No. 117439

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ALYSIA R. TILLMAN and
STORM FLEETWOOD,

Plaintiffs-Appellants,

v.

KATHERINE A. GOODPASTURE, D.O.,

Defendant-Appellee.

AMENDED REPLY BRIEF OF APPELLANTS

APPEAL FROM THE DISTRICT COURT OF RILEY COUNTY,
HONORABLE JOHN F. BOSCH, JUDGE,
DISTRICT COURT CASE NO. 16–CV–000094

Lynn R. Johnson, KS #07041
SHAMBERG, JOHNSON & BERGMAN, CHTD.
2600 Grand Boulevard, Suite 550
Kansas City, MO 64108
T: (816) 474-0004
F: (816) 474-0003
ljohnson@sjblaw.com
ATTORNEY FOR PLAINTIFF-APPELLANT

ORAL ARGUMENT REQUESTED: 30 minutes

TABLE OF CONTENTS AND AUTHORITIES

ARGUMENTS AND AUTHORITIES

Pursuant to Supreme Court Rule 6.05, Plaintiffs offer the following limited arguments and authorities in response to new material in the Appellees' briefs.

Defendant Goodpasture and the Attorney General's Office ("Appellees") stress throughout their Response briefs that abortions are against Kansas public policy. However, Kansas public policy on abortion is not the issue in this case. The issue is whether the common law medical malpractice wrongful birth cause of action is entitled to the protections of Sections 5 and 18 of the Bill of Rights of the Kansas Constitution. This appeal is not relitigating the issues which were addressed and resolved by the Kansas Supreme Court in *Arche v. U.S. Dept. of Army*, 247 Kan. 276, 798 P.2d 477 (1990). In this Reply, Plaintiffs explain: (1) *Leiker* does not govern the applicability of Section 18; (2) the *Leiker* test for Section 5 is identical to that presented by Plaintiffs; (3) wrongful birth is not a new tort different from negligence; (4) the quid pro quo requirement is binding; and (5) public policy requires the Court to uphold constitutional rights.

I. Appellees incorrectly rely on *Leiker* for Section 18 applicability.

Appellees incorrectly argue that *Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823 (1989) provides the test for Section 18 applicability. (Def. p. 9, A.G. p. 4). Even though Plaintiffs and Appellees have largely combined Sections 5 and 18 when discussing their applicability, they have separate and distinct tests. Section 18 applies to all common law causes of action, regardless of whether they existed at common law when the Kansas

Constitution was adopted. *See* Vol. 3, pp. 14-24.[1] The difference is clearly stated in comparing the syllabus by the Court in *Miller v. Johnson*, 295 Kan. 636, 636, ¶ 2, ¶ 3, 289 P.3d 1098 (2012), which states:

> 2. Section 5 of the Kansas Constitution Bill of Rights preserves the right to jury trial as it historically existed at common law when the Kansas Constitution came into existence.
>
> 3. Section 18 of the Kansas Constitution Bill of Rights provides an injured party a constitutional right to be made whole and a right to damages for economic and noneconomic losses.

The Section 18 right has long been recognized by Kansas courts to mean "reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure and after a fair hearing." *Miller*, 295 Kan. at 655 (quoting *Hanson v. Krehbiel*, 68 Kan. 670, Syl. ¶ 2, 75 P. 1041 (1904)).

The line of Kansas cases applying and analyzing legal challenges under Section 18, starting with *Hanson v. Krehbiel*, 68 Kan. 670, 75 P. 1041 (1904) through *Miller v. Johnson*, 295 Kan. 636, 269 P.3d 1098 (2012), never required that the underlying cause of action be one that existed or was recognized at common law when the Kansas Constitution was adopted. This line includes: *Noel v. Menninger Found.*, 175 Kan. 751, 762-64 (1954) (holding charitable immunity violated Section 18); *Neely v. St. Francis Hosp. & Sch. of Nursing, Inc.*, 192 Kan. 716, 719-23 (1964) (holding statute exempting funds from attachment, garnishment or other process to enforce judgment against charitable organizations violated Section 18); *Manzanares v. Bell*, 214 Kan. 589, 598-99, 522 P.2d

[1] Plaintiffs incorrectly cited to *Hanson v. Krehbiel*, 68 Kan. 670, 75 P. 1041 (1904) in their initial Brief. *See* p. 7. *Hanson* does not state that Section 18 requires the remedy to be recognized at common law, which Plaintiffs correct in this section of their Reply brief.

1291 (1974) (holding Kansas No-Fault Act did not violate Section 18 because the right received in exchange was no less adequate); *Ernest v. Faler*, 237 Kan. 125, 131-34, 697 P.2d 870 (1985) (notice of claim statute violated Section 18); *Kan. Malpractice Victims v. Bell*, 243 Kan. 333, 346-52, 757 P.2d 251 (1988) (holding "[t]he cap and annuity provisions of H.B. 2661 infringe upon a medical malpractice victim's constitutional right to a remedy by due course of law and no quid pro quo is provided in return"); and *Lemuz v. Fieser*, 261 Kan. 936, 943-59, 933 P.2d 134 (1997) (holding the statute did not violate Section 18 because "the Act, the Plan, and the Fund, as amended, supplemented by the risk management statutes, create an adequate quid pro quo for the abrogation of the plaintiff's corporate negligence remedy").

The *Lemuz* decision, however, follows a critical misstatement of Kansas law by the Court from its opinion in *Leiker*, 245 Kan. at 361. In *Lemuz*, the defendants, quoting *Leiker*, asserted that K.S.A. § 65-442(b) did not violate Section 18 because the provisions of Section 18 only applied to causes of actions "recognized as justiciable by the common law as it existed at the time our constitution was adopted." *Lemuz*, 261 Kan. at 944 (arguing the corporate negligence cause of action did not implicate Section 18 because it was a judicial expansion of common law negligence remedies, which were not recognized at the time the Kansas Constitution was adopted). The defendants and the Court in *Lemuz* relied on the statement:

> The apparent purpose of this argument is to avoid Kansas case law which holds that the Bill of Rights of the Kansas Constitution preserves the right to trial by jury (§ 5) and the right to remedy by due course of law (§ 18) only as to civil causes of action that were

> recognized as justiciable by the common law as it existed at the time our constitution was adopted.

Leiker, 245 Kan. at 361. The *Leiker* Court then cited six Kansas Supreme Court cases to support its statement of Kansas law: *Kan. Malpractice Victims v. Bell*, 243 Kan. 333, 342, 757 P.2d 251 (1988); *In re Estate of Suesz*, 228 Kan. 275, 277, 613 P.2d 947 (1980); *First Nat'l Bank of Olathe v. Clark*, 226 Kan. 619, Syl. ¶ 1, 602 P.2d 1299 (1979); *In re Rome*, 218 Kan. 198, 204, 542 P.2d 676 (1975); *Craig v. Hamilton*, 213 Kan. 665, 670, 518 P.2d 539 (1974); *Kimball and others v. Connor, Starks and others.*, 3 Kan. 414, 428 (1866). *Id.* Yet, none of the six cases apply or analyze Section 18. They only apply and analyze the Section 5 right to trial by jury. No Kansas Supreme Court opinion addressing Section 18 holds as a matter of law that it preserves the right to remedy by due course of law "only as to civil causes of action that were recognized as justiciable by the common law as it existed at the time our constitution was adopted"—except *Leiker*.

After ostensibly accepting *Leiker*'s misstatement of Kansas law on Section 18, the *Lemuz* Court rejected the defendants' argument. In a unanimous decision, the Court rejected the defendants' contention with two words: "We disagree." The Court then held:

> The plaintiffs' claim of corporate negligence against the hospital is based upon the basic principle of negligence, a common-law remedy which was recognized at the time the Kansas Constitution was adopted…
>
> Thus, corporate negligence causes of action are not "new" causes of action but are simply different applications of the basic concepts of negligence which existed at common law when the Kansas Constitution was adopted. As such, corporate negligence causes are protected by § 18. If this were not the case, then any evolution of negligence law since the time of the Kansas Constitution was adopted could be abrogated without implicating § 18. Since K.S.A. 6 5-442(b) precludes a corporate negligence cause of action, it implicates § 18.

261 Kan. at 945. As a result, Section 18 applies to all common law causes of action, regardless of whether they were specifically recognized at common law when the Kansas Constitution was adopted. Appellees' arguments that Plaintiffs' wrongful birth cause of action is a "new tort" or was "not recognized" in 1859 is of no consequence.

Even if this Court relies on *Leiker*, Section 18 still protects Plaintiffs' right to assert a common law medical malpractice wrongful birth action. Appellees argue here, as the defendants did in *Lemuz*, that Section 18 should not apply to K.S.A. § 60-1906 because the tort of wrongful birth was not recognized at common law in 1859. When the "cause of action for the tort of wrongful birth" is substituted for the "cause of action for corporate negligence," then the *Lemuz* defendants' contention becomes the Appellees' contention in this case. *See* 261 Kan. at 944. The contention fails. In *Arche*, the Kansas Supreme Court recognized wrongful birth based on the "basic principle of negligence, a common law remedy which was recognized at the time the Kansas Constitution was adopted." *See Lemuz*, 261 Kan. at 945; *Arche*, 247 Kan. at 281. Like corporate negligence, wrongful birth is based on basic principles of negligence, a common law remedy recognized at the time the Kansas Constitution was adopted, even if characterized as a judicial expansion of the common law. As a result, wrongful birth causes of action are not "new," but simply an application of basic concepts of negligence to new medical technology and a woman's right to choose an abortion guaranteed by *Roe v. Wade*, 410 U.S. 113 (1973). Wrongful birth causes of action, like corporate negligence, are protected by Section 18.

II. The *Leiker* test for Section 5 applicability is identical to Plaintiffs' test.

Appellees argue that *Leiker* creates a test for applicability of Section 5, which they contend is different from Plaintiffs' test. (Def. pp. 9-10, A.G. pp. 4-5).[2] In reality, the *Leiker* opinion defines a test identical to Plaintiffs' for Section 5 that states the Constitution preserves the right to trial by jury only as to "civil causes of action that were recognized as justiciable by the common law as it existed at the time our constitution was adopted." 245 Kan. at 361. "Justiciable" actions are actions at law, which are actions seeking monetary relief, not equitable relief or relief created by statute. *See* Pl. Brief pp. 4-5, 7-8; Vol. 2, pp 17; *Kan. Malpractice Victims*, 243 Kan. at 343; *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 355, 789 P.2d 541 (1990) ("*Samsel II*"). An action seeking damages resulting from negligence is recognized as an action at law justiciable by the common law at the time the Kansas Constitution was adopted. *Gard v. Sherwood Constr. Co.*, 194 Kan. 541, 549, 400 P.2d 995 (1965) ("The legal questions here involved are so well settled in our law that they need not be labored").

Defendant cites to the recent Kansas Supreme Court opinion *State v. Love*, 305 Kan. 716, 735, 387 P.3d 820 (2017) to support her proposed test for Section 5's applicability. (Def. pp. 9-11). Yet, *Love* reinforces the fact that the *Leiker* test is identical to Plaintiffs' Section 5 test. Specifically, *Love* declares that a person is entitled to a jury trial as a matter of right for causes of action **at law**, involving issues of fact. 305 Kan. at 735-36. The *Love*

[2] It is worth noting that Defendant represents the Kansas Supreme Court "articulated" a three-part "test" for the applicability of Sections 5 and 18, but *Leiker* did not establish a three-part test. (Def. p. 9). Defendant created a three-part test from one sentence in the *Leiker* opinion.

Court noted that there are "two basic questions in any Section 5 analysis." *Id.* First, "In what type of case is a party entitled to a jury trial as a matter of right?" *Id.* (citing *Hasty v. Pierpont*, 146 Kan. 517, 72 P.2d 69 (1937) (finding Section 5 applied when an action sought money owed for professional services rendered, distinguishing actions at law from actions in equity)). Second, "[W]hen such a right exists, what does the right protect?" *Id.* (holding issues of fact must be submitted to a jury). Here, Plaintiffs' action seeks monetary damages through a claim not created by statute and it involves issues of fact which must be submitted to a jury. Plaintiffs' wrongful birth action is entitled to Section 5 protection under the *Leiker* test.

"Justiciable" does not mean the cause of action must have specifically existed when the Kansas Constitution was adopted. (Def. pp. 13-17 A.G. pp. 5-7). This position is simply wrong. *See* Pl. Brief pp. 6-7, 8-9. Appellees' definition of "justiciable" would overrule all causes of action based on technological advancements and abrogate the doctrine of stare decisis on which common law is based. *See Samsel II*, 246 Kan. at 356 (explaining the significance of stare decisis). A case on which Appellees repeatedly rely, albeit out of context, *OMI Holdings, Inc. v. Howell*, 260 Kan. 305, 918 P.2d 1274 (1996),[3] cites to a case which rebuts Appellees' contention:

> The common law is not static, but is endowed with vitality and a capacity to grow. It never becomes permanently crystalized but

[3] Appellees misstate the Court's reference to wrongful births in *OMI Holdings*. (Def. p. 17, A.G. pp. 6, 9). The Court was summarizing OMI Holdings' argument for the court to recognize the tort of "embracery." 260 Kan. at 314 ("Further, OMI cites to several cases in which Kansas courts have found that it was proper to adopt a new cause of action based on public policy, such as wrongful birth, wrongful discharge, outrage, loss of chance of survival, false light, intrusion upon seclusion and invasion of privacy"). The Court was not affirming OMI Holdings' description of wrongful birth actions nor declaring its description as law.

> changes and adjusts from time to time to new developments in social and economic life to meet the changing needs of a complex society.

Hoffman v. Dautel, 189 Kan. 165, ¶ 2 (1962). Appellees' proposed test for the application of Section 5 (and Section 18) is the antithesis of common law because it would require the common law to remain static, which is simply unrealistic.

Appellees draw an unfounded analogy between wrongful death actions and wrongful birth actions to argue that wrongful birth is not a common law action. (Def. p. 9, A.G. pp. 7-8). One was created by statute. The other was not. The basis of Kansas law is the common law of England, except as modified by constitutional provisions, statutory provisions, judicial decisions or by the wants and needs of the people, and it continues to remain the law of this state. *Leiker* 245 Kan. at 361. No common law cause of action existed for wrongful death. *Goodyear v. Davis, Dir. Gen. of R.Rs.*, 114 Kan. 557, 220 P. 282, 284 (1923). In 1846, the wrongful death cause of action was created by statute, commonly known as Lord Campbell's Act. *Id.* The Kansas Territorial Assembly first enacted its version of the statute before the Kansas Constitution was adopted in 1859, which was almost identical to the Lord Campbell's Act and created a statutory action for wrongful death. *See Appendix*, Ex. A., "Lord Campbell's Act, St. 9 & 10 Vict. C. 93," and Ex. B., "General Laws of the Territory of Kansas, 1859, ch. 1, sec. 1-3"). Not only was the wrongful death cause of action created by statute, but the statutory cause of action existed at the time Kansas' Constitution was adopted. As a creature of statute, the cause of action and its remedy are not entitled to the protections of Section 5. *Samsel II*, 246 Kan. at 355-56. In contrast, the wrongful birth cause of action was judicially recognized at common

law by the Kansas Supreme Court in *Arche*. Common law is "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (10th Ed. 2014). Thus, the wrongful birth action is recognized within the state's common law.

Appellees also draw an unfounded analogy between governmental immunity and wrongful birth actions to argue that wrongful birth was not justiciable at common law, citing to *Brown v. Wichita State Univ.*, 219 Kan. 2, 10, 547 P.2d 1015 (1976). (Def. p. 12, A.G. p. 8). This comparison is apples to oranges. The common law at the time the Kansas Constitution was adopted in 1859 explicitly denied the right to sue the government for torts. The immunity was judicially established in common law. *Brown*, 219 Kan. at 5 (citing *Maffei v. Town of Kemmerer*, 80 Wyo. 33, 338 P. 2d 808 (1959)). This was not an issue on which the common law was silent nor where a specific action was not recognized. The legislature could re-impose governmental immunity through the Kansas Tort Claims Act after governmental immunity for proprietary actions was abolished in *Carroll v. Kittle*, 203 Kan. 841, 848, 457 P.2d 21 (1969), because the government was immune at common law. The Court in *Carroll* acknowledged that the legislature had the right to re-impose governmental immunity. *Id.* ("in abolishing governmental immunity … we want it clearly understood that we recognize the authority of the legislature to control the entire field").[4]

[4] It should be noted that the unanimous court in *Arche* did not in any way suggest, as the *Carroll* court did, that the recognition of the common law tort of wrongful birth was within the authority of the legislature or that the legislature had any authority regarding a common law cause of action such as wrongful birth.

The Wyoming Supreme Court case that *Brown* cites, *Maffei*, examines the history of common law governmental immunity and traces it back to English common law established prior to 1558, long before the Kansas Constitution was adopted in October of 1859. Because the immunity was part of Kansas common law in 1859, neither Sections 5 nor 18 applied to K.S.A. § 46-901 *et seq.*, which re-imposed governmental immunity. The right to sue physicians for medical malpractice, however, was recognized at common law prior to 1859, making the wrongful birth action entitled to Section 5 protection.

III. Wrongful birth is not a new tort different from negligence.

Appellees assert that wrongful birth is an altogether "new" tort, which is not entitled to protection from Sections 5 and 18. (Def. p. 16-19, A.G. p. 12-16). Whether or not a tort is "new" is irrelevant in determining the applicability of Sections 5 and 18. Notwithstanding, Plaintiffs further explain why wrongful birth is not a new tort, in the event this Court disagrees.[5] *See* Pl. Brief p. 6, 10-11, 19; Vol. 1, p. 49-61.

Appellees cannot deny that if this case goes to trial, the trial judge will correctly instruct the jury that Defendant owed a duty to plaintiff Tillman

> to use her skill and knowledge as a specialist in a manner consistent with the special degree of skill and knowledge ordinarily possessed by other specialists in the same field of expertise at the time of the diagnosis or treatment [and that a] violation of this duty is negligence.

P.I.K. Civil 4th 123.12. That is because the "tort of wrongful birth" is without question a "common law" (derived from judicial decision) "tort" (civil wrong for which a remedy in

[5] Appellees themselves are not consistent with their position that wrongful birth is a new tort. They both acknowledge at times that wrongful birth was recognized as a medical malpractice action in their Responses, without explaining their position how it can both be a malpractice claim and a "new" tort. (Def. p. 15, A.G. p. 20). Furthermore, contrary to the Attorney General Office's improper suggestion, Plaintiffs do dispute that wrongful birth is a public policy-based judicial extension of traditional common law negligence. *See* Pl. Brief p. 6.

the form of damages may be obtained). *See* Black's Law Dictionary (10th Ed. 2014). Specifically, it is a "professional malpractice/negligence" tort (doctor's failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances). *Id.*

The first sentence in the *Arche* decision stated, "This is a medical malpractice wrongful birth action …" 247 Kan. at 276. Because this is a medical malpractice action, Chief Justice Miller, in the first of the three paragraphs of the *Arche* decision specifically addressing and judicially recognizing the "action for wrongful birth," sets forth the elements necessary in a "medical malpractice action in this state." 247 Kan. at 281. That is also why Chief Justice Miller, in the second of the three paragraphs states:

> We assume that plaintiff Nicole Arche was denied her right to make an informed decision whether or not to seek an abortion under facts which could and should have been disclosed …

Id. This reflects the medical malpractice concept of "informed consent." Furthermore, that is why Chief Justice Miller states in the third of the three paragraphs:

> In recognizing a cause of action for wrongful birth in this state, … We further assume that there is negligence on the part of the defendants; that the gross defects of the child could have been determined by appropriate testing prior to birth; that defendants owed plaintiffs a duty to perform such tests; and that no such tests were offered or performed, or if performed, were negligently performed.

Id. This clearly assumes as true the elements of a medical malpractice cause of action. *Id.* Furthermore, Chief Justice Miller states the objective of wrongful birth actions is to permit parents to recover at least their pecuniary losses. *Arche*, 247 Kan. at 283 (citing Prosser and Keeton, Law of Torts Sec. 55, p. 371 (5th ed. 1984)). Thus, the Court recognized

wrongful birth as a medical malpractice action which aims to make the parents whole or to put them in the position they would have been in, had the wrongful act not occurred.

In addition to the plain language of the Court, the reputable secondary source Gard's Kansas Law and Practice interprets *Arche* as recognizing wrongful birth actions as a species of medical malpractice in its section on § 60-1906. Gard, Kansas Law and Practice (Fifth Ed. 2017-2018). Even Black's Law Dictionary defines "wrongful birth" as of 1927 as "[a] lawsuit brought by parents against a doctor for failing to advise them prospectively about the risks of their having a child with birth defects." (10th Ed. 2014).

The majority of jurisdictions have recognized wrongful birth as a type of common law negligence action. *See* Vol. 1, p. 51-59; *see also Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 408 (2017) (providing a recent survey of wrongful birth). "[A] wrongful-birth claim fits comfortably within the traditional boundaries of negligence law." *Id.* Furthermore, the majority of jurisdictions with statutes terminating wrongful birth actions cited by Defendant, still recognize it as a type of negligence claim. (Def. p. 6-7). In addition, eight of those statutes do not eliminate wrongful birth actions altogether, preserving wrongful birth claims involving reckless and/or intentional acts. K.S.A. § 60-1906, however, immunizes reckless and intentional acts.

Appellees cite two cases where Minnesota and Utah statutes terminating the wrongful birth cause of action were challenged on constitutional grounds, *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 11 (Minn. 1986) and *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, 67 P.3d 436, 439 (2002). (A.G. p. 7, Def. pp. 20-22). These cases do not apply. Utah and Minnesota had not yet judicially recognized wrongful birth actions. In

fact, the Utah Supreme Court upheld the statute, explaining that it would have been unconstitutional under Utah's Open Courts Clause (which resembles Section 18) if the court had already recognized a common law wrongful birth cause of action (as in *Arche*). *Id.* at 442-43. Consequently, *Hickman* and *Woods* reinforce Plaintiffs' position. Appellees' attempt to argue that wrongful birth is not a negligence action is simply wrong.

IV. Appellees incorrectly suggest the quid pro quo test can be eliminated.

Appellees urge this Court to abandon the Kansas Supreme Court's adoption of the two-step quid pro quo test in its Sections 5 and 18 constitutionality analysis. Defendant specifically urges the adoption of the Utah Supreme Court's Open Courts Clause (Art. 1, Sec. 11 of the Utah Constitution) analysis, with certain modifications. (Def. pp 25-29, p. 26 F.N. 1). The Attorney General's Office urges a new due process test by abandonment of the quid pro quo requirement. (A.G. pp 16-23). This Court must follow Kansas Supreme Court precedent and cannot create a new, different analysis for Sections 5 and 18 constitutionality analysis as urged by Appellees. *Samsel II*, 246 Kan. at 356-67.

The Kansas Supreme Court has established that the quid pro quo test is required for determining constitutional challenges based on Section 5 right to trial by jury and Section 18 right to remedy by due course of law. In *Miller*, the Court specifically stated:

> We hold that a quid pro quo analysis is appropriate for determining Miller's Section 5 right-to-jury trial claims against K.S.A. 60-19a02. We will employ that analysis below after discussing the Section 18 challenge next … We have previously employed in Section 18 challenges the same quid pro quo analysis as discussed above regarding Section 5 to determine whether the legislature provided an adequate substitute remedy for the common-law right affected.

295 Kan. at 655-56. Furthermore, the Kansas Supreme Court has held that the quid pro quo test is a two-step analysis:

> For step one, we determine whether the modification to the common-law remedy or the right to jury trial is reasonably necessary in the public interest to promote the public welfare. This first step is similar to the analysis used to decide equal protection questions under the rational basis standard. For step two, we determine whether the legislature substituted an adequate statutory remedy for the modification to the individual right at issue. This step is more stringent than the first because even if a statute is consistent with public policy, there still must be an adequate substitute remedy conferred on those individuals whose rights are adversely impacted.

Id. at 657 (citations omitted). Consequently, the quid pro quo test is required for determining constitutionality under Sections 5 and 18, and it applies here. K.S.A. § 60-1906 terminates wrongful birth actions and provides no substitute remedy, let alone an adequate substitute, in violation of Sections 5 and 18.

V. Appellees inappropriately rely on public policy arguments to support unconstitutional legislation.

Appellees' policy arguments throughout their Responses are not appropriate or persuasive to the issue whether Sections 5 and 18 of the Bill of Rights of the Kansas Constitution apply and are violated by § 60-1906.

VI. Conclusion

A Section 5 and Section 18 analysis is applicable to determine the constitutionality of § 60-1906. Based on either a Section 5 or Section 18 analysis, § 60-1906 clearly violates both Plaintiffs' right to jury trial and right to remedy by due course of law, and it fails the second step of the quid pro quo test by not providing an adequate substitute remedy. Because it violates Section 5, § 60-1906 is unconstitutional and void and does not

bar Plaintiffs' common law medical malpractice wrongful birth cause of action. Because it violates Section 18, § 60-1906 is unconstitutional and void and does not bar Plaintiffs' common law medical malpractice wrongful birth cause of action. Plaintiffs request that this Court declare § 60-1906 unconstitutional and void, reverse the District Court's decision to dismiss Plaintiffs' cause of action with prejudice, and remand Plaintiffs' action back to the District Court for trial on the merits.

Respectfully submitted,

SHAMBERG, JOHNSON & BERGMAN, CHTD.

/s/ Lynn R. Johnson
Lynn R. Johnson, KS #07041 ljohnson@sjblaw.com
David R. Morantz, KS #22431 dmorantz@sjblaw.com
Paige L. McCreary, KS #2715 pmccreary@sjblaw.com
2600 Grand Boulevard, Suite 550
Kansas City, MO 64108
T: (816) 474-0004 F: (816) 474-0003
– and –
Stanley R. Ausemus, stanley@sraclaw.com
STANLEY R. AUSEMUS, CHARTERED
413 Commercial
P.O. BOX 1083
Emporia, Kansas 66801
T: (620) 342-8717 F: (620) 342-8717
ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on this 20th day of November, 2017, by e-mail and by electronically filing a copy with the Kansas Judicial Branch e-filing website which sent notices to the following:

Dustin J. Denning, KS 19348
Jacob E. Peterson, KS 25534
CLARK, MIZE & LINVILLE, CHTD.
129 South 8th Street, POB 380
Salina, Kansas 67402-0380
djdenning@cml-law.com
ATTORNEYS FOR DEFENDANT GOODPASTURE

Bryan C. Clark, KS # 24717
Dwight R. Carswell # 25111
Assistant Solicitor General
Memorial Building, 2nd Floor
120 SW 10th Ave.
Topeka, KS 66612-1597
bryan.clark@ag.ks.gov
dwight.carswell@ag.ks.gov
ATTORNEYS FOR INTERVENOR OFFICE OF KANSAS ATTORNEY GENERAL DEREK SCHMIDT

/s/ Lynn R. Johnson
ATTORNEYS FOR APPELLANT

APPENDIX

1. Lord Campbell's Act, St. 9 & 10 Victoria, c. 93 Appendix A of *Goodyear v. Davis, Dir. Gen. of R.Rs.*, 114 Kan. 557, 220 (1923)

2. General Laws of the Territory of Kansas, 1859

114 Kan. 557
Supreme Court of Kansas.

GOODYEAR
v.
DAVIS, DIRECTOR GENERAL OF RAILROADS.

No. 24503.[a1]
|
Nov. 10, 1923.

Syllabus by the Court.

The federal Employers' Liability Act (35 Stat. 65, as amended by 36 Stat. 291 [[[U. S. Comp. St. §§ 8662, 8665]) creates a right of action in the injured employee for his suffering and loss resulting from the injury and also creates a distinct and independent right of action in the personal representative of the deceased employee in the event death results from the injury, for the benefit of certain designated dependents.

A settlement made by the injured employee, after the injury and prior to his death, for his suffering and loss, is not a bar to the action by the personal representative for the benefit of dependents for the death, if it resulted from the injury.

In an action under the federal Employers' Liability Act by the personal representative for damages to the injured employee and for the death, the widow of the employee having been appointed administratrix, the fact that, as *283 the wife of the injured employee, she was present at the time an agent of defendant made a settlement with him for his injuries would not estop her, as personal representative of his estate, from seeking to set aside the release because of his mental incapacity to execute it.

Appeal from District Court, Republic County; John C. Hogin, Judge.

Action by Louisa Goodyear, as administratrix of the estate of Lewis Goodyear, deceased, against James C. Davis, Director General of Railroads, as Agent. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Attorneys and Law Firms

N. J. Ward and John F. McClure, both of Belleville, for appellant.

Luther Burns and J. E. Du Mars, both of Topeka, and W. D. Vance, of Belleville, for appellee.

Opinion

HARVEY, J.

This is an action by an administratrix for damages under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for (a) the wrongful death of Lewis Goodyear, and (b) for the personal injuries sustained by him. The answer, among other things, pleaded a settlement made with Goodyear after the injury, and a release executed by him of all damages resulting to him therefrom. The reply sought to avoid the release (a) for fraud, (b) because of mental incapacity of Goodyear to execute it, and (c) for mutual mistake. There was a trial to a jury which made special findings of fact and returned a general verdict for defendant and plaintiff has appealed.

For many years Lewis Goodyear was employed by the Chicago, Rock Island & Pacific Railway Company as car inspector at Belleville, a division point, and continued his employment under the Director General when the railroads passed under federal control. It was his duty to inspect trains, while they were at the station, for hot boxes, loose or damaged connections, etc. He worked 7 days a week, earned about $160 per month, was 64 years old, and enjoyed fairly good health. On July 31, 1919, a truck had been left, by some other employee of the defendant, so near the track that it was struck by an incoming train and thrown against Goodyear, who was attending to his duties. In the accident he sustained two fractured ribs and serious bruises about the head, body, and knee. He was taken home and treated by a physician employed by defendant, who had also been the physician for the Goodyear family. The fractured ribs healed in three or four weeks, and he was apparently recovered from the injury, except his knee, which continued to trouble him for several months. With the aid of a cane he went to the doctor's office and about town, but there was some stiffness in the knee, and he thought it unsafe to undertake his regular work. The physician continued to treat the knee, by electric applications, and otherwise, and finally, near the close of the year, had him wear an especially

Exhibit
A

prepared elastic stocking, and the knee seemed to get all right. Goodyear thought he could go to work and set March 1, 1920, as the date, but did not do so. On March 12, Goodyear met defendant's claim agent, a Mr. Stiers, about the depot, and told him he planned to go to work and wanted to settle with defendant. After a little talk a settlement was agreed upon, by which defendant was to pay him $1,135 and pay his doctor bills. Mr. Stiers stated that he would have to get authority to issue the draft in payment; that he would do so and return to Belleville and make payment in a few days. He did return March 16, went to Goodyear's home, delivered the draft to him, and Goodyear executed a full and complete release and satisfaction of all damages resulting to him from the accident and injuries of July 31, 1919.

On May 4, 1920, Mr. Goodyear died. Thereafter his widow was appointed administratrix of his estate and brought this action. It was one of the claims of the defendant that his death was not the result of the injuries received in the accident of July 31, but resulted from other causes. Much evidence was presented on this branch of the case, and it is possible the jury found for the defendant on that theory. But whether that be true is immaterial on this appeal, for, under the record as here presented, this appeal must be determined upon the instructions pertaining to the release. In answer to a special question the jury found that no fraud was practiced by any agent or employee of the defendant in obtaining the release, and no complaint is made of the instructions of the court on that question.

Appellant complains of the twelfth instruction, which reads:

> "One of the grounds alleged in plaintiff's petition for setting aside the release is that Lewis Goodyear was not in possession of his mental faculties at the time of the execution of the release, and that thereby he was rendered incompetent in law to transact business. You are instructed that if the plaintiff herein, wife of the deceased Lewis Goodyear, was present at the time of the settlement and knew of his mental condition and made no protest to the agent of defendant against such settlement and did not inform the agent of said Goodyear's mental condition, then she, as plaintiff in this action, will not be permitted to complain of the settlement having been made, but will be considered as having acquiesced in and agreed to the said settlement by her silence. But, on the contrary, if you find from the evidence that she was not present at the time of the settlement, or that she did not know of Lewis Goodyear's alleged mental condition, or that she did protest to the agent against such settlement, then she would not be estopped from setting up such defense to said release."

*284 [3] We think this is an erroneous statement of the law, first, because the silence of the wife could not estop dependent children for whose benefit, in part, the action was brought, and, second, the action is maintained, not by the widow, but by the personal representative of the deceased. This might be some one other than the widow, even a corporation, as it was in Chicago, R. I. & P. Ry. Co. v. Fontron Loan & Trust Co. (Okl. Sup.) 214 Pac. 172.

The appellee argues that any error in instruction No. 12 was cured by instruction No. 13, which reads as follows:

> "If you find from the evidence, and by evidence which is clear, decided, and satisfactory, that at the time Lewis Goodyear executed the release in question here he was not mentally capable of executing the same, then you would be justified in holding said release null and void."

But it is difficult to see how it could have that effect. Reading the two instructions together, plaintiff would be estopped from maintaining the action if the conditions existed as set out in instruction No. 12, and, if the jury should find they did not exist, then under instruction No. 13 they would be required to find mental incapacity by evidence which is clear, decided, and satisfactory. There is no claim here that Louisa Goodyear was paid anything at the time of that settlement for damages resulting in the death of her husband, and her presence at that time would not estop a personal representative of deceased from maintaining an action for the benefit of dependents.

Appellant complains of instruction No. 19, which reads:

> "You are instructed that the law favors a compromise and settlement of disputes, and, when parties in good faith enter into an agreement based on good consideration, neither is afterwards permitted to deny it."

When we consider the dual nature of the relief sought, the triple nature of the attack made upon the release, together with questions which necessarily arise in an action of this character, it is apparent the court could not state everything in one instruction. It was proper for the court to inform the jury of the general principles of law applicable to the case and their specific application to the case on trial. This instruction is a statement of a general principle of law, which has been frequently announced by this and other courts. Lewis, Adm'x, v. Kimball, 103 Kan. 173, 173 Pac. 279; Roy v. Kirn, 208 Mich. 571, 175 N. W. 475; Kilby v. Charles City Western Ry. Co., 191 Iowa, 926, 183 N. W. 371. It requires that the settlement be made in good faith, which means without fraud, duress, concealment, and assumes a lack of mental incapacity or mutual mistake, and upon good consideration. The court gave other instructions on fraud, mental capacity, mutual mistake, and specifically told the jury that the instructions must be considered as a whole. While it might have been stated with more specific detail of wording, we do not regard it as possible that the jury was misled by it.

[1] [2] Appellant complains of the sixth instruction, which reads as follows:

> "You are instructed that said release is a complete bar to the claims of the plaintiff, unless you find that it was executed by Lewis Goodyear by reason of fraud and misrepresentation on the part of the defendant or because Lewis Goodyear was mentally incapable of executing said release at the time he signed same, or because of mutual mistake on the part of the defendant and of said Lewis Goodyear which caused said Goodyear to sign said release. If you find from the evidence that said release should not be set aside for any of the reasons set up by the plaintiff, then you should find for the defendant and need not consider any further matters in the case."

Appellant contends that at most the release could be a bar to that portion only of the action which seeks to recover damages sustained by Lewis Goodyear personally, and could not be a bar to damages recoverable under the federal Employers' Liability Act by the personal representative of the deceased for the benefit of dependents for his death. So far as counsel have advised us, or as our investigation discloses, this question has never been passed upon by any federal or state court, construing the federal Employers' Liability Act. In order to understand the question presented, perhaps we should look into the history and purposes of the statute in question.

At common law a person injured by the wrongful act of another could maintain an action for the damages which he sustained resulting from the injury, but this cause of action abated at his death. It could not be brought by, nor revived and prosecuted by, his personal representative, nor by his dependents. By statute passed in most of the states in this country this cause of action survives the death of the injured person, and may be revived and prosecuted in the name of his personal representative.

At common law no cause of action existed for wrongful death, and no action for damages for wrongful death could be maintained by the personal representative of the deceased, nor by his dependents.

In 1846 there was enacted in England what is commonly known as Lord Campbell's Act, St. 9 & 10 Vict. c. 93 (Appendix A), which provides, in effect, that an action may be maintained whenever death is caused by a wrongful act, neglect, or default of another which would have entitled the person injured to maintain an action if death had not ensued; that the action should be brought in the name of the executor or administrator of the injured deceased for the benefit of *285 designated persons, members of deceased's family or next of kin, and the damages recoverable in such action are the pecuniary damages suffered by such beneficiaries by reason of the death. This was held to create a new cause of action, one which arose only when death resulted from the injuries, and to permit the recovery of damages, different in their nature from those which could be recovered in an action brought by the injured person, viz. the pecuniary damages

sustained by the dependents by reason of the death of the injured.

Statutes similar to Lord Campbell's Act have been enacted by many of the states in this country. In 1908 Congress, by virtue of the authority given it by the Constitution over interstate commerce (Kelly's Adm'x v. C. & O. Ry. Co. [D. C.] 201 Fed. 602), passed what is commonly known as the federal Employers' Liability Act (36 U. S. Stat. at L. 65, c. 149 [U. S. Comp. St. §§ 8657-8665] Appendix B), which provides, in substance, that every common carrier engaged in interstate commerce shall be liable in damages to (a) any person suffering injury while he is employed by such carrier in such commerce, or (b) in case of death of such employee, to his or her personal representative, for the benefit of certain designated relatives or next of kin dependent upon him, for such injury or death resulting in whole or in part from the negligence of the carrier. This was the first effective congressional legislation on the subject (the prior act of June 11, 1906 [34 Stat. 232] was held invalid in Howard v. Ill. C. R. Co., 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297), and by it Congress took possession of the field of the liability of carriers by rail to their employees while engaged in interstate commerce. In this field it supersedes state legislation upon the subject. It is held to be both inclusive and exclusive; that is, it includes all circumstances under which common carriers are liable because of injuries to their employees while engaged in interstate commerce, and excludes their liability to their employees so engaged under any other circumstances, such as injury not caused by negligence, and under any other statute, such as a state workmen's compensation act. Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Chicago, R. I. & P. Ry. Co. v. Wright, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431; Erie R. R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662; New York Cent. & H. R. Co. v. Tonsellito, 244 U. S. 360, 37 Sup. Ct. 620, 61 L. Ed. 1194; New York Cent. R. Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536. It provides for an action by the injured employee, which he had at common law, and for an action for death by the personal representative, similar to the Lord Campbell Act. Mich. Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; St. Louis, Iron M. Ry. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160. As originally passed it did not provide for the survival of the cause of action of the injured employee (Fulgham v. Midland Valley R. Co. [C. C.] 167 Fed. 660; Walsh v. New York, N. H. & H. R. Co. [C. C.] 173 Fed. 494) but this was provided for by an amending statute passed by Congress in 1910 (36 U. S. Stat. at L. 291, c. 143 [[[U. S. Comp. St. §§ 8662, 8665]), and made section 9 of the original act (U. S. Comp. St. § 8665), which provides:

> "Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

It was admitted by the pleadings and statements of counsel in this case--

> "That the plaintiff is authorized to bring this action as administratrix; that the defendant is the Director General of Railroads and the proper party whom this case should be brought against; that Lewis Goodyear was an employee of the defendant at the time of the accident and was rightfully upon the property of the defendant in performance of his duties and was injured in the performance of such duties; and that such injury occurred while decedent was employed in interstate commerce."

So, under the federal Employers' Liability Act as applied to this case, Lewis Goodyear had a cause of action against defendant for the personal injuries he sustained, which (omitting for the present any settlement made by him in his lifetime) survived his death, whether his death resulted from the injury or from other causes, and which could be prosecuted by his administratrix. Under this cause of action the measure of damages would be his suffering and such pecuniary loss as he personally sustained by reason of the injury. At his death (assuming that his death resulted from the injury) a cause of action then accrued in behalf of his personal representative for the benefit of his widow and children for the damages such dependents sustained by reason of his death. On this cause

of action the measure of damages is the pecuniary loss to such dependents occasioned by his death. This has been made clear by the decisions of the Supreme Court of the United States interpreting this act. Mich. Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176, was an action brought by the personal representative of an employee after his death, not for the injuries suffered by his intestate, but for the loss suffered by his widow as a consequence of his wrongful death. Speaking of the act the court said:

***286** "We think the act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. It plainly declares the liability of the carrier to its injured servant. If he had survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering and diminished earning power." 227 U. S. 65, 33 Sup. Ct. 195, 57 L. Ed. 417, Ann. Cas. 1914C, 176.

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. * * *

This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had--one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only." 227 U. S. 68, 33 Sup. Ct. 195, 57 L. Ed. 417, Ann. Cas. 1914C, 176.

In St. Louis, Iron Mt. & S. Ry. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160, the action was brought after the death of the injured employee by an administrator to recover for injuries to and the death of his intestate.

> "The action was for the benefit of the father, there being no surviving widow, child or mother, and the damages sought were for (a) pecuniary loss to the father by reason of the death and (b) conscious pain and suffering of the decedent before the injuries proved fatal. In the trial court the plaintiff had a verdict and judgment awarding $1,000 for the pecuniary loss to the father and $11,000 for the pain and suffering of the decedent, and the Supreme Court of the state, after reducing the latter sum to $5,000, affirmed the judgment."

After discussing the original act with the amendment made in 1910, the court said:

> "No change [by the amendment] was made in § 1 [of the act of 1908]. * * * It continues, as before, to provide for two distinct rights of action; one in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person 'shall survive' to his personal representative 'for the benefit of' the same relatives in whose behalf the other right is given. Brought into the act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly. It does not mean that the injured person's right shall survive to his personal representative and yet be unenforceable by the latter, or that the survival shall be for the benefit of the designated relatives and yet be of no avail to them. On the contrary, it means that the right existing in the injured person at his death--a right covering his loss and suffering while he lived but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life--shall survive to his personal representative to the end that

> it may be enforced and the proceeds paid to the relatives indicated. And when this provision and section 1 are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong."

In Great Northern Ry. Co. v. Central Tr. Co., 242 U. S. 144, 37 Sup. Ct. 41, 61 L. Ed. 208, L. R. A. 1917E, 1050, after discussing the provisions of the act as creating a liability to the injured employee and also to his personal representative, it was said:

> "Damages recoverable under the former claim are limited to such as will reasonably compensate for the loss and suffering of the injured person while he lived."

And at page 147 of 242 U. S., at page 42 of 37 Sup. Ct. (61 L. Ed. 208, L. R. A. 1917E, 1050) quotes with approval from the Craft Case, 237 U. S. 648, 658, 35 Sup. Ct. 704, 59 L. Ed. 1160, as follows:

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong."

Recovery both for the loss and suffering sustained by the injured employee and for the damage to dependents resulting from the death have been allowed in Kilburn v. C., M. & St. P. Ry. Co., 289 Mo. 75, 232 S. W. 1017; Chicago, R. I. & P. Ry. Co. v. Fontron Loan & Trust Co. (Okl. Sup.) 214 Pac. 172; Thornhill v. Davis (S. C.) 113 S. E. 370, 24 A. L. R. 617; and in other cases, where the action was brought by the personal representative of the injured employee. But the question of *287 the effect of a settlement by the injured employee for his injuries, nor the kindred question of the effect of an action brought by him, which went to judgment in his favor and the judgment paid, upon the right of the personal representative to maintain an action for his death, was not involved in any of those cases. The latter question was specifically reserved by the Supreme Court in the Craft Case, 237 U. S. 648, 659, 35 Sup. Ct. 704, 59 L. Ed. 1160.

In Seaboard Air Line Ry. Co. v. Oliver, 261 Fed. 1, 171 C. C. A. 597, decided by the U. S. Circuit Court of Appeals of the Fifth circuit, it was held:

> "Under Employers' Liability Act April 22, 1908, § 1 (Comp. St. § 8657), making railroad carrier liable to an injured employee, or in case of death to his personal representatives, and section 9, as amended by Act April 5, 1910, § 2 (Comp. St. § 8665), providing that rights of action given to a person suffering injuries shall survive, and that in such case there shall be only one recovery for the same injury, the personal representative of an injured employee, who recovered judgment for his injuries, cannot recover for his death."

This decision appears to be reached by reason of the wording of section 1 (U. S. Comp. St. § 8657). It is said in the opinion:

"The first section of the act makes the carrier liable in damages to the injured employee, 'or, in case of the death of such employee, to his or her personal representative. * * *' The two distinct rights of action are given in the alternative or disjunctively. The language used indicates the absence of an intention to allow recoveries for the same wrong by both the injured employee and, in case of his death, by his personal representatives; only one recovery being allowed when the injured employee dies without having enforced the right of action given to him."

It will be noted that this reasoning is contrary to that of the Supreme Court, announced in the cases above cited, where it is repeatedly said, "The two claims are quite distinct, no part of either being embraced in the other," and recovery is permitted on both.

In view of the fact that statutes somewhat similar to the federal Employers' Liability Act have been passed in many of the states--that is, authorizing an action on behalf of an injured person for wrongful injuries and providing for the survival of that action in the event of his death, and also providing for an action for death for wrongful injury by the personal representative for the benefit of certain designated relatives or next of kin--it would seem that some light could be thrown upon the matter by the decisions of the court upon the respective state statutes. An examination of them, however, discloses that they are not as convincing as they might be, for the reason that there is quite a little variation in the state statutes upon the subject, and a still greater variation in the interpretation which the courts have placed upon the statutes of their respective states.

In this state we have a statute providing an action for death by wrongful act by the personal representative. Gen. Stat. 1915, § 7323. We also have a statute which provides for the survival of causes of action. Gen. Stat. 1915, § 7322. Under these statutes it was held, in McCarthy v. Railroad Co., 18 Kan. 46, 26 Am. Rep. 742, that under our survival statute the only causes of action to survive for injury to the persons are when death does not result from the injury, but occurs from some other circumstance; that, if the death was the result of the injury, the action should be solely under section 7323. Judge Brewer was a member of this court at that time and concurred in the decision, and afterwards, while judge of the federal court of this state, in the case which arose before him involving the statute (Hulbert v. City of Topeka [C. C.] 34 Fed. 510) he questioned the correctness of the decision. However, the conclusion reached in that case has been uniformly adhered to by this court (City of Eureka v. Merrifield, 53 Kan. 794, 37 Pac. 113; Martin v. Missouri Pac. Ry. Co., 58 Kan. 475, 49 Pac. 605; Missouri Pac. Ry. Co. v. Bennett's Estate, 58 Kan. 499, 49 Pac. 606, disapproving contrary position taken in the same case by the Court of Appeals 5 Kan. App. 231, 47 Pac. 183; Sewell v. A., T. & S. F. R. Co., 78 Kan. 1, 96 Pac. 1007; Berner v. Mercantile Co., 93 Kan. 769, 145 Pac. 567, Ann. Cas. 1916D, 350). The same conclusion was reached in Horton v. Daly, 106 Ill. 131, and Lubrano v. Atlantic Mills, 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797. Under this construction the question of the effect of a settlement by the injured person upon an action brought by his personal representative could not arise.

Interpreting the Lord Campbell Act, in Read v. G. E. Ry. Co., L. R. 3 Q. B. 555, where the injured person had settled in his lifetime, accepting a sum of money in full satisfaction and discharge of all the claims and causes of action he had against defendant, it was held "that the cause of action was the defendants' negligence, which had been satisfied in the deceased's lifetime, and that the death * * * did not create a fresh cause of action," and hence that the action for wrongful death could not be maintained. In the opinion it was said:

"The question turns upon the construction of section 1 of 9 & 10 Vict. c. 93. Before that statute the person who received a personal injury, and survived its consequences, could bring an action, and recover damages for the injury; but if he died from its effects, then no action could be brought. To meet this state of the law the 9 & 10 Vict. c. 93, was passed, and 'whenever the death of a person is caused by a wrongful act, and the act 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 *288 liable if death had not ensued shall be liable for an action for damages notwithstanding the death of the party injured.' Here, taking the plea to be true, the party injured could not 'maintain an action in respect thereof,' because he had already received satisfaction. Then comes section 2, which regulates the amount of damages, and provides for its apportionment in a manner different to that which would have been awarded to a man in his lifetime. This

section may provide a new principle as to the assessment of damages, but it does not give any new right of action. Mr. Codd was driven to argue that the executor could bring a fresh action even if the deceased had recovered damages in an action; but to hold this would be to strain the words of the section. The intention of the enactment was that the death of the person injured should not free the wrongdoer from an action, and in those cases where the person injured could maintain an action his personal representative might sue."

LUSH, J.:
"I am of the same opinion. The intention of the statute is, not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim actio personalis moritur cum persona would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer. It is true that section 2 provides a different mode of assessing the damages, but that does not give a fresh cause of action."

The courts in many of our states, having statutes worded identical with, or in effect the same, as the Lord Campbell Act, have reached the same conclusion. And from this line of authorities has grown the definite rule that the personal representative cannot maintain the action for wrongful death, unless the injured person had a right of action for his injuries immediately before his death. Hence, in those states it is held that a settlement made by the injured person, after the accident and before his death, for his injuries, is a bar to an action by the personal representative for the wrongful death; and also that such action is barred if an action be brought by the injured person for his damages, which action goes to judgment, and the judgment is satisfied before his death. 17 C. J. 1200; Thornton's Federal Employers' Liability Act (3d Ed.) § 188; Tiffany on Death by Wrongful Act (2d Ed.) § 124; Edwards v. Chemical Co., 170 N. C. 551, 87 S. E. 635; Perry v. P. B. & W. R. Co., 1 Boyce (Del.) 399, 77 Atl. 725; S. B. Tel. Co. v. Cassin, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694; Strode v. St. Louis Tel. Co., 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084; McGahey v. N. E. R. Co., 166 N. Y. 617, 59 N. E. 1126; Hecht v. Ohio, etc., R. Co., 132 Ind. 507, 32 N. E. 302; Hill v. P. R. Co., 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754; Price v. R. R. Co., 33 S. C. 556, 12 S. E. 413, 26 Am. St. Rep. 700; Brown v. Chattanooga Elec. R. Co., 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666.

It is possible the Supreme Court had this in mind when it reserved the question in the Craft Case, 237 U. S. 648, 659, 35 Sup. Ct. 704, 59 L. Ed. 1160, for it cited the Vreeland Case, 227 U. S. 59, 70, 33 Sup. Ct. 192, 196 (57 L. Ed. 417, Ann. Cas. 1914C, 176), where it is said, speaking of the right of action given for the wrongful death:
"But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury"--citing some of the authorities last given.

But the federal Employers' Liability Act differs from the Lord Campbell Act in that it does not in terms make the personal representative's right to maintain an action dependent upon a right of action in the decedent immediately before he died. This is pointed out in Seaboard Air Line Ry. Co. v. Oliver, 261 Fed. 1, 4, 171 C. C. A. 597. Hence the authorities based upon the wording of the Lord Campbell Act and state statutes similarly worded are not necessarily controlling. In S. B. Tel. Co. v. Cassin, 111 Ga. 575, 594, 36 S. E. 881, 50 L. R. A. 694, it is argued that to permit the injured person to recover, or settle, for his damages, and to hold it possible for the personal representative to recover later for the wrongful death would in some instances permit a double recovery, as where there was a permanent injury, and the injured person was paid on the basis of his loss of earning capacity in the future, computed upon his life expectancy, and thereafter dies as a result of the injury. But whatever may be the measure of damages in the state courts, the Supreme Court has said in at least three cases, previously quoted, what the measure of damages is upon each right of action, under the act in question, and specifically said "the two claims are quite distinct, no part of either being embraced in the other." Under this statute it has been held that the question of the proper measure of damages is inseparably connected with the right of action and must be settled according to the principles of law as administered in federal courts. C. & O. Ry. Co. v. Kelly, 241 U. S. 485, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367.

In some states, where the statute for wrongful death was held to create a new right of action, distinct and independent of any right of action the injured person had

in his lifetime, it has been held that a release executed by the injured person before his death cannot deprive the beneficiary of the right of action for the wrongful death which the statute gives him. In Rowe v. Richards, 35 S. D. 201, 215, 151 N. W. 1001, 1006 (L. R. A. 1915E, 1075, Ann. Cas. 1918A, 294), it was said:

> *289 "We must confess our inability to grasp the logic of any course of so-called reasoning through which the conclusion is drawn that the husband, simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action--one which has not then accrued; one which may never accrue; one which from its very nature cannot accrue until his death; and one which, if it ever does accrue, will accrue in favor of his wife and be based solely upon a violation of a right vested solely in the wife."

To the same effect, in Blackwell v. American Film Co. (Cal. Sup.) 209 Pac. 999, citing earlier California cases to the same effect; Denver, etc., R. Co. v. Frederic, 57 Colo. 90, 140 Pac. 463; Maguire v. Cincinnati Tract. Co., 33 Ohio Cir. Ct. R. 24; Milwaukee Coke Co. v. Industrial Com., 160 Wis. 247, 151 N. W. 245; Davis v. St. Louis, Iron Mt. & S. R. Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283. It will be noted that these cases hold that the respective rights of action given by the statute are separate and distinct; just as the Supreme Court holds the rights of action to be under the statute in question.

In St. Louis & S. F. R. R. Co. v. Goode, Adm'x, 42 Okl. 784, 142 Pac. 1185, L. R. A. 1915E, 1141, the injured employee began an action for damages but died pending the action. His administrator brought a separate action for his wrongful death and recovered a judgment which was paid. Later the action brought by the injured employee in his lifetime was revived under the name of the administrator and upon trial a judgment recovered. This was affirmed, the court holding that the rights of action were separate and distinct, and that the judgment in favor of the personal representative for the wrongful death did not bar recovery under the action brought by the injured employee which was revived.

It is of interest to note the purpose of Congress in the amendment to the Employers' Liability Act made in 1910 as stated in St. Louis Iron Mt. & S. Ry. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160:

"The original act, as we have said, made no provision for the survival of the right of action given to the injured person, although such a provision existed in the statutes of many of the states. Shortly after the act two cases arose thereunder in each of which the personal representative of an injured employee, who died from his injuries, sought to recover damages for the employee's personal loss and suffering while he lived as well as for the pecuniary loss to the beneficiaries named in the act. In both cases--one in the Circuit Court for the Western District of Arkansas and the other in the Circuit Court for the District of Massachusetts--the right of the injured employee would have survived if the local statutes were applicable, and the ruling in both was that the federal act was exclusive and superseded the local statutes, that it made no provision for a survival, and therefore that the recovery should be confined to damages for the pecuniary loss resulting to the designated beneficiaries from the death. Fulgham v. Midland Valley R. R., 167 Fed. 660; Walsh v. New York, N. H. & H. R. R., 173 Fed. Rep. 494. Following these decisions the amendment embodying the new section was proposed in Congress. In reporting upon it, the Committees on the Judiciary in the Senate and House of Representatives referred at length to the opinions delivered in the two cases, to the absence from the original act of a provision for a survival of the employee's right of action and to the presence of such a provision in the statutes of many of the states, and then recommended the adoption of the amendment, saying that the act should be made 'as broad, as comprehensive, and as inclusive in its terms as any of the similar remedial statutes existing in any of the states, which are suspended in their operation by force of the federal legislation upon the subject.' Senate Report No. 432, 61st Cong. 2d Sess. pp. 12-15; House Report No. 513, 61st Cong. 2d Sess. pp. 3-6. While these reports cannot be taken as giving to the new section a meaning not fairly within its words, they persuasively show that it should not be narrowly or restrictively interpreted."

When we further consider that in Arkansas, where one of the cases arose which caused Congress to make the

amendment, it had been held that a judgment by the injured person would not bar an action by his personal representative (Davis v. St. L., I. M. & S. R. Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283), and in Massachusetts, where the other case arose. it had been held that the rights of action were so separate and distinct that they could both be prosecuted together (Bowes v. Boston, 155 Mass. 349, 29 N. E. 633, 15 L. R. A. 365), and that Congress intended so to amend the act that it could give relief as fully as any of the state statutes which it supplanted, then it seems Congress must have intended that the two rights of action were separate and distinct, and that the settlement of one would not be a bar to the other. We are therefore constrained to hold that the giving of instruction No. 6 was error.

Though not taken into consideration in the conclusion reached, there are two matters which are, perhaps, worthy of note. First, the release signed by Lewis Goodyear did not purport on its face to release anything but his claim for damages to him. The only mention in the release of damages for death is in a clause printed in parenthesis reading "(or of resulting death, if this be executed by an administrator or administratrix of the estate of said person)." It was not, of course, signed by an administrator or executor, hence this clause is not effective. Second, the evidence clearly shows that the payment made Lewis Goodyear by the defendant was computed upon the basis of time he had lost, being straight time, possibly plus one or two items of expense, from the date of the injury to March 1, 1920. Nothing was paid *290 him for pain and suffering, for which he might have recovered in an action brought by him. This fact would not, of course, invalidate the release so far as he was concerned, as he was at liberty to settle his claim for a sum less than the total amount due him if he wished to do so. Thus it seems clear that in this case nothing was paid in settlement of the right of action for the death, and that the release relied upon does not purport to settle such right of action.

The cause will be reversed and remanded, for a new trial in accordance with this opinion.

All the Justices concurring.

APPENDIX A.

Lord Campbell's Act, St. 9 & 10 Victoria, c. 93.

An Act for compensating the Families of Persons killed by Accidents [August 26, 1846].

Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that whensoever 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, and although the death shall have been caused under such circumstances as amount in law to felony.

II. And be it enacted, that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct.

III. Provided always, and be it enacted, that not more than one action shall lie for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

IV. And be it enacted, that in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

V. And be it enacted, that the following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter; that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word 'Persons' shall apply to bodies politic and corporate; and the word 'Parent' shall include Father and Mother, and Grandfather and Grandmother, and Stepfather and Stepmother; and the word 'Child' shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

VI. And be it enacted, that this act shall come into operation from and immediately after the passing thereof, and that nothing therein contained shall apply to that part of the United Kingdom called Scotland.

VIII. And be it enacted, that this act may be amended or repealed by any Act to be passed in this session of Parliament.

APPENDIX B.

Federal Employers' Liability Act,
35 U. S. Stat. at L. 65, c. 149.

Section 1. Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. Every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

*291 Sec. 3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions

of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. (Amended by 36 U. S. Stat. at L. 291, c. 143, § 1.) No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Under this act an action may be brought in a [Circuit Court] of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Sec. 7. The term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. Nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled "An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employees," approved June eleventh, nineteen hundred and six.

Sec. 9. (Added by 36 U. S. Stat. at L. 291, c. 143, § 2). "Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

All Citations

114 Kan. 557, 220 P. 282, 39 A.L.R. 563

Footnotes

a1 Rehearing denied 220 Pac. 1049.

End of Document

GENERAL LAWS

OF THE

TERRITORY OF KANSAS,

PASSED AT THE FIFTH SESSION

OF THE

LEGISLATIVE ASSEMBLY;

BEGUN AT THE

CITY OF LECOMPTON,

ON THE 1ST MONDAY OF JAN'Y, 1859, AND HELD AND CONCLUDED

AT THE

CITY OF LAWRENCE.

PUBLISHED BY AUTHORITY.

LAWRENCE, K. T.:
HERALD OF FREEDOM STEAM PRESS.
1859.

CONTENTS.

AUTHENTICATION.

I, HUGH S. WALSH, Secretary of the Territory of Kansas, do hereby certify that the printed Acts contained in this volume, are true copies of the enrolled laws on file in my office, which were passed at the session of the Legislative Assembly of said Territory, held in the months of January and February, A. D. 1859, with the exception of the correction of clerical errors.

SEAL

Given under my hand and the great seal of the Territory, at Lecompton, this 1st day of June, A. D. 1859.

HUGH S. WALSH.

GENERAL LAWS.

CHAPTER I.

AN ACT authorizing Actions to be brought in certain Cases.

Be it enacted by the Governor and Legislative Assembly of the Territory of Kansas:

Action to survive death of party.

SECTION 1. That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as could, [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, and although the death shall have been caused under such circumstances as amount, in law, to murder in the first or second degree, or manslaughter.

Brought in name of representative.

SEC. 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow, if there be one, and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate; and in every such action the jury may give such damages as they may deem fair and just, not exceeding ten thousand dollars: *Provided*, That every such action shall be commenced within two years after the death of such deceased person.

Commenced in two years.

SEC. 3. This Act shall take effect and be in force from and after the first day of June next.

A. LARZALERE,
Speaker of the House of Representatives.
C. W. BABCOCK,
President of the Council.

Approved February 8, 1859.

S. MEDARY,
Governor.