place undue burdens on the female worker in violation of her constitutional right to equal protection.

TORTS—PARENTAL IMMUNITY—UNEMANCIPATED MINOR CHILD OF DIVORCED PARENTS MAY SUE NONCUSTODIAL PARENT. *Fugate v. Fugate*, 582 S.W.2d 663 (Mo. 1979) (en banc). An unemancipated minor sought damages in a wrongful death suit[1] against her father, alleging that his negligent operation of an automobile caused the death of her mother. Defendant and the deceased were divorced prior to the accident. The divorce decree gave the deceased custody of plaintiff and granted visitation and temporary custody rights to defendant. The circuit court, in an evidentiary hearing, found that the suit had not disrupted the harmonious relationship between plaintiff and defendant,[2] but nevertheless dismissed the action on the basis of parental immunity. The court of appeals transferred plaintiff's appeal[3] and the Missouri Supreme Court *held:* The parental immunity doctrine does not bar an unemancipated minor child's tort suit against a parent who, pursuant to a divorce decree, does not have general custody of the child at the time the tort occurs.[4]

The parental immunity rule first appeared in the United States[5] in

1. Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, 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 or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, which damages may be sued for and recovered

(1) By . . . minor children . . . of the deceased

. . . .

MO. REV. STAT. § 537.080 (1978) (amended 1979).

2. Witnesses at the hearing included defendant, plaintiff's paternal grandmother, and a close family friend. All testified that the parties' relationship was good both before and after the suit was filed. Brief for Appellant at 2, Fugate v. Fugate, 582 S.W.2d 663 (Mo. 1979) (en banc).

3. The Missouri Court of Appeals decided that the "statewide interest and importance" of the matter required its transfer to the Missouri Supreme Court. 582 S.W.2d at 664.

4. *Id.* at 669.

5. Apparently, there were no reported English cases of parent-child tort actions for negligence. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 865 (4th ed. 1971); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1059 (1930); Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 180 (1961).

Hewelette v. George.[6] In that case the Supreme Court of Mississippi refused to award damages in a minor child's suit against her mother for false imprisonment.[7] The court based its decision on a "sound public policy" to promote peace in the family and in society.[8] Courts have relied on *Hewelette* to bar suits by minors seeking damages from their parents for cruel and inhumane treatment,[9] rape,[10] and other torts.[11] Supporters of the parental immunity rule argue that tort actions by minor children against their parents disrupt family harmony and domestic tranquility,[12] hinder parental discipline and control,[13] and encourage fraud and collusion.[14]

Judicial dissatisfaction with the strict application of the parental immunity rule produced numerous exceptions,[15] which caused many ju-

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6. 68 Miss. 703, 9 So. 885 (1891).

7. *Id.* at 710, 9 So. at 887. The mother confined the child to an insane asylum for eleven days. The child sought damages for time lost from employment, mental pain and suffering, and injury to her reputation. *Id.*

8. *Id.* at 711, 9 So. at 887. The court cited no precedent or authority for its decision.

9. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903). The *McKelvey* court also relied upon cases involving a husband's immunity from his wife's suit. *Id.* at 391, 77 S.W. at 665.

10. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). The court stated that there would be "no practical line of demarkation [*sic*]" if it allowed such suits. *Id.* at 244, 79 P. at 789.

11. Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924) (action by minor against adoptive parents for fraud and deceit); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966) (action by minor children against father for alleged gross negligence in operation of automobile).

12. *See, e.g.,* Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1969) (en banc); Tucker v. Tucker, 395 P.2d 67 (Okla. 1964); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). Critics of the family-harmony argument point to the inconsistency of allowing parent-child property and contract actions but denying tort actions. *See, e.g.,* Young v. Wiley, 183 Ind. 449, 107 N.E. 278 (1914); McKern v. Beck, 73 Ind. App. 92, 126 N.E. 641 (1920). Critics also assert that tort suits have been allowed between siblings. *See, e.g.,* Herrell v. Haney, 207 Tenn. 532, 341 S.W.2d 574 (1960); Midkiff v. Midkiff, 201 Va. 829, 113 S.E.2d 875 (1960).

13. *See, e.g.,* Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923). Most parent-child tort suits arise from automobile accidents. Some states have limited the immunity rule to situations involving parental authority or discretion. *See* Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Other states have held the immunity rule not applicable in situations involving negligent operation of an automobile. *See* Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970) (en banc).

14. *See, e.g.,* Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957). *Contra,* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950).

15. Courts allowed suits by a child against his parent, for example, in cases in which the

risdictions either to abolish the rule entirely or to limit severely its application.[16] California, in *Gibson v. Gibson*,[17] abolished the rule and substituted the "reasonably prudent parent" test. Courts generally allow recoveries when: the child, minor or not, is emancipated;[18] the defendant's conduct is willful and malicious;[19] a master-servant relationship exists between parent and child;[20] the parent was engaged in a business venture;[21] or the minor sues the parent's estate.[22]

The early development of the parental immunity rule in Missouri was inconsistent. In *Wells v. Wells*[23] the Kansas City Court of Appeals permitted a mother to sue her unemancipated minor son for injuries sustained in an automobile accident. The court rejected the family harmony argument because disruption of family harmony was not a bar to contract or property actions between family members.[24] Seven years

parent engaged in wilfull and malicious conduct or the parent and child had a master-servant relationship. The Supreme Court of Missouri, in Baker v. Baker, 364 Mo. 453, 458, 263 S.W.2d 29, 32 (1953), mentions some of these exceptions, but neither approves nor disapproves of the cases espousing them.

16. Rouley v. State Farm Mut. Auto Ins. Co., 235 F. Supp. 786 (W.D. La. 1964); Xaphes v. Mossey, 224 F. Supp. 578 (D. Vt. 1963); Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970) (en banc); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Tamashiro v. DeGama, 51 Hawaii 74, 450 P.2d 998 (1969); Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); France v. A.P.A. Transp. Corp., 56 N.J. 500, 267 A.2d 490 (1970); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). *See generally* 13 ARIZ. L. REV. 720 (1971); 76 DICK. L. REV. 623 (1971); 44 NOTRE DAME LAW. 1001 (1969).

17. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

18. Thompson v. Thompson, 264 S.W.2d 667 (Ky. 1954) (parent cannot bring suit against minor child unless child is emancipated); Wurth v. Wurth, 322 S.W.2d 745 (Mo. 1959) (en banc) (plaintiff-minor child emancipated at time of accident may bring suit against her parent); Murphy v. Murphy, 206 Misc. 228, 133 N.Y.S.2d 796 (Sup. Ct. 1954) (whether four-year-old child was emancipated should be determined at trial; defendant-father's motion for summary judgment denied).

19. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950); Brown v. Selby, 206 Tenn. 71, 332 S.W.2d 166 (1960).

20. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930) (sixteen-year-old living at home with parents injured while employed by father).

21. Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952) (five-year-old boy allowed to sue father for injuries from father's negligent operation of truck for business purposes).

22. Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960) (en banc); Brower v. Webb, 5 Pa. D. & C.2d 193 (C.P. 1955).

23. 48 S.W.2d 109 (Mo. Ct. App. 1932).

24. *Id.* at 110.

later,[25] however, the Springfield Court of Appeals applied the parental immunity rule and held that unless authorized by statute, a minor child has no right of action against a parent for willful and malicious assault.[26]

The Supreme Court of Missouri first explicitly accepted the parental immunity rule in 1953.[27] In *Baker v. Baker*[28] a minor child sought damages from her father for injuries resulting from her father's negligent operation of an automobile.[29] The court held that public policy precluded a minor child from suing its parent in tort for mere negligence.[30] Recent decisions of the Supreme Court of Missouri have modified *Baker*, holding that a child may sue its parent in tort even for simple negligence if the child is emancipated[31] or if the suit would not "seriously disturb family relations."[32] The court has also implied that the party relying on the parental immunity rule must carry the burden of proof.[33]

In *Fugate v. Fugate*[34] the Supreme Court of Missouri further defined the scope of the parental immunity rule. The court rejected defendant's contention that every tort action brought by an unemancipated minor against its living parent should be prohibited as against the public pol-

25. Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939). The court in *Cook* apparently was unaware of *Wells* because it stated that it found no Missouri case on point. *Id.* at 997, 124 S.W.2d at 676.

26. Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939).

27. Taylor v. Taylor, 360 Mo. 994, 232 S.W.2d 382 (1950). The court allowed a mother to recover against her son in tort because the tort occurred when defendant was of legal age. The court, however, implicitly approved of the parental immunity rule: "There is more reason to apply the rule in a case where the child is a minor than where he is of age." *Id.* at 1000, 232 S.W.2d at 385.

28. 364 Mo. 453, 263 S.W.2d 29 (1953).

29. *Id.*

30. *Id.* at 458, 263 S.W.2d at 32.

31. Wurth v. Wurth, 322 S.W.2d 745 (Mo. 1959) (en banc).

32. Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960) (en banc) (court allowed minor to sue the estate of his parent, reasoning that the harmonious-family argument was extinguished by the parent's death).

33. Bahr v. Bahr, 478 S.W.2d 400 (Mo. 1972). The court held that a child bringing suit against its parent should be allowed to present evidence to show either emancipation or that no disruption of family relations would occur as a result of the suit. The court also affirmed the *Brennecke* position that the parental immunity rule should apply "*only* when the court concludes that to hold otherwise would seriously disturb the family relations and thus be contrary to public policy." *Id.* at 402 (citing Brennecke v. Kilpatrick, 336 S.W.2d 68, 70 (Mo. 1960) (en banc)).

34. 582 S.W.2d 663 (Mo. 1979) (en banc).

icy protecting family harmony.[35] It reasoned that because parental immunity is a court-made rule, it is subject to modification based on the court's perception of public policy.[36] *Fugate* followed a rule developed in *Brennecke v. Kilpatrick*[37] and *Bahr v. Bahr*[38] that viewed "any disruption in the tranquility of the domestic establishment"[39] as a disturbance of family relations.[40] The court found that the divorce of the parents before the accident disrupted the family long before plaintiff filed the lawsuit.[41] A new family unit, consisting of plaintiff and her mother, formed after the divorce.[42] The mother had custody of plaintiff and was responsible for her daily care.[43] Upon divorce, defendant surrendered rights to discipline of the child and to family association.[44] At the time of the accident, plaintiff and defendant were not members of the same family unit, and thus no family relationship required the parental immunity rule.[45] *Fugate* refused to extend the parental immunity rule beyond the point necessary to "assist and support the functioning of an existing family unit."[46] The court indicated that under "appropriate circumstances" the parental immunity rule should still bar parent-child tort actions.[47]

The court correctly reasoned that because the divorce extinguished the need to preserve family harmony, the parental immunity rule was

35. *Id.* at 665. The court also rejected plaintiff's argument that the wrongful death statute abrogated the parental immunity rule. *Id.* at 665-67.

36. *Id.* at 668.

37. 336 S.W.2d 68 (Mo. 1960) (en banc). *See* note 32 *supra* and accompanying text.

38. 478 S.W.2d 400 (Mo. 1972). *See* note 33 *supra* and accompanying text.

39. 582 S.W.2d at 669 (citing Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960) (en banc)).

40. *Id.*

41. *Id.*

42. *Id.*

43. Defendant was obligated to pay child support and had temporary custody rights, but the court found these factors insufficient to warrant consideration. *Id.* The court, however, left open the possibility that relative rights of the noncustodial parent may be considered in allowing immunity.

> We are also cognizant of the fact that a noncustodial parent must perform parental duties of care, discipline, etc., when the child is in that parent's temporary custody, and that the relative rights and duties of the parties may result in a modification or denial of recovery when the injury arises out of the performance of such duties. Those matters will have to be adjudicated on a case-by-case basis.

Id.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 668.

unjustifiable.[48] The court avoided the harder question whether the parental immunity rule serves any useful purpose in modern society. The traditional arguments—fraud and collusion,[49] family harmony,[50] and parental discipline and control[51]—no longer support the parental immunity rule.

Most parent-child tort actions are brought as a result of automobile accidents. The prevalence of liability insurance[52] reduces the possibility of family discord in those situations. In fact, family discord will more likely result from an intrafamily contract or property suit in which the loser bears the cost burden. The Missouri courts, however, allow intrafamily contract and property actions without concern for disruption of family relations.[53]

The danger of fraud and collusion certainly exists in parent-child lawsuits, but that danger is present whenever the parties to a suit are close friends or family members. The danger itself does not justify a rule that denies an entire class of litigants access to the courts.[54] Dean Prosser states: "the danger of fraud has been stressed, although it is difficult to see why it is any greater, as between the parties themselves, than in any other tort action involving an infant."[55]

The danger of interference with parental control and discipline is the more logical justification for the parental immunity rule. The usual parent-child tort, however, occurs outside the scope of parental discipline and control. In *Fugate*, defendant's negligent operation of his car precipitated the lawsuit;[56] that conduct had no relation to parental discipline and control. The rule is unnecessary because it protects an unthreatened interest.

The Supreme Court of California in *Gibson v. Gibson*[57] abolished the

48. *See* note 45 *supra* and accompanying text.

49. *See* note 14 *supra* and accompanying text.

50. *See* note 12 *supra* and accompanying text.

51. *See* note 13 *supra* and accompanying text.

52. On the effects of insurance, see James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

53. *See* Hubbard v. Hubbard, 140 Mo. 300, 41 S.W. 749 (1897) (property rights); Goodrick v. Harrison, 130 Mo. 263, 32 S.W. 661 (1895) (same); Jine v. Jine, 226 S.W. 51 (Mo. Ct. App. 1920) (contract); Cole v. Fitzgerald, 132 Mo. App. 17, 111 S.W. 628 (1908) (same). *See also* note 21 *supra*.

54. *Accord,* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

55. W. PROSSER, *supra* note 5, at 865-66.

56. 582 S.W.2d at 664.

57. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

rule, characterizing it as "a legal anachronism, riddled with exceptions . . . lacking the support of authority and reason."[58] The court in *Fugate* should have followed *Gibson*. The parent-child relationship does not require the parental immunity rule, but traditional views of negligence applied to parent-child actions might interfere with parental control and discipline.[59] The California court adopted a "reasonably prudent parent test."[60] Adapted from common tort notions, the test compares the defendant's actions to those of a reasonable and prudent parent in similar circumstances.[61] Scholars have recently praised the substitution of this test for the parental immunity rule.[62]

By clinging to the modified parental immunity rule of *Brennecke* and *Bahr*, the Supreme Court of Missouri in *Fugate* failed to define adequately the scope of the remaining immunity. The court offered little guidance in allowing the rule to apply "under appropriate circumstances." The future of the parental immunity rule in Missouri is uncertain, and Missouri courts should join other states in the movement away from the parental immunity doctrine.

CONSTITUTIONAL LAW—ILLEGITIMACY—OHIO INTESTATE SUCCESSION LAW DOES NOT VIOLATE EQUAL PROTECTION CLAUSE. *White v. Randolph*, 59 Ohio St. 2d 6, 391 N.E.2d 333 (1979) (per curiam). Decedent's will devised all of decedent's property to his wife, but failed to provide for its disposition in the event that she did not survive him. When the will failed, decedent's administrator brought an action to determine decedent's heirs-at-law, joining appellant, who claimed to be decedent's illegitimate daughter, as one of the defendants. The probate judge held, as a matter of law, that appellant could not inherit from decedent's estate because of her status as an illegitimate child.[1] The

58. *Id.* at 916, 479 P.2d at 648, 92 Cal. Rptr. at 288.

59. *Id.* at 921, 479 P.2d at 652, 92 Cal. Rptr. at 292.

60. *Id.*, 479 P.2d at 653, 92 Cal. Rptr. at 293.

61. *Id.*

62. *See*, Note, *Intrafamilial Tort Immunity in New Jersey: Dismantling the Barrier to Personal Injury Litigation*, 10 RUT.-CAM. L.J. 661 (1979); Note, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795 (1976); 12 TULSA L.J. 545 (1977).

1. White v. Randolph, 59 Ohio St. 2d 6, —, 391 N.E.2d 333, 333-34 (1979) (per curiam).