

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000123-MR

LORETTA POTTER

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 16-CI-00871

PIKEVILLE MEDICAL CENTER, INC;
TIMOTHY J. ZIOLKOWSKI, M.D.; AND
SOUTHEASTERN EMERGENCY
PHYSICIANS, LLC

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: JONES, TAYLOR AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Loretta Potter appeals from an order of the Pike
Circuit Court granting partial summary judgment dismissing her claim for loss of
consortium relating to the death of her forty-eight-year-old disabled son, Cullen

Alfred Potter (Alfred). Because we decline to extend a loss of consortium claim for the loss of an adult child to a parent, we affirm.

Alfred was born on February 8, 1967. At seven months old, he began having seizures and continued to do so throughout his life. He was unable to talk, received disability benefits because of his intellectual impairment and was dependent on Loretta.

On September 16, 2015, Alfred was taken to the Pikeville Medical Center, Inc. for medical treatment. He died on September 20, 2015. This medical malpractice action was filed against Pikeville Medical Center, Inc., Dr. Timothy J. Ziolkowski and Southeastern Emergency Physicians, LLC. for personal injury and wrongful death. Loretta also made a claim for loss of Alfred's consortium. Upon motion of Pikeville Medical Center and Dr. Ziolkowski, the circuit court granted partial summary judgement dismissing Loretta's loss of consortium claim because Kentucky Revised Statute (KRS) 411.135 limits a parent's loss of consortium claim to the loss of minor children. Loretta appealed.

KRS 411.135 states as follows:

In a wrongful death action in which the decedent was a minor child, the surviving parent, or parents, may recover for loss of affection and companionship that would have been derived from such child during its minority, in addition to all other elements of the damage usually recoverable in a wrongful death action.

While KRS 411.135 expressly permits a loss of consortium claim of parents for the wrongful death of their minor child, it has been held that it also permits a minor child to claim loss of consortium in the event of a parent's wrongful death.

Giuliani v. Guiler, 951 S.W.2d 318 (Ky. 1997). The law that followed *Giuliani* explains that its holding is limited to situations where the child is a minor, whether the loss of consortium claim is brought by the child or the parent.

In *Clements v. Moore*, 55 S.W.3d 838, 839 (Ky.App. 2000), this Court held that the *Giuliani* "opinion does not remotely suggest that our highest court intended the same result with respect to children over the age of eighteen." The same conclusion was reached in *Smith v. Vilvarajah*, 57 S.W.3d 839, 842 (Ky.App. 2000) (emphasis added) (citation omitted), and the Court further explained why *Giuliani* could not be extended beyond permitting a claim by minor children for the death of a parent:

[W]e recognize that the Supreme Court's opinion in *Giuliani v. Guiler, supra*, set forth specific policy reasons for recognizing the claim. This Court should attempt to stay within those established parameters. The Supreme Court first noted the statutory policy of the Commonwealth to protect and care for children in a nurturing home. KRS 600.010. Clearly, this interest would not be served by extending a claim for loss of parental consortium to emancipated adult children. In addition, the Supreme Court also noted that KRS 411.135 recognizes the individuality of the child and the value to a family by providing parents a consortium claim for the loss of the love and affection of their minor child. In this case, *there is no reciprocity interest because Kentucky*

statutes do not recognize a parent's claim for loss of consortium with their adult children.

In *Pauly v. Chang*, 498 S.W.3d 394 (Ky.App. 2015), a twenty-one year old son was precluded for claiming loss of consortium for the death of his father and a younger sibling was limited to recovery for the time between the loss of her father and when she turned eighteen-years old. In that opinion, this Court again recognized “there is no reciprocity interest because Kentucky statutes do not recognize a parent’s claim for loss of consortium with their adult children.” *Id.* at 415 (citation omitted).

Loretta argues the cases cited are inapplicable and that a different result is required where, as here, the adult child was mentally or physically disabled and a parent claims loss of consortium. She argues a parent should be able to recover for the loss of consortium of an adult mentally or physically disabled child because under KRS 405.020(2), mentally or physically disabled children are not emancipated by operation of law at eighteen. *Abbott v. Abbott*, 673 S.W.2d 723, 726 (Ky.App. 1983). We disagree.

KRS 411.135 does not use the word emancipated but limits recovery to a “minor child” and the “loss of affection and companionship that would have been derived from such child during its minority[.]” KRS 2.015 establishes the age of majority at eighteen. As has been stated, in *Giuliani* our Supreme Court allowed a claim of a minor child for loss of parental consortium only if a “claim of

loss of parental consortium is a reciprocal of the claim of the parents for loss of a child's consortium ... in KRS 411.135.” *Giuliani*, 951 S.W.2d at 321. As noted by the federal court in *In re Air Crash at Lexington*, 2008 WL 687012 at 1 (E.D. Ky. 2008) (unpublished), “[i]f *Giuliani* were expanded to include claims by mentally or physically handicapped adult children, it would no longer be a ‘reciprocal’ of K.R.S. § 411.135.”

We conclude that KRS 411.135 only permits a parent to recover for loss of her minor children, regardless of any disability the minor child may have had. Without exception, Kentucky law does not allow for a loss of consortium claim by a parent upon the death of an adult child.

Loretta argues we should ignore the statutory language and the case law cited quoting the language in *Hilen v. Hayes*, 673 S.W.2d 713, 717 (Ky. 1984) that “[t]he common law is not a stagnant pool but a moving stream.” While it is the responsibility of the courts to direct the common law as society and the passage of time require loss of consortium is no longer just a matter of common law, it is now a matter of statutory law. In *Clements*, the Court recognized that the determination of who can recover in wrongful death actions is a matter for the General Assembly and not the courts:

[I]t is the belief of this Court that it is not the proper function of the judiciary to further develop the common law in the area of loss of consortium claims in the context of wrongful death. Rather, the recognition of filial

claims for wrongful death is one exclusively within the purview of the Legislature. Unlike the situation presented in *Giuliani*, there is no “reciprocal” statute to finesse Section 241 of the Kentucky Constitution so as to avoid its clear provisions. While this Court has not hesitated to take an active role in extending the common law of torts when appropriate, we decline the invitation in the case *sub judice* so as not to invade the province of the Legislature, the branch of our government to which our constitution has granted “the [sole] responsibility for determining who can recover what damages for the wrongful death of another.”

Clements, 55 S.W.3d at 840-41 (footnotes omitted) (quoting *Guiliani*, 951 S.W.2d. 325-26 (Cooper, J., dissenting)). We hold the same belief expressed in *Clements* and conclude that any change in the law permitting parents to recover for loss of consortium of their adult children must come from our General Assembly. Cases cited by Loretta from other jurisdictions that permit recovery do not persuade us to the contrary.

The partial summary judgment dismissing Loretta’s loss of consortium claim is affirmed.

ALL CONCUR.

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