

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.	:	

REPLY BRIEF OF APPELLANTS JOHN AND NANCY HUTCHINGS

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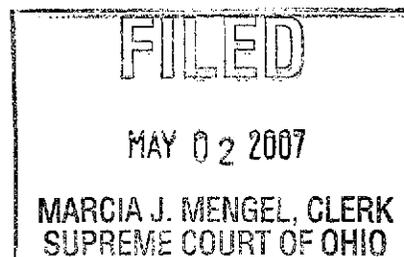


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I. Appellees Make No Attempt To Address The Proposition Of Law This Court Has Accepted For Review

Rather than address the question this Court has accepted for review, Appellees seek to mislead this Court by making the false claim that Appellants changed their theory of recovery following the April, 2005 trial. Appellees' counsel is at it again. On appeal, Appellees' counsel falsely asserted that Appellants had submitted evidence regarding the value of home healthcare, which led the Fifth District Court of Appeals to conclude that allowing both home healthcare and Mr. Hutchings' lost earnings would constitute a double recovery. On reconsideration, the Fifth District Court of Appeals acknowledged that Appellees' counsel had misrepresented the trial record. [Appx. 14].

Similarly, Appellees repeatedly represent to this Court that Appellants sought to recover the earnings Mr. Hutchings lost solely "as part of Mr. Hutchings' loss of consortium claim." Appellees repeat this statement throughout their Brief and contend that Appellants have recast their argument claiming that "the Hutchings" are entitled to recover the lost earnings to Mr. Hutchings as a result of the permanent injury suffered by his wife, Nancy. Nothing could be further from the truth. Appellees fail to inform this Court of the portions of the trial record that make clear that Appellants sought to recover Mr. Hutchings' lost earnings as part of Mr. Hutchings' loss of consortium claim as well as Mrs. Hutchings' personal injury claim.

Indeed, Appellants specifically asked the Trial Court for a Jury Instruction making it clear that they were seeking Mr. Hutchings' lost earnings on each of their claims. [See Plaintiffs' Proposed Jury Instruction No. 11]. Appellants' counsel further made it clear on the record that the Hutchings were seeking Mr. Hutchings' lost earnings on Nancy's personal injury claims or the loss of consortium claim asserted by Mr. Hutchings.

Mr. Elliott: Also, Your Honor, I just want the record to reflect our proposed jury instruction on Nancy Hutchings' claim for loss of services and consortium should include John Hutchings' lost income, if the lost income claim is not included in John Hutchings' loss of services, consortium claim. I understand the Court has already relied on that, but I just wanted to make it part of the record.

The Court: It will be part of the record.

[Tr. at p. 454].

Finally, the Trial Court's Judgment Entry makes it crystal clear that John and Nancy Hutchings each sought recovery of Mr. Hutchings' lost earnings. The Trial Court's Judgment Entry expressly states:

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.

[Appx. 29][emphasis added].

Appellees entire Merit Brief is based on the erroneous statement that Appellees only sought Mr. Hutchings' lost earnings "as part of Mr. Hutchings' loss of consortium claim." For instance, Appellees review Ohio cases evaluating care provided by family members leading up to the *Depouw v. Bichette* decision in 2005 and conclude that none of the cases are applicable because Mr. Hutchings' lost income was "never sought by Mrs. Hutchings as part of her personal injury action." [Appellees' Merit Brief at pp. 4-6]. Not only does Appellees' argument fail to answer the proposition of law this Court accepted for review, but the Trial Transcript, Proposed Jury Instructions and the Court's Judgment Entry demonstrate that the basis for Appellees' argument is simply not true.

Appellees' argument, based on this "loss of consortium" misrepresentation, takes on three other forms: (i) that Ohio law does not allow recovery of Mr. Hutchings' lost income "as part of his loss of consortium claim" [Appellees' Merit Brief at pp. 6-7]; (ii) that there is no

conflict between the Appellate Districts because Appellants sought to recover Mr. Hutchings' lost income only "as part of his loss of consortium claim" [Appellees' Merit Brief at pp. 7-9]; and (iii) that Appellants may not raise a new argument on appeal because the lost earnings were sought only "as part of Mr. Hutchings' loss of consortium claim." [Appellees' Merit Brief at pp. 9-10]. None of these arguments address the proposition of law currently before this Court, and the citations above to the trial record establish that Mr. Hutchings' lost income was sought on the personal injury claims of both John and Nancy Hutchings.

The reality is this: John and Nancy Hutchings have lost income because Appellees caused an automobile crash that resulted in Nancy Hutchings suffering a permanent brain injury. As a result, John Hutchings' financial planning business has suffered enormous damage because of the time he is required to devote to caring for his wife. Appellants are entitled to recover these losses in order to make them whole for the injuries directly attributable to Appellees' negligence.

II. Ohio Law Should Permit Recovery Of Lost Earnings Due To A Spouse Caring For An Injured Spouse

Appellees' Merit Brief does, however, recognize the many circumstances in which family members are permitted to recover damages they incur for caring for an injured family member. For instance, Ohio courts have permitted parents to recover economic harm due to the need to care for an injured child. E.g., *Cincinnati Omnibus v. Kuhnell* (1994), 9 Ohio Dec. Rep. 197 (permitting a mother to recover the value of services provided in caring for her son); *Rouse v. Riverside Meth. Hosp.* (10th Dist. 1983), 9 Ohio App.3d 206 (permitting a parent to recover the reasonable value of care the parent provides to a child); *Howard v. McKittrick* (10th Dist. 1987), 1987 WL 13837 (holding that it was error to deny a plaintiff the right to recover the reasonable value of nursing care provided by her mother).

Prior to the Trial Court's decision in this case and the Second District's decision in *Depouw v. Bichette*, no Ohio Court had addressed the issue of whether spouses could recover the income one spouse loses while caring for another spouse. In this case, the Fifth District initially held that Mr. Hutchings' lost income could not be recovered because the jury had awarded Appellants the value of home healthcare. The Fifth District subsequently acknowledged that it erroneously reached this conclusion because Appellees had misrepresented the trial record. The Fifth District, however, noted the error and concluded that the result of its opinion remained unchanged. As a result, the Fifth District has provided no rationale for refusing to allow Appellants the income they have lost due to Appellees' negligence.

The Second District in *Depouw*, however, discussed in detail why such recovery should be allowed. The *Depouw* Court first noted the fundamental principle of Ohio law which requires injured victims to be made whole for all the damages they have suffered. John Hutchings made the decision to care for his injured wife instead of hiring a stranger to care for her. As a result, the Hutchings suffered demonstrative economic harm due to Mr. Hutchings' need to care for his wife.¹ If the Hutchings are not entitled to recover these damages -- caused by the negligence of another -- there will be a major exception to the principle that injured victims should be made whole for the injuries caused by the negligence of another.

The *Depouw* Court further reviewed decisions from courts in jurisdictions throughout the United States noting that, at a minimum, most jurisdictions allow the reasonable value of nursing care when wages are lost through caring for an injured family member. The *Depouw* Court also cited the cases in jurisdictions which permit spouses to recover wages lost

¹ The income loss due to Mr. Hutchings caring for his injured wife was established through expert trial testimony that Appellees elected not to rebut.

due to caring for another spouse and concluded that this should be the rule of law in Ohio. The Second District provided the following sound reasoning:

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 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 . . .

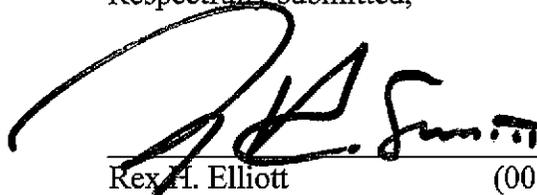
The amount an injured party must spend for nursing care and services needed due to the injury is owed by the wrongdoer. If a family member chooses to render those services, the injured party should be reasonably compensated for those services to the extent that they reduce marital income.

Appellees' Merit Brief utterly fails to even address this rationale or to discuss the other reasons set forth in Appellants' Merit Brief for allowing spouses to recover income lost due to one spouse caring for an injured spouse. Accordingly, there is no argument of Appellees as to the merits of this issue to which Appellants can reply. Nevertheless, this Court should make clear that Ohio is among the states that promote family values by allowing spouses to care for one another without sustaining economic losses as a result of injuries caused by the negligence of another.

Conclusion

For the reasons set forth above and in Appellants' Opening brief, Appellants respectfully ask this Court to remand this case to the Trial Court for a determination of the damages Appellants suffered because John Hutchings elected to care for his injured wife.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief of Appellants John and Nancy Hutchings was served upon the following counsel of record, by ordinary U.S. mail, postage prepaid, this 20 day of May, 2007:

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