depouw lost while off work before the complaint was filed is a measurable damage.

{¶ 29} The purpose of special-pleading requirement Civ.R. 9(G) is to avoid surprising opposing counsel by requiring the pleader to provide specific notice of measurable losses at the pleading stage. *Morrison v. Devore Trucking, Inc.* (1980), 68 Ohio App.2d 140, 22 O.O.3d 223, 428 N.E.2d 438. We have held that where special damages are not specifically pleaded, it is improper to admit into *344 evidence matters dealing with their recovery. *Dibert v. Ross Pattern & Foundry Dev. Co.* (1957), 105 Ohio App. 264, 6 O.O.2d 73, 152 N.E.2d 369. We have also held that no recovery can be had for special damages not pleaded. *House v. Moomaw* (1964), 120 Ohio App. 23, 28 O.O.2d 211, 201 N.E.2d 66.

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{¶ 30} Megan Depouw's pleading that set out her general claim for "lost income" failed to comply with the special-pleading requirement of Civ.R. 9(G). The trial court therefore erred when it admitted evidence to prove Megan Depouw's general claim for lost income. And defendant appears to have been surprised by Megan Depouw's intention to offer evidence of Thomas Depouw's lost wages to prove her lost-income claim. Defendant's motion to exclude evidence of Thomas Depouw's lost wages did not argue the defect in Megan Depouw's pleading, however. Therefore, the particular error in admitting the evidence despite the Civ.R. 9(G) defect is waived. Defendant's objection instead complained that the evidence was irrelevant to prove Megan Depouw's claim because it was not evidence of a loss she suffered directly. The court overruled the objection, relying on the loss of "family income" it represented. The further issue is whether that view correctly stated the applicable law in the instructions and the interrogatory that the court provided to the jury concerning Megan Depouw's claim for damages, to which defendant did object.

{¶ 31} A jury charge must correctly state the law applicable to the facts that the jury must decide. *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 19 OBR 8, 482 N.E.2d 583. Reversible error occurs if a jury charge is incomplete, misleading, or incorrect. *Id.* Likewise, an interrogatory that is based on an incorrect statement of the law should not be submitted. *Wightman v. Consol. Rail Corp.* (1994), 94 Ohio App.3d 389, 640 N.E.2d 1160.

{¶ 32} Compensatory damages are defined as those that measure actual loss and are allowed as amends therefor. *Fantozzi v. Sandusky Cement Prod.* (1992), 64 Ohio St.3d 601, 597 N.E.2d 474. They are intended to make the plaintiff whole for a loss resulting from a wrong committed by the defendant and accrue at the time of the injury. *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657, 590 N.E.2d 737.

{¶ 33} "In general, the damages that may be recovered in a civil action are, in the absence of any statutory modification of the rule, such only as are the natural **751 and probable consequences of a

tortious act or breach of contract on the part of the defendant, for the wrongdoer, or party in default, is responsible only for the proximate, and not for the remote, consequences of his or her actions." 30 Ohio Jurisprudence 3d (2005) Damages, Section 14.

{¶ 34} "The principle that damages may be recovered only for such injuries as flow directly from, and as the probable and natural result of, the wrong complained of necessarily excludes all those consequences of the act that are *345 remote and indirect, and all investigation of losses that are purely speculative, and denies an allowance of damages for injuries remotely consequential from a tortious wrong." *Id.*, Section 15.

{¶ 35} Persons who suffer bodily injury due to the negligence of a tortfeasor and are unable to engage in gainful employment as a result suffer a direct loss from that inability to work, which is compensable in money damages. The reasonable measure of damages, typically, is the value of wages the injured person did not earn.

{¶ 36} The theory of lost "family income" that the trial court adopted permitted Megan Depouw to recover damages for the entire amount of the wages Thomas Depouw did not earn. The majority approves that application on a holding that, because it was reasonable under the circumstances for Thomas Depouw to provide the care his wife needed, the jury could find that Megan Depouw suffered a loss because of his inability to work, which is compensable in the amount of wages her husband did not earn.

{¶ 37} That it was reasonable for Thomas Depouw to provide the care his wife needed might permit a finding that his resulting loss in the form of his inability to work was a natural consequence of the injury Megan Depouw suffered. However, that does not necessarily show that his loss was a probable consequence of her injury. More important, it does not at all make Thomas Depouw's inability to work a loss that Megan Depouw suffered "as the direct result of the defendant's negligence," which was the jury's finding.

{¶ 38} While it was unquestionably direct to

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Thomas Depouw, the wage earner who was unable to work, his inability to work was a loss that was only remote and indirect as to Megan Depouw. That is so regardless of any partial and collateral benefit she might expect from the wages he would otherwise have earned, which on this record is wholly speculative. Therefore, the wages Thomas Depouw did not earn were not compensable damages that could be awarded to Megan Depouw on her own claim for lost income.

{¶ 39} The majority finds support for the trial court's "family income" theory in R.C. 3103.03(A), which imposes an interspousal duty of support. However, any right that section conferred on Megan Depouw to share in the benefits of Thomas Depouw's wages is inchoate only. It does not make the entire amount of the wages he failed to earn or any specific portion thereof a loss that was whole and direct as to Megan Depouw. Stated otherwise, R.C. 3103.03(A) does not modify the rule of law that a loss must be direct to the party who is awarded damages to compensate for the loss.

{¶ 40} The majority nevertheless approves the trial court's ruling that Megan Depouw may recover Thomas Depouw's lost wages, adopting what it terms the *346 minority view. However, a review of the authorities cited offers no basis to find that a minority view exists that allows one plaintiff to recover for a loss of wages a coplaintiff suffered, even when they are married.

**752 {¶ 41} Plaintiffs regularly recover for wages they lost while absent from work because of a personal injury caused by a tortfeasor's negligence. They have also recovered for wages they lost while absent from work while caring for a spouse who suffered a personal injury due to a tortfeasor's negligence. Injured parties have also recovered the reasonable value of nursing services that a family member gratuitously provided. The provider of such services has also recovered the reasonable value of such nursing care. However, in no instance has an injured coplaintiff been awarded damages to compensate her for a coplaintiff's inability to work while providing for the injured person's care, as Megan Depouw was in the amount of the wages her husband failed to earn. Our

holding to the contrary adopts a wholly novel and singular rule of the law of damages, an extension of the law that is unwise and unnecessary.

{¶ 42} Thomas Depouw might have pleaded his own claim for the wages that he failed to earn, but he didn't. Had he pleaded the claim, the jury could have awarded him damages in the amount of the wages he was unable to earn while absent from work to care for his wife had the jury also found that his inability to work was a natural and probable consequence of his wife's injuries. The jury might have found that, or it might have found instead that his decision to stay home from work was an unforeseen consequence of his wife's injuries, and therefore not probable, even though it was reasonable. The trial court's lost "family income" theory and the instructions and interrogatory it gave the jury assume that as a consequence of his wife's injuries, Thomas Depouw's loss was foreseeable, and therefore probable, improperly removing that issue of fact from the jury's consideration. The assumption the court made is posited on a "but for" test, which has no application to damage awards.

{¶ 43} The trial court erred when it gave an instruction to the jury containing an incorrect statement of law, allowing the jury to consider evidence of a loss of her husband's inability to work where that loss was only remote and indirect as to Megan Depouw, and when it submitted an interrogatory permitting the jury to then find that her husband's lost wages are a measure of the damages to which Megan Depouw is entitled for a loss she suffered "as a direct result of defendant's negligence." I would sustain the error assigned and modify the judgment by deleting the amount of Thomas Depouw's lost wages from the damages that were awarded to Megan Depouw.

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