

ABRAHAM LOPEZ ET AL *v.* JAMES B. WALDRUM ESTATE

5-5373

460 S. W. 2d 61

Opinion delivered November 30, 1970

1. EXECUTORS & ADMINISTRATORS—LIMITATIONS ON FILING CLAIMS AGAINST ESTATE—STATUTORY PROVISIONS.—The language of Ark. Stat. Ann. §§ 62-2601—2602 (Supp. 1969) requires that all claims, including those sounding in tort, must be asserted within six months after the first publication of notice to creditors.
2. LIMITATION OF ACTIONS—SOLDIERS' & SAILORS CIVIL RELIEF ACT —APPLICATION OF STATUTE.—Statute of nonclaim as statute of limitations was not tolled by Soldiers' and Sailors' Civil Relief Act as to recovery of damages to which soldier's wife and child were entitled, each in her own right.
3. LIMITATION OF ACTIONS—SOLDIERS' & SAILORS' CIVIL RELIEF ACT —INTENTION OF STATUTE.—It was the intention of the Soldiers' and Sailors' Civil Relief Act that the statute be tolled during military service as to those elements of damage for which one in the military service is entitled to recover in his own right.

4. LIMITATION OF ACTIONS—SOLDIERS' & SAILORS' CIVIL RELIEF ACT—APPLICATION OF STATUTE.—Soldier's recovery on account of his wife's injuries was limited to loss of services, society, companionship, marriage relationship and medical services incurred for which soldier would be liable, attributable to negligence on tortfeasor's part, since no one other than the husband could have sued for elements of damage which were personal to him.
5. PARENT & CHILD—ACTIONS ON BEHALF OF MINOR CHILD—RIGHT OF ACTION.—A father may bring an action on behalf of his unemancipated minor child but the right of action is that of the child, not that of the father, for recovery of damages for pain and suffering, personal disfigurement, inability to attend school, future medical expenses reasonably certain to be required after his majority and probable loss of earnings and earning capacity after majority.
6. PARENT & CHILD—LOSS OF SERVICES & EARNINGS—PARENT'S RIGHT OF RECOVERY.—A parent is entitled to recover for the value of a minor's services and loss of minor's earning capacity during minority, and for expenses incurred and to be incurred by the parent on account of injury to the child.
7. HUSBAND & WIFE—ACTION FOR TORT—WIFE'S RIGHT TO BRING ACTION.—A wife may sue independently of her husband for another's negligence resulting in injury to her since she is the real party in interest in an action on her behalf for damages for her personal injuries and the recovery is her separate property and not that of her husband.
8. HUSBAND & WIFE—RIGHTS OF ACTION BY HUSBAND OR WIFE.—The mere fact that a husband's cause of action for injuries to his wife is derivative from his wife's cause of action does not mean that the actions cannot be independently prosecuted, or that the husband's cause is barred when the statute of limitations has barred the wife's cause of action.

Appeal from Clark Circuit Court, *W. H. Arnold, III*, Judge; affirmed in part, reversed in part.

James C. Cole and *G. W. Lookadoo*, for appellants.

Tackett, Young, Patton & Harrelson, for appellee.

JOHN A. FOGLEMAN, Justice. This appeal comes from an order granting appellee's motion to dismiss the complaint of appellant Abraham Lopez, individually, on his own behalf, as husband of Wilma Lopez on her behalf, and on behalf of Carmen Lopez, as her father and next friend. By the same order a complaint filed by Darlene Satterfield was dismissed upon the same motion. The

two cases against appellee had been consolidated for trial. The motion to dismiss was based upon the statute of nonclaim. [Ark. Stat. Ann. § 62-2601 (Supp. 1969)]. The circuit court did not dismiss that portion of the Lopez complaint by which he sought recovery for damages to his own personal property.

On August 12, 1967, there was a collision between an automobile owned by Abraham Lopez and one driven by James B. Waldrum. The Lopez automobile was being driven by Wilma Lopez, and Carmen Lopez and Darlene Satterfield were passengers therein. Waldrum died as a result of injuries received in the collision. His widow was appointed administratrix of his estate. Her first notice to creditors was published on September 14, 1967.

At the time of the collision, appellant Abraham Lopez was in Vietnam in the military service of the United States. Although he returned and resumed his relationship with his family on April 4, 1968, it is alleged that he is still in the armed services. His complaint was filed on April 21, 1969. The separate complaint of appellant Satterfield was filed on May 6, 1969. A copy of the Lopez complaint was filed with the clerk of the probate court on April 21, 1969.

Appellants first contend that our statute of nonclaim only bars the right to subject the assets of an estate to the payment of a judgment, but not the right to prosecute an action against the estate to judgment. As a corollary, they argue that a statute of limitations, being procedural only, may bar a remedy, but not the right upon which it is based. They contend that insofar as the right of action is concerned, Ark. Stat. Ann. § 27-901 (Repl. 1962) provides the only statutory bar. We have held that the language of Ark. Stat. Ann. §§ 62-2601 and 2602 (Supp. 1969) requires that all claims, including those sounding in tort, must be asserted within six months after the first publication of notice to creditors. *Wolfe v. Herndon*, 234 Ark. 543, 353 S. W. 2d 540; *Turner v. Meek*, 225 Ark. 744, 284 S. W. 2d 848.

We are asked to overrule or disregard our previous holdings in this respect upon the basis of the concurring opinion of a single judge in *Swan v. Estate of Monette*, 400 F. 2d 274 (8th Cir. 1968). We do not find appellants' argument in this regard sufficiently persuasive to change our evaluation of the legislative intent expressed in *Wolfe*. This concurrence actually verified the correctness of the very thorough opinion of Senior District Judge John E. Miller (265 F. Supp. 362). The concurring judge only observed a basic appeal to equitable justice in appellants' arguments. It is clearly pointed out in that opinion that our approach in *Wolfe* and *Turner*, applying the statute of nonclaim as a statute of limitations superseding any other applicable statute, was not novel, since this rule had been Arkansas common law for more than a century. See *Walker v. Byers*, 14 Ark. 246.

Any appeal to natural equities here asserted by appellants or noted in the concurring opinion referred to addresses itself to the lawmaking body, not to the courts. The General Assembly has met in regular session 4 times since our decision in *Wolfe*, and 7 times since *Turner*. Even though several amendments to the Probate Code have been enacted during those intervening sessions, our judgment of the legislative intent with respect to these sections of the code has not been corrected. We must adhere to our previous holdings.

While the Satterfield appeal is thus disposed of, Lopez contends that he is entitled to maintain his action because of the Soldiers' and Sailors' Relief Act. See § 525, Title 50, App. USCA. The pertinent language provides that the period of military service shall not be included in computing any period limited by law for the bringing of any action in any court by one in military service. There is no doubt that the circuit court was correct in its application of this statute to that part of the complaint relating to damage to personal property belonging to Lopez. We also agree that the claims asserted on behalf of his wife and minor child are not actions to which the federal act applies.

The wife's right of action was personal. See *Texarkana & Ft. Smith Ry. Co. v. Adcock*, 149 Ark. 110, 231 S. W. 866. No logical reason appears why she could not or did not bring timely suit in her own name. Whatever may have been her disability under Texas law, she was not barred as a married woman from bringing her action in Arkansas. *Little Rock Gas & Fuel Co. v. Coppedge*, 116 Ark. 334, 172 S. W. 885; *Texarkana & Ft. Smith Ry. Co. v. Adcock*, supra; *Texas & Pacific Railway Co. v. Humble*, 181 U. S. 57, 21 S. Ct. 526, 45 L. Ed. 747 (1901), aff'g 97 F. 837, 38 C. C. A. 502; *Libaire v. Minneapolis & St. L. R. Co.*, 113 Minn. 517, 130 N. W. 8 (1911).

Even if we should entertain the suggestion that the common law rule permitting a husband to sue upon his wife's right of action was not abrogated by the Married Women's Act [Ark. Stat. Ann. § 55-401, et seq. (1947)],¹ we cannot conceive of such an action as one in which the statute of limitations is to be tolled under § 525, however liberally that act is construed. Where there were competent persons by whom an action was or could have been brought as easily as it could have been by the person in military service, it has been held that the section does not apply, particularly when the suit is brought in a representative capacity. *McCoy v. Atlantic Coast Line*, 229 N. C. 57, 47 S. E. 2d 532 (1948); *Stutz v. Guardian Cab Corporation*, 273 App. Div. 4, 74 N. Y. S. 2d 818 (1947); *Smith v. Fitch*, 25 Wash. 2d 619, 171 P. 2d 682 (1946). See also *Thompson v. Anderson*, 208 S. C. 208, 37 S. E. 2d 581 (1946); *Irving Trust Co. v. Fifteen Park Row Corp.*, 182 Misc. 1044, 51 N. Y. S. 2d 724 (1944). It cannot be doubted that the wife is the real party in interest in an action on her behalf for damages for her personal injuries, as the recovery is her separate property and not that of her husband, at least after the passage of the Married Women's Acts. *Texas & Pacific Railway Co. v. Humble*, supra; *Libaire v. Minneapolis & St. L. R. Co.*, supra; *Laskowski v. Peoples Ice Co.*, 203 Mich. 186, 168 N. W. 940, 2 A. L. R. 586 (1918); *Berger v. Jacobs*, 21

¹This question was left unanswered in *Mt. Nebo Anthracite Coal Co. v. Martin*, 86 Ark. 608, 111 S. W. 1002.

Mich. 215 (1870); *Burrell Tp. v. Uncapher*, 117 Pa. 353, 11 A. 619 (1887); *Normile v. Wheeling Traction Co.*, 57 W. Va. 132, 49 S. E. 1030 (1905); *Messervy v. Messervy*, 82 S. C. 559, 64 S. E. 753 (1909); *Coulter v. Hermitage Cotton Mills*, 112 S. C. 93, 98 S. E. 846 (1919); *Hamm v. Romine*, 98 Ind. 77 (1884).

Even though a father may bring an action on behalf of his unemancipated minor child, the right of action is that of the child, not that of the father, at least for recovery of damages for pain and suffering, personal disfigurement, inability to attend school, future medical expenses reasonably certain to be required after his majority, and probable loss of earnings and earning capacity after majority. *St. L. I. M. & S. R. Co. v. Waren*, 65 Ark. 619, 48 S. W. 222; *Wood & Henderson v. Claiborne*, 82 Ark. 514, 102 S. W. 219, 11 L. R. A. (n. s.) 913; 118 A. S. R. 89; *Dieter v. Byrd*, 235 Ark. 435, 360 S. W. 2d 495; *Irby v. Dowdy*, 139 Ark. 299, 213 S. W. 739; *Buckley v. Collins*, 119 Ark. 231, 177 S. W. 920. There is no reason why the present action for these elements of damage could not have been brought by the minor's mother, by any person as next friend or by a duly appointed guardian. See Ark. Stat. Ann. § 27-823 (Repl. 1962); *Kibler v. Kibler*, 180 Ark. 1152, 24 S. W. 2d 867. On the other hand, an unemancipated minor child's earnings during minority are the property of the parents. *St. L. I. M. & S. R. Co. v. Waren*, supra; *Jolly v. Smith*, 188 Ark. 446, 65 S. W. 2d 908. A parent is also entitled to recover for the value of the minor's services and loss of such a minor's earning capacity during minority and for expenses incurred and to be incurred by the parent on account of an injury to the child. *Arkansas Power & Light Co. v. Connelly*, 185 Ark. 693, 49 S. W. 2d 387; *Western Coal & Mining Co. v. Burns*, 84 Ark. 74, 104 S. W. 535; *Byrd v. Galbraith*, 172 Ark. 219, 288 S. W. 717.

We have no hesitancy in holding that the statute of limitations was not tolled as to recovery of damages to which the wife and child were entitled, each in her own right. On the other hand, we are just as certain that it

was the intention of the Soldiers' and Sailors' Civil Relief Act that the statute be tolled during the period of military service as to those elements of damage for which appellant Lopez, as husband and father, was entitled to recover in his own right.

His recovery on account of his wife's injuries is limited, of course, to loss of services, society, companionship and marriage relationship, and medical expenses incurred and for which he is, or may become, liable, attributable to negligence on the part of James B. Waldrum. *Little Rock Gas & Fuel Co. v. Coppedge*, 116 Ark. 334, 172 S. W. 885; *Shipley v. Northwestern Mutual Ins. Co.*, 244 Ark. 1159, 428 S. W. 2d 268. Neither the wife nor any person other than Abraham Lopez could have sued for these elements of damage which are personal to him. *Butler County Rd. Co. v. Lawrence*, 158 Ark. 271, 250 S. W. 340; *Little Rock Gas & Fuel Co. v. Coppedge*, supra.

We do not agree with appellee, or the trial court, that the bar of the wife's claim by the statute of non-claim prevented the tolling of the statute as to her husband's damages. It is true that we have held that his cause of action is derivative and subject to the defense of comparative negligence. *Nelson v. Busby*, 246 Ark. 247, 437 S. W. 2d 799. It is also true that we have held that a judgment adverse to the wife is a bar to the husband's action. *Sizemore v. Neal*, 236 Ark. 574, 367 S. W. 2d 417.² Appellee relies upon *Tollett v. Mashburn*, 291 F. 2d 89, 183 F. Supp. 120, and dictum in *Sisemore* quoting from the opinion in the district court, in asserting that Lopez's claim is barred. We agree with the result reached in *Tollett*, but the court was concerned there only with determining the statute of limitations applicable to the husband's cause of action. The husband and wife in that case were joined as plaintiffs, and no question was presented as to the tolling of the statute of limitations as to one but not the other. The mere fact that the husband's cause of action is derivative does not mean that the ac-

²This decision seems to have overruled *Arkansas Power & Light Co. v. Marsh*, 195 Ark. 1135, 115 S. W. 2d 825, without mentioning it.

tions cannot be independently prosecuted.³ *Little Rock Gas & Fuel Co. v. Coppedge*, supra; *Texas & P. Ry. Co. v. Humble*, 181 U. S. 57, 21 S. Ct. 526, 45 L. Ed. 747 (1901), aff'g 97 F. 837, 38 C. C. A. 502.

The right of the parties to pursue separate actions was not in anywise affected by our decision in *Sizemore*. Had there not been separate actions there would never have been any occasion for the application of res judicata to the derivative liability to the husband.

The judgment is affirmed, except as to the right of Abraham Lopez to recover those damages which are personal to him. The cause is remanded for further proceedings consistent with this opinion.
