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# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-001874-MR

BETTIE WILLIS APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 08-CI-006347 & 08-CI-006797

LOUISVILLE/JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT;
AND ALONZO SPENCER APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT, SENIOR JUDGE.

WINE, JUDGE: Bettie Willis appeals from a summary judgment by the Jefferson Circuit Court in favor of the Louisville/Jefferson County Metropolitan Sewer District, *et al*. (hereinafter, "MSD") on her claims of loss of consortium and negligent infliction of emotional distress stemming from the death of her minor granddaughter for whom she served as legal guardian.

**History**

Bettie Willis was the maternal grandmother of nine-year-old Shelby Gray of Louisville, Kentucky. Shelby was born in Clark County, Indiana. Clark County's Division of Family and Children assumed protective custody of Shelby immediately after her birth because Janet Gray, Shelby's biological mother, was being sent to prison. After learning that Shelby had been placed in foster care, Willis sought custody of her. Thereafter, the Clark County Indiana Superior Court placed Shelby with Willis and appointed Willis as legal guardian over Shelby's person and estate. Shelby resided with Willis from her infancy until the untimely accident occurring in her ninth year of life, which is the subject of this case. During this time, Willis allegedly never received support from Gray, and Gray rarely exercised visitation with the child.

On the morning of January 30, 2008, Willis was driving Shelby to school. While traveling to school, Shelby saw the school bus she normally took to school and asked Willis if she could ride the bus the rest of the way to school with her friends. Willis agreed and pulled the car to the curb so that Shelby could board the bus with her friends. As Shelby was crossing the street to board the bus, Willis heard a loud "thump" and knew that Shelby had been hit by a car. Although there was no marked crosswalk at this intersection, it is apparently where children in the neighborhood were supposed to cross the street to board the bus.[1] Shelby was

[1] However, deposition testimony in the record indicates that Jefferson County Public School procedure was for children to wait on the sidewalk for the bus driver to wave them across the street. In this case, the bus had not yet reached the bus stop or activated its stop sign. Nonetheless, the facts surrounding this circumstance are not relevant or necessary to this appeal, but would be a question at trial for causation and apportionment purposes.

struck by a truck owned by MSD and driven by an MSD employee. Willis rushed from the car and screamed for help from nearby houses. Thereafter, although the record is not entirely clear as to how this occurred, it appears that Willis's car rolled from its original position, also striking Shelby where she lay on the street.[2] Shelby's injuries were so extensive that emergency personnel were unable to save her. Shelby died at Kosair Children's Hospital as a result of blunt force injuries sustained from the accident.

Willis, who had raised and cared for Shelby since birth, was in a state of grief and shock following her death. Thereafter, Willis began to experience anxiety, high blood pressure, and general emotional distress. She was prescribed medications for these conditions by her primary care physician. She continued to take these medications at the time of this appeal.

Willis's adult son (and Shelby's uncle), Robert Willis, moved to be appointed as the administrator of Shelby's estate. On June 26, 2008, Robert, as Administrator of the Estate of Shelby Gray, sued MSD for wrongful death. Willis, as an individual, also sued MSD for loss of consortium and negligent infliction of emotional distress.[3] MSD moved for partial summary judgment on Bettie's claims. The Jefferson Circuit Court granted MSD's motion for partial summary judgment on September 8, 2009, on the grounds that our statutory law does not recognize a

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[2] Although the police report states that Willis forgot to put her car in park before running for help (and the vehicle rolled into Shelby), Willis's deposition states that she had no knowledge or recollection of whether she put the car into park. Again, the actual facts surrounding this circumstance are not relevant or necessary to this appeal, but would be a question at trial for causation and apportionment purposes.

[3] Apparently, Janet Gray also filed a suit for loss of consortium against MSD in a separate action. Presumably, however, if the facts in this case are to be believed as true, Mandy Jo's Law would act to prevent Janet Gray from recovering in said case. Kentucky Revised Statute ("KRS") 411.137.

claim for loss of consortium for non-parents and because negligent infliction of emotional distress claims are subject to the "physical impact" rule. Bettie now appeals the grant of summary judgment on these claims. The principal wrongful death suit filed by Robert Willis remains active in the Jefferson Circuit Court.

**Standard of Review**

On review of the grant or denial of a motion for summary judgment, we ask "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). When making such a determination, the trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment" and resolve all doubts in her favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). As this involves a determination of law, we review such judgments *de novo*. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

**Analysis**

On appeal, Willis asks this Court (1) to recognize a claim for loss of consortium for grandparents that serve as legal guardians of their minor grandchildren, and (2) to abandon the "physical impact" rule in negligent infliction of emotional distress ("NIED") cases involving bystanders and to adopt a "general negligence" rule instead.

***Loss of Consortium Claim by a Grandparent-Guardian***

We first address Willis's request that this Court recognize a claim for loss of consortium for grandparents who act as legal guardians to their minor grandchildren. This is an issue of first impression in the Commonwealth. The principal statute governing loss of consortium claims in the Commonwealth is KRS 411.135, which reads 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.

(Emphasis added.) The trial court found that Willis's loss of consortium claim must fail because she is not a "parent" as contemplated by the statute.

Our first task in determining whether Willis's loss of consortium claim must fail is to ask whether Willis has a cause of action under KRS 411.135. To accomplish this, we first consider whether KRS 411.135 is silent as to a non-parent's recovery for loss of consortium. We find that it is not. "The primary rule [of statutory construction] is to ascertain the intention from the words employed in enacting the statute and not to guess what the legislature may have intended but did not express." *Gateway Const. Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962) (internal citations omitted). We are not free to "add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Lafayette Football Boosters, Inc. v. Commonwealth*, 232 S.W.3d 550, 555 (Ky. App. 2007). Clearly the statute refers only to a "surviving parent, or parents,"

and does not name grandparents, guardians, or other custodial family members as parties who may thereunder state a claim.

In the present case, we recognize that to allow a biological parent or adoptive parent the right to recover, while precluding a custodial family member who has essentially acted as a "parent" to the child since birth may be arbitrary. Indeed, we acknowledge the realities present in our society today and understand that many grandparents and other family members have assumed a parental and custodial role to their minor grandchildren, nieces, or nephews. In some cases, this occurs after the State has been forced to intervene (such as in the present case); and in others this occurs when a parent has abandoned the child and another has stepped in to provide for the child. Whether arbitrary or not, however, unless unconstitutional, we are compelled to follow the clear language of KRS 411.135. The statute describes a particular class of persons, "parents," and acts to exclude other unmentioned classes by application of the legal maxim of statutory construction, "*expressio unius est exclusio alterius,*" which means that the inclusion of specific things implies the exclusion of those not mentioned. *Fiscal Court of Jefferson County v. Brady*, 885 S.W.2d 681, 685 (Ky. 1994).

While we acknowledge that the Supreme Court, in *Giuliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997), judicially created a right of recovery for minor children for the loss of parental consortium, thereby expanding recovery previously contemplated under KRS 411.135, such expansion was based upon a recognition that it was "a reciprocal of the claim of the parents for loss of a child's consortium

. . . ." *Id.* at 321. There is no claim which allows for a child to recover for the loss of consortium for a guardian or custodial family member who suffers an untimely death. Thus, there can be no reciprocal claim for a caregiver or legal guardian such as Willis, regardless of how close or long the relationship may be.

Nonetheless, we do not fail to take heed that our Supreme Court has expressed that "loss of consortium is a judge-made common law doctrine." *Id.* at 319. Indeed, the Court has cautioned that the "[d]evelopment of the common law is a judicial function [that] should not be confused with the expression of public policy by the legislature." *Id*. The *Giuliani* Court wisely stated that the "common law grows and develops and must be adapted to meet the recognized importance of the family . . . and the Court has the authority and responsibility to modify loss of consortium as a common law doctrine when necessary." *Id*. at 320.

Here, however, we have chosen to limit our extension of loss of consortium to cases which are reciprocal to claims already recognized in the common law or by statute (KRS 411.135) and will not further extend the cause beyond the bounds recognized in *Giuliani*. We are ever mindful that the "judicially created common law must always yield to the superior policy of legislative enactment and the Constitution." *Commonwealth ex rel.Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992), *overruled on other grounds by Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152 (Ky. 2009). We decline herein to exercise the power of the Courts to expand the judicially-created common law of doctrine of loss of consortium. As the reasoning utilized by our

superior Court in *Giuliani* is not directly applicable because no direct reciprocal claim exists, we will reserve to our highest Court for another day the question of whether custodial family members and guardians should be extended a cause for loss of consortium where they have stood in the shoes of a parent with respect to a child.

Accordingly, we affirm the Jefferson Circuit Court's judgment as to Willis's claim for loss of consortium.

***The Physical Impact Requirement***

We next consider Willis's claim that our courts should abandon the "physical impact rule" as applied to bystanders in NIED cases. Unlike the issue of "loss of consortium," the application of the "physical impact rule" is not an issue of first impression in this Commonwealth. *See, e.g., Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 930 (Ky. 2007). Rather, our Supreme Court has made clear that the physical impact rule is the law of this state, whether we are dealing with a bystander or victim. *Id.; see also, Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980) and *Hetrick v. Willis*, 439 S.W.2d 942, 943 (Ky. 1969). In fact, this Court has previously considered a very similar factual situation in which a mother witnessed a truck leave the roadway and strike and kill her infant child. *Wilhoite v. Cobb*, 761 S.W.2d 625 (Ky. App. 1988). In that case, we cited *Deutsch, supra*, and noted that the impact rule prohibits recovery in such cases and this Court is bound by the corresponding precedent. *Id*. As such, Willis's request is not for us to interpret a statute or to decide an issue of first impression with respect to the

common law. Rather, the request is to overturn existing precedent and make new law. This Court is simply without authority to do so. Rules of the Supreme Court ("SCR") 1.030(8)(a). Rather, only our Supreme Court could make the decision to fall in line with other jurisdictions that have modified or abandoned the "impact rule" when dealing with cases involving bystanders. Thus, we affirm the Jefferson Circuit Court's summary judgment on Willis's claim for NIED as it is in line with controlling precedent in this Commonwealth.

Accordingly, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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