IN THE SUPREME COURT OF OHIO

John H. Hutchings, et al.,	:	
	:	**Case Nos. 2006-1703**
Appellants,	:	**2006-2183**
	:	
v.	:	
	:	**On Appeal from the**
David R. Childress, et al.,	:	**Delaware County Court of Appeals**
	:	**Fifth Appellate District**
Appellees.	:	

MERIT BRIEF OF APPELLEES DAVID R. CHILDRESS AND CENTRAL OHIO PAINTBALL INC.

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STATEMENT OF FACTS

On January 8, 1999, Appellee David Childress and Appellants John and Nancy Hutchings were involved in an automobile accident. Mr. Childress failed to stop at a stop sign at the intersection of Glick Road and Memorial Drive while driving a truck owned by Appellee Central Ohio Paintball, Inc. Nancy Hutchings suffered a closed head injury as a result of the accident.

On January 8, 2001, John and Nancy Hutchings filed a Complaint in the Delaware County Court of Common Pleas against David R. Childress and Central Ohio Paintball, Inc. Ms. Hutchings brought a claim for personal injury while Mr. Hutchings brought a claim for both personal injury and loss of consortium. Mr. Hutchings later drop his personal injury claim at trial and proceeded only with his loss of consortium claim.

During trial, the Appellants' claimed Mr. Hutchings' income declined as a result of his decision to care for his wife. The "evidence" presented by the Hutchings at trial showed that "the Hutchings" did not sustain any losses until three years after the accident. (Tr. Transcript at pp. 280-281.) In fact, the evidence showed Mr. Hutchings' income actually increased by approximately $120,000.00 during the year of the accident, presumably during the time in which Mrs. Hutchings would have need the most care. *Id.* The Appellants then sought to recover Mr. Hutchings' alleged "lost wages" and "lost earning capacity" solely as part of Mr. Hutchings' loss of consortium claim. (Tr. Transcript at pp. 384-387, 393-398.)

After careful consideration, the Trial Court concluded that Mr. Hutchings' "lost wages" and "lost earning capacity" were not recoverable as part of his loss of consortium claim. *Id.* The Court refused to allow the jury to consider Mr. Hutchings' "lost wages" and "lost earning capacity" as part of his loss of consortium claim. *Id.*

On April 25, 2005, the Court entered a judgment against David R. Childress and Central Ohio Paintball, Inc., in favor of John and Nancy Hutchings. Mrs. Hutchings was awarded $255,000.00 for her claims. Mr. Hutching was awarded $20,000.00 for his loss of consortium claim. All parties filed Notices of Appeal on May 24, 2005.

Three months after trial had concluded, the Second District Court of Appeals rendered a decision in *Depouw v. Bichette* (2005), 162 Ohio App.3d 336. In *Depouw*, Mr. Depouw provided care for his injured wife for a total of twelve (12) days following her automobile accident with Ms. Bichette. Mr. Depouw lost income as a result of being away from work to provide care for his wife during this short period. Mrs. Depouw sought to recover her husband's lost wages as part of her personal injury claim. The trial court allowed the jury to consider Mr. Depouw's lost wages as part of Mrs. Depouw's personal injury claim, without limiting the possible award to the cost of home health care. The Second District Court of Appeals affirmed, holding that given the small amount of time Mr. Depouw was off of work, the trial court had not erred in allowing the jury to consider the amount of wages actually lost by Mr. Depouw as part of Mrs. Depouw's personal injury claim.

On September 24, 2005, the Appellants filed their appellate brief in Fifth District Court of Appeals. Seeing the *Depouw* decision as their ticket to recovery, the Appellants presented a new argument based upon the Second District Court of Appeals decision. Instead of addressing whether the Trial Court erred by refusing to allow the jury to consider Mr. Hutchings' "lost wages" and "lost earning capacity" as part of his loss of consortium claim, the Appellants attempted to create a new issue arguing that under *Depouw*, "the Hutchings" had a right to recover Mr. Hutchings' "lost wages" and "lost earning capacity." Mr. Hutchings' loss of consortium claim for his own "lost wages" and "lost earning capacity" was recharacterized as a

loss sustained by "the Hutchings." Citing *Depouw*, the Appellants claimed that the Trial Court erred in refusing to instruct the jury on the losses "the Hutchings" had sustained because of Mr. Hutchings' efforts to care for his wife. In so doing, the Appellants misleadingly implied that the "lost wages" and "lost earning capacity" sought by the Appellants, had been originally sought by Mrs. Hutchings, there by rewriting their original claim. The Fifth District Court of Appeals properly noted that Mr. Hutchings' only claim was for loss of consortium, and correctly affirmed the Trial Courts decision to refuse to allow the jury to consider Mr. Hutchings' "lost wages" and "lost earning capacity" as part of his loss of consortium claim.

On September 11, 2006, the Appellants filed their Memorandum in Support of Jurisdiction with this Court. Appellees filed their Memorandum Contra on October 11, 2006. On November 17, 2006, the Fifth District Court of Appeals found its decision in conflict with Second District Court of Appeals' decision in *Depouw*. A conflict was certified with respect to the following issue: "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."

This Court accepted this matter on appeal on January 24, 2007.

ARGUMENT

Proposition of Law No. 1

A non-injured husband who gratuitously provides care to his injured wife cannot recover his own "lost wages" and "lost earning capacity" as part of his loss of consortium claim.

Gratuitous Care Provided By Family Members

Ohio Courts have addressed the issues surrounding the recovery of gratuitous care provided by a family member on several occasions. See *Cincinnati Omnibus Co. v. Kuhnell* (1884), 9 Ohio Dec. Rep. 197; *Rouse v. Riverside Methodist Hospital* (1983), 9 Ohio App.3d 206; *Howard v. McKitrick*, (1987) Tenth Dist. App. No. 87AP-148; *Griffen v. Cincinnati Reality Co.* (1913), 27 Ohio Dec. 585; *Depouw* supra.

Cincinnati Omnibus Co. v. Kuhnell (1884), 9 Ohio Dec. Rep. 197, *Rouse v. Riverside Methodist Hospital* (1983), 9 Ohio App.3d 206, and *Howard v. McKitrick*, (1987) Tenth Dist. App. No. 87AP-148, all addressed situations in which a parent provided gratuitous care for an injured child. In *Kuhnell*, the Court held that it was error for a court to charge that a mother could recover for the loss of her time in caring for her son instead of earning money. However, the Court suggested that the mother could recover for the value of the nursing services rendered to her son. In *Rouse*, the 10th District Court of Appeals held that a parent may recover from the wrongdoer the reasonable value of the care or attendance which he himself renders to his child as a result of negligent injury. While in *Howard*, the 10th District Court of Appeals applied the collateral source rule to allow an injured child to claim the value of the nursing services provided by a parent as part of the child's personal injury claim.

Griffen v. Cincinnati Reality Co. (1913), 27 Ohio Dec. 585, and *Depouw v. Bichette* (2005), 162 Ohio App.3d 336, on the other hand, addressed situations where a spouse provided gratuitous care for their injured partner. In *Griffen*, the Court held that a husband could not

recover the value of the nursing services gratuitously furnished to him by his wife and that the wife could not recover her earnings lost as a result of quitting her job to nurse her husband. In *Depouw*, Mr. Depouw provided cared for his injured wife for twelve (12) days following her automobile accident with Ms. Bichette. Mr. Depouw lost income as a result of his choice to provide care for his wife. At trial, Mrs. Depouw sought, as part of her damages, the wages lost by her husband as a result of him taking time off to care for her. The trial court allowed the jury to consider Mr. Depouw's lost wages as part of Mrs. Depouw's personal injury claim, without limiting the award to the cost of home health care. In affirming the trial court's decision, the Second District Court of Appeals stated:

> In particular, in a situation such as this, where Mr. Depouw was absent from work for only twelve days, we cannot say he was wrong to care for his spouse rather than hire a nurse. Considering the small amount of time Mr. Depouw was off of 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.

Id. at ¶16.

From this review of the Ohio case law, a few guiding principals emerge regarding claims for gratuitous care provided by a family member. When a parent provides gratuitous care for an injured child, the value of the services provided may be recovered either by the parent who rendered the care to their child, or by the injured child as part of that child's personal injury claim pursuant to the collateral source rule. Furthermore, there is distinction between a parent providing gratuitous care to a child and a spouse providing gratuitous care to their partner. In situations where a spouse has provided gratuitous care for an injured partner, the law is no longer as clear. *Griffen* clearly precluded any recovery by either spouse. *Depouw*, however, embraced the sprit behind *Kuhnell* and *Howard*, and allowed an injured wife to recover the value of the

services provided as part of her personal injury claim. The *Depouw* court then deviated from *Kuhnell* and *Howard* by concluded that given the small amount of time Mr. Depouw was off of work, the trail court had not erred in allowing the jury to consider the amount of wages actually lost by the husband as the measure of the damages, instead of the reasonable cost of home health care.

Despite the Appellants' contentions, none of the cases cited above are applicable to this matter. At trial, the Appellants sought to recover Mr. Hutchings' alleged "lost wages" and "lost earning capacity" as part of Mr. Hutchings' own loss of consortium claim. (Tr. Transcript at pp. 384-387, 393-398.) Mr. Hutchings' "lost wages" and "lost earning capacity" were never sought by Ms. Hutchings as part her personal injury action.

Lost Wages Are Not Recoverable Under A Loss Of Consortium Claim

Loss of consortium is a non-economic loss, which is defined as the loss of the tangible and intangible benefits which arise out of the marital relationship itself. See *Clouston v. Remlinger Oldsmobile Cadillac, Inc.* (1970), 22 Ohio St.2 65. Compensable losses for consortium may include the loss of "society, services, sexual relations and conjugal affection which includes companionship, comfort, love and solace." *Id.* Losses such as lost wages and lost earning capacity are not recoverable under a claim for loss of consortium. See *Id*; *Branton v. Draper Corporation* (1988), 185 Ga.App. 820, 366 S.E.2d 206.

The closest an Ohio court has come to awarding a claim for lost wages as part of a loss of consortium claim was in *Henson v. Andre*, (1982) Tenth Dist. App. No. 82AP-84. In *Henson*, the Tenth District Court of Appeals allowed Mrs. Henson to recover the cost of hiring additional help to perform the jobs that her husband could no longer perform as part of her loss of consortium claim. The court concluded that:

> * * * under the circumstances of this case, where there was evidence that plaintiffs operated a store as a family enterprise and that the wife was required to run the enterprise by herself and hire extra help as the result of her husband's injury, and the husband did not seek recovery of lost wages or for impairment of his earning capacity in connection with the operation of the family business, then expenditures for extra help to replace the husband's labor is within the scope of the wife's claim for loss of services, made within standard language pleading loss of her husband's consortium. In so holding, we fully recognize that the cost of hiring additional help might just as well have been sought by Mr. Henson, under the theory of loss or impairment of earning capacity. But, the right to recover is not exclusively the husband's; it also may be claimed by the wife as a part of her loss of her husband's consortium, even though it is in a sense a claim for loss of financial support, so long as there is no double recovery."

Id. (emphasis added).

The holding in *Henson* allows either the injured spouse to recover his own lost wages and/or impairment of earning capacity as part of his own personal injury claim, or his partner to recover the cost of hiring additional help to perform the jobs that injured spouse can no longer perform as part of a loss of consortium claim, so long as both claims are not made.

Even if *Henson* is broadly construed, in a light most favorable to the Appellants, to allow a spouse to recover the lost wages of an injured partner, the holding in *Henson* is still inapplicable as *Henson* does not address the issue before this Court. Construed broadly, *Henson* would allow a non-injured spouse to recover the wages lost by their injured partner as part of a loss of consortium claim. Here, Mr. Hutchings, the non-injured spouse, sought to claim his own alleged "lost wages" as part of his loss of consortium claim. Neither *Henson* nor any other case cited thus far would allow such a recovery.

There Is No Conflict Between The Appellate Districts

The Fifth District Court of Appeals certified a conflict with respect to the following issue: "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." The Fifth District Court of

Appeals found that its decision in this matter was in conflict with Second District Court of Appeals decision in *Depouw*. Why the Fifth District Court of Appeals certified a conflict with respect to that issue is unclear, as this matter was not one of determining which measure of damages was proper, but is instead a matter of determining whether Mr. Hutchings had a right to recover his alleged "lost wages" and "lost earning capacity" as part of his own loss of consortium claim.

It is clear from the record that the Appellants sought to recover Mr. Hutchings' alleged "lost wages" and "lost earning capacity" as part of Mr. Hutchings' own loss of consortium claim. (Tr. Transcript at pp. 384-387, 393-398.) Ms. Hutchings never sought to recover Mr. Hutchings' "lost wages" and "lost earning capacity" as part her personal injury action, nor did Mr. Hutchings pursue his claim for personal injury.[1] Recovery for Mr. Hutchings' alleged "lost wages" and "lost earning capacity" was sought solely as part of Mr. Hutchings' own loss of consortium claim. (Tr. Transcript at pp. 384-387, 393-398.) Recognizing that Mr. Hutchings' "lost wages" and "lost earning capacity" were not recoverable as part of Mr. Hutchings' loss of consortium claim, the Trial Court refused to allow the jury to consider Mr. Hutchings' "lost wages" and "lost earning capacity" as part of his loss of consortium claim.

Depouw, the case claimed to be in conflict, does not address the issues of whether Mr. Hutchings' could have claimed his "lost wages" and "lost earning capacity" as part of his loss of consortium claim. *Depouw* allowed an injured wife to recover the value of the gratuitous care provided by her husband as part of her own personal injury claim. Furthermore, the court allowed the jury to consider the amount of wages actually lost by the husband as the value of the services, based upon the fact that the duration of the care provided was for a very short period of

[1] During the course of the trial, Mr. Hutchings dropped his claim for personal injury electing to proceed only with his loss of consortium claim.

time. Therefore, even if this Court should decide that "the Hutchings" had a right to recover, *Depouw* does not allow the Appellants to recover the Mr. Hutchings' "lost wages" and "lost earning capacity," as the decision in *Depouw* was clearly limited to situations where it was shown that only short term care was necessary.

Quite simply, there is no proposition of law stated in the *Depouw* decision that would allow Mr. Hutchings to recover his alleged "lost wages" and "lost earning capacity" as part of his own loss of consortium claim. Appellants have not cited any law, which would have allowed Mr. Hutchings to make such a claim, and, frankly, there is no conflict amongst the appellate districts.

Appellants May Not Raise A New Argument On Appeal

In an effort to distance themselves from the arguments made at trial, the Appellants have misrepresent the facts and issues in this matter, so that they could make new arguments based upon *Depouw*.

Mr. Hutchings' claim for "lost wages" and "lost earning capacity" as part of his loss of consortium claim has been transformed into an "economic loss" suffered by "the Hutchings." The issue has been misrepresented by the Appellants as a determination of which measure of damages is proper, that is, a determination of whether "the Hutchings" should be allowed to recover Mr. Hutchings' alleged "lost wages" and "lost earning capacity" or are "the Hutchings" limited to the cost of home health care. Instead, the proper issue is whether Mr. Hutchings had a right to recover his alleged "lost wages" and "lost earning capacity" as part of his loss of consortium claim. To provide further support for a position, for which none exists, the Appellants misquote *Depouw* as holding "[t]he 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." Not surprisingly, no citation was provide by the Appellants for this quote, as this was not the holding in *Depouw*. In fact, the sentence quoted by the Appellants does not appear any anywhere within the *Depouw* decision.

"Ordinarily reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." *Goldberg v. Indus. Comm.* (1936), 131 Ohio St. 399, 404. Arguments that parties raise for the first time on appeal will not be considered by an appellate court. *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, 81. The record clearly shows that the Appellants were seeking to recover Mr. Hutchings' "lost wages" and "lost earning capacity" solely as a part of Mr. Hutchings' own loss of consortium claim. (Tr. Transcript at pp. 384-387, 393-398.) Furthermore, there was no testimony, expert or otherwise, indicating that Mrs. Hutchings required continuous care. The Trial Court simply refused to allow the jury to consider any evidence of Mr. Hutchings' alleged "lost wages" and "lost earning capacity" as part of his loss of consortium claim on the basis that Mr. Hutchings' could not recover his own "lost wages" and "lost earning capacity" as part of his loss of consortium claim. At issue in this matter is whether Mr. Hutchings had a right to recover his alleged "lost wages" and "lost earning capacity" as part of his own loss of consortium claim. The Appellants have provided no support for their position that Mr. Hutchings was entitled to recover, nor have they shown how the trial court erred. Both the Trial Court and the Fifth District Court of Appeals were correct in concluded that Mr. Hutchings' "lost wages" and "lost earning capacity" were not recoverable as part of his loss of consortium claim. The Trial Court simply did not err in refusing to allow the jury to consider Mr. Hutchings' "lost wages" and "lost earning capacity" as part of his loss of consortium claim.

CONCLUSION

The issues that addressed by the Second District Court of Appeals in *Depouw* and the courts in this matter were very different. It is clear from the record that Mr. Hutchings was attempting to claim his own lost wages and loss in earning capacity as part of his loss of consortium claim. (Tr. Transcript at pp. 385-390) Neither the Appellants, the Appellees, the Delaware County Court of Common Pleas nor the Fifth District Court of Appeals could find a single case which would have allowed Mr. Hutchings' to recover his "lost wages" and "lost earning capacity" as part of his own loss of consortium claim. The Trial Court properly concluded that Mr. Hutchings' "lost wages" and "loss in earning capacity" were not recoverable as part of his own loss of consortium claim and correctly refused to allow the jury to consider the same. There is no conflict. This appeal to the Supreme Court of Ohio was improvidently allowed and should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was served by ordinary U.S. Mail, postage prepaid, on Rex. H. Elliott, Charles H. Cooper, Jr., COOPER & ELLIOTT, LLC, 2175 Riverside Drive, Columbus, Ohio 43221 this 12th day of April, 2007.

A. Scott Norman (0041935)