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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001386-MR

KIM HOLLOWAY, AS PERSONAL
REPRESENTATIVE FOR THE ESTATE
OF CHRIS HOLLOWAY (DECEASED) APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 06-CI-00980

SARAH HOLLOWAY AND GRANGE
MUTUAL CASUALTY COMPANY, AN
OHIO CORPORATION APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

ACREE, JUDGE: In this appeal we address whether the statutory hierarchy of Kentucky Revised Statutes (KRS) 411.130, which establishes the order by which surviving beneficiaries may receive damages in an action for wrongful death, allows the amount recovered under the statute to pass over negligent beneficiaries to the next level of kindred. Because we hold that the unambiguous language of the statute prohibits such an interpretation, we affirm the trial court's ruling.

On October 12, 2003, Kentucky residents Sarah Holloway and her husband, Chris Holloway, were traveling by car in Vienna, Illinois. Sarah was driving; Chris was her passenger. Sarah lost control of the vehicle, veered off the road and struck a tree. Sarah suffered severe injuries but survived. Chris suffered terminal injuries, and was pronounced dead at the scene.

Chris's mother, Kim Holloway, and Sarah were appointed co-administrators of Chris's estate. On behalf of Chris's estate, Kim filed suit in Johnson County, Illinois, asserting a wrongful death claim against Sarah and a bad faith claim against Grange Mutual Insurance Company. That complaint was filed exactly two years after the accident, on October 12, 2005. On March 26, 2006, the Illinois court dismissed the estate's complaint based on Illinois Supreme Court Rule 187, governing Illinois' doctrine of *forum non conveniens*. The estate refiled the complaint in McCracken Circuit Court on September 18, 2006.[2]

[2] The complaint filed in McCracken Circuit Court added a common law negligence count for the first time. The lower court ruled that this claim was barred by the applicable statutes of limitation. KRS 413.140 and KRS 304.39-230. The court also ruled that the wrongful death claim was timely based on the waiver provision of the Illinois rule. Neither of these rulings has been challenged on appeal.

Sarah and Grange filed motions for summary judgment. Ultimately, our review requires examination of KRS 411.130. That statute states in relevant part:

> (1) Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it . . . . The action shall be prosecuted by the personal representative of the deceased.
>
> (2) The amount recovered . . . shall be for the benefit of and go to the kindred of the deceased in the following order:
>
> (a) If the deceased leaves a widow . . . and no children . . . then the whole to the widow or husband.
>
> . . . .
>
> (d) If the deceased leaves no widow . . . then the recovery shall pass to the mother . . . .

KRS 411.130. Though a wrongful death action is prosecuted by the estate, the amount recovered passes directly to the statutory beneficiary and outside the estate's administration. *Rhodes v. Rhodes*, 764 S.W.2d 641, 643 (Ky.App. 1988).

In granting summary judgment in favor of Sarah and Grange, the trial court said:

> In the case at bar, the decedent . . . was survived by a spouse, but no children. Therefore, the spouse, Sarah Holloway, is the sole beneficiary. It appears to this Court that comparative negligence is irrelevant in an analysis of the facts before it. If the decedent was in any way at fault,[3] a recovery could not be had on his behalf due to

[3] Some evidence in the record indicates that Chris may have grabbed the steering wheel, thereby contributing to the cause of the accident and, consequently, his own death.

> the negligence of his actions.[4] If Sarah Holloway was negligent, she cannot recover for her own negligence. So, regardless whether there could be some apportionment of fault between Sarah Holloway and the decedent, fault bars recovery.
>
> [The estate] argues that in some fashion the benefits arising out of the wrongful death of the decedent could pass to the next category of beneficiary [the mother]. The Court rejects [the estate's] reasoning.

(Summary Judgment in Favor of Defendants, entered June 11, 2007). We agree with the trial court that the estate's reasoning should be rejected.

The estate asserts that the trial court's analysis fails to properly consider the case of *Citizen State Bank v. Seaboard System RR, Inc.*, 803 S.W.2d 585 (Ky.App. 1991). In that case, a husband was at the wheel of the family car, with his wife in the front passenger seat, and their daughter in the back seat. The husband was distracted by his daughter and, as he returned his attention to the road, the automobile collided with a train at a railway crossing. The wife died as a result of the accident and her estate brought a wrongful death suit against the husband and the railway company.

A jury awarded the estate $500,000, plus funeral expenses for the death of the wife, apportioning 50 percent of the liability to the husband and 50 percent to the railway company. This court held that while the husband was not completely barred from recovery, he was barred to the extent his negligence caused the death of his wife. He was entitled to recover to the extent of the railway's

[4] *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 56 (Ky. 2003)(estate's recovery in wrongful death claim reduced in proportion to decedent's fault).

negligence only. We held that the daughter was entitled to recover $250,000 of the judgment amount, to be paid equally by the husband and the railway company. Because the husband himself was 50 percent negligent, he was awarded only $125,000, or 50 percent of his half of the total recovery, which represented the percentage attributable to the railway's negligence. The total amount of the award was $375,000. Each of the liable parties, the railway company and the husband, was ordered to pay this damage amount in equal portions to reflect their equal liability. *Id.* at 590.

In its analysis of *Seaboard*, the estate correctly notes the case stands for the proposition that Kentucky's adoption of the doctrine of comparative fault means that a negligent beneficiary may not always be completely barred from recovery. However, the estate disregards two significant factors that distinguish that case from this.

First, there were two statutory beneficiaries in *Seaboard* – the husband and the daughter. The daughter was able to recover her share of damages unaffected by apportionment because she was completely without fault. The only statutory beneficiary in the case before us is Sarah. *Seaboard* unquestionably retains the rule that a beneficiary under KRS 411.130 is barred from recovery to the extent her negligence caused the decedent to die. *Id.* at 590 ("Mr. Anderson . . . is barred to the extent that his negligence caused the death of his wife.").

Second, in *Seaboard* there was a third-party tortfeasor – the railway company. Consequently, liability could be attributed to a party that was not a

beneficiary under the statute, and damages awarded for the benefit of one who was both a beneficiary and only partly at fault. Therefore, the beneficiary or beneficiaries under the statute were able to fully recover damages attributable to that third-party tortfeasor's negligence. *Id.* at 590.

At its core, the estate's argument, and the key to recovery, is that KRS 411.130 should be read to treat Kim, Chris's mother, as a "non-negligent successor beneficiary." If this could be accomplished, Kim would be entitled to recover as did the daughter in *Seaboard* – perhaps to an even greater degree. Unfortunately for Kim, this cannot be accomplished.

Initially, we note that "the plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source." *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005). Once the plain meaning of the statute's language is ascertained and deemed unambiguous, "[w]e are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." *Beckham v. Board of Education*, 873 S.W.2d 575, 577 (Ky. 1994).

The estate asks this Court to consider the approach of the Supreme Court of Rhode Island. In *Commercial Union Ins. Co. v. Pelchat*, 727 A.2d 676 (R.I. 1999), that court, examining a wrongful death statute comparable to ours, said:

> we interpret the words of [Rhode Island's wrongful death statute] "if there is no husband," to intend "if there is no husband legally entitled to recover."

Pelchat at 682.

In order to follow Rhode Island's lead and add these words to our statute, we would first be required to find the language in our own statute ambiguous. We have already held that it is not. We believe, rather, that the order of beneficiary entitlement prescribed in the statute reflects a public policy determination by the Kentucky Legislature that spouses and children take priority over parents when they survive the decedent in wrongful death actions. *Totten v. Parker*, 428 S.W.2d 231, 238 (Ky. 1967)("Legislature has the plenary power to declare the public policy . . . that certain beneficiaries living at the time of the death of the one wrongfully killed shall share the recovery."). As a result of this public policy decision, regardless of fault, so long as the spouse or children survive the deceased, the parents will not be able to recover damages for wrongful death under KRS 411.130.

The estate also argues that KRS 411.130 as applied, violates the provisions of §241, §14, and §54 of the Kentucky Constitution. Under KRS 418.075(1) and (2), and Kentucky Rule of Civil Procedure 76.03(5), challenges to the constitutional validity of a statute require that the Attorney General be given notice by serving that office with a copy of the petition, a prehearing statement, and a copy of any "pleading, paper, or other documents which initiate the appeal in the appellate forum" before the filing of the appellant's brief.

We have examined the record and find no indication that notice was sent to the Attorney General regarding this constitutional challenge. Where a party fails to make the required service on the Attorney General, any issues regarding the constitutionality of a statute or ordinance are not properly before the Court of Appeals and therefore are not subject to review. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 466 (Ky. 2004). We therefore are unable to consider the merits of that argument.

As the lower court noted, the estate's claim against Grange for bad faith was predicated upon an obligation to pay. The trial court held that because "there is no cause of action against the Defendant, Sarah Holloway, then there can be no cause of action against the insurance company for failure to pay the claim." We agree.

For the foregoing reasons, we affirm the summary judgments entered by the Graves Circuit Court in favor of Sarah Holloway and Grange Mutual Insurance Company.

ALL CONCUR.

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