

It is doubtful whether the court meant to commit itself on the question of recovery on the theory of implied warranty where no privity of contract exists; yet the language of the court allows the conclusion that such a problem when presented will receive liberal treatment. For a discussion of this problem, see 4 O.S.L.J. 403.

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TORTS

RELEASE BY THE SOLE BENEFICIARY UNDER THE WRONGFUL DEATH ACT

Ralph Pilkington, a minor, was injured by defendant on April 7, 1934. His mother, who was his next of kin and sole beneficiary under the Wrongful Death Act, made application to the probate judge for consent to a settlement for \$495 without the appointment of a guardian as provided in General Code, section 10507-19. The court gave its consent and ordered payment by defendant and execution of a release by Mrs. Pilkington (for Ralph) of any and all claims arising out of the accident and injuries. This release was executed on May 24, 1934, and on the same day, Mrs. Pilkington in consideration of \$225 executed another release of all actions or claims she had or might have in the future as sole beneficiary under the wrongful death statute. The son died July 2, 1935, from the results of the injury, and the present action for wrongful death was brought by his administratrix for the next of kin. The court of appeals stated that the release by the decedent would not bar such an action, but held that the additional release by the sole beneficiary prior to the death of the injured person constituted a valid defense to any action subsequently brought by the personal representative of the deceased under the wrongful death statute. *Pilkington v. Saas*, 25 Ohio L. Abs. 663 (Ohio App. 1938).

In reiterating the doctrine that a settlement and release by the decedent is no defense to an action for wrongful death brought by his personal representative after his death, the court once again states the minority view which has, as yet, been followed by the courts of Ohio. General Code, section 10509-166 gives the personal representative an action to be brought for the benefit of the next of kin "when the death of a person is caused by a wrongful act, neglect, or default *such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued. . . .*" There are like provisions in the statutes of all states. The earlier Ohio cases held that a

settlement by the decedent was a defense to such an action. "If the deceased in his lifetime has debarred himself from recovery, he has no cause of action to which the statutory cause could succeed. It prevents an action from arising in favor of the next of kin and precludes his administratrix from recovering upon a liability which the deceased in his lifetime by his own act discharged." *The Solor Refining Co. v. Elliott*, 8 Ohio C.D. 225, 15 Ohio C.C. 581 (1898). "Should the injured party be compensated in his lifetime, no action can be maintained by his administrator or next of kin for damages." *Helman v. The P., C., & St. L. Ry. Co.*, 58 Ohio St. 400, 50 N.E. 986, 41 L.R.A. 860 (1898).

Shortly thereafter, however, the seed of the present contrary doctrine was sown by the Supreme Court in *Railway Co. v. Van Alstine*, 77 Ohio St. 395, 83 N.E. 601, 14 L.R.A. (N.S.) 893 (1908). In that case, in holding that a recovery by the personal representative in a survivor action under General Code, section 11235 did not bar an action for wrongful death, the court said: "The two actions, although prosecuted by the same personal representative, are not in the same right, and hence a recovery and satisfaction in one case is not a bar to a recovery in the other."

Enlarging upon this statement, the court in *Maguire v. Cin. Traction Co.*, 14 Ohio C.C. (N.S.) 431, 230 Ohio C.D. 24 (1911), held that a release by the decedent did not bar an action for the next of kin and stated: "We do not think it is within the power of the party injured, by any act of his subsequent to the injury, to bar this action." The court's interpretation of the statute was that the death of the injured party gave a new cause of action entirely independent of the injured person's or his personal representative's right to recover for the wrong. The wrongful act must be of such a *character* as would have entitled the injured person to maintain an action and recover damages in respect thereof. "Circumstances of the accident or injury determine the right of such action and not whether the deceased had an action which he could have maintained at his death." The same construction was used in *Coal Co. v. Robinette*, 120 Ohio St. 110, 165 N.E. 576, 64 A.L.R. 441 (1929). However there is a possibility in the *Maguire* case that the court was influenced by the fact that the settlement was made with the decedent for \$25.

In *Phillips, Adm'x v. Community Traction Co.*, 46 O. App. 483, 189 N.E. 444, 7 Ohio Bar 291 (motion to certify overruled—1933), the court allowed recovery by the administratrix for the benefit of the children even though both the injured wife and the husband had executed separate releases.

A few jurisdictions take a similar stand. The California courts so hold, saying that there is a new cause of action with a different measure of damages from that which accrued to the injured person. *Earley v. Pac. Electric Ry. Co.*, 176 Cal. 79, 167 Pac. 513, L.R.A. 1918A 997 (1917). The Massachusetts courts hold there is a new cause of action giving a penalty to the heir for the death of the injured person and that the injured person has no control over it. *Wall, Executrix v. Mass. Northeastern St. Ry. Co.*, 229 Mass. 506, 118 N.E. 864 (1918). The Massachusetts statute gives a penalty in fact, however, and by doing so expresses the legislature's intention that the decedent be not able to relieve the tort-feasor from the action.

On the other hand, most jurisdictions take a contrary view of the effect of a release by the decedent. "The widow and child of one who has settled with and released the party liable for his injuries, cannot maintain an action for his subsequent death resulting from the same injuries." *Thompson v. Fort Worth & Rio Grande Ry. Co.*, 97 Tex. 590, 80 S.W. 990 (1904). "A widow has no independent right of action for the death of her husband caused by negligence or default of another which he could not release in his lifetime, after injury and before death." *Hill v. Pennsylvania Rd. Co.*, 178 Pa. 223, 35 Atl. 997, 35 L.R.A. 196 (1896). See note 27 L.R.A. (N.S.) 176. "An action for wrongful death is barred by a release executed by the decedent." *Lindsay v. Chicago, B. & Q. R. Co.*, 226 Fed. 23, 141 C.C.A. 131 (1915); *Perry v. Philadelphia, B. & W. R. Co.*, 1 Boyce (Del.) 336, 77 Atl. 725 (1910); 8 R.C.L. 786; *Fuller v. Atchison, T. & S. F. Ry. Co.*, 124 Kan. 66, 257 Pac. 971 (1927); Tiffany, *Death By Wrongful Act*, 269.

It is true that a few of these jurisdictions hold, in interpreting the wrongful death statute, that it does not create a new cause of action but that it is merely a successor to the decedent's action for personal injuries. The majority, however, agree with Ohio courts that it creates a new cause of action but differ on the effect of a release by the decedent. The reasoning of these latter courts is well stated in *Southern Bell Tel. & Tel. Co. v. Cassin*, 111 Ga. 575, 36 S.E. 881, 50 L.R.A. 694 (1900): "The statute gives rise to a new cause of action and thus there are two actions that may be maintained by the personal representative (survivor action and the action for wrongful death). But they are not independent; they are concurrent and connected. Both arise from the injury which is wiped out by a release and settlement by the deceased before his death." Of course, in all the states the release can be avoided for fraud or because the decedent was not *sui juris*.

The principal argument advanced against the Ohio court's refusal to recognize a release by the injured person as a valid defense to a subsequent wrongful death action is that it makes the tort-feasor pay twice for the same wrong. The Ohio courts deny this because they say the statute gives a new and separate cause of action entirely divorced from the one that the injured person had. Yet it is well to note that, although allowing the survivor action and the wrongful death action to be maintained concurrently, all courts, including those of Ohio, limit the elements of damage recoverable in each. "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." *Coal Co. v. Robinette*, *supra*; *Railway Co. v. Van Alstine*, *supra*. The Ohio courts are particular to see that these elements of damage do not overlap.

The elements of damage considered in a settlement and release include not only medical services, pain and suffering of the injured person, but also include the pecuniary loss to his dependents resulting from his present disability and his incapacity to provide for them in the future. The amount received in the settlement accrues to the estate and passes to the next of kin. Yet these same Ohio courts, in refusing to hold the release to be a defense in a wrongful death action, take no cognizance of a possibility of twice compensating the next of kin for the same mishap or of making the tort-feasor pay twice for the same wrong. In addition to this unfortunate result, the Ohio courts are also turning their backs on a well established policy—that of encouraging the settling of disputes without litigation and without delay.

In states other than Ohio, if the injured party lives long enough to prosecute a suit against the tort-feasor and recover from him, then such recovery will be a valid defense to a wrongful death action after his death. "While the right of action given to the personal representative is a new cause of action which does not arise until after death, yet the decedent's recovery of damages for the injuries which resulted in his death is a bar to an action by his personal representative for a wrongful death." *Golding v. Town of Knox*, 56 Ind. App. 149, 104 N.E. 978 (1914); *Harris v. Ill. Cent. R. Co.*, 111 Miss. 623, 71 So. 878 (1916); *Little v. Blue Goose Motor Coach Co.*, 244 Ill. App. 427 (1928). Ohio has also held that a prior recovery by the deceased bars an action for wrongful death. *Alston, Adm'r v. C., C. & I. R. R. Co.*, 1 Ohio C.D. 353, 2 Ohio C.C. 45 (1886). The courts of this state since have held that a recovery by the administrator on the survivor action (where damages are limited to certain elements) is no defense

to the action for wrongful death, yet it has never been held that a suit and recovery by the decedent prior to his death is no defense to the subsequent action. If the Ohio courts make this distinction between the effect of a release by the decedent and of an action and recovery by the decedent, it seems inconsistent and unjustified.

In *Connors, Adm'x v. New York Central Ry.*, 20 Ohio N.P. (N.S.) 573, 29 Ohio D. 64 (1918), after deciding that the Federal Employers' Liability Act conferred the survivor and the wrongful death actions in the alternative, thereby giving validity as a defense to a release by the decedent, the court said, "The case at bar furnishes a fair example of what would otherwise occur under the circumstances. The employee settled for damages for total disability. Then to allow the personal representative to recover on behalf of the beneficiaries named in the statute would be to recover twice from the defendant for one injury. It would violate one of the fundamental principles of the law of damages; and so to construe an act of Congress as to obtain this result would equally violate one of the fundamental principles of statutory construction."

However, until the Supreme Court sees fit to interpret differently the effect of a release by the decedent, Ohio has taken the minority stand, discouraging settlement and making the wrongdoer pay twice for his default if he obtains a release from the decedent.

In *Pilkington v. Saas, supra*, an Ohio court for the first time held that a release by the sole beneficiary before the death of the injured person, coupled with the latter's release, will be a valid defense to an action by the personal representative after the death has occurred. The only case approaching the problem was *Cullison, Adm'r v. B. & O. R. R. Co.* 4 Ohio N.P. 360, 7 Ohio N.P. 602, 7 Ohio D.N.P. 269 (1897). Therein the court stated, "Where the widow, the sole beneficiary, there being no children, accepts from the relief department of a railroad company the money stipulated in a contract of release from further liability, she cannot afterwards in her character as administratrix bring an action for wrongful death."

This holding is in accord with the decisions in other jurisdictions. "Before the administrator is appointed, the sole beneficiary may compromise, settle and give a binding release of the death claim, good as against an administrator thereafter appointed." *Fischer v. Pope*, 229 Ala. 170, 155 So. 579 (1934). "In an action for death, the defendant would be entitled to assert as a defense a release executed by the decedent's heirs at law." *Peters v. Kanawha Banking & Trust Co.*, 191 S.E. 581 (1937); *Story v. Page*, 280 Mich. 34, 273 N.W. 384 (1937); *Tiffany, Death By Wrongful Act*, 269.

The release made by the beneficiary before the death of the injured person must expressly include release from all claims and actions which might be had in the future by the beneficiary in respect of the injuries as well as present claims and actions. If there be more than one beneficiary under the wrongful death statute, then a settlement and release by one beneficiary does not bar the action for the benefit of the others. *B. & O. R.R. Co. v. Hottman*, 1 Ohio C.C. (N.S.) 17, 15 Ohio C.D. 140; 17 C.J. 1247 (1903); *Phillips, Adm'r v. Community Traction Co., supra*.

Before the *Pilkington* case, insurance companies and other claim adjustors made the practice of having the beneficiaries join in the release with the injured person and then, to provide for the possibility of the release being held not to constitute a defense, had the beneficiaries also sign a contract of indemnity to the tort-feasor for any actions or claims arising out of the injuries in the future.

There is a split in the different jurisdictions as to the effect of a settlement and release directly with the beneficiary after the death of the injured party and after the personal representative has been appointed. A few states have taken the position that, since the wrongful death statute gives the personal representative the right to settle the claim with the consent of the probate court, the right to settle and release is exclusively in him and the beneficiary is powerless to do so. *Louisville v. Hart's Adm'rs*, 143 Ky. 171, 136 S.W. 212, 35 L.R.A. (N.S.) 207 (1911). Ohio seems to follow this view in *Baltimore and Ohio R.R. Co. v. McCamey*, 12 Ohio C.C. 543, 5 Ohio C.D. 631 (1896), wherein the court says, "The statute gave a cause of action to the personal representative, and so, when the beneficiary released, she released no right of action she might have had against the railroad company, because she had none." However, this statement by the court is purely dictum since there were other beneficiaries under the statute besides the one who released, and the court did not decide whether or not this one could share in the proceeds of the wrongful death action.

The majority of the courts, however, find that the beneficiary has power to make a valid settlement with the wrongdoer although an action on such a claim must be brought by the personal representative of the deceased. *McKeigue v. Chicago & N. W. Ry. Co.*, 130 Wis. 543, 110 N.W. 384, 11 L.R.A. (N.S.) 148, 118 Am. St. Rep. 1038 (1907). The courts have not directly met this problem as yet, but, with the *Pilkington* case as precedent, it seems likely that they will see fit to follow the majority view as expressed in *Fetty v. Carroll et al.*, 190 S.E. 683 (1937): "Under the code an action for wrongful death

is for the exclusive benefit of the decedent's next of kin; and, while the decedent's administrator alone may sue, his relation to any fund recovered is not that of the decedent's representative, but that of trustee for the next of kin. It would, therefore, seem the thing to do to admit any defense against him which would be a defense against them."

The possibility of now joining the beneficiary with the decedent in the release, in many cases, does not help to counteract the unfortunate result of Ohio's position on the effect of a release by the decedent alone. There are still problems presented where the beneficiaries are minors and cannot release, or where the tort-feasor overlooks or does not know of one or more of the beneficiaries (especially if he be a non-resident of the state), and thus a necessary signature is missing from the release.

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TRUSTS

THE RIGHT OF CREDITORS TO REACH THE CESTUI'S INTEREST

The defendant and his wife conveyed certain property to trustees under a trust device, naming themselves and their five children, or their heirs as beneficiaries. It was provided that the defendant was to receive one thousand dollars a year from the income of the fund so long as he acted as the manager of a business enterprise and thereafter he was to receive five hundred dollars per year for life in the form of a pension, but in the event the business were unprofitable for three years the trustee was authorized to sell the property and distribute the proceeds as therein provided, in which event the defendant was not to participate in the distribution. The plaintiffs subsequently recovered a judgment against the defendant and execution was returned unsatisfied. They then sought, by proceedings in aid of execution, to subject his interest in the trust to the payment of their claim. The defendant's salary account was overdrawn at the time these proceedings were instituted. The court denied recovery to the plaintiffs, saying that the defendant's interest in the fund "is too uncertain as to duration to be subject of an order in aid, except as to definite sums as they accrue to him."*

* *Kuhn, et al., v. Wolf*, 59 Ohio App. 15 (1938).

case is illustrative of the problem facing the creditor whose debtor is the *cestui* of trust having no other property subject to the payment of his obligations.

In undertaking to set forth the principles governing creditors' procedure in reaching such interests, the first part of this paper will be given