

Supreme Court No. 85679-6

SUPREME COURT OF THE STATE OF WASHINGTON

In Re: THE ESTATE OF ASHLIE BUNCH:

AMY KOZEL
Petitioner,

v.

MCGRAW RES. CTR d/b/a SEATTLE CHILDREN'S HOME,
et al.
Respondents.

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STATE OF WASHINGTON
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PETITIONER'S RESPONSE TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION

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I. INTRODUCTION

Petitioner Amy Kozel (“Kozel”) files this response to the amicus brief filed by the Washington State Association for Justice Foundation.

II. STATEMENT OF THE CASE

For the purposes of this response, Kozel relied upon the statement of the case set forth in her supplemental brief.

III. ARGUMENT

A. **Joinder of a Parent is Required Under 4.24.010 Where that Parent Appears in the Action.**

In its amicus brief, the Washington State Association for Justice Foundation (“Amicus”) states that joinder of a second parent should be automatic under RCW 4.24.010 when that second parent files a pleading seeking to join the other parent’s action. *Brief of Amicus Curiae*, p. 8. Kozel agrees. There is nothing in the statute, or in the notice received by Kozel pursuant to the statute, that required Kozel to follow any procedure in particular to join in the action. The Motion she filed in the action was sufficient to establish her appearance and joinder.

As indicated by the record in this case, Kozel was served with the statutorily required notice of institution of suit. That notice, which is similar in form to a summons, advised Kozel that:

You must join as a party to the suit within twenty (20) days after the date this Notice was served upon you... or within sixty (60) days if this Notice was served outside the State of Washington, or your right to recover damages under RCW 4.24.010 shall be barred. **Your failure to timely appear will bar your action to recover any part of an award made to Steven Bunch, individually.** CP 47- 48 [emphasis added].

Consistent with the requirements of the statute and the Notice, Amy Kozel appeared in the action through her “*Motion to Intervene in Death of a Child Action*” within the time limit imposed. CP 50 – 53. Kozel styled the pleading as a motion under CR 19 (Joinder of Persons Needed for Just Adjudication). While Kozel may have referenced CR 19, her Motion clearly demanded intervention pursuant to RCW 4.24.010. The Motion stated: “Amy Kozel is the mother of Ashlie Bunch. Pursuant to 4.24.010, she has a claim under the Death of a Child statute,” implicitly asserting her automatic right to join in the suit. CP 51. In addition, Kozel requested intervention as a matter of right: “[Ms. Kozel] is an indispensable party and must be allowed to intervene.” CP 53.

In denying Kozel’s right to join the action, the Court of Appeals purported to apply the standards imposed by CR 19 through the lens of RCW 4.24.010. The Court refused to address any argument based on CR 24, notwithstanding Kozel’s trial court argument, at CP 53, that she was entitled to intervene as a matter of right. Bunch v. McGraw Residential Center, 159 Wn.App. 852, 856, 248 P.3d 565 (Div. 1, 2011). The Court of Appeals’ approach incorrect for at least three reasons.

First, as pointed out by Amicus, RCW 4.24.010 sets forth no procedural requirements specifying any Civil Rule to which a parent of an injured or dead child must comply. Rather, the statute only states that **“[f]ailure of the other parent to timely appear shall bar such parent's action to recover any part of an award made to the party instituting the**

suit.” [emphasis added]. The effect of this language, requiring appearance only, is underscored by another sentence in the statute, stating: “Such notice shall be in compliance with the statutory requirements for a summons,” further indicating that that a sufficient response to the notice is an appearance, not motions practice based upon some unidentified Civil Rule.

A litigant appears in response to a summons when she makes any application for an order in the case. RCW 4.28.210. Kozel, therefore, appeared in the lawsuit. Her parentage, having been duly established, allowed her to intervene, and she made a timely appearance as required under RCW 4.24.010. She was therefore entitled to join in the suit. Technicalities, such as whether the correct Civil Rule was cited, should not be interposed to deprive her of this right. Pleadings are to be liberally construed—after all, their purpose is to facilitate a proper decision on the merits, “not to erect formal and burdensome impediments to the litigation process.” State v. Adams, 107 Wn.2d 611, 620, 732 P.2d 149 (1987).

Kozel’s automatic joinder does not mean that Respondent McGraw would have been without opportunity to challenge Kozel’s standing. After a parent has joined the action, another party who contends that that the parent does not qualify for recovery under RCW 4.24.010 could of course bring a motion to dismiss under CR 12 or CR 56. Those rules provide the trial court and the parties with clearly established procedural rules. Had they been applied in this case, many of the messy procedural questions presented in this record would have been avoided. Instead, as illustrated by

the facts of this case, the application of CR 19 analysis by the trial court and the Court of Appeals introduced unnecessary and difficult issues, such as whether counsel should have cited CR 19 or CR 24, or should have demanded a hearing or not.

Second, the restrictive application of CR 19 ignores the facts that Kozel stated, in her brief, that (1) she is entitled to join because she is a parent of Ashlie and (2) that she sought to intervene. CR 1 provides that the Civil Rules “shall be construed to secure the just, speedy, and inexpensive determination of every action.” Particularly with respect to CR 17 – 25, the purpose of the rules “is to enable the trial court to expeditiously reach the merits of the controversy with the least procedural difficulty . . . Accordingly, a practical solution should be preferred to a technical one whose use might result in frustrating the purpose of the superior court rules. Kohl v. Zemiller, 12 Wn.App. 370, 372, 529 P.2d 861 (Div. I, 1974.). By ignoring the arguments within Kozel’s Motion, and instead focusing on the Civil Rule cited, the Court of Appeals’ decision runs afoul of the principle that the Civil Rules should be construed so as to eliminate procedural traps and provide uniformity in judicial procedure. Gott v. Woody, 11 Wn.App. 504, 508, 524 P.2d 452 (Div. II, 1974).

Third and finally, the application of CR 19 as a threshold bar to joinder effected a subtle yet devastating shift in the burden among the parties. It became Kozel’s initial burden to establish that she must be joined in for just adjudication under CR 19, rather than the burden of the defendant to establish

the absence of a valid claim under CR 12, CR 56 or other applicable rule. On the other hand, Bunch, solely because he was the party to file the lawsuit, was established as a proper litigant. Nothing in the statute suggests that only the first party to file suit is automatically considered to be a party and therefore enjoys the advantage of the legal burden against those who might consider him or her to be illegible to claim damages under RCW 4.24.010. Rather, the statute was enacted in order to afford an opportunity to any parent to intervene in a lawsuit relating to the injury or death of a party, and the statute should be so interpreted to avoid the “unseemly race to the courthouse” of which Amicus warns. *Brief of Amicus Curiae*, p. 5.

B. 4.24.010 is a Remedial Statute that Requires Construction Consistent with its Purpose.

At pages 10 through 16 of its brief, Amicus suggests that this Court should resolve conflicting lines of cases that suggest, on the one hand, that wrongful death and survival statutes must be construed “strictly” because they are in derogation of common law (e.g., Whittlesey v. Seattle, 94 Wash. 645, 647, 163 Pac. 193 (1917)) or “liberally” in order to promote the purpose of the statutes (e.g., Beggs v. DSHS, 171 Wn.2d 69, 82, 247 P.3d 421 (2011)). Amicus urges that the Court of Appeals erred when it held that RCW 4.24.010 must be “strictly construed.” Bunch, 159 Wn.App. at 865.

Amicus is correct. In its opinion, the Court of Appeals cited to McNeal v. Allen, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980) for the oft-stated proposition that “statutes in derogation of the common law must be strictly construed.” Bunch, 159 Wn.App. at 865. However, McNeal involved the

construction of a procedural rule, RCW 4.28.360, requiring that a plaintiff respond to a request for a statement of damages within fifteen days. Relying on the conclusion that RCW 4.28.360 was procedural in nature, the Court strictly construed it, rejecting the notion that the statute expresses an intent by the legislature to create a cause of action for noncompliance with its procedural requirements.

McNeal, a case involving the construction of a procedural rule, is unconvincing in light of the large number of cases holding that the wrongful death statutes are **remedial** in nature, and therefore must be construed liberally. As early as 1939, this Court recognized that wrongful death statutes, “being remedial in their nature, are liberally construed.” Cook v. Rafferty, 200 Wash. 234, 240, 93 P.2d 376 (1939) (allowing wrongful death action by parents partially dependent upon their daughter for support).

The Court reaffirmed this principle in 1954, holding that “being remedial in nature, [the wrongful death] statute is to be liberally construed” when it held that where a husband murdered his wife and then committed suicide, leaving children, the deceased wife's personal representative had a cause of action against husband's estate. Johnson v. Ottomeier, 45 Wn.2d 419, 275 P.2d 723 (1954).

In 1963 this Court rejected the contention that a wrongful death action could not pass to the estate of a deceased beneficiary, again stating that “[i]n resolving this issue, we are mindful that the statute, being remedial in nature, is to be liberally construed.” Gray v. Goodson, 61 Wn.2d 319, 324, 378 P.2d

413 (1963). More recently, Armijo v. Wesselius, 73 Wn.2d 716, 440 P.2d 471 (1968), rejected a strict construction approach in order to allow recovery by the “illegitimate” child of a decedent.

Relying on Gray v. Goodson and Johnson v. Ottomeier, 45 Wn.2d 419, 423, 275 P.2d 723 (1954) Division III of the Washington Court of Appeals held that a defendant could be liable for the death of a viable 8-month old fetus:

Washington statutes have created three causes of action which may apply to the tortious death of a child. RCW 4.20.010; RCW 4.20.046; RCW 4.24.010. These statutes, being remedial in nature, are to be liberally construed. . . . The Legislature enacted these statutes to remedy an anomalous twist in the common law which allowed victims of tortious injury to sue if they survived, but barred their claims if they died:

The result was that it was more profitable for the defendant to kill the plaintiff than to scratch him, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy. (Citing Warner v. McCaughan, 77 Wn.2d 178, 182, 460 P.2d 272 (1969) (quoting W. Prosser, Torts § 121 (3d ed. 1964)).

Cavazos v. Franklin, 73 Wn.App. 116, 118, 867 P.2d 674 (1994).

All of the above-cited cases involved the question of whether or not the claimant had a cause of action under the wrongful death statutes (the parents of an adult daughter, Cook; the children of a deceased wife, Johnson; the Estate of a deceased beneficiary, Gray; the illegitimate child of decedent, Armijo; the parents of a deceased fetus, Cavazos). **All of them liberally construed the wrongful death statutes liberally in finding that the claimants were indeed proper beneficiaries.**

Ignoring these cases, the Court of Appeals in the instant case instead relied on the Court of Appeals case, Phillippides v. Bernard, 151 Wn.2d 736, 390, 88 P.3d 939 (2004), for the proposition that “causes of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law.” Bunch, 159 Wn.App. at 858. Phillippides in turn relies on Tait v. Wahl, 97 Wn.App 765, 987 P.2d 127 (Div. I, 1999). Tait rejected the claim of the decedent's niece, her children, and the decedent's non-dependent brother for wrongful death, stating: “[l]iberal construction of wrongful death statutes is appropriate only after the proper beneficiaries have been determined.” Tait cites to another Division I case, Masanuga v. Gapasin, 57 Wn.App. 624, 631, 790 P.2d 171 (1990).

As noted by Amicus, this “strict construction” approach to the identification of proper beneficiaries originated in Whittlesey v. City of Seattle, 94 Wash. 645, 163 P. 193 (1917). Whittlesey denied the surviving children of a deceased woman the right to sue for her wrongful death because the statute, at that time, explicitly limited such an action to the survivors of a dead father or husband. From this case, which rests upon antiquated notions of the effect of a wrongful death statute and the role of mothers and fathers, the lower courts in the instant case have denied Kozel the right to intervene.

The “strict construction” language of Whittlesey with respect to identifying beneficiaries under wrongful death statutes has been seriously diminished by the later decisions of this Court, cited above (Cook, Johnson, Gray and Armijo). “Strict construction” has no valid application in the

reading of a remedial statute. In addition, this Court may consider that the results of Whittlesey, Masanuga, and Tait would have been identical even had “strict construction” not been employed. In each of those cases, the wrongful death statutes at hand simply did not reference the class of claimants involved (the children of a deceased woman, Whittlesey; the non-financially dependant parents of a deceased adult child, Masanuga; and the niece of a decedent; Tait). The courts, in each of those cases, were constrained to apply the wrongful death statute as it exists or (existed). The statute, making no provision for, or even reference to, each class of claimant, could not be expanded or augmented in order to provide relief that was not in the contemplation of the Legislature. In other words, “strict construction” was not required: the statutes were **entirely silent** with respect to each type of claimant in the Whittlesey, Masanuga and Tait cases.

In the instant case, however, Amy Kozel belongs to a class of persons who are specifically identified as being actual or potential beneficiaries of the statute. RCW 4.24.010 provides that “[a] mother . . . who has regularly contributed to the support of . . . her minor child . . . may maintain or join as a party an action as plaintiff for the injury or death of the child.” The intent section (upon which this Court must rely in the event these words are ambiguous) states “[t]he legislature intends to provide a civil cause of action for wrongful injury or death of a minor child to a mother . . . if the mother . . . has had significant involvement in the child's life, including but not limited to, emotional, psychological, or financial support.”

The narrow construction proposed by Whittlesey simply has no application where, as here, the statute expressly references parents. Following appearance, a parent is entitled to participate in the lawsuit until and unless another party establishes that he or she has not regularly contributed to the child's support and has not had significant involvement with the child and brings the appropriate motion under the Civil Rules. In the event either parent – whether the first one who brought the lawsuit or the second one who joined the suit – is shown to not have “regularly contributed,” that parent's claim is appropriately dismissed.

In this case, it is conceded by the Respondent that Kozel regularly contributed to the support of Ashlie for years and has had significant involvement in her life. Any claimed attenuation or cessation of that relationship in more recent times simply leaves the amount of Kozel's damages in the hands of the jury: “In such an action . . . damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.” RCW 4.24.010.

This Court should follow the line of cases, including Cook v. Rafferty, Johnson v. Ottomeier, Gray v. Goodson, and Armijo v. Wesselius, to construe RCW 4.24.010 to include Amy Kozel. Narrow construction has no valid application in this case, and serves only to defeat the remedial purpose intended by the Legislature.

IV. CONCLUSION

Commenting upon the development of wrongful death statutes in a Supreme Court Opinion, Justice Cardozo articulated:

Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. **'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.'** Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day.

Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350, 57 S.Ct. 452, 81 L.Ed. 685 (1937). This language was cited, with approval, in Gray v. Goodson, 61 Wn.2d at 327. The reasoning remains as persuasive today as it was then. This Court should reject the contention that the second parent to join a lawsuit must face threshold hurdles that are not set forth in the remedial wrongful death statute.

RESPECTFULLY SUBMITTED this 28 day of October, 2011,



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