

IN THE SUPREME COURT OF OHIO

John H. Hutchings, et al.,	:	
	:	Case Nos. 06-1703
Appellants,	:	06-2183
	:	
v.	:	On Appeal from the
	:	Delaware County Court
David R. Childress, et al.,	:	of Appeals, Fifth
	:	Appellate District
Appellees.	:	

MERIT BRIEF OF APPELLANTS JOHN AND NANCY HUTCHINGS

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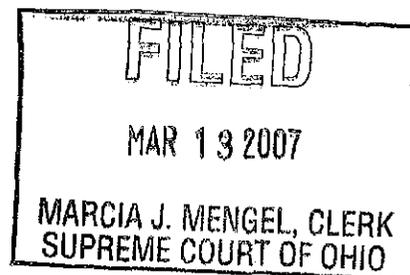


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STATEMENT OF FACTS

This case arises out of a January 8, 1999 motor vehicle crash which resulted in a serious and permanent brain injury to appellant Nancy Hutchings. The crash occurred when appellee, David Childress, an employee of appellee, Central Ohio Paintball, Inc., ran a stop sign at an intersection in Dublin, Ohio, crashing into the passenger side of the Hutchings' vehicle. [Trial Transcript ("TT") at pp. 126-127]. In the course of the collision, Nancy Hutchings, who was in the front passenger seat, struck her head on the metal bar between the front and back doors of the Hutchings' van. [TT at pp. 188-193]. The blow to her head caused Nancy Hutchings to suffer a very serious traumatic brain injury. [*Id.*; Dr. Cook Trial Deposition].

From the date of this collision more than eight years ago, Nancy Hutchings has been unable to perform many of life's simplest activities. Nancy experiences constant confusion and memory loss, she finds it difficult at times to string thoughts together and she cannot properly process information to enable her to function on her own. [TT at pp. 136-139, 196-200, 203-204; Dr. Cook Trial Deposition]. For instance, she has extreme difficulty driving because she can become so confused she cannot remember where she is or where she was headed when she left home. [*Id.*]. She also becomes so confused at the information on a restaurant menu that she has been unable to order her food. [TT at pp. 137-138]. Nancy Hutchings' brain injury impacts the way she thinks and speaks, interferes with her ability to do even the most basic household activities, and even impacts her ability to leave the family's home on her own. [TT at pp. 137-138, 200-201; Dr. Cook Trial Deposition].

As a result of Nancy's mental incapacity, her husband, John Hutchings, has been required to miss substantial time from his business to care for his wife. John Hutchings spent the entire first six weeks after the crash at home caring for his wife, and he has accompanied Nancy

to more than 100 doctors and therapy appointments since the crash. [TT at pp. 130-134, 161].

Mr. Hutchings has taken over all of Nancy's household activities and is required to take substantial time off work each day to care for his brain-injured wife. [*Id.*]. As a result, John and Nancy Hutchings have suffered substantial economic losses because John has been forced to provide daily care to his injured wife.

John Hutchings is a financial planner who operates his own business. Because of his wife's injury, John Hutchings' business has suffered devastating losses due to the time he is required to spend away from the business taking care of Nancy. [TT at pp. 247-275]. Nancy's brain injury not only requires John to spend much more time at home, he no longer travels in connection with his business and rarely entertains clients because of his wife's daily care needs. [TT at pp. 134, 151]. There is no question that Mr. Hutchings will be required to care for his wife for the remainder of her life and a Delaware County jury concluded following trial that Nancy Hutchings, in fact, sustained a permanent brain injury.

At trial, appellants presented evidence of the economic loss to the Hutchings family due to the time Mr. Hutchings is required to care for his wife. [TT at pp. 247-275]. Appellants' economic loss evidence was unopposed by the defense. Appellants did not present evidence of the cost to hire a professional to care for Nancy because John Hutchings believed he was obligated to care for his wife. John Hutchings loves his wife dearly and he has done all he can to care for her daily needs and to make her life comfortable as she copes with a brain injury that impacts literally everything she does.

The undisputed evidence at trial established past economic loss of \$288,659 in the four years Mr. Hutchings had been caring for his wife and substantial future losses over the remainder of his work life expectancy. Although the testimony was unopposed and the defense

did not object to the economic loss evidence, the Trial Court refused to instruct the jury on any of the losses the Hutchings had sustained because of John Hutchings' efforts to care for his wife. [TT at p. 396].

In reaching its decision, the Trial Court concluded that there were few Ohio cases, if any, addressing the issue of whether a spouse's lost income for caring for an injured spouse is recoverable. [*Id.*]. The Court's decision was reached just months prior to the decision by the Second District Court of Appeals in *Depouw v. Bichette* (2d District 2005), 162 Ohio App.3d 336, 833 N.E.2d 744, which held that such losses are recoverable because they are damages directly and proximately caused by the tortfeasor's negligence.

The Fifth District Court of Appeals initially held that Appellants could not recover their economic losses because they had presented evidence of home health care costs. The Fifth District's decision was based on a misrepresentation contained in Appellees' brief. Appellants did not present evidence regarding the cost to care for Nancy Hutchings because they had incurred no such costs. Rather, evidence of economic loss was presented because John Hutchings shouldered the burden of caring for his wife and the Hutchings sustained substantial lost income due to his subsequent inability to devote his full time and attention to the business. The Fifth District corrected the error when it granted Appellants' motion to certify a conflict holding that the Hutchings were not permitted to recover any of the losses they sustained due to Mr. Hutchings' need to care for his wife.

ARGUMENT

Proposition of Law No. I:

Spouses should be able to recover the income lost due to one spouse caring for another spouse and should not be limited to the cost to hire home health care.

There is no more basic principle in Ohio's tort law than the rule permitting injured victims to recover all the damages that directly and proximately result from the carelessness of another. Restatement of the Law 2d, Torts (1979), Section 920A, Comment b. This principle is designed to restore injured victims to the position they were in before the negligence occurred.

In this case, Nancy Hutchings suffered a permanent brain injury that requires daily care. Rather than hire a home health care specialist to come into the Hutchings' home, Mr. Hutchings elected to care for his wife. Because of his decision to take care of his wife, the Hutchings have suffered substantial economic losses which they will never recover. Despite the jury's verdict for both John and Nancy Hutchings, the Hutchings have not been made whole for the damages they suffered as a direct and proximate result of appellees' careless behavior on January 8, 1999.

Remarkably, very few Ohio cases addressed this legal issue before the *Depouw v. Bichette* decision just a few months after the jury's verdict in this case. The *Depouw* case also involved a motor vehicle accident which required a husband to care for his wife. Although the economic losses in *Depouw v. Bichette* were far less substantial than they are here, the Second District held that:

The value of wages lost by a spouse due to caring for an injured spouse, rather than the cost of having 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.

The *Depouw* Court based its decision on several fundamental principles of Ohio law. First, the Court noted the fundamental principle that injured victims should be compensated for all damages suffered as a result of a tortfeasor's negligence. Restatement of the Law 2d, Torts (1979), Section 920(A), Comment b. The Court further relied on the well settled principle that lost income is a recoverable item of compensatory damages in all negligence cases. 30 Ohio Jurisprudence 3d (2007), Damages, Section 40. Finally, the Court noted that Ohio courts have permitted family members to recover the value of nursing services, even if the services were provided without charge. *E.g.*, *Cincinnati Omnibus Co. v. Kuhnell* (1984), 9 Ohio Dec. Rep. 197; *Rouse v. Riverside Methodist Hosp.* (1983), 9 Ohio App.3d 206, 459 N.E.2d 593.

If this Court were to adopt the position advocated by Appellant, and permit the recovery of wages lost by a spouse while caring for the injured plaintiff, it would not be alone. Case law from other jurisdictions indicates that other states permit this very type of recovery. For instance, in *Keeth v. State* (La. App. 1993), 618 So.2d 1154, the court considered a virtually identical situation, wherein a healthy spouse lost wages by missing work to care for an injured spouse. *Keeth* involved a car accident in which a husband was injured. The court noted:

In the instant case, plaintiff clearly proved through the testimony of her supervisor, Mr. Scott, that Mrs. Keeth took five sick days and a four-month leave of absence in order to care for her seriously injured husband. Accordingly, we find the trial court erred in awarding \$3,200.00 for Mrs. Keeth's loss of wages, when she showed a loss of \$4,692.25. We will amend to so reflect.

Id. at 1163.

Indeed, the court stated, in no uncertain terms, "One may recover loss of earnings for attending to an injured spouse." *Id.* Courts in Michigan and Texas have agreed with this principle. *See Kerns v. Lewis* (1929), 249 Mich. 27 (holding that husband could properly recover six months of wages lost while caring for injured wife); *Pullman Palace-Car Co. v. Smith*

(1890), 79 Tex. 468 (finding it proper to award damages based on a husband's lost salary while caring for his injured wife).

In *Depouw*, the conflict case below, the Second District Court of Appeals noted that the majority of other jurisdictions have determined that the value to be awarded as damages is the cost of hiring outside nursing care, not lost wages. However, in doing so, the *Depouw* Court overstated the degree of agreement among other jurisdictions. To be sure, there are other jurisdictions that have determined that wages lost while caring for an injured spouse are not recoverable. See, e.g., *Western Union Telegraph Co. v. Morris* (Kan. App. 1900), 10 Kan. App. 61. At the same time, however, many of the cases cited by the *Depouw* Court in support of the so-called "majority rule" do not in fact address the issue presently before this Court. For instance, in *Rodriguez v. Bethlehem Steel Corp.* (1974), 12 Cal.3d 382, the California Supreme Court did not hold that wages lost in caring for a spouse could not be recovered, but rather, the court properly held that the recovery of lost wages along with the recovery of the value of the nursing services provided constituted a double recovery. The same was true in *Heritage v. Pioneer Brokerage & Sales, Inc.* (Alaska 1979), 604 P.2d 1059. And, in *Strand v. Grinnell Auto Garage* (1907), 136 Iowa 68, the court only addressed whether the value of nursing services gratuitously provided by the plaintiff's wife could be recovered. The *Strand* Court did not even consider whether the wife's lost wages were recoverable.

While jurisdictions vary on this question, the policy reasons in support of the rule adopted by the Second District in *Depouw* are compelling. When a family member is seriously injured by the carelessness of another, families frequently find themselves coping with many difficulties. Among these struggles is often the question of how to best provide care for the injured loved one. Understandably, these families often determine that the best course of action

is for a spouse to provide care for his or her injured partner, which can frequently necessitate missing time from their employment. Put simply, this is an additional injury that is proximately caused by the tortfeasor's negligence.

Thankfully, the State of Ohio has a long and proud history of supporting the family unit. For instance, Revised Code §3103.03(A) requires every married person to support that person's spouse out of the person's property or by the person's labor. Indeed, in Ohio, spouses have an affirmative obligation to care for one another, as well they should. The rule of law proposed by appellants -- that spouses may recover income lost in caring for an injured spouse -- works in concert with these pro-family principles. Any other rule of law serves only to undermine them.

There is no difference here. John and Nancy Hutchings elected not to hire home health care for Nancy Hutchings' daily needs. Rather, John Hutchings performed these services because he loves his wife and believed his wife would prefer him -- not some nurse or some other third party -- to care for her. The Hutchings should not be punished for a husband's decision to care for his wife by precluding the established economic losses they sustain because of the need to care for an injured spouse.

Ohio Law Should Permit Recovery of These Economic Losses

There are multiple reasons why this Court should ensure that Ohio law permits spouses to recover economic losses if they choose to care for an injured spouse. Ohio law allows injured victims to recover all damages that directly and proximately result from the carelessness of another. Precluding spouses from recovering economic losses due to caring for an injured spouse would violate this fundamental principle. Indeed, in a case like this, the injured victim would come nowhere close to being made whole if they are denied such economic losses.

Even more importantly, a rule of law allowing these damages would promote the important institutions of marriage and family. In an era where family values are often ignored or discounted, this Court has the opportunity to emphasize the importance of the marital relationship by fashioning a rule of law that allows spouses to care for each other without the fear of incurring unreimbursed economic losses. A rule that requires spouses to hire home health care specialists would put spouses in an impossible predicament: either return full time to work and leave your spouse at home to be cared for by someone else or stay home to provide the necessary care and suffer income loss that can never be recovered.

There is nothing to be gained by requiring spouses to immediately return to work and, instead, hiring home health care personnel in order to avoid economic loss. Spouses should be permitted to decide whether to care for an injured spouse temporarily or to hire home health care. Whichever choice they make, they should be entitled to recover the economic losses that result. Any other rule would deny spouses a category of damages -- which in this case are substantial -- that directly and proximately result from the carelessness of another.

There also is no sound policy for permitting a tortfeasor to avoid the damages he or she caused simply because a spouse decides to care for an injured spouse as opposed to hiring home health care. The tortfeasor caused the injury and the tortfeasor must be responsible for all the damages that directly and proximately result from the careless act.

In this case, John Hutchings decided to provide daily care to his brain-injured wife rather than hire a home health care provider. Yet, despite this noble act, they are being prevented from recovering the economic losses they have suffered. There is no dispute that the Hutchings have suffered economic loss because John Hutchings is required to provide daily care for his wife and that this care is the direct and proximate result of the injuries Nancy Hutchings

suffered in the January 8, 1999 motor vehicle crash. This Court should further the fundamental principle that victims are entitled to recover all damages that result from a careless act, while simultaneously promoting the sanctity of marriage by permitting spouses to care for one another without being penalized by precluding them from economic losses that result.¹

**The Court Should Remand This Case For
Determination of the Hutchings' Economic Losses**

Although appellants presented unopposed evidence of their economic losses, the Trial Court precluded the jury from considering these losses. As noted above, the Court should permit the Hutchings to recover the economic losses due to John's efforts to care for his wife.

However, if this Court were to permit only the cost of home health care, the Court should remand this case for a trial on what it would have cost the Hutchings in the past and in the future to care for Nancy Hutchings' daily needs. *E.g., Charles R. Combs Trucking, Inc. v. International Harvester Co.* (1984), 12 Ohio St.3d 241 (remanding for retrial on the sole issue of damages). If this Court concludes that the cost to hire someone to provide nursing care services and not Appellants' actual income loss is the proper way to measure this economic loss, Appellants should be permitted the opportunity to recover this loss by presenting such evidence to a Delaware County jury.

¹ The principle of mitigation will guard against any potential for abusing this rule. If a spouse stays at home and cares for an injured wife, and a jury determines that such care was not necessary, the injured spouse will not be entitled to recover. Or, if at some point the spouse could return to full time work and failed to do so, the requirement that all tort victims must take reasonable steps to mitigate their damages will also prevent a windfall recovery.

CONCLUSION

For all the foregoing reasons, Appellants respectfully submit that the Court should remand this case to the Trial Court for a determination of the economic loss to Appellants by virtue of John Hutchings' need to care for his injured wife.

Respectfully submitted,



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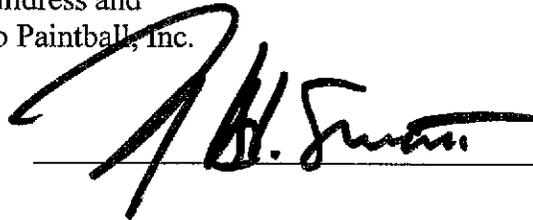
John and Nancy Hutchings

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellants John and Nancy Hutchings was served upon the following counsel of record, by ordinary U.S. mail, postage prepaid, this **13th** day of March, 2007:

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Frost, Maddox & Norman Co., L.P.A.
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Attorney for Appellees
David R. Childress and
Central Ohio Paintball, Inc.



A handwritten signature in black ink, appearing to read "A. S. Norman", is written over a horizontal line.

APPENDIX

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. Antopolus, Clerk of Courts
McClintock Deputy

JOHN H. HUTCHINGS, et al. : Case No. 05CAE05-031
: :
Plaintiffs-Appellants : JUDGMENT ENTRY
Vs. : :
: :
DAVID R. CHILDRESS, et al. : :
: :
Defendants-Appellees : :

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
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JAN ANTONOPLOS
CLERK

{¶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:

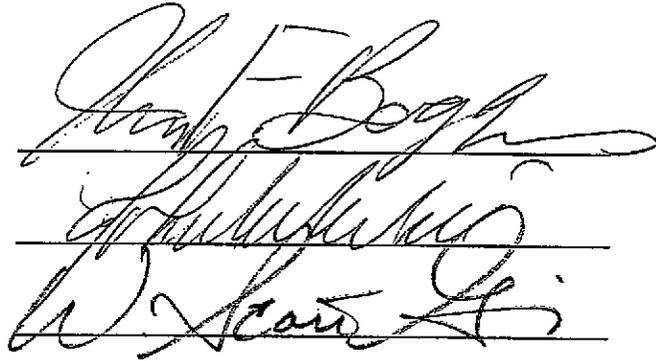
{¶3} "Whether spouses can recover the income lost due to one spouse caring for another or whether they may only recover the cost to hire outside home health care."

{¶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

CLERK -
PLEASE FILE
THIS JF
3rd

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 Antonopoulos, Clerk of Courts
 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:

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COURT OF APPEALS
 DELAWARE COUNTY, OHIO
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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 who 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 a trial 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.

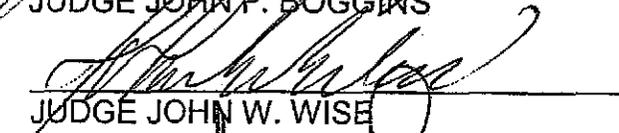
By: Boggins, J.

Wise, P.J. and

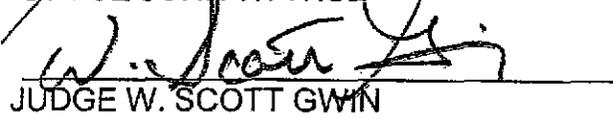
Gwin, J. concurs.



JUDGE JOHN F. BOGGINS



JUDGE JOHN W. WISE



JUDGE W. SCOTT GWIN

IN THE COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN H. HUTCHINGS, et al. : Case No. 05CAE05-031
Plaintiffs-Appellants : JUDGMENT ENTRY
v. :
DAVID R. CHILDRESS, et al. :
Defendants-Appellees :

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
06 NOV 17 PM 12:11
JAN ANTONOPLOS
CLERK

{¶1} This matter came before the Court on Appellants' Application for Reconsideration, filed August 3, 2006, Appellee's Memorandum Contra, filed August 21, 2006, and Appellant's Reply Brief, filed August 22, 2006.

{¶2} Appellants argue that this Court should reconsider its decision as such contained an error based on a misrepresentation in Appellee's brief as to the presentation of evidence as to "home health care."

{¶3} Upon review, we find Appellant is correct as to no evidence having been presented as to home health care. However this Court's ultimate decision on Appellant's Assignment of Error remains unchanged. Our opinion has been corrected and refiled as a Nunc Pro Tunc Opinion to reflect our correction of this error and to support our decision.

{¶4} Appellants' Application for Reconsideration is overruled.

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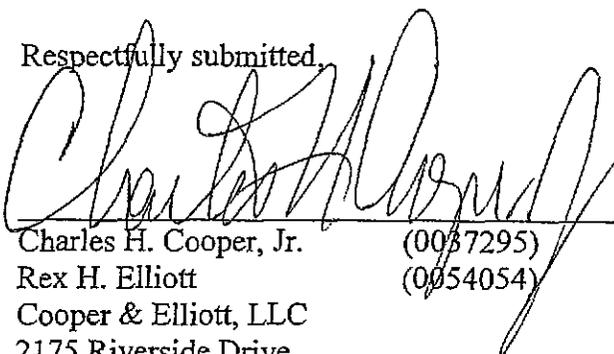
[Handwritten signatures of three judges]

Court of Appeals
JUDGES 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
[Signature] Deputy

NOTICE OF APPEAL OF APPELLANTS,
JOHN H. HUTCHINGS AND NANCY L. HUTCHINGS

Appellants, John and Nancy Hutchings, hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Delaware County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case No. 05CAE05-031 on July 27, 2006. As discussed in appellants' jurisdictional memorandum, the decision by the Fifth District Court of Appeals is in conflict with the Second Appellate District's decision in *Depouw v. Bichette* (2005), 112 Ohio App.3d 358, reflects a gap in the law of damages that requires clarification for all Ohioans, and presents a matter of public and great general interest.

Respectfully submitted,



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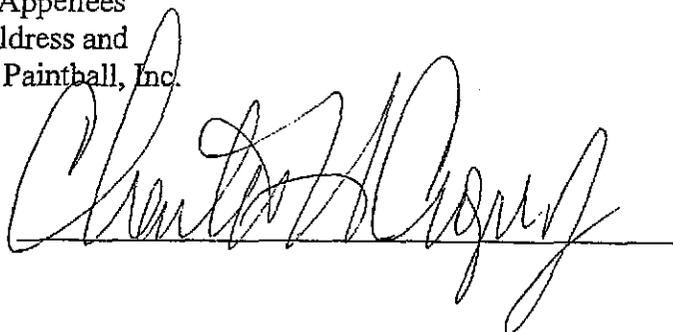
Attorneys for Appellants
John and Nancy Hutchings

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served upon the following counsel of record, by ordinary U.S. mail, postage prepaid, this 11th day of September, 2006:

A. Scott Norman, Esq.
Frost, Maddox & Norman Co., L.P.A.
987 South High Street
Columbus, Ohio 43206

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

A handwritten signature in cursive script, appearing to read "A. Scott Norman", is written over a horizontal line.

COURT OF APPEALS
 DELAWARE COUNTY, OHIO
 FIFTH APPELLATE DISTRICT

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.	:	
	:	
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:

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COURT OF APPEALS
 DELAWARE COUNTY, OHIO
 FILED
 06 JUL 27 AM 11:50
 JAN ANTONIOPLOS
 CLERK

**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
 By McLine Deputy

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} Evidence was presented to the jury with regard to the lost wages of Nancy Hutchings, the loss services of Nancy Hutchings and the cost of home health care for Nancy Hutchings.

{¶28} To allow the jury to consider and award damages for both the cost of home health care for Mrs. Hutchings and Mr. Hutchings' lost wages resulting from the care he provided would be to allow recovery twice for the same damages.

{¶29} 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.

{¶30} 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.

{¶31} Based on the foregoing, we do not find that the trial court erred in not allowing the jury to consider John Hutchings' lost wages.

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

CROSS-APPEAL

I.

{¶33} 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.

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

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

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

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

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

{¶40} 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.

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

II.

{¶42} 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.

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

{¶44} "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).

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

{¶46} “I. Statement of Facts

{¶47} “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.

{¶48} “II. Issues of Fact

{¶49} “Nature, extent and proximate cause of Plaintiff’s damages.

{¶50} “III. Issues of Law

{¶51} “None anticipated.”

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

{¶53} Appellees/Cross-Appellants’ second assignment of error is overruled.

III.

{¶54} 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.

{¶55} 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).

{¶56} 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).

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

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

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

By: Boggins, J.

Wise, P.J. and

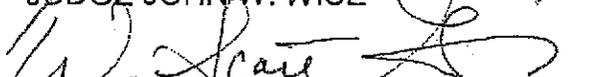
Gwin, J. concurs.



JUDGE JOHN F. BOGGINS



JUDGE JOHN W. WISE



JUDGE W. SCOTT GWIN

IN THE COURT OF APPEALS DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN H. HUTCHINGS, et al.

Plaintiffs-Appellants

-vs-

DAVID R. CHILDRESS, et al.

Defendants-Appellees

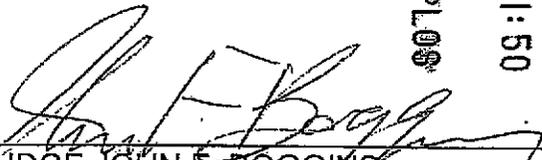
JUDGMENT ENTRY

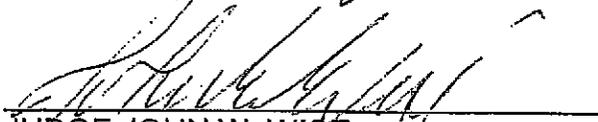
CASE NO. 05CAE05-031

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas, Ohio, is affirmed. Costs assessed to Appellants/Cross-Appellees and Appellees/Cross-Appellants equally.

COURT OF APPEALS
DELAWARE COUNTY, OHIO
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JUDGE JOHN F. BOGGINS


JUDGE JOHN W. WISE


JUDGE W. SCOTT GWIN

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

C

Restatement of the Law -- Torts
Restatement (Second) of Torts
Current through June 2006

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Division 13. Remedies
Chapter 47. Damages
Topic 2. Diminution Of Damages

§ 920A. Effect Of Payments Made To Injured Party

[Link to Case Citations](#)

(1) A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.

(2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

Comment:

a. Payments by or for defendant. If a tort defendant makes a payment toward his tort liability, it of course has the effect of reducing that liability. This is also true of payments made under an insurance policy that is maintained by the defendant, whether made under a liability provision or without regard to liability, as under a medical-payments clause. This is true also of a payment by another tortfeasor of an amount for which he is liable jointly with the defendant or even by one who is not actually liable to the plaintiff if he is seeking to extinguish or reduce the obligation. (See § 885). The rule applies to benefits other than cash payments.

b. Benefits from collateral sources. Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant. The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself. If the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers. The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him. One way of stating this conclusion is to say that it is the tortfeasor's responsibility to compensate for all harm that he causes, not confined to the net loss that the injured party receives. Compare § 924, Comment c (recovery for harm to earning capacity though plaintiff was on vacation), § 914A (recovery for damage to earning capacity ordinarily not reduced by amount of income tax that was not imposed).

Restatement (Second) of Torts § 920A (1979)

(Publication page references are not available for this document.)

Perhaps there is an element of punishment of the wrongdoer involved. (See § 901). Perhaps also this is regarded as a means of helping to make the compensation more nearly compensatory to the injured party. (Cf. § 914A, Comment b).

c. The rule that collateral benefits are not subtracted from the plaintiff's recovery applies to the following types of benefits:

(1) Insurance policies, whether maintained by the plaintiff or a third party. Sometimes, as in fire insurance or collision automobile insurance, the insurance company is subrogated to the rights of the third party. This additional reason for keeping the tortfeasor's liability alive is not necessary, however, as the rule applies to insurance not involving subrogation, such as life or health policies.

(2) Employment benefits. These may be gratuitous, as in the case in which the employer, although not legally required to do so, continues to pay the employee's wages during his incapacity. They may also be benefits arising out of the employment contract or a union contract. They may be benefits arising by statute, as in worker's compensation acts or the Federal Employers' Liability Act. Statutes may subrogate the employer to the right of the employee, or create a cause of action other than by subrogation.

(3) Gratuities. This applies to cash gratuities and to the rendering of services. Thus the fact that the doctor did not charge for his services or the plaintiff was treated in a veterans hospital does not prevent his recovery for the reasonable value of the services.

(4) Social legislation benefits. Social security benefits, welfare payments, pensions under special retirement acts, all are subject to the collateral-source rule.

d. The collateral-source rule is of common law origin and can be changed by statute. Changes made are sometimes in statutes providing a different method of compensation such as the first-party insurance involved in certain motor vehicle reparations acts.

Case Citations

Reporter's Notes, Case Citations & Cross References Through December 1977

Case Citations 1978 -- June 1990

Case Citations July 1990 -- June 2006

Reporter's Notes, Case Citations & Cross References Through December 1977:

REPORTER'S NOTE

This Section is new.

The subject of payment from collateral sources was mentioned in the first Restatement, hidden in two comments: Comment e to § 920 (benefit to plaintiff resulting from defendant's tort), and a short statement in Comments c and b to § 924 (harm to the person). It has become a very significant aspect of the law of damages and is here given treatment as a separate section. Subsection (1) has been added to round out the Section. (See § 885(3)).

There is one change here from the position taken by the first Restatement. It there stated (§ 924, Comment f) that "there can be no recovery for the value of services rendered gratuitously by a state-supported or other public charity." The cases do not sustain this, and the commentators agree. See, e.g., Hudson v. Lazarus, 95 U.S.App.D.C. 16, 217 F.2d 344 (1954).

Ohio Jurisprudence, Third Edition
Database updated November 2006Damages
Rosemary Gregor, J.D.III. Actual or Compensatory Damages
B. Measure and Elements of Compensatory Damages
3. Injury to Person
c. Loss of Time and Earnings; Impairment of Earning Capacity[Topic Summary](#) [Correlation Table](#) [Divisional References](#)

§ 40. Loss of time and earnings

West's Key Number Digest

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Losses sustained through being temporarily deprived of the capacity to perform ordinary labor or attend to ordinary business—loss of time and consequent loss of earnings—are proper elements of damages for the consideration of the jury in personal injury actions.[FN39] 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.[FN40] However, there may be no recovery for loss of time where there is no testimony from which the jury may fix the damage in money to the plaintiff because of loss of time.[FN41]

In an action prosecuted for damages from tortious acts resulting in injuries and in death, there may be a recovery for loss of earnings, if such are shown to exist, from the time of the injury to the time of death.[FN42]

[FN39] Rutherford v. Ohio Finance Co., 69 Ohio L. Abs. 417 (C.P. 1954).

As to the rules of pleading dealing with the recovery for loss of time and earnings, see § § 40 et seq.

As to the loss of earnings of business or professional persons, see § 44.

Forms

Complaint, petition, or declaration—Allegation—Loss of past earnings. 8 Am. Jur. Pleading and Practice Forms, Damages, Forms 52, 53.

Complaint, petition, or declaration—Allegation—Loss future earnings in a definite amount. 8 Am. Jur. Pleading and Practice Forms, Damages, Form 54.

Complaint, petition, or declaration—Allegation—Loss of earnings and impairment of earning capacity. 8 Am. Jur. Pleading and Practice Forms, Damages, Form 55.

Complaint, petition, or declaration—Allegation—Loss of earnings and impairment of earning capacity—

Exact amount unknown. 8 Am. Jur. Pleading and Practice Forms, Damages, Forms 56–58.

[FN40] Mikula v. Balogh, 9 Ohio App. 2d 250, 38 Ohio Op. 2d 311, 224 N.E.2d 148 (2d Dist. Montgomery County 1965).

A.L.R. Library

Cost of hiring substitute or assistant during incapacity of injured party as item of damages in action for personal injury, 37 A.L.R. 2d 364.

Forms

Loss of past earnings. 8 Am. Jur. Pleading and Practice Forms, Damages, Form 263.

Loss of past earnings—Factors to be considered in fixing amount. 8 Am. Jur. Pleading and Practice Forms, Damages, Form 265.

[FN41] E.G. Buchseib, Inc. v. Frey, 20 Ohio L. Abs. 205 (Ct. App. 2d Dist. Franklin County 1935).

Forms

Loss of past earnings—Loss of time. 8 Am. Jur. Pleading and Practice Forms, Damages, Form 264.

[FN42] Allen v. Burdette, 66 Ohio App. 236, 19 Ohio Op. 567, 33 Ohio L. Abs. 315, 32 N.E.2d 852 (9th Dist. Summit County 1940), judgment aff'd, 139 Ohio St. 208, 22 Ohio Op. 209, 39 N.E.2d 153 (1942).

As to the items recoverable in a survival action, generally, see § 35.

As to injury resulting in death, see § 35.

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OHJUR DAMAGES § 40

END OF DOCUMENT

103.03. Support obligations of married persons and of parents of minor child.

Each 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. A biological or adoptive parent of a minor child must support the parent's minor children out of the parent's property or the parent's labor.

Notwithstanding section 3109.01 of the Revised Code and to the extent provided in section 3319.86A of the Revised Code, the parental duty of support to children shall continue beyond the age of majority as long as the child continuously attends on a full-time basis any recognized and accredited high school. That duty of support shall continue during seasonal vacation periods.

If a married person neglects to support the person's spouse in accordance with this section, any other person, in good faith, may supply the spouse with necessaries for the support of the spouse and recover the reasonable value of the necessaries supplied from the married person who neglected to support the spouse unless the spouse abandons that person without cause.

If a parent neglects to support the parent's minor child in accordance with this section and if the minor child in question is unemancipated, any other person, in good faith, may supply the minor child with necessaries for the support of the minor child and recover the reasonable value of the necessaries supplied from the parent who neglected to support the minor child.

If a decedent during the decedent's lifetime has purchased an irrevocable preneed funeral contract pursuant to section 59.75/DA of the Revised Code, then the duty of support owed to a spouse pursuant to this section does not include an obligation to pay for the funeral expenses of the deceased spouse. This division does not preclude a surviving spouse from assuming by contract the obligation to pay for the funeral expenses of the deceased spouse.

TORY: RS § 3110; 84 v 132; GC § 8002-3; 124 v 178; Bureau of Code Revision, 10-1-53; 135 v S 1 (Eff 1-1-74); 136 v H 346 (Eff 5-31-90); 143 v S 3 (Eff 4-11-91); 144 v S 10 (Eff 7-15-92); 146 v H 538, § 10 (Eff 1-1-97); 147 v H 538 (Eff 1-1-98); 148 v S 180. Eff 3-22-2001.

Division (B), was 3119.86 intended?

Division (E), was RC § 1111.19 intended?