IN THE
INDIANA SUPREME COURT
CAUSE NO. _____

JEFFREY S. CAHOON, M.D., and SHARI A. KOHNE and EDWARD L. KENNEDY, CO-EXECUTORS OF THE ESTATE OF ROBERT W. KOHNE, M.D.,	On Petition To Transfer From The Indiana Court of Appeals Cause No. 79A05-9801-CV-026
Appellants/Defendants Below,	Appeal from the Tippecanoe Superior Court Cause No. 79D01-9502-CP-38
v.	
GLESSIE JOAN CUMMINGS, wife of the deceased, William T. Cummings,	
Appellee/Plaintiff Below.	

BRIEF OF DEFENSE TRIAL COUNSEL OF INDIANA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS/DEFENDANTS BELOW

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I. INTEREST OF AMICUS CURIAE

The Defense Trial Counsel of Indiana ("DTCI") is an association of Indiana lawyers who defend clients in civil litigation. DTCI offers this brief in connection with its Motion for Leave to file the same and for the same reasons enunciated therein. In doing so, the DTCI will request this Court grant transfer, affirm in part and reverse in part the Court of Appeals, and then remand to the trial court for a new trial.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Was it error for the Court of Appeals to hold:

1. The trial court's wrongful death instruction was a correct statement of the law;

2. Wrongful death and survival actions, while inconsistent, may be simultaneously presented to a jury without an election of remedies by a plaintiff; and,

3. A plaintiff in a death claim based upon Restatement (Second) of Torts § 323 may recover full wrongful death damages related to the loss of a spouse?

III. STATEMENT OF THE CASE

DTCI hereby adopts the Introduction as set forth in the Brief in Support of Joint Motion to Transfer filed by Appellants Defendants (hereinafter "Brief of Appellants") with this Court as its Statement of the Case. See also the attached Appendix.

IV. STATEMENT OF FACTS

DTCI hereby adopts the facts as described in *Cahoon v. Cummings*, 1999 WL 437222, –N.E.2d–, (Ind.App. June 30, 1999), pp. 1-2 as its Statement of Facts:

> In 1991, William Cummings sought treatment for heartburn from Dr. Kohne, his family physician. Dr. Kohne ordered x-rays of his esophagus, stomach and small bowel. The x-rays were evaluated by Dr. Cahoon, a radiologist, who diagnosed Cummings with a hiatal hernia and reflux esophagitis. Dr. Cahoon also noted that there was an area of mucosal irregularity within the esophagus. After receiving Cahoon's report, Dr. Kohne failed to recommend an endoscopy and tissue biopsy. Dr. Kohne told Cummings that he had a hiatal hernia with reflux and suggested that Cummings lose weight, sleep sitting up, and avoid greasy foods. Dr. Kohne also told Cummings to return to his office after losing weight.
>
> From December of 1991 to July of 1992, Cummings dieted in an attempt to lose weight. In July of 1992, Cummings returned to Dr. Kohne's office and Dr. Kohne arranged for Cummings to acquire his x-rays and obtain further consultation at the V.A. Hospital in Danville, Illinois. However, before Cummings reported to the hospital, his esophagus perforated and hemorrhaged. An emergency endoscopy revealed a large malignancy in the esophagus and Cummings was subsequently diagnosed with esophageal cancer.
>
> In March of 1993, Cummings filed a complaint with the Department of Insurance against Dr. Cahoon, which Wife later amended adding Dr. Kohne. The Medical Review Panel concluded that both doctors had failed to comply with the appropriate standard of care but that such conduct was not a factor in the resultant damages.
>
> Cummings died on August 15, 1993. In February of 1995, Wife filed a complaint against Appellants asserting a claim for damages resulting from their failure to diagnose Cummings's cancer. In her complaint, Wife alleged that, as a result of the negligence of the Appellants, Cummings had incurred medical expenses, lost income, lost a substantial chance of survival, and died. In addition, she alleged that she had lost the services and consortium of her husband since the date of the negligence,

would suffer future loss of services and consortium, and had incurred her own medical expenses and lost income.

In March of 1996, Dr. Kohne died and his estate was substituted as a party defendant. A few days prior to trial, both Cahoon and Kohne amended their answers admitting that they breached the duty of care in their treatment of Cummings, but continued to deny that their conduct was the proximate cause of the alleged damages. A jury trial was conducted in September and October of 1997. The jury returned a verdict against Dr. Kohne in the amount of $194,000 and against Dr. Cahoon in the amount of $75,000.

Thereafter, Wife filed a motion for prejudgment interest. The trial court denied the motion for prejudgment interest with respect to Dr. Kohne and awarded $18,443.84 in prejudgment interest with respect to Dr. Cahoon.

V. SUMMARY OF ARGUMENT

The Court of Appeals erred when it determined the wrongful death instruction given by the trial court was a correct statement of the law. The Court of Appeals erred when it affirmed the trial court's determination that plaintiff could pursue the mutually exclusive remedies of wrongful death and a survival action. Finally, it was error for the Court of Appeals to allow a recovery for full wrongful death damages against each defendant. Damages must be proportionally reduced and appropriately allocated, whether they are for the value of a life lost or for loss of consortium.

VI. ARGUMENT

A. WHAT THIS COURT DECIDED IN *MAYHUE*:

This Court was presented with a claim for loss of consortium resulting from medical malpractice that did not proximately cause the death of a spouse. The single issue presented was whether Indiana law recognizes, in medical malpractice claims, a separate loss of chance doctrine. *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1385 (Ind. 1995). The court recognized a recovery based upon the Restatement (Second) of Torts §323. This doctrine only applies where the defendant has

undertaken to provide services which he should recognize as necessary for the protection of the other's person. Once this fact pattern is present, and the plaintiff has proven that the negligence increased the risk of harm to the plaintiff (stated negatively)/reduced the chance of a cure (stated as positively as possible), the jury is permitted to decide whether the defendant's negligence was a substantial factor in causing the harm suffered by the plaintiff. A plaintiff avoids summary judgment on the issue of proximate causation even though a plaintiff had less than a 50% chance of recovery. *Mayhue* at 1388. This Court then held that where the health care provider was negligent, but the patient would have suffered injury or death anyway, if the plaintiff proves the negligence increased the risk of harm to/reduced the chance of a cure for the plaintiff, a jury may decide whether the medical malpractice was a substantial factor in causing the harm suffered by the plaintiff. This Court also specifically held a separate loss of chance doctrine is not required, granted transfer, vacated the opinion of the court of appeals, affirmed the trial court's denial of defendants' motion for summary judgment, and remanded the case. *Mayhue* at 1389.

B. WHAT THE COURT OF APPEALS DECIDED IN *CAHOON* :

The Court of Appeals was presented with wrongful death, survival action, and (like *Mayhue*) a claim for loss of consortium resulting from medical malpractice that did not proximately cause the death of a spouse. The issues considered in this amicus Brief are listed *supra*. *Cahoon* held: (1) the trial court's wrongful death instruction was a correct statement of the law and plaintiff in a § 323 setting may recover full wrongful death/loss of life damages; (2) the trial court's survival action instruction was erroneous; and, (3) while wrongful death and survival actions are inconsistent, they may be pursued simultaneously and no election of remedies must be made by a plaintiff.

Procedurally, the case was reversed and remanded for a new trial. A petition for rehearing was denied on August 24, 1999 and a motion for transfer is pending.

C. WHAT THIS COURT DID NOT DECIDE IN *MAYHUE*/WHAT THE COURT OF APPEALS DISCUSSED IN *CAHOON*:

Not decided by this Court but discussed in *Cahoon* was whether the measure or calculation of damages for the loss of consortium and other claims should be reduced proportionally given the limited liability of the negligent doctor in actually causing the death of the already terminally ill patient. Likewise, neither court actually discussed whether negligence should be allocated in a case based upon § 323 where there are two or more defendants.

D. ISSUES THE SUPREME COURT SHOULD DECIDE IN *CAHOON*:

Specific issues addressed by the Court of Appeals which need to be considered by this Court are as follows.

1. Wrongful Death Theory of Recovery/Instruction:

Substantively, the Court of Appeals expanded *Mayhue* allowing the Restatement (Second) of Torts §323 to be used under the wrongful death statute despite the undisputed fact that the doctors' negligence was not the proximate (i.e., probable; more than 50%) cause of the death of Cummings. *Cahoon,* p. 6; *Mayhue, supra.* This amicus adopts the arguments contained in the Brief of Appellants, pp. 7 - 8 in regard to this issue. Obviously, if the theory of recover is not permitted, any instruction based upon a wrongful death theory was erroneously given by the trial court.

2. Wrongful Death and Survival Action:

Procedurally, the majority opinion held that while wrongful death and survival actions are inconsistent remedies, there is no procedural bar to pursuing inconsistent theories or remedies at trial since some procedural means may be employed to prevent a double recovery for the injury (e.g., judgment on the pleadings, summary judgment, judgment on the evidence). *Cahoon, supra* at pp.

14-15 and f.n. 8. This amicus adopts the arguments contained in the Brief of Appellants, pp. 2 - 7 in regard to this issue. *See also, Foster v. Evergreen Healthcare, Inc.*,1999 WL 619379, –N.E.2d–, (Ind.App. August 17, 1999) f.n. 6 and 7.

3. Loss of Life/Wrongful Death and Loss of Consortium Damages:

The majority opinion of the Court of Appeals held full wrongful death damages for the loss of William T. Cummings life are available, and that there is no reduction or proportional adjustment tantamount to the reduction of the chance for a cure/survival or in relation to the relative degrees of limited fault of the doctors. *Cahoon, supra,* at pp. 5-6. Implied in this conclusion is that in situations like Cummings and *Mayhue*, the recovery must be all-or-nothing. *Cahoon, supra*, p. 19 (Sullivan, J., concurring and dissenting in part). This Court needs to consider what effect such legal yarn will have when it is woven into the many bolts of fabrics that comprise our tort system, and then used by our trial judges to window dress the court created cliques we call juries with final jury instructions.

For example, neither this Court nor the court of appeals has explicitly addressed how damages should be calculated for *loss of consortium* resulting from medical malpractice that did not proximately cause the death of claimant's spouse. Both this Court and the Court of Appeals acknowledge a loss of consortium claim is purely derivative; that it survives only to the extent a medical malpractice, wrongful death or survival cause of action is viable; and that a recovery is allowed. *See, Mayhue* at 1386-1387; *Cahoon* p. 7. No discussion on how to calculate those damages, however, is included in either *Mayhue* or *Cahoon*. Yet, since a loss of consortium claim is purely derivative, in comparative fault and other cases where loss of consortium claims are allowed, the derivative claim is disallowed if the primary claimant either cannot recover (i.e., more

than 1% contributorily negligent or more than 50% comparatively at fault) or is proportionately reduced by the amount of the primary claimant's fault that is less than 50%. I.P.J.I. 6.03, 13.13, and 13.15 (Lexis Law Publishing, 1998); *Ind. Code* § 34-51-2-*et seq.* By not addressing this issue, the court of appeals assumes there is no reduction of damages on the loss of consortium claim. Would not the better inference be, that because this Court did not address this issue, that the current law applies, thereby requiring a reduction? By not addressing the issue, the court of appeals has, in effect, created new law that is implicit rather than explicit, must be assumed.

This brings us to the decision by the Court of Appeals not to adopt a specific method for calculating damages in *Mayhue* and *Cahoon*:

> We think it more likely that the supreme court intended to allow for full recovery. First, the proportional damage scheme set out in *McKellips* is complicated and would require extensive further discussion by our supreme court had they intended to adopt such a scheme.

Cahoon, p. 5.

Complex societies beget complex legal systems. The calculation method suggested by *McKellips v. Saint Francis Hospital, Inc.*, 741 P. 2d 467, 476-477 (Okla.1987)[1] is no more

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[1] *See* Attached Appendix.:

complicated than those required by our comparative fault act (*Ind. Code* § 34-51-2 *et seq.*), nor in the case presently before this Court entitled *Mendenhall v. Skinner & Broadbent Co., Inc.*, No. 49S04-9811-CV-0074 (Ind. November 23, 1998, *transfer granted*). It is hard to understand how the Court of Appeals in the span of three paragraphs can refuse to adopt a formula to calculate damages by concluding the "proportional damage scheme set out in *McKellips* is complicated" and then express its "'strong faith in the ability of the jury to decide . . . complex questions.'" *Cahoon* at pp. 5 - 6.

Finally there is the public policy (i.e., a fairness factor) which dictates a calculation method be used. Compare and contrast the following fact scenarios which now exist in our law because this Court and the *Cahoon* court have remained silent and/or rejected the methodology suggested by *McKellips*:

A negligent motorist may only be responsible for the aggravation of a pre-existing injury, and then only in proportion to his fault for the accident as compared with all faultfeasors. I.P.J.I. 11.26 and Comments (Lexis Law Publishing, 1998); *Ind. Code §§* 34-51-2-5 through 7.

Chance of patient being cured (as a %)		
the reduction of the chance of cure		40%
because of doctor's negligence (as a %)		25%
loss of survival (as a %) = A		15%
Total amount of damages		$500,000
× A		× 15%
loss of chance damages = B		$75,000
Apportion fault as between faultfeasors-	$75,000	$75,000
doctor1 = 65%; doctor 2 = 35%	× 65%	× 35%
	$48,750	$26,250

patient's chance of a cure /increased the risk of harm. *Mayhue, supra.*

V. A physician whose negligence did not cause the injury or death of a patient, is liable for the total value of the lost life; is not entitled to any reduction attributable to how much he reduced the chance of a cure/increased the risk of harm; and may not allocate fault with any colleague who is also shown to have reduced the

The person liable for having increased the risk of harm or reduced the chance of a cure, like the negligent motorist, should only be responsible for the aggravation/reduction. And if the culpable party has acted in concert with others, then the responsibility should not be *fully* borne by *each*, but apportioned between the two based upon their respective negligence to prevent unjust enrichment or a double recovery for plaintiff. Reasonable limits on the damages which may be awarded under § 323 should mirror the limited factual application of this theory of recovery. Without such limits, the overarching umbrella of § 323 will be used for every rainy day.

VII. CONCLUSION

This Court should grant transfer only as to the issues addressed in this Brief and the Brief of the Appellants, reverse the Court of Appeals decision to affirm the trial court's decisions on the issues addressed in this Brief and the Brief of the Appellants, and otherwise affirm the decision of the Court of Appeals.

Respectfully submitted,

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VERIFIED STATEMENT OF WORD COUNT IN BRIEF OF AMICUS CURIAE, DEFENSE TRIAL COUNSEL OF INDIANA

The undersigned counsel for amicus curiae, Defense Trial Counsel of Indiana, pursuant to Appellate Rule 11(B)(6), hereby verifies that its Brief contains 3,481 words (including the Appendix), exclusive of the items listed in Appellate Rule 8.3(A)(1), as counted by the word processing program used to prepare the Brief, WordPerfect 8.0.

I verify under the penalties for perjury that the foregoing representations are true.

Dated: September __, 1999

Ross E. Rudolph, Esq., Attorney Number 6337-82
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