

IN THE SUPREME
COURT OF FLORIDA

CASE NO. 67,398

FILED
SID J. [unclear]

SEP 18 1985

CLERK, SUPREME COURT
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Chief Deputy Clerk

NANCY C. VILDIBILL, as personal
Representative of the Estate of
Steven Allen Paul, deceased,

Petitioner-Appellant,

v.

EDDIE JOHNSON, AAA COOPER TRANSPORTATION,
INC., and TRANSPORT INSURANCE COMPANY.

Respondent-Appellee.

ON CERTIFICATION FROM
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANSWER BRIEF OF APPELLEE

GWYNNE A. YOUNG, Attorney-at-Law
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
P.O. Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Respondent/Appellee

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STATEMENT OF ISSUE

I.

FLORIDA'S WRONGFUL DEATH ACT DOES NOT ALLOW THE PERSONAL REPRESENTATIVE OF A DECEDENT'S ESTATE TO RECOVER FOR LOSS OF NET ACCUMULATIONS OF ESTATE WHEN THE DECEDENT IS NOT A MINOR CHILD AND IS SURVIVED BY PARENTS.

STATEMENT OF CASE AND FACTS

Appellee concurs in Appellant's Statement of the Case.
The parties agree that there are no genuine issues of material
fact.

SUMMARY OF ARGUMENT

The Florida Wrongful Death Act permits a decedent's personal representative to recover certain lawfully prescribed damages for the benefit of the decedent's survivors and estate. The Florida courts have repeatedly held that damages provided under the Florida Wrongful Death Act are constitutional despite the fact that certain classes of individuals, as in the instant case, are not entitled to damages under the Act. Florida Statutes, section 768.18(1) defines survivors to include parents. Florida Statutes, section 768.18(2) defines minor children as children under twenty-five years of age notwithstanding the age of majority.

Appellant's claim for wrongful death seeks recovery for the prospective loss of net accumulations of decedent's estate; however, the Florida Wrongful Death Act clearly does not permit Appellant here to recover these prospective net accumulations.

The Florida Wrongful Death Act provides for recovery of prospective net accumulations of an estate in only two situations, neither of which is present here. The decedent's survivors do not include a surviving spouse or lineal decedents. Further, though decedent was twenty-five years of age at the time of his death and therefore not a minor child, as defined in Florida Statutes, section 768.18(2), he does have survivors as defined in section 768.18(1), Florida Statutes, namely, his natural mother and father. Therefore, Appellant, as personal

representative of decedent's estate, may not recover for loss of prospective net accumulations of the estate pursuant to section 768.21(6)(a)(2).

The express language of the Florida Wrongful Death Act, as amended in 1981, is clear and unambiguous. To construe the statute as suggested by Appellant would require this court to accomplish a significant change in the common law by implication. Such an amendment by implication is contrary to well established legal principals which hold that, courts in interpreting statutes which change the common law will not presume that the legislature intended to make any alteration in the common law other than that which is plainly pronounced under the express language of the statute.

Florida courts have repeatedly upheld the validity of the Florida Wrongful Death Act even though certain parties are denied recovery under the terms of the statute. Applying the clear language of the statute to the instant facts and considering prior cases interpreting the statute, the certified question should be answered in the negative.

ARGUMENT

FLORIDA'S WRONGFUL DEATH ACT DOES NOT ALLOW THE PERSONAL REPRESENTATIVE OF A DECEDENT'S ESTATE TO RECOVER FOR LOSS OF NET ACCUMULATIONS OF ESTATE WHEN THE DECEDENT IS NOT A MINOR CHILD AND IS SURVIVED BY PARENTS.

At common law, there existed no right of action to recover damages for the death of a human being occasioned by the negligent act of another. Chamberlain v. Florida Power Corp., 114 Fla. 719, 198 So. 486 (1940). Thus, the right to bring an action for wrongful death exists only by virtue of statute, Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926); Stern v. Miller, 348 So.2d 303 (Fla. 1977), and having created the right of action, the legislature may alter the elements of damage recoverable under the statute. White v. Clayton, 323 So.2d 573 (Fla. 1975).

The Florida Wrongful Death Act permits a decedent's personal representative to recover certain lawfully prescribed damages for the benefit of the decedent's survivors and estate. The Florida courts have repeatedly held that damages provided under the Florida Wrongful Death Act are constitutional despite the fact that certain classes of individuals as in the instant case were not entitled to damages under the Act. White v. Clayton, 323 So.2d 573 (Fla. 1975) (limiting recover of net accumulations to surviving spouse or lineal decedents does not violate the equal protection clauses); Bassett v. Merlin, Inc., 335 So.2d 273 (Fla.

1976) (recovery of net accumulations not permitted when decedent was not a minor and was survived only by his parents); Capiello v. Goodnight, 357 So.2d 222 (2d DCA Fla. 1978) (Wrongful Death Act is not unconstitutional because it does not permit recovery of net accumulations by adult, nondependent children of decedent); Martin v. United Security Services, Inc., 314 So.2d 765 (Fla. 1975); Henderson v. Insurance Company of North America, 347 So.2d 690 (4th DCA Fla. 1977). Gullien v. Kitching, 354 So.2d 900 (3rd DCA Fla. 1978).

§768.18(1), Florida Statutes, provides that:

"Survivors" means the decedent's spouse, minor children, parents, and when partly or wholly dependent on the decedent for support or services any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support."

Further, §768.18(2), Florida Statutes, defines "minor children" as "children under twenty-five years of age, notwithstanding the age of majority."

Appellant's claim for wrongful death seeks recovery for the prospective loss of net accumulations of decedent's estate; however, the Florida Wrongful Death Act clearly does not permit Appellant here to recover these prospective net accumulations.

Section 768.21(6) provides that:

(6) The decedent's personal representative may recover for the decedent's estate the following:

(a) Loss of earnings of the deceased from the date of injury to the date of death, less loss support of survivors excluding contributions in kind with interest. Loss of the prospective net accumulations of estate which might reasonably have been expected but for the wrongful death, reduced the present money value, may also be recovered:

1. If the decedent's survivors include a surviving spouse or lineal decedents; or

2. If the decedent is not a minor child as defined in §768.18(2) and does not have survivors as defined in §768.18(1).

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).

Thus, the Florida Wrongful Death Act provides for recovery of prospective net accumulations of an estate in only two situations, neither of which is present here. The decedent's survivors do not include a surviving spouse or lineal decedents. Further, though decedent was twenty-five years of age at the time of his death and therefore not a minor child as defined in §768.18(2), he does have survivors as defined in §768.18(1), Florida Statutes, namely, his natural mother and father. Therefore, Appellant here may not recover for loss of prospective net accumulations of the estate pursuant to §768.21(6)(a)(2), Florida Statutes.

In Jones, Varnum & Co. v. Townsend, 23 Fla. 355, 2 So. 612, 613 (1887), the Florida Supreme Court said:

". . . [I]t is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified and besides what is plainly pronounced" (Emphasis in original).

Furthermore, in Bryan v. Landis, 106 Fla. 19, 142 So. 650, 651 (1932), the Florida Supreme Court said:

"Statutes designed to change the common law rule must speak in clear unequivocal terms, as this rule will not be changed by doubtful implications, and, if changed or modified, the change or modification extends no further than is expressly declared." (Emphasis added).

Appellant argues that the 1981 amendment creates an ambiguity in the definition of parent as a survivor under the act. Notably, the definition of survivors was unchanged by the amendment. The terms of the statute are clear and unambiguous. Survivors is defined to include parents not "dependent" parents.

Appellant also argues that a parent is not a survivor if a parent has no individual right to recover. The personal representative always brings action for the benefit of those entitled to recover. Pursuant to Florida Statutes § 768.21(1) survivors may recover the value of lost support and services, future loss of support and services, and medical or funeral expenses if paid by the survivor under § 768.21(5). In the instant case, the decedent has not been killed without a remedy as asserted by appellant. Rather his survivors do not qualify

for the statutory remedy to which they are entitled. To interpret the statute otherwise is contrary to the clear statutory language.

Appellant incorrectly argues that the instant fact situation is the only instance where an estate cannot recover net accumulations. An estate cannot recover net accumulations where the decedent is a 25 yr. old with only parents, a 25 yr. old with dependent blood relatives, a 25 yr. old with dependent adoptive brothers and sisters, or where the decedent is a minor child survived by parents. Interestingly, an estate where the decedent is survived by parents regardless of age of the child, may not recover net accumulations. Clearly, the intent of the statute is to provide a recovery to those who need it, the spouse, children or dependents. It allows recovery by children from their parents but not vice versa. Parents may only recover where they are dependent upon their children.

Appellant also argues that where there are no survivors as defined by the statute and the estates recovers net accumulations, the recovery escheats to the state. This is incorrect. The estate may be distributed by will, by intestate succession, or to pay creditors, before it would escheat to the state. Thus, it would be rare that a recovery would escheat to the estate.

The instant statute is not ambiguous. It's meaning is clear on its face. Thus there is no construction necessary. As the Court stated in State v. Beardsley, 94 So. 660 (Fla. 1922) "where

the legislative intent is clearly manifest by the language used considered in its ordinary and grammatical sense, rules of construction are unnecessary and inapplicable." See also Englewood Water District v. Tate, 334 So.2d 626 (2d DCA Fla. 1976).

The express language of the Florida Wrongful Death Act, as amended in 1981, is clear and unambiguous. The term survivors, as defined by the statute, includes parents. Appellant argues that the definition of survivors does not include parents when parents have no right of recovery on their own behalf.¹ Such a construction would require this court to accomplish a significant change in the common law by implication. To construe the statute as Appellant suggests is contrary to long established precedent. Appellant would ask this court to judicially amend the statute and insert language expanding the rights of recovery beyond that which is expressly set forth in the statute. An expansion of the rights of recovery under the Florida Wrongful Death Act is a matter for the Legislature, not the courts.²

¹ Parents who are dependent on their children for support and services do have a right to recover the value of loss of support and services. The parents in the instant case were not dependent, therefore they have no right to recover any damages other than the funeral bill if they paid it.

² During the 1985 legislative session, the legislature passed a bill providing for recovery of net accumulations by a non-dependent parent of an adult child which became effective on June 19, 1985. Chapter 85-260, Florida Session Laws.

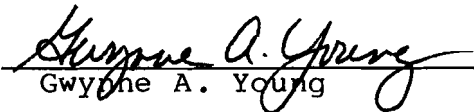
The Florida courts have repeatedly upheld the validity of the Florida Wrongful Death Act even though certain parties are denied recovery under the terms of the statute. Applying the clear language of the statute to the instant facts, and considering prior cases interpreting the statute, the certified question should be answered in the negative.

CONCLUSION

The language of the Florida Wrongful Death Act is clear and unambiguous. Decedent was not a minor child as defined in Florida Statute, section 768.18(2) and had survivors as defined in Florida Statute, section 768.18(1), namely his natural mother and father. Therefore, pursuant to Florida Statute, section 768.21(6)(a)(2), Appellant, as personal representative of decedent's estate, may not recover for loss of prospective net accumulations of the estate. Thus the certified question should be answered in the negative.

Respectfully submitted,

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
P. O. Box 3239
Tampa, Florida 33601
(813) 223-5366
Attorneys for Respondent/Appellee

By: 
Gwynne A. Young

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail this 9th day of September, 1985, upon: Todd R. Stern, Esquire, 601 East Twiggs Street, Tampa, Florida 33602; and Joseph F. Kinman, Jr., Esquire P. O. Box 3324, Tampa, Florida 33601.



Attorney