SOUTHWESTERN GAS & ELECTRIC COMPANY *v.* GODFREY.

Opinion delivered October 22, 1928.

1. DEATH—PERSONS ENTITLED TO SUE.—Under Crawford & Moses' Dig., § 1075, the administrator of a deceased minor is entitled to recover all damages for a wrongful death, both for the benefit of his estate and the next of kin.
2. DEATH—PERSONS ENTITLED TO SUE.—In a joint action by surviving parents and administrator for a wrongful death, it was error to overrule a demurrer to the parents' complaint on the ground that the administrator alone could recover.
3. APPEAL AND ERROR—HARMLESS ERROR.—In a joint action for a wrongful death by the parents and administrator of the deceased infant, the error of overruling a demurrer questioning the right of both the parents and the administrator to recover *held* harmless.
4. TORTS—SEPARATE ACTS PRODUCING SINGLE INJURY.—Where, although concert is lacking, the separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it, and the damages must be assessed in a single sum, and cannot be apportioned by the jury.
5. TORTS—SEPARATE JUDGMENTS FOR SINGLE TORT.—Where, in an action against a corporation and an individual for a wrongful death caused by their combined negligence, the jury returned a verdict against the corporation for $14,000 and against the individual for $4,000, it was error to render judgment for $14,000 against the corporation and for $4,000 against the individual, since there could be no greater recovery against both joint tortfeasors than the smaller amount assessed by the jury against the individual.
6. DEATH—WHEN DAMAGES SUSTAINED.—Evidence *held* to sustain a judgment for $4,000 for the wrongful death of a boy under the age of 16.

Appeal from Scott Circuit Court; *J. Sam Wood,* Judge; modified and affirmed.

STATEMENT BY THE COURT.

This is a suit by J. R. Godfrey and Eller Godfrey, appellees, and of J. R. Godfrey, as administrator of the estate of his son Victor Godfrey, deceased, for damages

for his wrongful death, alleged to have been caused by the negligence of appellants.

Victor Godfrey, a minor under 16 years of age, unmarried, was employed as a workman in the heading mill plant of Harry Wann, at Mena, Arkansas, which was run and operated by electricity furnished by the Southwestern Gas & Electric Company, over appliances installed by it. Victor Godfrey came in contact with the wire carrying the current, was severely burned, and the injury resulted in his death shortly thereafter. It was alleged that the deceased was under the age of 16 years, unmarried, in good health, and, at the time of his death and prior thereto, was contributing all his earnings to the support of his mother and father, and would have continued to do so for the remainder of their lives but for his death, wrongfully caused by appellants' negligence, and that J. R. Godfrey incurred for medical and funeral expenses for his son, on account of the injury, $250. J. R. and Eller Godfrey prayed judgment for $25,000, and Godfrey, as administrator, prayed judgment in the sum of $25,000.

On February 6, 1928, the Southwestern Gas & Electric Company filed a demurrer to the complaint, alleging it did not state facts sufficient to constitute a cause of action, and by separate answer denied the allegations of the complaint, and pleaded the contributory negligence of Victor Godfrey which caused and contributed to his injury by getting into a place of danger after being shown the danger; that he was a trespasser as to the property of the Southwestern Company, not being employed to do any work in or about its property and without its knowledge of his employment in any capacity; that he had no right to handle any of its appliances and no right to be in the place where he was injured, and the injury received was due to his own negligence; that deceased was employed by Harry Wann, in violation of law, being under 16 years of age, in a dangerous occupation, and that plaintiffs' permitting and suffering such employment consti-

tuted contributory negligence, and was the proximate cause of the boy's death. That if Victor Godfrey was injured as alleged, his injury grew out of the nature of his employment, the risk of which was assumed by him, and also by plaintiffs when they suffered and permitted such employment.

Appellant Wann denied the allegations of the complaint, and alleged that the injury of the deceased did not occur in the course of his employment, but was the result of his own carelessness and negligence, apart from and outside of the scope of his employment. That he was employed with the knowledge and consent and at the request of the plaintiffs, and if there was any negligence on his part in the employment of the said Godfrey to do the work, the plaintiffs, assenting thereto, were guilty of contributory negligence and not entitled to recover. Denied that there was any negligence on the part of either defendant.

The testimony shows that the boy was under 16 years of age, was employed as an offbearer at one of the machines, some distance from the heading machine, where the injury occurred, and had been working in the mill for about one year; that his father knew that he was employed there, and frequently passed by the mill in the morning with his son, on the way to his own work, which was at another mill some distance away. No one saw the deceased until he came in contact with the wire. The wires carrying the current came into the mill shed along the top of it, and came straight down to near the top of the stop-box, up through which the wires carrying the current to the machine extended, and were spliced to the other wires just above the stop-box. The top of this stop-box was about four and one-half feet from the floor, and above it was a shelf upon which there were several articles, and a cake of soap which was used for dressing the belts to keep them from slipping on the wheels of the machines. The deceased was reaching up toward the shelf, upon which the soap and other articles were rest-

ing, when his forearm came in contact with the wire where it was spliced above the stop-box, and he was severely burned. Some of the employees saw the flash and the flame five or six inches in length on his arm, and a boy working near by rushed over and struck the wire loose from him with a stick. There was a place burned about the size of a dollar down to the bone of his arm, and he was severely burned on the pelvis bone and his privates. He was shortly removed down town two or three blocks, where a doctor examined and gave him first aid. Some witnesses testified that he groaned and frowned as though in pain, and one stated that he thought he recognized him. They stated his eyes were about half open, and appeared normal, and, from other tests made, that he was not killed instantly. The doctors, one of whom treated him on the sidewalk immediately upon his arrival down town and the other some time afterwards, before he had been removed, both stated that it was their belief that the shock caused his death instantly, and that he suffered no conscious pain, although treatment in attempt to revive him was continued for half an hour or more after he was carried down town. There was testimony showing the earning capacity of the boy, and that he was unmarried, and some testimony indicating an intention or disposition to contribute to the support of his parents after he came of age. Some of the instructions allowed to be given over appellants' objections were made assignments of error, and the jury returned two verdicts as follows:

"We, the jury, find for the plaintiff against the Southwestern Gas & Electric Company the sum of $14,000. Ross Harris, foreman."

"We, the jury, find for the plaintiff against the defendant Harry Wann the sum of $4,000. Ross Harris, foreman."

From the judgment on the verdicts this appeal is prosecuted.

J. I. Alley, W. H. Arnold, W. H. Arnold, Jr., and *David C. Arnold,* for appellant.

A. F. Smith, W. A. Bates, Sam T. Poe, Tom Poe and *McDonald Poe,* for appellee.

KIRBY, J. It is urged for reversal that the court erred in not sustaining the demurrer to the complaint of the parents of the deceased, the administrator only being authorized to sue for damages for his wrongful death, and that in no event could there be a recovery against the appellants jointly liable for the injury, if liable at all, separately and for different amounts. Under the statute the administrator alone was entitled to recover all damages resulting from the wrongful death of Victor Godfrey, both for the benefit of his estate and the next of kin. Section 1075, C. & M. Digest; *Ashcraft* v. *Jerome Hardwood Lumber Co.,* 173 Ark. 135, 292 S. W. 386.

The right of the heirs and next of kin of the decedent to sue for damages for his wrongful death is dependent upon there being no personal representative of such decedent, and, since the complaint of the heirs and next of kin did not allege there was no personal representative of the deceased, and did allege that J. R. Godfrey was the administrator of his estate, it did not state a cause of action as to them, and was subject to the demurrer, which should have been sustained. Section 1070, 1075, C. & M. Digest; *Jenkins, Adm'r.,* v. *Midland Valley R. R. Co.,* 134 Ark. 1, 203 S. W. 1; *Davis* v. *Ry.,* 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 203 s. c., 55 Ark. 462, 18 S. W. 628; *K. C. S. Ry. Co.* v. *Henrie,* 87 Ark. 443, 112 S. W. 967. Since the suit was brought by the administrator or personal representative of the decedent, however, who had the right to recover all damages resulting from his wrongful death, no prejudice resulted from the court's failure to sustain the demurrer, and the error was harmless.

The other assignment, that there could be no greater recovery than $4,000, the amount of the sum of damages assessed against Harry Wann, the other joint tort-feasor and appellant, under the verdict rendered, must be sus-

tained. Only one act of negligence was alleged in the complaint, which consisted in the failure of appellants to guard properly, protect and insulate the electric wires carrying the current from the power plant of the appellant light company to the mill plant and the machinery of the other appellant, and in his failure to guard properly, protect and insulate the electric wire, machinery and equipment in the heading-mill plant. The jury returned two verdicts, finding for the plaintiff against the gas and electric company in the sum of $14,000, and for the plaintiff against Harry Wann in the sum of $4,000. Cyc. says: "Where, although concert is lacking, the separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it." 38 Cyc. 488. The liability of the wrongdoers is not affected by the relative degree of negligence or of the care required, and if the negligence of both be a contributory cause, although one may owe to the person injured a higher degree of care, and even though there be different degrees of negligence by each, either or both alike are responsible. Damages must be assessed in a single sum, and cannot be apportioned by the jury among the defendants, since the sole inquiry is to the damages resulting from the injury, and not who ought to pay them. 38 Cyc. 490, 492; *St. Louis S. W. R. Co.* v. *Kendall,* 114 Ark. 224, 169 S. W. 822, L. R. A. 1915F, 9; *Coleman* v. *Gulf Ref. Co. of La.,* 172 Ark. 428, 289 S. W. 2.

In *Spears and Purifoy* v. *McKennon,* 168 Ark. 357, 270 S. W. 524, a suit for damages for negligence in performing a surgical operation, the jury returned a verdict in the sum of $3,500, separately, against the physicians, and judgment was rendered for $7,000 against them, to be paid one-half by each. This court held that a judgment for the sum of both the separate verdicts could not be rendered, saying: "This suit was against defendants jointly, to recover damages against them as tort-feasors;

there was only one operation and one damage, both appellants participated in it, and, according to the verdict, both were liable. Under the testimony they were liable as joint tort-feasors, if at all, and the verdict should be construed as a finding of joint and not separate liability. The only way this can be done is to construe the verdict as a joint finding against appellants for $3,500."

In *Wear-U-Well Shoe Co.* v. *Armstrong,* 176 Ark. 592, 3 S. W. (2d) 698, the jury returned two verdicts, one against John Rule, the agent or salesman of the shoe company, for the sum of $750, and the other against the company for $1,750, and this court held that each of the tort-feasors, only one tort being committed and one damage resulting, was liable for the whole damage, and that there could be no greater recovery against both the joint tort-feasors than the lower sum assessed by the jury against one of them. So here, under our decisions, since the injury resulted from the joint or concurring negligence of the two appellants, the negligence of both contributing to it, their liability was not affected by the relative degree of negligence and of the care required, each being liable for the whole damage resulting, and there could be no greater recovery against either or both the joint tort-feasors than the smaller amount assessed by the jury against one of them, the sum of $4,000.

We have carefully considered the authorities in the able brief of appellee supporting a different rule, but find no sufficient reason for not following the rule already adopted by our decisions. The court erred in rendering judgment for the entire damage resulting from the negligence of appellants for more than the smaller amount of the verdict against the appellant Harry Wann in the sum of $4,000.

The testimony is in decided conflict as to whether there was any conscious pain and suffering of the deceased after he came in contact with the defectively insulated wire, the preponderance of it probably being

against such a finding, but there was some substantial testimony from which the jury might have found that such was the fact, and we cannot say the evidence is not sufficient to support the judgment. The testimony also was slight as tending to show a disposition on the part of the deceased to contribute any great amount of his earnings to the support of his parents, but we cannot hold it insufficient, the jury having found otherwise.

We do not regard it necessary, nor do we attempt, to separate the damages resulting to the estate on account of the pain and suffering endured by the deceased and the pecuniary losses to his heirs and next of kin, since there were no debts or claims against the deceased or his estate for which his father and the next of kin were not liable to the payment, and since his heirs and next of kin will be entitled to the whole amount recovered by the administrator for the estate and the next of kin.

There are other errors complained of, and it is insistently urged that the verdicts were excessive, but, under this court's holding that only the smaller amount of damages assessed against the one defendant can be recovered from both of them, we do not find it necessary to go further into the question of the excessiveness of the verdict, nor to consider the other assignments, which are not urged in view of the conclusion reached.

The judgment against the appellant electric company will be modified in accordance with the opinion herein and reduced to the amount of the damages assessed against appellant Wann, $4,000, for which amount only both appellants are liable, and judgment will be entered here accordingly, and the case affirmed. It is so ordered.