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Notes

Does Loss of Custody of a Child Resulting from Attorney Negligence Cause Damage?

*Collins v. Missouri Bar Plan*¹

I. INTRODUCTION

Attorneys face the prospect of legal malpractice actions on a daily basis and in regard to every type of legal issue with which they deal. Indeed, a lawyer's negligence subjects him to liability whether he has mishandled a multi-million dollar business transaction or failed to adequately represent his client in a custody battle over the client's children. Whereas the harm in the former example is clearly monetary, the latter example presents the issue of whether the client can recover monetary damages for loss of custody of his child, a harm that is non-economic in nature. While few people would likely argue that loss of custody of a child is not a cognizable harm, under Missouri's current law, damages based on such a harm are not recoverable in a legal malpractice action. Although Missouri courts have not yet squarely faced the issue, *Collins v. Missouri Bar Plan*² raises the question, the answer to which would establish whether Missouri allows damages for loss of society based on loss of custody in a legal malpractice action.

II. FACTS AND HOLDING

In *Collins*, Chad and Chandrika Collins appealed the circuit court's entry of summary judgment in favor of the defendants Barry Anderson and his law firm, Strong and Strong, and Sanford Krigel and his law firm, Krigel and Krigel.³ After a prolonged dispute involving the adoption of their son Chase,⁴ the Collinses brought the instant action against a number of individuals in-

1. 157 S.W.3d 726 (Mo. Ct. App. 2005).

2. *Id.*

3. *Id.* at 730.

4. See *In re D.C.C.*, 935 S.W.2d 657 (Mo. Ct. App. 1996) [hereinafter D.C.C. I]; *In re D.C.C.*, 971 S.W.2d 843 (Mo. Ct. App. 1998) [hereinafter D.C.C. II].

volved in the adoption.⁵ Specifically, the Collinses charged Anderson, Krigel and their respective firms with malpractice and breach of fiduciary duty.⁶

As a direct and proximate result of the defendants' alleged negligence, the Collinses sought damages for the loss of physical custody of their son, the emotional pain and suffering and mental anguish over that loss, the deprivation of their son's love, affection and companionship, attorneys' fees and costs expended in an attempt to regain custody, and "numerous other related expenses including, but not limited to, professional counseling."⁷

Missouri residents Chad and Chandrika Collins are the birth parents of Chase, born December 10, 1995.⁸ Two days after Chase's birth, the Collinses consented to the adoption of their son by Joseph and Diane Standen, a married couple residing in Pennsylvania.⁹ Prior to Chase's birth, the Standens had hired Samuel C. Totaro, Jr. to represent them in the adoption process.¹⁰ Totaro, in turn, hired Krigel and Anderson to represent the Collinses.¹¹ Before Chase's birth, Krigel met with Chandrika and gave her advice concerning the law of adoption.¹² Later, in November of 1995, Anderson met with both Chad and Chandrika to do the same.¹³ Both Krigel and Anderson informed the Collinses that consent to the adoption could be withdrawn "at any time before the adoption was final."¹⁴ Believing Krigel and Anderson to be representing them as their attorneys,¹⁵ the Collinses consented to the adoption of Chase by the Standens.¹⁶

The consent form signed by both Chad and Chandrika expressly articulated the couple's understanding that their parental rights would be terminated by a decree of adoption granted to the Standens.¹⁷ Additionally, at the custody hearing, the Collinses "acknowledged under oath that they had executed the consent, that they had discussed the adoption, and that they had read and reviewed the consent before signing it."¹⁸ Both Chad and Chandrika testified

5. *Collins*, 157 S.W.3d at 730. Also named as defendants were Samuel C. Totaro, Jr., Eugene E. Kellis, Howard H. Soffer, Holly Kellis Soffer, Michael J. Belfonte, Tammy Thompson, and Janet Wake-Larison. *Id.*

6. *Id.* at 731. Anderson and his firm were additionally accused of negligent misrepresentation, but this Note will focus on the allegations attributed to both attorneys. *See id.*

7. *Id.* at 736-37 (Smart, Jr., J., concurring) (quoting Plaintiffs' petition).

8. *Id.* at 730 (majority opinion).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. D.C.C. I, 935 S.W.2d 657, 658.

18. *Id.*

that they had discussed the matter with each other and given careful consideration to the decision.¹⁹ Indicating her belief that the adoption was in Chase's best interest, Chandrika specifically testified that she had not been threatened or coerced and that her decision was voluntary.²⁰ At the close of the custody hearing, the circuit court entered a temporary custody order transferring custody of Chase to the Standens.²¹

On December 15, 1995, five days after Chase's birth, the Collinses decided to withdraw the adoption consent that they had executed three days prior.²² Upon learning of this decision, the Standens asked to see the child one last time.²³ When the Collinses granted this request, the Standens locked themselves and Chase in their hotel room, refusing to return him to the Collinses.²⁴ The Collinses contacted Anderson for assistance in the matter, but he informed them that he could not help.²⁵ Without immediate recourse, the Collinses could not prevent the Standens from returning to Pennsylvania with Chase.²⁶

On December 19, 1995, the circuit court convened and heard evidence from the Standens and the guardian ad litem regarding the approval of the appropriate authorities in Missouri and Pennsylvania for transfer of custody of Chase under the Interstate Compact for the Placement of Children.²⁷ The Collinses were not present at this hearing,²⁸ but the guardian ad litem reported the Collinses' desire to withdraw their consent to the adoption.²⁹ Despite this information, the circuit court entered an order for transfer of legal custody of Chase to the Standens, who were allowed to return to Pennsylvania with the child.³⁰

19. *Id.* at 659.

20. *Id.*

21. *Collins*, 157 S.W.3d at 730.

22. D.C.C. II, 971 S.W.2d 843, 845.

23. *Collins*, 157 S.W.3d at 730.

24. *Id.*

25. *Id.*

26. *Id.* at 730-31.

27. D.C.C. I, 935 S.W.2d 657, 658. The Interstate Compact for the Placement of Children is an agreement, entered into by all 50 states, that seeks to protect children who are transported interstate for foster care and/or adoption purposes. Douglas E. Abrams and Sarah H. Ramsey, *A Primer on Adoption Law*, 52 JUVENILE AND FAMILY COURT JOURNAL 23, 32 (2001). The agreement requires the "receiving state" to be notified of a child's proposed transfer, whereupon the receiving state will investigate whether the proposed placement of the child is in his/her best interest. *Id.*

28. *Collins*, 157 S.W.3d at 730-31.

29. D.C.C. II, 971 S.W.2d 843, 845. The guardian ad litem was aware of the Collinses' wishes because, prior to the hearing, the Collinses had contacted the guardian ad litem, asking if he would represent them in their attempt to revoke consent. *Id.*

30. *Collins*, 157 S.W.3d at 730-31.

Later that month, the Collinses hired attorney Janet Wake-Larison to represent them in their attempt to regain custody of Chase.³¹ On January 8, 1996, the Collinses filed a motion seeking leave to withdraw consent for the adoption.³² The circuit court denied and the Missouri Court of Appeals for the Western District affirmed the denial of the Collinses' motion on the grounds that the Collinses had failed to allege "any valid grounds – or grounds of any kind – for granting their motion."³³

On December 10, 1996, Chase's one-year birthday, the Collinses tried again; they filed a new motion seeking leave to withdraw consent to the adoption, this time alleging various grounds in support of the motion.³⁴ The Collinses claimed their consent was not actual because it was given under duress by force of circumstances.³⁵ Additionally, the Collinses alleged fraud and misrepresentation, averring that the Standens and the attorneys they hired had falsely informed the Collinses that their consent to the adoption could be withdrawn at any time prior to the final adoption hearing and that the Collinses relied on this information in deciding to consent to the adoption.³⁶ The circuit court dismissed the Collinses' motion without specifying grounds for dismissal.³⁷

This time, the Missouri Court of Appeals for the Western District did not fully agree with the lower court's decision. Although the appellate court rejected the Collinses' assertion of duress because their testimony at the initial custody hearing "belied this claim,"³⁸ the court found that the Collinses' contention of fraud and misrepresentation was different because "[n]othing in the record contradict[ed] these allegations."³⁹ If proven, the Collinses' claims of fraud and misrepresentation would be proper grounds for setting aside a

31. *Id.* at 731. Wake-Larison was a named defendant in the underlying case but was not a respondent to the instant appeal. *Id.* at 726.

32. *D.C.C. I*, 935 S.W.2d at 658.

33. *Id.* at 659. The appellate court specifically noted that consent to adoption is irrevocable without leave of the court and that such leave "will not be awarded for the mere asking or upon the whim of the consenter." *Id.* at 659 (quoting *O.V. & M.V. v. S.V. (In re D.)*, 408 S.W.2d 361, 366 (Mo. Ct. App. 1966)).

34. *D.C.C. II*, 971 S.W.2d at 845. Among the various grounds alleged in support of the Collinses' motion were violations of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (2000), and of Missouri's adoption code, MO. REV. STAT. §§ 453.005-.170 (2000). *D.C.C. II*, 971 S.W.2d at 845.

35. *D.C.C. II*, 971 S.W.2d at 846.

36. *Id.*

37. *Id.* at 845-46. Although the instant case describes this dismissal as grounded on the circuit court's finding that the Collinses were "estopped from denying that they had consented to the adoption because of their original representations," Collins v. Mo. Bar Plan, 157 S.W.3d 726, 731 (Mo. Ct. App. 2005), the appellate court's decision reviewing the dismissal suggests that the circuit court's reasons for dismissal were not clearly articulated. See *D.C.C. II*, 971 S.W.2d at 845-46.

38. *D.C.C. II*, 971 S.W.2d at 846; see *supra* text accompanying notes 18-20.

39. *D.C.C. II*, 971 S.W.2d at 846.

judgment;⁴⁰ thus, the court of appeals remanded the case to the circuit court for a hearing on the alleged fraud and misrepresentation.⁴¹ Before the circuit court could issue a decision on the merits, however, “the Collinses and the Standens settled their dispute by agreeing to joint custody.”⁴² The Collinses opted to settle on the basis of advice received from an expert in juvenile law.⁴³ The expert had informed the Collinses that, even if they successfully proved fraud and misrepresentation, it was unlikely that they would regain custody of their son “because of the difficulty of showing that removing the child from the Standens’ custody was in the child’s best interest.”⁴⁴

After the settlement, the Collinses filed the instant lawsuit against Anderson, Krigel and their respective law firms (collectively referred to as “the lawyers”).⁴⁵ The lawyers moved for and were granted summary judgment.⁴⁶ The circuit court based its decision on the determination that the action of the lawyers did not directly and proximately cause the damage the Collinses claimed to have suffered, and on the lawyers’ argument that attorney Wake-Larison’s negligence was an intervening cause that cut off their liability.⁴⁷

Although this grant of summary judgment did not dispose of all of the Collinses’ claims, the circuit court ruled that no reason justified delay of appeal.⁴⁸ Accordingly, the Missouri Court of Appeals for the Western District, once again welcomed the Collinses into its courtroom. Finding that the Collinses’ claims were not precluded on either the circuit court’s reasoning or on the basis of any of the lawyers’ numerous arguments in support of summary judgment, the appellate court reversed the circuit court’s grant of summary judgment and remanded for further proceedings.⁴⁹

40. *Id.* (citing MO. CT. C.P.R. 74.06(b) (“On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment or order for . . . fraud . . . misrepresentation or other misconduct of an adverse party.”)).

41. *Id.* at 847.

42. *Collins*, 157 S.W.3d at 731.

43. The Honorable Frank D. Connett, Jr., a judge with 30 year’s experience with juvenile issues served as the Collinses’ expert. *Id.* at 735-36.

44. *Id.* at 735-36.

45. *Id.* at 731.

46. *Id.*

47. *Id.* at 731-32.

48. *Id.* at 731; see MO. CT. C.P.R. 74.01(b) (“When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may enter a judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay.”).

49. *Collins*, 157 S.W.3d at 736.

III. LEGAL BACKGROUND

Legal malpractice is “any professional misconduct or unreasonable lack of skill or fidelity in professional and fiduciary duties by an attorney.”⁵⁰ A client can bring an action based on an attorney’s misconduct in his representation of the client under a specific legal malpractice claim⁵¹ or under an independent tort, such as breach of fiduciary duty.⁵²

In a legal malpractice action, the plaintiff has the burden of establishing four elements: (1) that an attorney-client relationship existed; (2) that the attorney acted negligently by failing “to exercise the degree of skill and diligence ordinarily used under the same or similar circumstances by members of the legal profession;” (3) that the plaintiff sustained loss or injury; and (4) that a causal connection exists between the attorney’s negligence and the plaintiff’s loss.⁵³ To prove damages and causation, the last two elements of a legal malpractice claim, the plaintiff must show that “‘but for’ the attorney’s negligence, the result of the underlying proceeding would have been different.”⁵⁴ Thus, the principle measure of damages in a legal malpractice claim is the amount the client would have received in the underlying claim had the attorney’s alleged negligence not prevented a favorable judgment.⁵⁵ Any other damages “‘proximately caused’ by the lawyer’s malpractice” are also available to the plaintiff in a successful malpractice action.⁵⁶

50. *Cain v. Hershewe*, 760 S.W.2d 146, 149 (Mo. Ct. App. 1988) (citing BLACK’S LAW DICTIONARY 864 (5th ed. 1979)).

51. 34 ROBERT H. DIERKER & RICHARD J. MEHAN, MISSOURI PRACTICE PERSONAL INJURY AND TORT HANDBOOK § 12.1 (2004). Additionally, a client may bring claims against an attorney for the attorney’s intentional tort or for the attorney’s breach of the attorney-client contract. *Id.* at § 12.1(c).

52. *Id.*

53. *See Steward v. Goetz*, 945 S.W.2d 520, 531 (Mo. Ct. App. 1997); *see also O’Neal v. Agee*, 8 S.W.3d 238, 241 n.3 (Mo. Ct. App. 1999); *Rodgers v. Czamanske*, 862 S.W.2d 453, 458 (Mo. Ct. App. 1993). The listed elements of the legal malpractice claim are based in tort law, as evidenced by the negligence requirement as the second element. A legal malpractice claim can also be based in contract law; the only difference being that the plaintiff must prove breach of contract, rather than negligence. *See, e.g., Klemme v. Best*, 941 S.W.2d 493, 495-96 (Mo. 1997) (en banc).

54. *Steward*, 945 S.W.2d at 532 (citing *London v. Weitzman*, 884 S.W.2d 674, 677 (Mo. Ct. App. 1994)). The requirement that the plaintiff prove that the underlying proceeding would have been successful “but for” the attorney’s negligence often results in a “case in a case,” wherein the court must try the underlying case to determine the results of the instant action. JAMES R. DEVINE ET AL., PROFESSIONAL RESPONSIBILITY 194 (3d ed. 2004); *see, e.g., Williams v. Preman*, 911 S.W.2d 288, 294 (Mo. Ct. App. 1995), *overruled on other grounds by Klemme v. Best*, 941 S.W.2d 493 (Mo. 1997) (en banc).

55. *Steward*, 945 S.W.2d at 532 (citing R.E. MALLIN & J.M. SMITH, LEGAL MALPRACTICE, Vol. II, § 19.4, 602 (4th ed. 1996)).

56. DEVINE, *supra* note 54, at 194.

In a breach of fiduciary duty claim, the plaintiff must prove five elements: (1) the existence of a fiduciary duty; (2) a breach of that duty; (3) causation; (4) damages to the plaintiff; and (5) that no other recognized tort encompasses the facts alleged.⁵⁷ Missouri law imposes a fiduciary obligation upon an attorney when an attorney-client relationship exists;⁵⁸ an attorney has the obligations of “undivided loyalty and confidentiality” to the client.⁵⁹ The imposition of these obligations transforms the first element into a requirement of proof akin to the first element required in a legal malpractice action – that an attorney-client relationship existed. Thus, a breach of fiduciary obligation claim against an attorney requires proof very similar to that required in a legal malpractice claim. However, the two claims are not identical; a breach of fiduciary obligation claim is distinguished from a claim of legal malpractice by the second and fifth elements of the former.⁶⁰

Although the second elements of a legal malpractice claim and a breach of fiduciary duty claim both call for proof of breach, the elements are distinctly different in regard to what the attorney’s action must have breached and what the breach itself establishes. Whereas a breach in the standard of care is necessary to show negligence in a legal malpractice claim,⁶¹ a breach in the attorney’s obligation to provide loyalty and confidentiality is necessary to prove constructive fraud in a claim of breach of fiduciary duty.⁶² Frequently, in cases dealing with alleged attorney misconduct, the plaintiff’s ability to prove a breach of fiduciary obligation depends on the existence of attorney negligence; thus, “the alleged breach can be characterized as both a breach of the standard of care . . . and a breach of fiduciary obligation.”⁶³ In such cases, the facts constituting the basis for the claim of breach of fiduciary duty can be redressed by another tort – that of legal malpractice. Thus, as the fifth element of a breach of fiduciary duty claim requires, Missouri courts will recognize such a claim as an action for professional negligence and will treat it solely as a legal malpractice claim.⁶⁴

Regardless of whether the plaintiff alleging attorney misconduct brings an action under a claim of legal malpractice, breach of fiduciary duty, or a

57. *Klemme*, 941 S.W.2d at 496.

58. *Dairy Farmers of Am., Inc. v. Travelers Ins. Co.*, 292 F.3d 567, 572-73 (8th Cir. 2002).

59. *Klemme*, 941 S.W.2d at 495; *see also* *Gardine v. Cottey*, 230 S.W.2d 731, 739 (Mo. 1950) (attorney had duty to “represent, advise and protect [client’s] interest.”); *In re Thomasson’s Estate*, 144 S.W.2d 79, 83 (Mo.1940) (“The very nature of the lawyer’s profession necessitates the utmost good faith toward his client and the highest loyalty and devotion to his client’s interests.”).

60. *Klemme*, 941 S.W.2d at 496.

61. *Steward v. Goetz*, 945 S.W.2d 520, 531 (Mo. Ct. App. 1997).

62. *Klemme*, 941 S.W.2d at 495-96.

63. *Id.* at 496.

64. *Id.*; *see, e.g.*, *Blackstock v. Kohn*, 1998 Mo. App. LEXIS 1816, *14 (Mo. Ct. App. 1998); *see also* *DIERKER*, *supra* note 51, at § 12.2(3).

combination of the two, the plaintiff must prove damages.⁶⁵ As a general term, damages connotes the concept of the plaintiff's recovery of monetary compensation for losses caused by the defendant's legal wrongs.⁶⁶ One of the ways in which damages are categorized is by whether they are economic or non-economic.⁶⁷ Economic damages are "objectively verifiable monetary losses, such as medical expenses [or] lost earnings or profits."⁶⁸ In comparison, non-economic damages, are "subjective and non-verifiable losses, such as pain and suffering, emotional distress, . . . [or] loss of consortium."⁶⁹ Regardless of the categorization, the goal behind any award of damages is to place the plaintiff in the position he would have occupied but for the defendant's legal wrongs by using "money to ameliorate the consequences" of those wrongs.⁷⁰ In attempting to achieve this goal and simultaneously prevent a windfall to the plaintiff, the law frequently imposes limitations on the type or amount of damages available.⁷¹

As previously noted, in a legal malpractice action, the type of damages recoverable is limited to that which the client can establish would have been recovered on the underlying claim but for the attorney's negligence and to any other damages proximately caused by the lawyer's misconduct.⁷² Although the elements of the claim itself do not limit the plaintiff's recovery to purely economic damages, whether non-economic damages are available to a plaintiff in such an action is a disputed issue.⁷³ The trend in Missouri and a majority of other states has been to restrict the availability of awards in malpractice actions to economic losses.⁷⁴ A claim of breach of fiduciary duty, on the other hand, imposes no express or implicit limitation; a successful plaintiff may recover a damages award for economic and non-economic losses.⁷⁵

65. DIERKER, *supra* note 51, at §§ 12.2(1), 12.2(3), 33.2(1). Missouri law requires that the fact of damage (as opposed to the amount of damages) be proven with reasonable certainty. *Layton v. Pendleton*, 864 S.W.2d 937, 941 (Mo. Ct. App. 1993).

66. 22 AM. JUR. 2D *Damages* § 1 (2003); JAMES M. FISCHER, UNDERSTANDING REMEDIES § 2[c], at 5 (1999). Although "damage," the loss or harm that results from the invasion or violation of a legal right, is distinguishable from "damages," the recompense for the damage suffered, oftentimes the two terms are used interchangeably. 22 AM. JUR. 2D *Damages* § 2 (2003).

67. FISCHER, *supra* note 66, § 2[c], at 5.

68. *Id.* § 5[e], at 24.

69. *Id.*

70. *Id.* § 2[c], at 5.

71. *See id.* § 3, at 10.

72. *See supra* text accompanying notes 54-56.

73. FISCHER, *supra* note 66, § 222, at 611.

74. *Id.* at 611; *see, e.g.*, *ATS, Inc. v. Listenberger*, 111 S.W.2d 495, 499 (Mo. Ct. App. 2003); *see also White v. Auto Club Inter-Ins. Exch.*, 984 S.W.2d 156, 160 (Mo. Ct. App. 1998).

75. FISCHER, *supra* note 66, § 232, at 616.

Thus, under Missouri law, when a plaintiff-client pursues a claim alleging attorney misconduct under a legal malpractice claim, the plaintiff-client is limited to recovering economic damages from the negligent attorney-defendant. If the plaintiff can successfully claim a breach of fiduciary duty by the attorney, recovery is expanded to include non-economic damages. However, where a claim of breach of fiduciary duty is actually a claim for legal malpractice and the court recognizes it as such,⁷⁶ the damages available will be limited accordingly.

IV. THE INSTANT DECISION

A. The Majority Opinion

In *Collins v. Missouri Bar Plan*,⁷⁷ the Missouri Court of Appeals for the Western District reversed the grant of summary judgment in favor of the defendants because the circuit court had “erred in resting . . . on either Wake-Larison’s alleged negligence being an intervening cause or on the Collinses’ not showing that the attorneys caused their injury.”⁷⁸ Because the reviewing court “must sustain the trial court’s award of summary judgment if the judgment can be sustained under any theory supported by the . . . record,”⁷⁹ the court of appeals also rejected several other arguments posited by the defendant-lawyers in support of summary judgment.⁸⁰

Recognizing that the plaintiff must prove that the attorney’s purported negligence was the direct and proximate cause of the plaintiff’s injuries in a claim for legal malpractice, the appellate court first focused on the issue of causation.⁸¹ The court of appeals rejected the lower court’s finding that Wake-Larison’s negligence was an intervening cause that cut off the defendant-lawyers’ liability.⁸² The court reasoned that any injury that she may have caused “was no different than what would have occurred had she never been involved in the case.”⁸³ The court found that the Collinses’ loss of custody was the natural and probable consequence of Krigel and Anderson’s negligent advice that the Collinses could withdraw their consent to the adoption at any

76. See *supra* text accompanying notes 63 and 64.

77. *Collins v. Mo. Bar Plan*, 157 S.W.3d 726 (Mo. Ct. App. 2005).

78. *Id.* at 732.

79. *Id.* at 731 (quotation omitted).

80. See *infra* text accompanying notes 88-103.

81. *Collins*, 157 S.W.3d at 732. Direct causation is proven by showing that, but for the attorney’s negligence, the result would have been different. *Id.* Proximate causation is proven by showing that the plaintiff’s injury is the natural and probable consequence of the defendant’s negligent conduct. *Id.* (citing *Shaffer v. Bess*, 822 S.W.2d 871, 876 (Mo. Ct. App. 1991)).

82. *Id.* at 732.

83. *Id.*

time before it was final.⁸⁴ Accordingly, any action taken by Wake-Larison on behalf of the Collinses “did not interrupt the chain of events set in motion” by Krigel and Anderson.⁸⁵ The court reinforced this line of reasoning by noting that an intervening cause sufficient to cut off the liability of prior negligent acts is not foreseeable, but that, in this instance, it was entirely foreseeable “that the Collinses would seek additional legal advice after receiving negligent advice from Krigel and Anderson.”⁸⁶ Finally, the court noted that whether Krigel and Anderson had in fact caused the Collinses’ harm was a genuine issue of material fact that required determination at a trial on the merits.⁸⁷

The defendant-lawyers averred that the summary judgment should be sustained on the grounds of both judicial estoppel⁸⁸ and collateral estoppel,⁸⁹ neither of which the court thought applicable.⁹⁰ Krigel and Anderson’s judicial estoppel argument claimed that the Collinses should be estopped from making the present allegations because they swore in the custody hearing that they consented to the adoption.⁹¹ The court rejected this contention because the Collinses’ allegations in the instant suit did not contradict any of their previous testimony; they were not claiming that they did not give consent, but that their consent was based on a mistaken belief.⁹² The court gave similarly short shrift to the lawyers’ collateral estoppel argument, finding that the issue of whether the Collinses consented to the adoption was an issue separate from whether the lawyers’ negligently advised the Collinses that they should consent.⁹³ As the latter issue had not yet been litigated, the court found that the doctrine of collateral estoppel did not apply.⁹⁴

The defendant-lawyers’ final arguments in support of summary judgment rested on the fact that the Collinses settled their previous claims against the Standens.⁹⁵ Krigel and Anderson first alleged that, by settling, the Collinses had “abandoned their right to challenge the validity of their consent” to

84. *Id.*

85. *Id.* For the same reasons, the court also rejected the defendant-lawyers’ argument that Wake-Larison’s failure to repair the harm they had caused constituted an intervening cause sufficient to cut off their liability. *Id.* at 732-33.

86. *Id.* at 733.

87. *Id.*

88. *Id.* The doctrine of judicial estoppel prevents a person “who states facts under oath, during the course of a trial” from denying such facts in a later suit. *Id.* (quoting *Bellinger v Boatmen’s Nat’l Bank of St. Louis*, 779 S.W.2d 647, 650 (Mo. Ct. App. 1989)).

89. *Id.* at 734. The doctrine of collateral estoppel “prohibit[s] a party from litigating an issue that he has previously litigated and lost.” *Id.*

90. *Id.* at 733-34.

91. *Id.* at 733; *see supra* text accompanying notes 18-20.

92. *Collins*, 157 S.W.3d at 733-34.

93. *Id.* at 734.

94. *Id.*

95. *Id.* at 735; *see supra* text accompanying note 42.

the adoption.⁹⁶ The court found, to the contrary, that settlements, such as the Collinses', do not preclude damage claims.⁹⁷ Public policy, which favors settlements, supports the view that victims of legal malpractice should not be precluded from settling their underlying claims, "particularly when the plaintiff can show that settlement was justified."⁹⁸ The court found that the Collinses unquestionably fell within the category of plaintiffs whose settlement was justified.⁹⁹ The Collinses had been informed of the unlikelihood of recovering custody of their son,¹⁰⁰ rather than risk losing all rights to the child by continuing to litigate against the Standens, "the Collinses made a bona fide attempt . . . to mitigate their damages" by settling.¹⁰¹

Again relying on the Collinses' settlement with the Standens, the defendant-lawyers argued that the settlement rendered any malpractice damages "too conjectural and speculative" to meet the requirement of proving damages in a legal malpractice claim.¹⁰² Relying on its finding that the Collinses were justified in settling, the court dismissed this assertion by noting that, "[a]lthough a settlement of an underlying suit injects some speculation," the plaintiff need only prove that the settlement was necessary to mitigate damages to establish the requisite proof of damages.¹⁰³

In dismissing the circuit court's basis for and the defendant-lawyers' argument in support of summary judgment,¹⁰⁴ the court of appeals reversed the circuit court's judgment and remanded for further proceedings.¹⁰⁵ The court expressed confidence in the circuit court's ability to "craft[] the proper remedy" despite concerns raised by the concurring opinion.¹⁰⁶

96. *Collins*, 157 S.W.3d at 735.

97. *Id.*

98. *Id.* (citing *Williams v. Preman*, 911 S.W.2d 288, 298 (Mo. Ct. App. 1995), *overruled on other grounds by Klemme v. Best*, 941 S.W.2d 493 (Mo. 1997) (en banc)).

99. *Id.*

100. See *supra* text accompanying note 44.

101. *Collins*, 157 S.W.3d at 735 (citation omitted).

102. *Id.*

103. *Id.* at 735-36.

104. The two defendant-lawyers each made an argument in support of summary judgment in which the other did not join. The argument, raised by Anderson alone, that the Collinses would be unable to establish the requisite elements of a negligent misrepresentation claim was dismissed easily by the court's finding that, if the facts alleged by the Collinses were true, they stated a valid claim. *Id.* at 734-35. Krigel's argument that the Collinses failed to present evidence sufficient to find that Krigel had acted as their attorney was similarly rejected. *Id.* at 736. An attorney-client relationship is formed when one seeks and receives legal advice and assistance from a lawyer intending to render such advice and assistance to that person. *Id.* (citing *Donahue v. Shughart, Thomson & Kilroy*, 900 S.W.2d 624, 626 (Mo. 1995) (en banc)). The court found ample evidence to put into issue whether such a relationship existed; thus summary judgment was improper. *Id.*

105. *Id.*

106. *Id.*

B. *The Concurring Opinion*

Although Judge James M. Smart agreed with the majority's analysis and ultimate decision to remand, he wrote separately to highlight his concern with the Collinses' damage claims,¹⁰⁷ specifically their request for "recovery for the loss . . . of the[ir] child's 'sole and undivided love, affection and companionship.'"¹⁰⁸ Judge Smart's concern was grounded on the fact that the Collinses' claim amounted to a prayer for "monetary damages for negligent interference with relationship rights as to a *living* child" – an issue of first impression in Missouri.¹⁰⁹

Judge Smart expressed concern that, unlike other causes of action that allow for recovery for interference with relationship rights as between parents and a child, such as abduction or wrongful death,¹¹⁰ the Collinses' claim would put their child's interests "squarely in the crucible of litigation over monetary compensation for the child's affections."¹¹¹ Although Judge Smart recognized the sanctity of parental rights,¹¹² in his estimation, asking the fact finder to put an economic value on parents' rights to the exclusive care for and the society of a child raised several public policy problems.¹¹³

First, Judge Smart noted the perverse incentive that allowing recovery of such a claim would create.¹¹⁴ Under a claim for damages for loss of society of a living child, the greater the degree of alienation between the child and the parents at the time of trial, the greater the amount of damages likely to be awarded.¹¹⁵ This situation, Judge Smart feared, would tempt plaintiff parents to maintain substantial distance in their relationship with their child, thereby acting in contradiction of the public policy of providing for the child's best interests.¹¹⁶

Judge Smart's primary concern with recognizing the Collinses' damages claim was that it would necessarily force "the child and the child's affections

107. *Id.* (Smart, Jr., J., concurring).

108. *Id.* at 737 (quoting Plaintiffs' petition).

109. *Id.*

110. *See infra* notes 159-161 and accompanying text.

111. *Collins*, 157 S.W.3d at 737 (Smart, Jr., J., concurring).

112. *Id.* at 738-39.

113. *Id.*; *see infra* text accompanying notes 114-23.

114. *Collins*, 157 S.W.3d at 737-38 (Smart, Jr., J.; concurring).

115. *Id.* at 737-38.

116. *Id.* at 738. In determining child-related issues, Missouri employs a "best interests of the child" standard; *see, e.g.*, MO. REV. STAT. § 452.375.2 (2000) ("The court shall determine custody in accordance with the best interests of the child."). Although Judge Smart never expressly sets forth this standard, his arguments appear to intrinsically rest upon ground, the foundation for which is this "best interest of the child" standard. *See, e.g., Collins*, 157 S.W.3d at 739 (Smart, Jr., J., concurring) ("To make the child a chattel at this point in our search for accountability has too great a potential to distort the child's relationships and damage his welfare.").

to be evaluated like a chattel.”¹¹⁷ Not only, Judge Smart noted, would such a determination place pressure on the child by affecting the way the parents relate to the child,¹¹⁸ but it would be inherently contrary to Missouri’s well-founded public policy that “[p]arental rights are not for sale.”¹¹⁹ Noting that Missouri has statutes that require a court order for permanent transfer of custody of a child,¹²⁰ that restrict the money that can pass between natural and adoptive parents during an adoption,¹²¹ and that prohibit trafficking in children,¹²² Judge Smart found that “Missouri is . . . very solicitous of the notion that children are not chattels to be bartered or sold.”¹²³

Because of these public policy concerns, Judge Smart found it doubtful that the Collinses should be permitted to seek recovery for the loss of their child’s love, affection and companionship.¹²⁴ Had the issue not been one of first impression or had either party addressed the issue in their briefs, Judge Smart suggested, partial summary judgment as to the damage claim was appropriate.¹²⁵ As it was, Judge Smart was content to raise his concerns “so that the parties may address the issues in the trial court if they wish to do so.”¹²⁶

V. COMMENT

The issues presented in *Collins v. Missouri Bar Plan* involve many areas of law, including adoption law and its policy of acting in the best interest of the child, professional misconduct and the various causes of action on which allegations of misconduct can be based, and the intricacies of damage awards. It is this final aspect, highlighted in the concurring opinion, but given only minimal mention by the majority, that makes *Collins* a potentially groundbreaking case. The Collinses’ prayer for damages for the loss of physical custody of their son and the deprivation of their son’s “love, affection and

117. *Collins*, 157 S.W.3d at 738 (Smart, Jr., J., concurring).

118. *Id.*

119. *Id.* at 738-39.

120. *See, e.g.*, MO. REV. STAT. § 453.110 (2000). The statute was designed to prevent parents from “pass[ing] [children] on like chattel to . . . new owner[s].” *Peggy v. Michael & Becky (In re Baby Girl)*, 850 S.W.2d 64, 68 (Mo. 1993) (en banc). The court will enter a custody order based on the child’s best interests. *Id.* at 65.

121. *See* MO. REV. STAT. § 453.075 (2000).

122. *See* MO. REV. STAT. § 568.175.1 (2000) (“A person . . . commits the crime of trafficking in children if he . . . offers, gives, receives or solicits any money, consideration or other thing of value for the delivery or offer of delivery of a child to another person . . . for purposes of adoption, or for the execution of a consent to adopt or waiver of consent to future adoption or a consent to termination of parental rights.”).

123. *Collins*, 157 S.W.3d at 738 (Smart, Jr., J., concurring).

124. *Id.* at 737.

125. *Id.* at 737 n.1.

126. *Id.* at 737.

companionship”¹²⁷ presents novel issues in regard to two separate but related areas of the law of damages. First, the Collinses were requesting recovery of non-economic damages on a claim under which Missouri has traditionally only recognized economic damages. Second, the Collinses’ prayer for damages presented a claim for damages under a loss of society theory grounded on parental custody and visitation rights that has not yet been recognized in Missouri.

A. Non-Economic Damages

As loss of custody and the loss of society resulting therefrom are clearly “subjective and non-verifiable” losses,¹²⁸ the Collinses’ petition requested non-economic damages in an action based on legal malpractice and breach of fiduciary duty claims. While non-economic damages are generally available to a successful plaintiff under the claim of breach of fiduciary duty,¹²⁹ legal malpractice actions in Missouri have been interpreted to allow recovery only of economic damages.¹³⁰ The Collinses’ prayer for non-economic damages does not, on its face, present any novel issues given that the action is based on at least one claim that allows for recovery thereof. The request, however, is novel considering that a breach of fiduciary duty often overlaps with and is treated as the legal equivalent to a claim of legal malpractice.¹³¹

Based on the facts alleged by the Collinses, it is highly unlikely that their claim of breach of fiduciary duty will be recognized as a cause of action independent from their legal malpractice claim. The breach of duty alleged by the Collinses is based on Anderson and Krigel’s incorrect advice that the couple could withdraw their consent to adoption at any time prior to finalization of the adoption.¹³² While this rendering of incorrect advice may arguably constitute a breach of the duty of loyalty and confidentiality imposed upon the attorneys by virtue of their fiduciary roles,¹³³ this advice also constitutes a breach of the standard of care practiced by diligent members of the legal profession.¹³⁴ Clearly then, “the alleged breach can be characterized as both a breach of the standard of care (legal malpractice based on negligence) and a breach of fiduciary obligation.”¹³⁵ Thus, it is likely that a court, consistent with the rule that a breach of fiduciary duty will be treated as a legal malprac-

127. *Id.* at 736-37 (quoting Plaintiffs’ petition).

128. *See supra* text accompanying note 68.

129. *See supra* text accompanying note 75.

130. *See supra* text accompanying notes 73-74.

131. *See supra* text accompanying notes 63-64.

132. *Collins*, 157 S.W.3d at 732.

133. *See supra* text accompanying notes 58-59.

134. *Collins*, 157 S.W.3d at 732 (“The lawyers . . . had negligently advised the Collinses that they could revoke their consent at any time before the adoption was final.”).

135. *Klemme v. Best*, 941 S.W.2d 493, 496 (Mo. 1997) (en banc).

tice claim if the facts alleged are encompassed by such a claim,¹³⁶ will refuse to recognize the Collinses' claim of breach of fiduciary duty as separate or distinct from their legal malpractice claim. This merging of the Collinses' claims leaves them without any recognized grounds upon which to base a claim for non-economic damages.¹³⁷

While Missouri courts have recognized the economic basis for recovery in a legal malpractice suit, they have done so in a peripheral fashion, without the need to directly address the question of whether non-economic recovery in such an action is permissible.¹³⁸ Other jurisdictions, however, have squarely faced the issue. Courts' decisions have varied based on the factual circumstances presented by the cases before them.¹³⁹ The results, however, have been sufficiently consistent to support the notion that a "new rule" has emerged that allows recovery of non-economic damages in a legal malpractice action when the damage that results from the attorney's alleged negligence directly "interferes with a personal interest of the client, such as liberty or family."¹⁴⁰

The holding by the Superior Court of New Jersey in *Kohn v. Schiappa*,¹⁴¹ for example, is consistent with and offers justification for such a

136. *Id.*; see also *supra* text accompanying notes 63-64.

137. Although the Collinses did present at least one other cause of action against at least one of the attorneys, the court clearly reads the attorneys' negligence as the cause of the Collinses' loss of custody and any harm arising therefrom: "Losing custody was the natural and probable consequence of the lawyers' negligently advising the Collinses that they could withdraw their consent at any time before the adoption was final." *Collins*, 157 S.W.3d at 732.

138. See, e.g., *ATS, Inc., v. Listenberger*, 111 S.W.3d 495, 499 (Mo. Ct. App. 2003) (noting the "strictly economic loss compensated by a legal malpractice claim" as distinguishable from recovery for physical injury); *White v. Auto Club Inter-Ins. Exch.*, 984 S.W.2d 156, 160 (focusing on the "purely economic nature of the harm in a legal malpractice claim" as justification for permitting assignment of such a claim).

139. Compare *McGee v. Hyatt Legal Servs., Inc.*, 813 P.2d 754 (Colo. Ct. App. 1990) (the court rejected the client's prayer for non-economic damages based on the attorney's negligence that resulted in award of joint custody rather than sole custody of child), and *Leonard v. Walthall*, 143 F.3d 466 (8th Cir. 1998) (applying Arkansas law, denying recovery of emotional distress damages in a legal malpractice action), with *Person v. Behnke*, 611 N.E.2d 1350 (Ill. App. Ct. 1993) (the court permitted an award of non-economic damages based on loss of parental custody or visitation caused by the attorney's malpractice).

140. D. Dusty Rhoades & Laura W. Morgan, *Recovery for Emotional Distress Damages in Attorney Malpractice Actions*, 45 S.C. L. REV. 837, 841 (1994); cf. FISHER, *supra* note 66, § 222, at 611 ("Whether a malpractice plaintiff can recover distress damages remains a matter of contention. The general trend is to restrict malpractice awards to the recovery of economic losses. The strongest case for distress damages arises when the attorney's malpractice has resulted in the client's deprivation of liberty through incarceration. The middle ground case involves situations when the attorney is retained to achieve a non-economic objective for the client.").

141. 656 A.2d 1322 (N.J. Super. Ct. Law Div. 1995).

“rule.” The court found that “severe emotional distress” was an appropriate claim for damages when the attorney committed legal malpractice by erroneously disclosing privileged information in an adoption proceeding.¹⁴² The New Jersey court recognized that its holding deviated from tradition by noting that damages in a malpractice action are “typically measured by that amount which the client would have recovered, but for the attorney’s negligence.”¹⁴³ As rationale for this deviation, the court explained that if recovery was limited to economic damages, then situations in which the underlying claim was not “predicated upon economic interests,” such as adoption proceedings, the drafting of a living will, criminal defense work and child custody and visitation disputes, would provide the negligent attorney with “virtual immunity for any malpractice committed.”¹⁴⁴ Unwilling to leave the victim of the attorney’s negligence without remedy, the New Jersey court recognized the plaintiff’s claim for non-economic damages.¹⁴⁵

In *Collins*, Missouri is squarely presented with the issue of whether to allow recovery of non-economic damages in a legal malpractice claim. Although the appellate court did not directly mention the issue of the Collinses’ prayer for non-economic damages, the majority opinion at least hinted that the court was aware of the novelty of the issue. Before summarizing its holding, the court noted that, though determination of damages would be difficult, it had faith in the lower court’s ability to determine the “proper remedy.”¹⁴⁶ While this observation was an express response to the concerns raised by Judge Smart in his concurrence, it can also be read as a nod in recognition of the fact that the non-economic damages claimed by the Collinses might, in fact, constitute recoverable damages. Regardless of whether the appellate court meant to suggest such claims were permissible in legal malpractice actions, the fact that neither opinion in *Collins* raised the Collinses’ request for recovery of non-economic damages in a legal malpractice suit as reason for possible invalidity of their claim suggests, at the very least, that the court was willing to consider the viability of such a novel claim.

142. *Id.* at 1323.

143. *Id.*

144. *Id.* at 1324.

145. *Id.* at 1325. The “new rule” and holdings such as that expressed in *Kohn* do not suggest that the traditional rule basing recovery in a legal malpractice action on purely economic damages has completely gone by the wayside. Rather, the underlying concept is still present, for courts have consistently refused to recognize recovery of damages for non-economic claims when the attorney’s negligent conduct resulted in a purely economic loss to the client. *See, e.g.,* *Smith v. Superior Court*, 13 Cal. Rptr. 2d 133, 137 (Ct. App. 1993); *Richards v. Cousins*, 550 So. 2d 1273, 1278 (La. Ct. App. 1989); *Hilt v. Bernstein*, 707 P.2d 88, 96 (Or. Ct. App. 1985).

146. *Collins v. Mo. Bar Plan*, 157 S.W.3d 726, 736 (Mo. Ct. App. 2005).

B. Loss of Society

Even if Missouri courts are willing to recognize that a prayer for non-economic damages under a legal malpractice claim is actionable in some circumstances, the Collinses' prayer presents an additional problem, one on which Judge Smart focused in his concurrence. As the Judge surmised, the Collinses' claim, for "monetary damages for negligent interference with relationship rights as to a *living* child" presents an issue of first impression in Missouri.¹⁴⁷ Stated otherwise, the Collinses were claiming loss of society with a child who is still living and with whom they still have contact; thus, their claim for loss of society is grounded upon a loss of custody or visitation rights.¹⁴⁸

Although Judge Smart highlighted an important aspect of the case that was inexplicably overlooked by the majority of the appellate court, even Judge Smart failed to fully appreciate the novelty presented by such a request for damages. Judge Smart's main concern was that monetary damages for interference with relationship rights with a living child would necessarily place the child in the center of dispute, likening the child to chattel.¹⁴⁹ Even assuming the validity of the concurring judge's policy concerns,¹⁵⁰ Judge Smart glossed over and the majority opinion completely ignored the real problem with recognizing such a request: Missouri's policy toward recovery for loss of society, as evidenced through its current statutory scheme, provides a shaky basis for recognition of such a claim of damages grounded in loss of custody or visitation rights of a child.

More than ten years before Missouri courts were presented with the situation in *Collins*, the Appellate Court of Illinois, in *Person v. Behnke*,¹⁵¹ faced a claim of legal malpractice in which the attorney negligently represented the plaintiff in his divorce proceedings by failing to take any action on the plaintiff's behalf.¹⁵² The plaintiff claimed that the attorney's negligence caused damages in the complete loss of custody and visitation with his children for almost five years.¹⁵³ The appellate court held that "a valid claim ex-

147. *Id.* at 737 (Smart, Jr., J., concurring).

148. As part of the settlement agreement in the underlying case, the Collinses share joint custody with the Standens. *See supra* text accompanying note 42.

149. *See supra* text accompanying notes 117-23.

150. Judge Smart raises policy concerns that, should Missouri now or eventually recognize a loss of society claim based on loss of custody or visitation, the state will need to address and reconcile. *Collins*, 157 S.W.3d at 738-39 (Smart, Jr., J., concurring). Such concerns, however, are not addressed in this Note, which focuses on the initial question posed by the Collinses' claims – whether Missouri, in fact, does or should recognize a damages claim for loss of society based on loss of custody or visitation. *Id.* at 737.

151. 611 N.E.2d 1350 (Ill. App. Ct. 1993).

152. *Id.* at 1352.

153. *Id.* at 1355.

ists for non[-]economic damages resulting from a plaintiff's loss of custody and visitation of his children which allegedly resulted from an attorney's negligence."¹⁵⁴ The court found *Person* distinct from previous Illinois cases denying recovery of damages for loss of society of a child,¹⁵⁵ and, as the sole support for its holding, analogized the situation to a parent's ability to recover for the loss of society of a child under Illinois' wrongful death statute.¹⁵⁶ In recognition of concern about unnecessarily broadening the scope of tort liability, the court limited the availability of recovery on a "loss-of-society theory" to those claims that are "based on the *direct* interference with the child-parent relationship"¹⁵⁷ and those claims that allege actual loss of custody or visitation, not mere disappointment in the amount of visitation granted.¹⁵⁸

Were a Missouri court inclined to follow the reasoning of the Appellate Court of Illinois, the policy regarding recovery for loss of society evinced by the wrongful death statute seems to provide a basis for doing so. Missouri's wrongful death act is similar in language to Illinois' wrongful death act,¹⁵⁹ and, more importantly, the damages available in a cause of action brought under Missouri's wrongful death statute are akin to those available in an analogous action under Illinois' statute. Just as a wrongful death action in

154. *Id.*

155. *Id.* at 1353-55. For examples of cases distinguished by the court, see *Segall v. Berkson*, 487 N.E.2d 752, 756 (Ill. 1985), and *Dralle v. Ruder*, 529 N.E.2d 209, 212 (Ill. 1988).

156. *Person*, 611 N.E.2d at 1353-54 (Illinois' wrongful death act allows recovery for parents' non-economic damages "stemming from the loss of their child's society"); see 740 ILL. COMP. STAT. 180/1 (2002) (a 1995 amendment to the statute was invalidated by *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997); however, this does not affect the validity of the rule discussed in *Person*); see also *Bullard v. Barnes*, 468 N.E.2d 1228, 1232-33 (Ill. 1984).

157. *Person*, 611 N.E.2d at 1355 (emphasis in original).

158. *Id.* at 1356.

159. Compare MO. REV. STAT. § 537.080 (2000) ("Whenever the death of a person results from any act, conduct, occurrence, transaction or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person . . . who . . . would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured"), with 740 ILL. COMP. STAT. 180/1 (2002), ("Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who . . . would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured"), *invalidated in part* by *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997).

Illinois provides for non-economic damages for the loss of society,¹⁶⁰ Missouri law provides that damages in a wrongful death action include “the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support” of the deceased.¹⁶¹

Relying on the Missouri wrongful death statute, however, overlooks a striking difference in a parent’s claim for loss of society resulting from wrongful death as compared to a similar claim resulting from loss of custody or visitation rights. As Judge Smart repeatedly emphasized in his concurrence, the latter claims loss of society in a *living* child.¹⁶² The ill-fitting nature of a comparison of a claim for damages based on loss of custody or visitation rights to damages in a wrongful death claim is particularly apparent given the situation in *Collins*, in which the harm of loss of custody/visitation was merely temporary. Because the Collinses’ settlement with the Standens provided each set of parents with custody rights, the loss of society incurred as a result of the attorneys’ negligent interference with the Collinses’ parental relationship with their child was not perpetual, as the harm would necessarily be in a wrongful death action, but temporary, as is more likely the case in an action based on negligent infliction of injury. Indeed, a damages claim for loss of society based on loss of custody or visitation rights is more aptly suited for analogy to the damages available in an action grounded upon negligent infliction of injury.

It is through use of such an analogy, however, where the grounds for a claim for damages based on a loss of custody or visitation rights give way. “Longstanding Missouri case law” provides that, in a claim for negligent infliction of injury to a child, the parents of that child can recover only damages “consisting of loss of services or earning power and medical bills.”¹⁶³ In *Powell v. American Motors Corp.*,¹⁶⁴ the Missouri Supreme Court specifically refused to allow the plaintiff’s claim for damages for loss of a child’s soci-

160. *Person*, 611 N.E.2d at 1353-54 (noting the definition of “society” as meaning “the mutual benefits received from a family member’s continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection”).

161. MO. REV. STAT. § 537.090 (2000); *see also* Parr v. Parr, 16 S.W.3d 332, 337 (Mo. 2000) (en banc) (wife of deceased compensated for her non-economic loss of a “close and loving relationship” that resulted from the wrongful death of her husband); Bridges v. Van Enters., 992 S.W.2d 322, 325 (Mo. Ct. App. 1999).

162. *Collins v. Mo. Bar Plan*, 157 S.W.3d 726, 737 (Mo. Ct. App. 2005) (Smart, Jr., J., concurring). On three separate occasions, Judge Smart characterized the Collinses’ claim as a request for damages for negligent interference with relationship rights with regard to a *living* child. *Id.* Additionally, Judge Smart specifically distinguished the circumstances presented in the case from those of a wrongful death case. *Id.*

163. *Adams ex rel. Ridgell v. Children’s Mercy Hosp.*, 848 S.W.2d 535, 542 (Mo. Ct. App. 1993), *abrogated on other grounds by* Washington *ex rel. Washington v. Barnes Hosp.*, 897 S.W.2d 611, 615 (Mo. 1995) (en banc).

164. 834 S.W.2d 184 (Mo. 1992) (en banc).

ety.¹⁶⁵ Aware that Missouri's wrongful death statute allows recovery for equivalent damages,¹⁶⁶ the court expressed concern about the possibility of a "duplication of damages" were it to recognize a parent's loss of society claim resulting from negligent injury to the plaintiffs' child.¹⁶⁷ The court explained that, at least theoretically, if an award was granted to cover the injuries of the child "and thus constructively make[] him a whole person again, then any additional damage that would be awarded to his . . . parents would be overlapping."¹⁶⁸ The court also acknowledged that Missouri recognizes a spouse's claim for loss of consortium (equivalent to loss of society)¹⁶⁹ in an action based on negligent infliction of injury.¹⁷⁰ Nonetheless, the court refused to extend the concept to allow parents to recover for loss of society of their children, citing concern about a slippery slope.¹⁷¹ The court found that recognition of a claim for loss of a child's society would force the court to "also acknowledge that there will be other people who, depending on the facts, can make the same compelling argument."¹⁷² Although the court recognized that "there are meritorious policy arguments" on both sides of the issue, it ultimately refused to recognize a loss of child's society claim in an action for negligent infliction of injury.¹⁷³

Arguably, at least one of the court's proffered reasons for not allowing damages for loss of society that results from the defendant's negligent action would not apply in a claim for loss of a child's society based on loss of custody or visitation rights. Unlike in an action for negligent infliction of injury, in an action based on negligence resulting in the loss of custody or visitation rights the "injured" child does not have a recognized cause of action on which to base a claim. Thus, duplication of damages would be a non-issue.

165. *Id.* at 185-86. The court and parties used the term "filial consortium" rather than the phrase "loss of a child's society." *Id.* at 185. Filial consortium is defined as "[a] child's society, affection and companionship given to a parent." BLACK'S LAW DICTIONARY 328 (8th ed. 2004).

166. *Powell*, 834 S.W.2d at 186.

167. *Id.* at 187.

168. *Id.*

169. Consortium is defined as "[t]he benefits that one person . . . is entitled to receive from another, including companionship, cooperation, affection, aid, financial support, and (between spouses) sexual relations." BLACK'S LAW DICTIONARY 328 (8th ed. 2004). While loss of consortium is commonly thought to be grounded in a spouse's loss of the ability to engage in sexual intercourse with the other spouse, sex is only one, non-determinative element of consortium. *See, e.g., Powell*, 834 S.W.2d at 188.

170. *See, e.g., Lear v. Norfolk and W. Ry. Co.*, 815 S.W.2d 12, 14-15 (Mo. Ct. App. 1991).

171. *Powell*, 834 S.W.2d at 185-86.

172. *Id.* at 188.

173. *Id.* at 189. The court noted that any change in the existing law would be based on policy considerations that are best left to the legislature. *Id.*

Regardless of any contrary arguments, however, the highest court of the state has clearly established its unwillingness to extend damages for loss of society beyond those currently available in a wrongful death action or to a spouse in a loss of consortium claim. Thus, as it currently stands, Missouri's policy regarding loss of society damages claims does not allow recovery to the Collinses for a damages claim for loss of their child's society based on loss of their custody or visitation rights.

VI. CONCLUSION

The Collinses' claim for damages faces a two-fold threat from Missouri's current policies toward non-economic claims in legal malpractice actions and damages claims for loss of a living child's society in a negligence action. Despite this threat, the Missouri Court of Appeals found the Collinses' claim against attorneys Anderson and Krigel sufficiently meritorious to reverse the grant of summary judgment and remand the issue, in its entirety, back to the lower court for a trial on the merits.¹⁷⁴

As the court initially noted, an appellate court reviewing a grant of summary judgment, must, as a matter of law, uphold the lower court's decision if it is sustainable on any theory supported by the record.¹⁷⁵ Missouri's current policy regarding damages would appear to sustain the summary judgment of the portion of the Collinses' claim requesting damages for loss of physical custody of their child and of their child's society. Although this prayer for damages was not raised as an issue in support of the grant of summary judgment by the defendant attorneys, the fact that neither the majority nor the concurring opinion was willing to raise the issue *sua sponte*, or even so much as mention the policy problems surrounding this prayer, suggests a willingness to depart from Missouri's current policies. The appellate court failed to address the potentially groundbreaking issues raised by the Collinses' claim for damages; thus, no resounding departure from or affirmation of Missouri policy was made. Yet, with the remand of the case, the groundbreaking potential lives on; *Collins* will continue to be a case to watch.

JESSE E. WEISSHAAR

174. *Collins v. Mo. Bar Plan*, 157 S.W.3d 726, 736 (Mo. Ct. App. 2005).

175. *Id.* at 731 (quoting *Rodgers v. Czamanske*, 862 S.W.2d 453, 458 (Mo. Ct. App. 1993)); see also *Childress Painting & Assocs. v. John Q. Hammons Hotels Two, L.P.*, 106 S.W.3d 558, 562 (Mo. Ct. App. 2003) (citing *In re Estate of Blodgett*, 95 S.W.3d 79, 81 (Mo. Banc 1983)) (“[I]f a summary judgment can be sustained under any theory supported by the summary judgment record, an appellate court must do so even if the trial court reached the correct result for the wrong reasons.”).

