

RENDERED: APRIL 12, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-000986-MR

DONNA JOHNSON AND  
ROBERT JOHNSON, JR,  
CO-ADMINISTRATORS FOR  
THE ESTATE OF STEVEN PAUL JOHNSON

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE STEVE ALAN WILSON, JUDGE  
ACTION NOS. 14-CI-01180 AND 15-CI-00908

VICTORIA BASIL, AS GUARDIAN  
AND NEXT FRIEND OF KADEN  
ISAAC JOHNSON, A MINOR; AND  
VICTORIA BASIL, AS GUARDIAN  
AND NEXT FRIEND OF REMINGTON  
ISABELLA JOHNSON, A MINOR; STATE  
FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY; MADENA  
MINEFEE; TIERRA MITCHELL; AND  
NATALIE BOOKER

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: MAZE, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Donna Johnson and Robert Johnson, Jr., co-administrators for the Estate of Steven Paul Johnson, bring this appeal from a May 30, 2017, Findings of Fact and Conclusions of Law of the Warren Circuit Court ordering motor vehicle insurance proceeds to be distributed *in toto* to Victoria Basil, as guardian and next friend of minor children, Kaden Isaac Johnson and Remington Isabella Johnson, for their claims of loss of parental consortium. For the reasons stated, we reverse and remand.

On April 7, 2014, Steven Paul Johnson was a passenger in a motor vehicle being driven by Tierra Mitchell and legally titled to Natalie Booker. The vehicle stalled, and Steven exited the vehicle to push it off the roadway. While pushing the disabled motor vehicle, a motor vehicle driven by Madena Minefee struck Steven and the disabled vehicle. Steven suffered severe injuries and eventually died because of those injuries on July 18, 2014. At the time of his death, Steven was unmarried, resided in the home of his parents (Donna and Robert), and had fathered two minor children (Kaden and Remington).

On October 1, 2014, Victoria Basil,<sup>1</sup> as guardian and next friend of Kaden and Remington, (Basil) filed a complaint in the Warren Circuit Court (Action No. 14-CI-01180) asserting two claims for loss of parental consortium against Minefee and State Farm Mutual Automobile Insurance Company (State

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<sup>1</sup> Victoria Basil is the biological mother of Kaden Isaac Johnson and Remington Isabella Johnson.

Farm). Basil alleged that Minefee's negligence caused the April 7, 2014, accident that eventually led to Steven's death on July 18, 2014. Additionally, Basil stated that Steven was a resident of his parents' home at the time of the accident and was entitled to underinsured motorist coverage under his parents' motor vehicle insurance policy issued by State Farm. Minefee and State Farm filed answers.

Subsequently, on January 14, 2015, Donna and Robert, co-administrators for the estate of Steven Paul Johnson, (the Estate) filed a motion for leave to file an intervening complaint. Therein, the Estate pointed out that Donna and Robert had been appointed co-administrators of Steven's estate by a July 29, 2014, order of the Warren District Court (14-P-00436). The Estate sought to assert a wrongful death claim under Kentucky Revised Statutes (KRS) 411.130. Six days later, on January 20, 2015, Minefee filed a motion to pay \$35,000 of motor vehicle insurance proceeds into the circuit court. Minefee asserted that she was insured by a motor vehicle insurance policy issued by Alfa Vision Insurance Company (Alfa Insurance) with Basic Reparation Benefits (BRB) of \$10,000 and liability coverage limits of \$25,000.

Basil filed a response in opposition to the Estate's motion to file an intervening complaint. In particular, Basil maintained:

The beneficiaries have chosen not to file a wrongful death claim as evidenced by the complaint. The plaintiffs' damages for loss of consortium exceed the policy limits available in this case as the average verdict

for loss of consortium of a parent for a child is approximately one million dollars (\$1,000,000.00). In fact, the undersigned has advised defense counsel and the insurance carriers that, upon payment of their respective policy limits to the beneficiaries, in settlement of their loss of consortium claims, the beneficiaries will relinquish and release all claims, including any claims under the Kentucky wrongful death statute.

Response and Objection to Motion to File Intervening Complaint at 2-3. Viewing the available insurance proceeds as insufficient to fully compensate the wrongful death claim and both loss of parental consortium claims, Basil argued the insurance proceeds should be distributed solely as compensation for the loss of parental consortium claims.

While its motion to intervene was pending in Action No. 14-CI-01180, the Estate filed a complaint in the Warren Circuit Court (Action No. 15-CI-00908) against Minefee, Mitchell, and Booker. The Estate sought to recover damages for the wrongful death of Steven pursuant to Kentucky's wrongful death statute, KRS 411.130.<sup>2</sup> Eventually, in Action No. 14-CI-01180, the circuit court denied the Estate's motion to intervene in that action.<sup>3</sup>

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<sup>2</sup> Donna Johnson and Robert Johnson, Jr., co-administrators for the estate of Steven Paul Johnson, (the Estate) explained that it filed the complaint as it believed the statute of limitations for a wrongful death action would soon expire.

<sup>3</sup> The Estate appealed the court's order denying the motion to intervene, said appeal subsequently being dismissed by this Court by order entered March 15, 2016. Appeal No. 2015-CA-001381-MR.

Meanwhile, in Action No. 15-CI-00908, Minefee filed an answer and a motion to consolidate. Minefee sought to consolidate the wrongful death action filed by the Estate (Action No. 15-CI-00908) with the loss of parental consortium claims filed by Basil (Action No. 14-CI-01180). By order entered November 16, 2015, the two actions (Action Nos. 14-CI-01180 and 15-CI-00908) were consolidated.

In the consolidated action, Basil filed an amended complaint for declaration of rights on April 5, 2016. In particular, Basil petitioned the “[c]ourt to make a determination establishing and defining the rights of the minor beneficiaries to the wrongful death claims, loss of parental consortium claims and the above-referenced insurance proceeds and denying the defendant’s request for cost, expenses including funeral expenses, attorney fees and administrative fees . . . .” Amended Complaint at 3. The Estate answered and sought a declaration that the Estate was entitled to the insurance proceeds for compensation of the wrongful death claim.

Basil ultimately filed a motion for summary judgment or in the alternative a motion for declaration of rights. Therein, Basil stated that Alfa Insurance filed a motion to deposit \$35,000 into the circuit court and that State Farm had orally indicated it would also surrender the available limits to “the beneficiaries.” Basil argued that the minor children were Steven’s only

beneficiaries/kindred and would be entitled to the proceeds recouped for the wrongful death of Steven. Basil alleged that the Estate's "underlying motive behind the . . . wrongful death action is easily discernable as nothing more than a blatant attempt to circumvent their [Donna and Robert's] legal obligation to pay the decedent's funeral expenses." Motion for Summary Judgment at 5. Basil argued that the insurance proceeds should be only distributed as compensation for the loss of parental consortium claims.

In response, the Estate contended that funeral expenses, costs of administration, and related attorney's fees are specifically recoverable in a wrongful death action per KRS 411.130. The Estate believed that the claim for Steven's wrongful death took precedence over the parental consortium claims; thus, it would be entitled to the insurance proceeds.

By Findings of Fact and Conclusions of Law entered May 30, 2017, the circuit court concluded:

1) Pursuant to KRS 391.010, the sole beneficiaries of the Estate of Steven Johnson are Kaden Isaac Johnson and Remington Isabella Johnson.

2) Victoria Basil, as Guardian and mother of Kaden Isaac Johnson and Remington Isabella Johnson, as the sole beneficiaries of the Estate and the proper party to maintain a loss of consortium claim shall determine the manner, method, and distribution of damages arising from the death of Steven Johnson. Victoria Basil, as Guardian and mother of Kaden Isaac Johnson and

Remington Isabella Johnson desires the insurance monies pass through the loss of consortium claim.

3) The loss of parental consortium claim and wrongful death claim are separate and distinct claims that belong to Kaden Isaac Johnson and Remington Isabella Johnson.

4) The insurance proceeds from a loss of parental consortium claim are not required to pass through the Estate and suffer deductions for funeral expenses, attorney fees, and administrative fees.

5) The insurance proceeds shall go directly to the beneficiaries of Kaden Isaac Johnson and Remington Isabella Johnson without deductions of funeral expenses, attorney fees for the Estate of Steven Johnson, or administrative fees of the estate.

6) Donna and Robert Johnson are jointly and severally liable for the funeral bill they signed on July 17, 2014.

7) Counsel for Kaden Isaac Johnson and Remington Isabella Johnson shall submit the appropriate Order to this Court for approval of settlement funds to be placed in structured settlements accounts for the minor children.

8) In the event Estate of Steven Johnson desires to appeal this ruling, pursuant to CR [Kentucky Rules of Civil Procedure] 73.04, this Court determines that the Supersedeas Bond shall be \$50,000.00 cash.

Findings of Fact and Conclusions of Law at 10-11. Thus, the circuit court essentially determined that as a matter of law the available insurance proceeds

from Alfa Insurance and State Farm would be distributed *in toto* to Basil as compensation for the loss of parental consortium claims.<sup>4</sup> This appeal follows.

To begin, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Id.* Our review proceeds accordingly.

The Estate maintains that the circuit court erred by ordering the available motor vehicle insurance proceeds to be distributed *in toto* to Basil as compensation for the loss of parental consortium claims. For the reasons hereinafter stated, we agree.

In this Commonwealth, a wrongful death action is constitutionally recognized in Section 241 of the Kentucky Constitution<sup>5</sup> and provided for in KRS

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<sup>4</sup> Although the court styled the May 30, 2017, order as “Findings of Fact and Conclusions of Law,” we believe it was a summary judgment, as the court explained it was applying the summary judgment standard under Kentucky Rules of Civil Procedure 56.03 in reaching its decision. The record does reflect that no evidentiary hearing on the issues raised was conducted by the court.

<sup>5</sup> Section 241 of the Kentucky Constitution provides:

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom



411.130. KRS 411.130 sets forth the statutory elements for the cause of action; it reads:

- (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, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.
- (2) The amount recovered, less funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the defendant, 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 or husband, and no children or their descendants, then the whole to the widow or husband.
  - (b) If the deceased leaves a widow and children or a husband and children, then one-half (1/2) to the widow or husband and the other one-half (1/2) to the children of the deceased.
  - (c) If the deceased leaves a child or children, but no widow or husband, then the whole to the child or children.
  - (d) If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased, one (1) moiety each, if both are living; if the mother is dead and the father is living, the whole thereof shall pass to the father; and if the father is dead and the

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belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.

mother living, the whole thereof shall go to the mother. In the event the deceased was an adopted person, “mother” and “father” shall mean the adoptive parents of the deceased.

- (e) If the deceased leaves no widow, husband or child, and if both father and mother are dead, then the whole of the recovery shall become a part of the personal estate of the deceased, and after the payment of his debts the remainder, if any, shall pass to his kindred more remote than those above named, according to the law of descent and distribution.

It has long been recognized that the personal representative of the decedent’s estate is generally the only individual with standing to initiate a wrongful death action. *Wheeler v. Hartford Accident & Indem. Co.*, 560 S.W.2d 816, 819 (Ky. 1978). The personal representative “prosecutes” the wrongful death action on behalf of the real-parties in interest, who are the “kindred of the deceased.” KRS 411.130; *Pete v. Anderson*, 413 S.W.3d 291, 299 (Ky. 2103). In a wrongful death claim, the damages recoverable are for the loss of decedent’s power to earn money. *Birkenshaw v. Union Light, Heat and Power Co.*, 889 S.W.2d 804, 806 (Ky. 1994). More importantly, for this action, the proceeds recovered in a wrongful death action do not pass through the estate of the decedent and are not subject to the debts of the decedent. *Emmerke’s Adm’r v. Denunzio*, 302 Ky. 832, 196 S.W.2d 599, 600 (1946). Instead, the proceeds are paid as set forth in KRS 411.130. Under KRS 411.130, the proceeds must be initially utilized

to pay funeral expenses, administration costs, and recovery costs.<sup>6</sup> Thereafter, the remaining proceeds pass directly to the next of kin as identified in KRS 411.130.

Conversely, a loss of parental consortium claim is a common-law cause of action. *Giuliani v. Guiler*, 951 S.W.2d 318, 321-23 (Ky. 1997). In a parental consortium claim, a minor child is compensated for the loss of a parent's love and affection. *Giuliani*, 951 S.W.2d at 322. A loss of parental consortium claim and a wrongful death claim are separate and independent claims. *Id.* at 323. However, a claim for loss of parental consortium is "limited to cases involving the wrongful death of a parent." *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 780 (Ky. App. 2000).

In this case, Basil asserted two loss of parental consortium claims, and the Estate asserted a wrongful death claim. Viewing the motor vehicle insurance proceeds as insufficient to fully compensate these claims, Basil argued that the insurance proceeds should be allocated to the loss of parental consortium claims to the exclusion of the wrongful death claim.<sup>7</sup> And, Basil pointed out that funeral expenses, administrative costs, and recovery costs are not deducted from the

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<sup>6</sup> Funeral expenses, administration costs, and recovery costs are viewed as damages that resulted from the death of the decedent, as opposed to debts of the decedent. *Square Deal Cartage Co. v. Smith Adm'r*, 307 Ky. 135, 210 S.W.2d 340 (1940).

<sup>7</sup> It is uncertain whether Basil, as guardian and next friend of Kaden and Remington, would be entitled to \$85,000 in damages upon the loss of consortium claims. The damages recoverable for loss of consortium are incapable of mathematical calculation and are difficult to precisely ascertain before trial. *See Giuliana v. Guiler*, 951 S.W.2d 318, 322 (Ky. 1997) (stating that "[i]t remains to be seen how the Courts and triers of fact will evaluate such loss in monetary terms.").

insurance proceeds in a loss of parental consortium claim. The circuit court ultimately agreed with Basil and ordered the insurance proceeds to be distributed *in toto* as compensation for the loss of parental consortium claims. This was error.

The claims of loss of consortium are derivative of the wrongful death claim insofar as both derive from the same injury, the wrongful death of Steven. *See Daley v. Reed*, 87 S.W.3d 247, 250 (Ky. 2002). While there are multiple parties and claims, the minor children of Steven are the only beneficiaries. Under these unique circumstances, we believe that the claims of loss of consortium are merely an item of damage recoverable for the wrongful death of Steven.

Consequently, all recoverable damages must be distributed in accord with the requirements of KRS 411.130. Therefore, we reverse the May 30, 2017, Findings of Fact and Conclusions of Law and remand for the circuit court to disburse the insurance proceeds to the minor children after payment of funeral expenses, costs of administration, and costs of recovery per KRS 411.130.

We view any remaining contentions of error as being moot or without merit.

For the foregoing reasons, the order of the Warren Circuit Court is reversed and this cause is remanded for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEES,  
VICTORIA BASIL, AS GUARDIAN  
AND NEXT FRIEND OF KADEN  
ISAAC JOHNSON, A MINOR;  
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