

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000392-MR

MARLENE TROXLE on behalf of
and as guardian and next friend of
ASHLEY NICOLE FRENCH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEVE MERSHON, JUDGE
ACTION NO. 01-CI-001676

CAROL JONES, on behalf of and
as administrator of the
ESTATE OF JOHN M. FRENCH; and
KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS and McANULTY, Judges; and JOHN D. MILLER, Special Judge.¹

COMBS, JUDGE: Marlene Troxle, in her capacity as guardian and next friend of Ashley French, appeals the judgment of the Jefferson Circuit Court dismissing Ashley's claim against the estate of her father, John M. French (French), and French's

¹ Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

insurer, Kentucky Farm Bureau Mutual Insurance Company (Farm Bureau), pursuant to CR² 12.02(f). We affirm.

The sole issue raised in this appeal is whether a minor child has a cause of action against her father's estate for her loss of consortium with him when he died in an accident as a result of his own negligent conduct. The facts pertaining to this issue are not in dispute. John French was fatally injured on March 11, 1999, when the automobile he was operating ran into the rear of a tractor-trailer on Interstate 64. He was survived by his minor child, Ashley. At the time of the accident, French was insured by Farm Bureau.

On March 8, 2001, Troxle filed her complaint alleging that Ashley suffered injury in the form of the loss of consortium, an injury which was ~~A~~directly and proximately caused by the negligence of John M. French.[@] In addition to a judgment against French's estate, she sought a declaratory judgment that she was entitled to collect any such judgment under the two policies issued to French by Farm Bureau. Both defendants moved to dismiss the action, arguing that a first-party claim for loss of consortium has not been recognized in Kentucky or in any other jurisdiction.

On January 22, 2001, the trial court entered its opinion and order dismissing the complaint. In ruling that

²Kentucky Rules of Civil Procedure.

Troxle did not have a viable claim, the trial court concluded as follows:

Kentucky law recognizes a cause of action for a child's loss of a parent. Guiliani v. Guiler, Ky., 951 SW 2d 318 (1997). However, the Kentucky Court of Appeals has ruled unequivocally that a loss-of-parental-consortium claim is dependent upon the ability of the claimant to bring an action for wrongful death. Lambert v. Franklin Real Estate Company, Ky.App., 37 SW 3d 770 (2000). There, the Court specifically stated that:

In summary, based upon the context of *Guiliani*, its language, and the absence of a direct holding that the loss of parental consortium is available beyond wrongful death cases, *Guiliani* is best read as providing a cause of action to a child *only in those cases where there is likewise an action for the wrongful death of the parent* (emphasis added). Id., p. 780

All agree that Ashley cannot bring an action for the wrongful death of her father.

In her appeal, Troxle contends that the trial court erred in restricting a child's claim for loss of parental consortium (first recognized in Guiliani, supra) to those situations where there is the potential for a viable action against a third party for the wrongful death of the parent. She relies on the Court's holding that a child's damages are separate and distinct from the parent's injury. @ Guiliani, at 322. Troxle argues that Guiliani should be interpreted more expansively as authorizing a claim by a child against her parent's estate when that parent has essentially breached his duty of care to her by

acting negligently and thereby depriving her of his ongoing presence and ability to nurture her:

An injury is an injury. Guiliani unequivocally defines what happened to Ashley as an injury. Once so defined in terms of injury and a viable cause of action, the law does not differentiate based upon the identity of the tortfeasor. [Ashley] is entitled to compensation from the person that caused it.

. . .

After Guiliani, no one can dispute that a child has been injured when she loses a parent. This is exactly what John French has done. His negligence injured Ashley in the form of costing her the support and care of her father.

. . .

Under Guiliani, because the child's injury is separate and distinct, it is not necessarily a requirement that a valid wrongful death claim exist.

In making these assertions, Troxle argues that we should disregard the language in Lambert, supra, relied on by the trial court. In Lambert, this court addressed the issue of whether Guiliani should be extended beyond the context of wrongful death to allow a child to maintain a cause of action for the loss of parental consortium and to seek such damages where the parent is injured rather than killed. This court concluded that Guiliani was applicable only in cases of wrongful death. We noted that the Supreme Court had announced that a child's claim for loss of parental consortium is the reciprocal of the claim of

parents for loss of a child's consortium as recognized at KRS³ 411.135. Lambert, 37 S.W. 3d at 780, quoting from Guiliani at 321. Lambert emphasized Guiliani's holding that there is no legal distinction between a parent's loss of consortium claim for a child and a child's loss of consortium claim for a parent. Id. Lambert reiterated the Guiliani limitation that a cause of action for loss of parental consortium must be restricted to those cases involving a claim for the wrongful death of a parent. Id.

Troxle seeks to distinguish Lambert because it did not involve the death of a parent. She further contends that Lambert conflicts with Guiliani's holding that a child has a separate and distinct injury. Troxle's arguments C while persuasive and innovative C ignore the inherently derivative nature of all claims for loss of consortium -- not just those brought by children. See, Moore v. State Farm Mutual Insurance Company, Ky., 710 S.W.2d 225 (1986)(Leigson, concurring) and Hardin v. Action Graphics, Inc., Ky.App., 57 s.W.3d 844 (2001) (children of workers killed at work not entitled to bring an action against parents=employers for loss of parental consortium because parents had elected coverage under the workers=compensation act barring a claim for wrongful death).

The appellees have correctly observed that the Aseparate and distinct@language contained in Guiliani was framed to counter the argument that double recovery would result from

³Kentucky Revised Statutes.

allowing a claim for the loss of parental consortium. It permits a child to pursue its claim in a separate action rather than as part and parcel of the wrongful death action filed by the representative of the estate. However, the existence of a claim for wrongful death of the decedent against a negligent third party was essentially established as a condition precedent to the existence of the child's consortium claim. French could not have sued himself for his own death; therefore, his child cannot sue him since her cause of action must be premised upon and derived from his. Since he would have had no cause action, neither can his child.

A recent decision of the Supreme Court, Daley v. Reed, Ky., ___ S.W.3d ___ (rendered October 17, 2002), reinforces our reasoning in this regard and directly addresses the issue before us:

The Reed children rely primarily on the statement in Guiliani v. Guiler, supra, that a loss of consortium claim is independent and separate from a wrongful death action and shall not be treated as a single claim. @ 951 S.W.2d at 322. Guiliani, however, did not intend by that language to change the law applicable to insurance coverage for loss of consortium claims or to make new law applicable only to claims for loss of parental consortium.

(Emphasis added.) Additionally, our court discussed the policy-making supremacy of the General Assembly on this issue in Clements v. Moore, Ky.App., 55 S.W.3d 838, 840 (2000), holding that the recognition of filial claims for wrongful death is one

exclusively within the purview of the Legislature.@ A departure from Guiliani must be announced by the Supreme Court at a future date or must flow from a legislative enactment. We are not at liberty to move beyond the parameters currently defining this issue.

For the foregoing reasons, we hold that the trial court did not err in dismissing Troxle's cause of action against French's estate. Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT FOR
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