

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 2249

DONNA BOLING

VERSUS

DEK.
WBR
JW

RODNEY L. HOYT, LOUISIANA SERVICE, LLC, TRAVELERS CASUALTY AND SURETY COMPANY, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, TRAVELERS CASUALTY COMPANY OF CONNECTICUT, TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, TRAVELERS COMMERCIAL CASUALTY COMPANY, TRAVELERS COMMERCIAL INSURANCE COMPANY, TRAVELERS HOME AND MARINE INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY OF AMERICA, THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, THE TRAVELERS INDEMNITY COMPANY, TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA AND TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY

DATE OF JUDGMENT: JUN - 8 2012

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2010-14965, DIVISION G, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. CRAIN, JUDGE

* * * * *

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Travelers Property Casualty Company
of America, Travelers Property
Casualty Insurance Company, and
Louisiana Machinery Company, LLC

* * * * *

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: AFFIRMED.

KUHN, J.

This appeal is taken from a judgment sustaining a peremptory exception raising the objection of no right of action and dismissing the claims of Shelby T. Boling and Cooper E. Boling, with prejudice. Finding no error in the trial court's ruling, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

According to the petition, as amended, Jessica Ricks was involved in a multi-car collision that occurred in St. Tammany Parish on April 25, 2010, and she ultimately died as a result of the injuries she sustained therein. The chain of events leading to Ms. Ricks' death allegedly began when a vehicle driven by Rodney L. Hoyt, while in the course and scope of his employment, slammed into the rear of the vehicle in which Ms. Ricks was a passenger.

On August 4, 2010, Donna Boling, Ms. Ricks' mother, filed the instant suit for wrongful death and survival action damages against multiple defendants, including Mr. Hoyt and Travelers Property Casualty Company of America, his employer's insurer (defendants). Defendants answered the suit generally denying the allegations of the petition. Thereafter, Ms. Boling filed an amending petition in which she added as additional plaintiffs her minor children, Shelby T. Boling and Cooper E. Boling, whom she alleged were entitled to damages for the wrongful death of Ms. Ricks. Although not specifically alleged in the amending petition, Ms. Boling asserts on appeal that Shelby and Cooper are siblings of the decedent, Ms. Ricks. In any event, Mr. Hoyt and Travelers filed a peremptory exception raising the objection of no right of action on the grounds that Shelby

and Cooper had no right of action to bring a wrongful death suit under La. C.C. art. 2315.2.

Following a hearing, the trial court sustained the exception and dismissed the claims of Shelby and Cooper, with prejudice. Further, the trial court refused to allow Ms. Boling an opportunity to amend the pleadings in order to add a claim under La. C.C. art. 2315 on behalf of Shelby and Cooper. Ms. Boling now appeals, arguing the trial court erred both in sustaining the peremptory exception raising the objection of no right of action and in refusing to allow her an opportunity to amend the pleadings.

DISCUSSION

The peremptory exception pleading the objection of no right of action challenges whether the plaintiff has an actual interest in bringing the action. See La. C.C.P. art. 927(A)(6); *Estate of Mayeaux v. Glover*, 08-2031 (La. App. 1st Cir. 1/12/10), 31 So.3d 1090, 1093, writ denied, 10-0312 (La. 4/16/10), 31 So.3d 1069. Whether a person has a right of action depends on whether the particular plaintiff belongs to the class in whose favor the law extends a remedy. In other words, the exception questions whether the plaintiff has an interest in judicially enforcing the right asserted. Whether a plaintiff has a right of action is a question of law. Therefore, it is reviewed *de novo* on appeal. To prevail, the defendant must show that the plaintiff does not possess an interest in the subject matter of the suit. *Estate of Mayeaux*, 31 So.3d at 1093.

The legislature and courts of this state have never recognized the principle that every loss of a personal relationship, resulting from a delict, is compensable, recognizing *damnum absque injuria*. Moreover, it has been recognized both

historically and jurisprudentially that the wrongful death and survival actions are wholly creatures of the legislature. Prior to the legislative enactment of the wrongful death and survival actions, Louisiana courts held that the general tort principle embodied in La. C.C. art. 2315 that “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it” did not allow for such actions. *Estate of Burch v. Hancock Holding Company*, 09-1839 (La. App. 1st Cir. 5/7/10), 39 So.3d 742, 745-46.

In order to recover on a wrongful death claim, a plaintiff must fall within the class of persons designated as a beneficiary under La. C.C. art. 2315.2. *Turner v. Busby*, 03-3444 (La. 9/9/04), 883 So.2d 412, 416. Furthermore, courts have no authority to judicially expand the classes of beneficiaries to which the law grants the remedy of the wrongful death and survival actions. *Estate of Burch*, 39 So.3d at 749. Louisiana Civil Code article 2315.2(A) delineates the classes of individuals who have a right to bring a wrongful death action as follows:

(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

(3) *The surviving brothers and sisters of the deceased*, or any of them, *if he left no spouse, child, or parent surviving*.

(4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving. [Emphasis added.]

On appeal, Ms. Boling concedes that Shelby and Cooper are precluded by La. C.C. art. 2315.2 from bringing a wrongful death claim as a result of their sister’s death, since Ms. Ricks was survived by her mother. See La. C.C. art. 2315.2(A)(3).

Nevertheless, she argues that she should have been allowed to amend the pleadings pursuant to La. C.C.P. art 934¹ to assert a claim on their behalf for general tort damages under La. C.C. art. 2315. Specifically, she alleges that Shelby and Cooper are entitled to “damages for their own loss of consortium, loss of service, loss of society and emotional distress that arose due to the effect this tragedy had on their mother [Ms. Boling].” She further contends that the “children’s damages arise directly from the loss of their mother’s ability to care for them as she would have if this tragedy had not occurred.” In making this argument, Ms. Boling relies on *Green v. Southern Transplant Service, Inc.*, 97-1133 (La. App. 4th Cir. 8/13/97), 698 So.2d 699, which she claims allows the exact type of damages sought by Shelby and Cooper.

Ms. Boling raised these same arguments in the proceedings below, where they were rejected by the trial court. In so ruling, the trial court gave the following oral reasons for judgment:

Interesting argument. I have reviewed this, the claims of the plaintiff essentially derive from either the death of the victim or of the predeath [sic] act that caused the death of the victim; so they are derivative of acts that predate the death or the death itself.

Those acts are covered, I believe, under the Code of Civil Procedure -- I'm sorry, under the Civil Code as either survival or wrongful death acts; and those statutes provide exclusive categories.

The Supreme Court has said that the categories that are allowed under those survival and wrongful death statutes are exclusive and allow those persons listed in the class to recover appropriate damages

¹ Louisiana Code of Civil Procedure article 934 provides that:

When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection raised through the exception cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed.

to the exclusion of any other class; or, if a person is in a class above, they exclude as to all people below. I think that's what this case involves.

You've cited the Green case. In the Green case, that court did allow [La. C.C. art.] 2315 damages. But as I read the Green case, those damages derived from a post death act of mishandling the corpse, basically. So that is a -- that's a separate and distinct act that occurred after the death that I think distinguishes it from the facts of this case.

Therefore, I believe that the exception of no right of action has merit; I'm going to grant that.

I do not see, because the law precludes these claimants from making the claims that are asserted, I do not see any reason why time should be allowed to amend; so I'm not going to do that. I'm going to grant the exception of no right of action.

Based on our review of the law and facts, we adopt the trial court's analysis and find no error in its ruling sustaining the peremptory exception raising the objection of no right of action and denying Ms. Boling an opportunity to amend.

As conceded by appellant on appeal, Shelby and Cooper, the purported siblings of Ms. Ricks, have no right of action for her wrongful death, because Ms. Ricks was survived by her mother. Under La. C.C. art. 2315.2(A)(3), siblings of the decedent have a right to recover wrongful death damages only in instances where the decedent is not survived by a spouse, child or parent.

Nor is there any merit in Ms. Boling's argument that she should have been allowed to amend the pleadings pursuant to La. C.C.P. art. 934. Ms. Boling contends that, if allowed to amend, she can assert a viable loss of consortium claim on behalf of her children due to her diminished ability to provide them with parental attention, services and society as a result of Ms. Ricks' death. However, we reject

this argument because such a loss of consortium claim on behalf of Shelby and Cooper is derivative of Ms. Boling's wrongful death claim.²

Consequently, allowing the siblings of Ms. Ricks the right to recover loss of consortium damages under these circumstances would, in effect, be allowing an additional layer of recovery for her wrongful death to a class of beneficiaries precluded from recovery by La. C.C. art. 2315.2(A). Hence, such recovery would circumvent the intent of the legislature in providing exclusive classes of beneficiaries entitled to bring wrongful death claims. Courts lack the authority to expand the classes of beneficiaries to which the law grants the remedy of the wrongful death action. *Estate of Burch*, 39 So.3d at 749. Accordingly, the trial court was not required to allow Ms. Boling an opportunity to amend the pleadings, given that there is no means by which a right of action for loss of consortium on behalf of Shelby and Cooper can be established under the facts of this case. To allow amendment would be a vain and useless act. See *American International Gaming Association, Inc. v. Louisiana Riverboat Gaming Commission*, 00-2864 (La. App. 1st Cir. 9/11/02), 838 So.2d 5, 18.

² By their nature, derivative claims do not come into existence until someone else is injured. See *Ferrell v. Fireman's Fund Insurance Company*, 96-3028 (La. 7/1/97), 696 So.2d 569, 574. As a matter of law, loss of consortium claims are derivative of the primary victim's injuries. See *Ferrell*, 696 So.2d at 576; *Guidry v. Millers Casualty Insurance Company*, 01-0001 (La. App. 1st Cir. 6/21/02), 822 So.2d 675, 680 n.5; see also La. R.S. 13:5106(D)(4). Loss of consortium, in the context of the parent/child relationship, means loss of aid, assistance and companionship, or loss of affection, society and service. See *Lee v. USAA Casualty Insurance Company*, 540 So.2d 1083, 1092-93 (La. App. 1st Cir.) writs denied, 542 So.2d 514, 515 (La. 1989); *Turner v. Lyons*, 03-0186 (La. App. 4th Cir. 1/28/04), 867 So.2d 13, 21, writ denied, 04-0741 (La. 5/14/04), 872 So.2d 530.

CONCLUSION

For the reasons assigned, the judgment of the trial court is affirmed. All costs of this appeal are to be paid by appellant, Donna Boling.

AFFIRMED.