

IN THE SUPREME COURT OF FLORIDA

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CASE NO. : 73,207

EDITH J. WILCOX **as** Executrix
of the Estate of CARRIE MAUD
JORDAN,

Appellant,

v.

WILLIAM RENE LEVEROCK and
COMMERCIAL CARRIER CORP.,

Appellee.

ON QUESTION CERTIFIED FROM
UNITED STATES COURT OF
APPEALS, ELEVENTH CIRCUIT

DOCKET NO. : 88-3248

APPELLANT'S INITIAL BRIEF

JAMES A. HIGHTOWER
CHARLES J. KAHN, JR.
ROBERT M. LOEHR
Levin, Middlebrooks,
Mabie, Thomas, Mayes
and Mitchell, P.A.
226 South Palafox
P.O. Box 12308
Pensacola, FL 32581
(904) 435-7094

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STATEMENT OF THE CASE

On November 20, 1984, CARRIE MAUD JORDAN died in an automobile accident involving a collision between her vehicle and a vehicle owned by Appellee, COMMERCIAL CARRIER CORPORATION, (COMMERCIAL), and operated by Appellee WILLIAM RENE LEVEROCK (LEVEROCK) (R1-53-4). Thereafter, EDITH J. WILCOX, as Executrix of the Estate of CARRIE MAUD JORDAN (WILCOX), brought this action against COMMERCIAL and LEVEROCK, seeking recovery under the Florida Wrongful Death Act. As an element of damages in this action, WILCOX sought to recover the estate's loss of net accumulations (R1-53-5). \$768.21, Fla. Stat. (1983).

At the time of her death, the decedent's only source of income was the net income from two trusts, which was paid to her as the income beneficiary (R2-74; Interrogatories). The first *of* these trusts was established by the will of the decedent's late father, E. L. Jordan, and was administered by the AmSouth Bank Trust Department of Mobile, Alabama (R2-74; Deposition of Tom Gause, P6). The second trust was established by the will of Martha Annie Jordan, the late mother of the decedent, and was administered by the First Alabama Bank of Mobile, Alabama (R2-74; Deposition *of* Peter Sherman, P5).

Under the terms of these two trusts, decedent was entitled to receive the net income from these trusts for the

remainder of her life (R2-74; Deposition of Peter Sherman, P6; Deposition of Tom Gause, P8). Upon the death of the decedent, the right to receive the income from the E. L. Jordan trust passed to Edith Wilcox, decedent's sister. (R2-74; Deposition of Edith Wilcox, P7; Deposition of Tom Gause, P8). Under the Martha Annie Jordan trust, upon the death of the decedent, the right to receive the income devolved to Edith Wilcox's daughter, Susan Wilcox (R2-74; Deposition of Edith Wilcox, P8).

Defendants moved for Summary Judgment, contending that, as a matter of law, WILCOX was not entitled to recover the estate's loss of net accumulations because the only sources of income were from the two aforementioned trusts. LEVEROCK and COMMERCIAL argued that the definition of "net accumulations" contained in § 768.18 (5), Fla. Stat. (1983) excluded income derived from such trusts because the income was not generated by the "skill or effort" of the decedent (R2-71). The District Court entered its order granting Defendants' Motion for Summary Judgment on the issue of the recoverability of net accumulations on November 3, 1987. The order specifically held:

The Court finds that 'net accumulations' include salary **or** business income earned by the personal efforts of a decedent, and that in this case, since only passive income was received, the estate can not recover **for** its loss of 'net accumulations.' (R2-83-3).

The Court specifically noted that it was not ruling on any other issues raised in the Defendants' Motion for Summary Judgment (R2-83-4). WILCOX, LEVEROCK and COMMERCIAL entered into a Stipulation for Entry of Final Judgment (R2-87), and the District Court entered its Final Judgment on this cause on March 8, 1988 (R2-88). A timely appeal to the Eleventh Circuit Court of Appeals followed, resulting in that Court certifying the following question for determination by this Court:

Whether the executrix of an estate is entitled to recover the loss of income received from a trust, pursuant to the definition of "net accumulations" contained in section 768.18(5), Fla. Stat. (1983), when said income has not resulted from the skill **or** effort **of** the decedent.

SUMMARY OF ARGUMENT

The definition of "net accumulations" contained in §768.21, Fla. Stat. (1983) is not limited to amounts of income earned by the skill **or** effort of decedent. To the contrary, the clear wording of the statute, as well as the legislative intent behind its passage, shows that "net accumulations" is to be calculated using "probable gross income after taxes" as the starting point. "Gross income" is not limited in any way by

the provisions of the statute, and its clear meaning would include amounts received as trust income. The legislature has specifically excluded from the calculation of "net accumulations" income from investments continuing beyond death. Had the Legislature intended to also exclude income not derived by the skill and effort of the decedent, it would have done so in unequivocal terms.

The legislative intent behind the passage of the statute was to shift the loss resulting **from** the wrongful death of a person from the survivors to the wrongdoer. The construction placed upon this statute by Appellees and the Federal District Court would hinder the expressly stated intention of the Legislature.

No court has had the opportunity to rule upon the precise issue herein, but well established rules of statutory construction, often cited by the courts in Florida, dictate the conclusion that the Federal Court erred in formulating and applying the definition of "net accumulations" to the facts of this case.

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING COMMERCIAL AND LEVEROCK'S MOTION FOR SUMMARY JUDGMENT. THE DEFINITION OF PROSPECTIVE "NET ACCUMULATIONS" CONTAINED IN THE FLORIDA WRONGFUL DEATH ACT ALLOWS RECOVERY FOR INCOME RECEIVED FROM TRUSTS, REGARDLESS OF THE EXPENDITURE OF SKILL AND EFFORT ON THE PART OF THE DECEDENT.

The issue of the meaning of "net accumulations" in this case is basically one of statutory construction. Pursuant to the provisions of the Florida Wrongful Death Act, specifically §768.21(6)(a)(2), Fla. Stat. (1983), the estate of a decedent may recover the loss of "net accumulations" if the decedent is not a minor child and does not have survivors as defined by the Act. §768.21, Fla. Stat. (1983). CARRIE MAUD JORDAN was not a minor and had no survivors as defined by the act, thereby qualifying her estate to recover loss of prospective net accumulations.

"Net accumulations" is defined as follows:

'Net accumulations' means the part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of his estate if he had lived his normal life expectancy. 'Net business or salary income' is the part of the decedent's probable gross income after taxes, excluding income from investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors, excluding contributions in kind. §768.18(5), Fla. Stat. (1983).

COMMERCIAL and LEVEROCK contended, and the District Court

The present version of the Florida Wrongful Death Act has changed the test for recovery of net accumulations. Pursuant to §768.21, Fla. Stat. (1985), the decedent's personal representative may recover for the estate the loss of prospective net accumulations only: 1) If the decedent's survivors include a surviving spouse or lineal descendant; or 2) If the decedent is not a minor child, there are no lost support and services recoverable, and there is a surviving parent.

agreed, that the above definition limited the type of income which could be considered in determining the loss of "net accumulations" to that income which was derived from the "skill and effort" of the decedent. This contention and holding is unsupported by the clear provisions of the above and is likewise unsupported by any decisions of the courts in the State of Florida.

COMMERCIAL and LEVEROCK attempt to support their construction of the definition of "net accumulations" by pointing to the fact that the Florida legislature used the words "net business or salary income," thus limiting the type of income recoverable to that generated by business or salary. Had the Florida legislature chosen to end the definition of net accumulations by referring to business or salary income, this contention might warrant closer evaluation. But such is not the case. The legislature defined "net business or salary income" as:

. . . The part of the decedent's probable gross income after taxes, excluding income from investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors, excluding contributions in kind. (emphasis added) 5768.15 (5), Fla. Stat. (1983)

Since the legislature has quite precisely defined "net business or salary income" it is not only unnecessary, but inappropriate to graft onto the statute a speculative definition of that

phrase, as the trial judge did.

The proper scope of inquiry on this appeal is therefore whether the phrase "gross income after taxes" includes income which was received by a decedent which was not generated by the "skill or effort" of the decedent. The phrase "gross income after taxes" is in no way limited to amounts generated by the "skill or effort" of the decedent. Indeed, the legislative intent behind the Florida Wrongful Death Act compels the conclusion that all sources of income not specifically excluded by the terms of this statute are recoverable as "net accumulations."

The judicial exercise of determining what a legislative body intended by its enactment of a statute is often a difficult, painstaking process. That the Florida legislature chose to express its intent in unambiguous terms regarding the passage of the Florida Wrongful Death Act is clearly of great benefit in this endeavor. §768.17, Fla. Stat. (1983) provides:

LEGISLATIVE INTENT - It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16 through 768.27 are remedial and shall be liberally construed.

Although the issue on appeal is a matter of first impression, the long recognized role of the Courts in giving effect to the intention of the legislature has been affirmed by this Court in

many varied situations. In Schultz v. State, 361 So.2d 416 (Fla. 1978) this court stated:

. . . When reasonably possible and consistent with legislative intent, we must give preference to a construction which will give effect to the statute over another construction which would defeat it .

This rule of law was applied in Johnson v. State, 336 So.2d 93 (Fla. 1976) in an effort to save a statute from an unconstitutional construction. In Johnson, Chapter 74 - 206, Laws of Florida, 1974, provided for "expungement" of criminal records under certain circumstances. The lower Court held that the word "expunged," as used in the statute, meant to destroy or obliterate or physically strike out the documents in question. This construction, according to the lower Court, was an unconstitutional invasion of the judicial function. Id. at 94. In reversing the decision of the lower Court, this Court stated at 95:

Further, we recognize our duty to construe a statute in such a way as to achieve the legislative intent subject to constitutional restriction on legislative authority.

Although the actual language of the statute might have resulted in an unconstitutional foray into the judicial process, the Court construed it narrowly in order to avoid such an effect. Thus, Florida law provides:

Where two or more interpretations can reasonably be given a statute, the one that will sustain its validity should be given and not the one that will destroy the purpose of the statute . . . City of St. Petersburg v. Sibold, 48 So.2d 291, 294 (Fla. 1950).

The above cited cases demonstrate the efforts of the Florida Courts to construe statutes in a manner which will give effect to the legislative intent behind the statute. It is inconceivable that the construction placed upon the definition of net accumulations by COMMERCIAL, LEVEROCK and the District Court could in any way further the clearly stated legislative intent. Differentiating between the sources of income in a manner which is neither suggested nor required by the Statute in no way furthers the intention of shifting the losses from the survivors of the decedent to the wrongdoer. Indeed, the opposite effect is realized. A defendant, who through his negligence has taken the life of an innocent victim, is fortuitously exempted from liability for the loss of net accumulations simply because those accumulations resulted from income which was not generated by the "skill or effort" of the decedent. The decedent's survivors, on the other hand, would be denied the opportunity to take from the decedent's estate amounts which, absent the Defendant's negligence, they would have received upon the demise of the decedent. Not only would such a result be inequitable, but it would constitute a clear departure from both the language and the intent behind the

Florida Wrongful Death Act. The clear focus of the statute is upon the loss incurred as a result of the defendant's negligence. Ignoring this focus, the District Judge concentrated exclusively upon the source of the decedent's income, and reached a conclusion that wrongfully penalizes the survivors, whose loss should be shouldered by the wrongdoer. A further analysis of the language of the Statute clearly demonstrates the error in the lower Court's ruling.

"Net business or salary income" is defined as:

The part of the decedent's probable gross income after taxes, excluding income from investments continuing beyond death. that remains after deducting the decedent's personal expenses and support of survivors, excluding contributions in kind. §768.18 (5) Fla. Stat. (1983) (emphasis added).

It is important to note that the term "gross income" was limited by the phrase "excluding income from investments continuing beyond death." The income in the instant case did not continue beyond death. This Court and the District Courts of Appeal in Florida have repeatedly held that where the Legislature makes an exception to the precise language of a statute, it is assumed that there are no other exceptions to that language. In Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952) the Supreme Court stated:

We have oft times held that the rule 'expressio unius est exclusio alterius' is applicable in

connection with statutory construction. This maxim when translated from the latin means: express mention of one thing is the exclusion of another, is definitely controlling in this case. The legislature made one exception to the precise language of the statute of limitations. We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally. We must assume that it thoroughly considered and purposely preempted the field of exceptions to, and possible reasons for tolling, the statute. We cannot write into the law any other exception, nor can we create by judicial fiat a reason, or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof.

In the case at hand, the legislature expressly excluded from "probable gross income after taxes" only income from investments continuing beyond death. The legislature could have also excluded "income from investments not generated by the skill or effort of the decedent" or "income from sources other than business or salary." The legislature chose not to do so, and that is the decision which this Court should follow. See, also, Thayer v. State, 335 So.2d 815 (Fla. 1976), Baeza v. Pan American/National Air Lines, 392 So.2d 920 (Fla. 3rd DCA 1980), Florida Legal Services, Inc. v. State, 381 So.2d 1120 (Fla. 1st DCA 1979).

If this Court were inclined to look beyond the clear statutory definition of "net accumulations" and "net business or salary income," the inescapable conclusion is that the term "gross income" is not limited to amounts produced as a result of skill or personal effort. The most common usage of the term

"gross income" is in reference to matters involving taxation.

In this context, gross income is defined in 26 U.S.C. . §61 as:

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

1. Compensation for services, including fees, commissions, fringe benefits and similar items;
2. **Gross** income derived from business;
3. Gains derived from dealing in property;
4. Interest;
5. Rents;
6. Royalties;
7. Dividends;
- a. Alimony in separate maintenance payments;
9. Annuities;
10. Income from life insurance and endowment contracts;
11. Pensions;
12. Income from discharge of indebtedness;
13. Distributive share of partnership gross income;
14. Income in respect of a decedent; and
15. Income from an interest in an estate or trust.
(emphasis added)

The Florida legislature defined "net business **or** salary income" by reference to "**gross** income after taxes." Although this reference does not dictate that the definition of gross income contained in the Internal Revenue Code is applicable, it certainly lends itself to such a conclusion. The taxes which would be assessed upon the "gross income" of a decedent would be calculated by reference to the Internal Revenue Code. According to COMMERCIAL's and LEVEROCK's construction of this definition one portion of the determination of the amount of

income recoverable as "net accumulations" (the amount of tax) necessarily involves reference to the Internal Revenue Code, while the other half of the same sentence was intended to mean something entirely different than its meaning in that Code. It would be difficult to articulate a rule of statutory construction that would uphold such a result.

In further support of the broad meaning of the term "gross income" are the dictionary definitions which the terms have generated. According to Webster's Ninth New Collegiate Dictionary, 1984 ed., the term "gross" is defined as:

1 OBS: AMOUNT, SUM 2: An overall total exclusive of deductions.

According to the same source, "income" is defined as:

1: A coming in: entrance, influx 2: A gain or recurrent benefit usually measured in money that derives from capital or labor; also the amount of such gain received in a period of time.

The "common usage" of the term "gross income" is virtually identical to the usage of the same term under the Internal Revenue Code. The plain meaning of the words used to define "net business or salary income" clearly furthers the stated legislative intent behind passage of the Florida Wrongful Death Act. The only language in the Act that would cause any ambiguity, "net business or salary income," has been defined in

such a manner as to alleviate any question as to its meaning. Given these facts, there is no need to search the archives for bits and pieces of legislative history which could only confuse the clarity with which the legislature stated its purpose and method for effectuating that purpose.

Although no Court in Florida has directly addressed this issue, the decision in Smith v. Lassing, 189 So.2d 244 (Fla. 4th DCA 1966) is instructive. Regarding the issue of whether investment income was recoverable prior to the passage of the Revised Florida Wrongful Death Act, the Court stated:

Dealing with the question solely on the basis of admissibility of evidence it becomes apparent that there can be no separation of income into the categories of 'earned income' or 'investment income' as is done in some other fields of the law for the reason that more often than not any evidence of earnings is a combination of all. On the issue of damages the jury was properly instructed that the amount should be fixed by determining the amount that the decedent, if she had lived, would probably accumulated from her probable future earnings and saved during her life expectancy and thereby left at death.

Id. at 247. After mentioning the various subjective factors which should be taken into account by a jury in determining the amount of net accumulations, including age, health, business capacity, education, habits, experience, energy and skill, the Court noted:

None of these factors require exclusion of evidence of earnings of the deceased from investments,

management of rental property and management of capital. The Court did not err in admitting such evidence.

Id. The Court concluded:

The defendant appears to contend further that the decedent was not gainfully employed and thus could not be deemed to have any earnings. Earnings may be forthcoming even though not realized by the sweat of the brow and even though not denominated as salary consequent to being in someone's employ.


The Court also listed as one of the elements to be considered by the jury the "means" of the decedent. Id. at 246. The "means" of the decedent in the instant case includes the income from two trusts, which were her sole means of support. The plaintiff in Smith was not receiving any sums from the type of trust involved in the instant case, and thus, the Court did not address the issue herein.

The rule urged by COMMERCIAL and LEVEROCK would not only controvert the clearly stated intent of the Legislature, but would also result in unfair and unjustifiable outcomes. There is no reason in logic or law to differentiate between the sources of income as urged by the Defendants. The Florida legislature has specifically excluded the one form of income which it deems not recoverable; income from investments continuing beyond death. The reason for this exclusion is that such income is not "lost" to the estate. The income from the trust in the instant case clearly has been lost to the estate. Under the terms of the trust, the income is no longer paid to

the estate. The survivors of CARRIE MAUD JORDAN, who otherwise would have been able to receive the "net accumulations" of the decedent upon her natural demise, have now suffered a loss of such amounts. The intent of the Legislature, "to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer" compels the conclusion that "gross income" includes amounts received from trusts, regardless of whether the "skill or effort" of the decedent is utilized in generating the income.

CONCLUSION


The District Court erred in formulating and applying the definition of "net accumulations" contrary to the precise terms of the Florida Wrongful Death Act. The clear meaning of the statute, supported by the expressed legislative intent, dictates that amounts received by a decedent as income from trust accounts is recoverable under the statutory definition. Appellant requests that this Court answer the certified question in the positive, thus furthering the intent of the legislature.



JAMES A. HIGHTOWER
CHARLES J. KAHN, JR.
ROBERT M. LOEHR
Levin, Middlebrooks, Mabie, Thomas,
Mayes & Mitchell, P.A.
226 South Palafox
P.O. Box 12308
Pensacola, FL 32581

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant's Initial Brief has been served upon Mr. Gler Waddell, Esquire, P.O. Box 1363, Auburndale, Florida, 33823, by regular U.S. Mail, this 17th day of November, 1988.



JAMES A. HIGHTOWER
CHARLES J. KAHN, JR.
ROBERT M. LOEHR