

**IN THE COURT OF APPEALS OF IOWA**

No. 8-940 / 08-0748  
Filed November 26, 2008

**LORI M. CHILDERS, Administrator of the  
Estate of Ricardo Berry,**  
Plaintiff-Appellant,

**vs.**

**KENNETH L. LOGEL, JR., KENNETH L.  
LOGEL and ANTHONY HERMAN,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Plaintiff appeals from a summary judgment dismissing a suit based on a wrongful death claim against defendants. **AFFIRMED.**

David Scieszczinski, Wilton, for appellant.

William Bush of Bush, Motto, Creen, Koury & Halligan, P.L.C., Davenport,  
for appellees Logels

Jennifer Rinden, Cedar Rapids, for appellee Herman.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

**SACKETT, C.J.**

Plaintiff, Lori M. Childers, the administrator of the estate of Ricardo Berry, appeals from a summary judgment dismissing a suit based on a wrongful death claim against defendants Kenneth L. Logel Jr., and Kenneth L. Logel. Plaintiff contends the district court erred in ruling that a release given to the defendants by her, the mother of the decedent, and Antonio Berry, the father of the decedent, precluded the estate's claim against the defendants. We affirm.

**BACKGROUND.** In May of 2005, Ricardo Berry, then two years of age, followed his father, Antonio Berry, across the tarmac of a car wash in front of a pickup truck driven by Kenneth Logel Jr. and owned by his father Kenneth Logel. Kenneth Jr. pulled the pickup forward hitting and inflicting injuries on Ricardo that led to his eventual death.

Antonio and plaintiff individually and as parents and next friend of Ricardo sued defendants in Muscatine County, Iowa, claiming that as a result of the negligence of Kenneth Logel Jr., Ricardo suffered injuries that resulted in his death. Antonio and plaintiff requested a judgment for damages to compensate for Ricardo's injuries, medical expense, death, lost wages, lost earning capacity, pain and suffering, loss of capacity for enjoyment of life, economic loss, and elimination of his estate as a result of premature death. They also sought damages for their loss of the society, companionship, services, and assistance of the child.

Lori and Antonio subsequently individually and as parents of Ricardo accepted the sum \$25,000 from the insurer of Kenneth Logel, Sr., dismissed their lawsuit with prejudice and executed and delivered the following release.

The undersigned, Lori M. Childers and Antonio L. Berry, individually and as Parents and Next Friend of Ricardo M. Berry, a minor child, deceased, (Plaintiffs) being of legal age, hereby acknowledge payment of the sum of Twenty-Five Thousand Dollars (\$25,000.00), in consideration of which payment we do hereby release, acquit and forever discharge Kenneth L. Logel Jr. and Kenneth L. Logel Sr. (Defendants), and Pekin Insurance Company, their agents, representatives and assigns, from any and all liability whatsoever, including all claims, demands and causes of action of every nature affecting me by reason of the following:

An Auto/pedestrian accident on or about May 30, 2005 at a commercial car wash located at 800 Grandview Avenue, Muscatine, Muscatine County, Iowa, a claim arising therefrom and which forms the factual basis of a lawsuit filed in the Iowa District for Muscatine County, Captioned: Lori M. Childers and Antonio L. Berry, Individually and as Parents and Next Friend of Ricardo M. Berry, a minor child, deceased vs. Kenneth L. Logel, Jr. and Kenneth L. Logel, Sr., Case No.: LACV016664.

As a further consideration of said payment, We hereby agree:

1. That this release covers all injuries and damages whether known or not and which may hereafter appear or develop arising from the matter referred above.

2. With respect to the promises and covenants contained herein, the Plaintiffs represent and warrant that they have not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand, or action that is the subject of this Release. That this release covers all liens and subrogation interests whether such liens are known or not and which may hereafter appear or develop arising from the matters referred to above. The undersigned Plaintiffs specifically warrant that they will be responsible for payment of any health care providers' liens, workers' compensation liens, disability insurance liens, Medicaid liens, Medicare liens, subrogation claims, and/or unpaid medical bills allegedly incurred as a result of the incident forming the basis of Plaintiffs' action against the Defendants. Plaintiffs further agree to indemnify, defend, and hold Defendant, Defendant's counsel, and Defendant's insurance carrier harmless against any action by any entity making a claim for payment of such liens, subrogation

claims, unpaid medical bills, and/or claims for future medical payments, whether made pursuant to Iowa Code Section 249A6(1), 42 U.S.C. § 1395y(b)(2), or any other action to enforce any such claims or liens, whether authorized by statute or common law.

3. That the above sum, is all that we will receive from any claim and no promise for any other or future consideration has been made by anyone.

4. That this release is executed as a compromised settlement of a disputed claim, liability for which is expressly denied by the parties released, and the payment of the above sum does not constitute an admission of liability on the part of any person or entity.

5. That we are executing this release solely on reliance upon my own knowledge, belief and judgment and not upon any representations made by the parties released or others on their belief.

THAT I HAVE READ THE FOREGOING RELEASE AND UNDERSTAND ITS TERMS AND FREELY AND VOLUNTARILY SIGN THE SAME.

DATED AT Muscatine THIS 11<sup>th</sup> DAY of April, 2007.

On May 29, 2007, plaintiff as administrator brought this cause of action contending that Kenneth Jr. was negligent in the operation of his father's vehicle and that the negligence was a proximate cause of the injuries and death of Ricardo. As administrator of the estate and on her behalf and on behalf of Antonio she sought a judgment for damages they sustained.<sup>1</sup>

Defendants filed this motion for summary judgment, contending the release set forth above had been executed by both of the parents, the claims here were barred by the release, and that a release by the parents of a deceased minor is enforceable even if an administrator of his or her estate has not been appointed.

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<sup>1</sup> She sought the same damages against defendant Anthony Herman, the owner of the car wash. Herman did not file a motion for summary judgment and is not a party to this appeal.

Plaintiff responded, stating the estate owed medical and funeral expenses. Plaintiff also filed an amended argument contending the settlement covered only the parents' right to damages, not the estate's. Defendants responded, contending that the funeral expenses had been paid and the claim plaintiff was making for funeral expenses was only the interest that would have accrued on the funeral expenses if the child had lived his normal life expectancy, it is not a debt of the estate, and the funeral bill was paid before the estate was opened.

After considering the motion, the plaintiff's resistance, and holding a hearing, the district court sustained it, noting the holding in *Sweet v. Allstate Ins. Co.*, 471 N.W.2d 798 (Iowa 1991), and considering the all-encompassing nature of the release signed by the parents, who are the child's only heirs at law.

**ISSUES ON APPEAL.** Plaintiff contends the summary judgment should be reversed and the matter should be remanded for trial contending: (1) the release was not pled as an affirmative defense, (2) the district court erred in taking judicial notice of the release, (3) only the administrator had the right to bring the wrongful death action, and (4) there is an issue of fact as to the interpretation of the release.

Defendants contend the issue of the affirmative defense was first raised on appeal; consequently, error was not preserved. They also contend that the claims made in this suit against them have been released and the parents' case raising the same claims has been dismissed with prejudice; consequently, the claims brought here are barred by law. They also argue that plaintiff failed to respond to their claim that the language of the release and the dismissal with

prejudice released the claims now being brought by the estate. They argue that the release was executed by Ricardo's two parents, his sole heirs and beneficiaries, and the settlement is binding on the estate—notwithstanding the fact the settlement was made prior to the appointment of the administrator.

**SCOPE OF REVIEW.** Under Iowa Rule of Civil Procedure 1.981(3), summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. In ruling upon a motion for summary judgment, the court considers “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.” Iowa R. Civ. P. 1.981(3). “No fact question exists if the only dispute concerns the legal consequences flowing from undisputed facts.” *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006), *In re Estate of Beck v. Engene*, 557 N.W.2d 270, 271 (Iowa 1996). We therefore examine the record before the district court in deciding whether the court correctly applied the law. *Id.*

**RELEASE NOT PLED AND DISTRICT COURT TAKING JUDICIAL NOTICE OF RELEASE.** The plaintiff contends that because defendants filed their motion for summary judgment prior to filing an answer and did not raise the release as an affirmative defense in an answer it is not at issue here. Defendants correctly argue that this issue was not raised in the district court and consequently error on it is not preserved. Issues not addressed by the district court will not be considered on appeal. See *Shenandoah Educ. Ass'n v. Shenandoah Cmty. Sch. Dist.*, 337 N.W.2d 477, 483 (Iowa 1983).

Plaintiff also contends that the district court should not have taken judicial notice of the release. She fails to state how error was preserved on this issue. The defendants, in filing their motion for summary judgment, alleged that the release attached to their motion had been signed by plaintiff and Antonio. Plaintiff never denied the fact the release was signed by the parents. There being no factual dispute as to the existence of the release and the fact that it was signed by plaintiff and Antonio, there is no basis to this argument.

**RIGHT TO BRING WRONGFUL DEATH ACTION.** Plaintiff contends that only the estate has the right to bring the child's wrongful death action. Again plaintiff has failed to show how this error was preserved in the district court.

Plaintiff contends that Iowa Code section 611.20 provides that the wrongful death cause of action may only be brought by the administrator of the minor's estate. We do not so read section 611.20, which states: "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." Furthermore, in *Sweet*, 471 N.W.2d at 800, the court held that parents could have validly released any of their dead son's claims arising from his death that survived his death.

Plaintiff also contends her position that only the administrator can bring the claim is supported by Iowa Code section 613.15, which states:

**613.15. Injury or death of spouse--measure of recovery**

In any action for damages because of the wrongful or negligent injury or death of a woman, there shall be no disabilities or restrictions, and recovery may be had on account thereof in the same manner as in cases of damage because of the wrongful or negligent injury or death of a man. In addition she, or her administrator for her estate, may recover for physician's services, nursing and hospital expense, *and in the case of both women and*

*men, such person, or the appropriate administrator, may recover the value of services and support as spouse or parent, or both, as the case may be, in such sum as the jury deems proper; provided, however, recovery for these elements of damage may not be had by the spouse and children, as such, of any person who, or whose administrator, is entitled to recover same.*

(Emphasis added). We disagree that this statute supports plaintiff's position.

**INTERPERTATION OF RELEASE.** Plaintiff's last claim is that there is an issue of material fact concerning the interpretation of the release. Again plaintiff has failed to show how this issue was preserved for review. And while she contends there is a factual issue, she fails to state what the factual issue is. She makes no reference to what facts show the parents did not intend to release the claims now made by the administrator. We affirm the district court's summary judgment.

**AFFIRMED.**