18-119021-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN RE THE MARRIAGE OF:

DANA RAYMOND TOWLE, Petitioner / Appellant,

vs.

LOUISE C. LÉGARÉ, Respondent / Appellee,
and
MATHIEU BONIN, Respondent-Substitute Party / Appellee.

On Appeal from the District Court of Wyandotte County
Honorable Timothy Dupree, District Judge
District Court Case No. 2015-DM-002778

REPLY BRIEF OF THE APPELLANT

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Reply Argument and Authorities

Rule 6.05 Statement

This reply brief is made necessary by new material contained in the appellees' brief. Specifically, that new material is the appellees' argument that the appellant failed to preserve his third issue for appeal (Brief of the Appellees ("Aple.Br.") 33-35). The remainder of the appellees' brief does not bring up any new material not already addressed (and refuted) in the appellant's opening brief.

* * *

Standard of Appellate Review

Whether an issue is preserved for appeal is a question of law over which this Court exercises unlimited review. *State v. Plummer*, 295 Kan. 156, Syl. ¶1, 283 P.3d 202 (2012).

* * *

In the third issue in his opening brief, Husband explained that the trial court abused its discretion in substituting Son for Wife after Wife's death (Brief of the Appellant ("Aplt.Br.") 45-49). This is because K.S.A. § 60-225(a) requires that when a claim or defense survives a party's death, "the proper party" must be substituted for the deceased, which as a matter of law only can be the administrator or executor of the deceased's estate, not an heir (Aplt.Br. 46-49). As it is undisputed that Son was not the administrator or executor of Wife's estate and was merely an heir, as a matter of law he did not qualify under § 60-225(a). The trial court therefore premised its exercise of discretion on an error of law, abusing that discretion (Aplt.Br. 48-49).

Son's substantive response ignores nearly all the law addressed in Husband's opening brief, is refuted on its face by Husband's opening brief, and therefore does not warrant a reply under Rule 6.05 (Aple.Br. 31-36). But amid that response, Son also argues that Husband failed to preserve this issue for appeal because Husband stated "no objection" to Son's request for substitution or else somehow withdrew his objection (Aple.Br. 33-35).

Son's preservation argument is without merit. Husband timely and properly objected to Son's motion to substitute himself for Wife as party to this action, making the same argument that he does in his third point. That is all the law of Kansas required him to do to preserve this issue for appeal. Thereafter, Husband did not withdraw that objection and the trial court ordered Son substituted for Wife expressly recognizing and overruling Husband's objection. Husband's third issue is preserved for appeal.

And even if Husband somehow did not preserve this issue for appeal, this Court still can decide it because it involves only a question of law arising on admitted facts and is finally determinative of the case. *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008). Son admitted that he was not the administrator or executor of Wife's estate. But under § 60-225(a), as a matter of law *only* an administrator or executor of a deceased party's estate may be substituted for that party (Aplt.Br. 46-49). So, regardless of preservation, the trial court lacked authority to substitute Son for Wife, and the case below had to be dismissed. The trial court reversibly erred in holding otherwise.

A. Husband preserved his third issue on appeal by timely objecting to the substitution of Son for Wife on the same ground he argues on appeal, which is all the law of Kansas required him to do to preserve this issue for appeal.

Generally, to preserve an issue for appeal it "must be based on objections properly made and preserved at trial." *Hendrix v. Docusort Inc.*, 18 Kan.App.2d 806, 808, 860 P.2d 62 (1993). K.S.A. § 60-246 provides a simple procedure for this: "When the ruling or order is requested or made a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection." If the party has done that, the grounds he presented in the trial court are preserved for appeal. *Robinson v. McBride Bldg. Co.*, 16 Kan.App.2d 120, 122-23, 818 P.2d 1184 (1991).

Husband followed § 60-246's procedure and preserved his third issue on appeal that only Wife's estate could be substituted for her, so Son could not be. He objected on exactly that ground to Son's request to be substituted.

At the beginning of a hearing on August 31 over Husband's motion to dismiss Wife's petition after her death, as a "preliminary matter" Wife's counsel made "an oral motion under K.S.A. 60-225(a) to substitute [Son] as a successor or a representative of [Wife]'s interests" (R. 4 at 6). Husband's counsel, Craig Ritchie, immediately objected and opposed this, arguing that the action and Wife's claim extinguished on her death, so no one could be substituted for her at all, but that *even if it was not extinguished then only Wife's estate could be substituted for Wife under § 60-225(a)* (R. 4 at 6-8).

Mr. Ritchie stated:

> The procedure as at least I've seen in the cases, and the Wilson case is one of the cases we've cited to the Court, in that case, the

> estate at -- was the substitute party. The estate came in to represent the interests of the decedent. …
>
> Again, I'm not even sure that -- that [Son] would be the appropriate party to be -- to be substituted. It seemed like it would be the estate. They may have similar interests, but we don't know that. He's not here. He's not participating, not subject to cross-examination. So for those reasons, Your Honor, I suggest that it would not be appropriate to give standing to an individual that may or may not be the appropriate party.

(R. 4 at 7).

Moreover, Mr. Ritchie specfically stated that one reason he was making this objection was to preserve this issue for appeal:

> Your Honor, I think I have to make the objection on the record in part to preserve it for appeal, but, more importantly, because the statute only allows substitution if the claim can continue. So I don't want -- I don't want to, in essence, give up that -- that right.

(R. 4 at 8).

After further argument by the parties, during which Wife/Son's lawyer argued that despite the fact no estate yet had been opened for Wife, Son still should be considered a proper party for substitution because "I don't know who else would be an appropriate successor or representative under the statute" (R. 4 at 9), the court expressly granted Son's motion for substitution and overruled Husband's objection:

> THE COURT: Okay. Very well. The Court's gonna grant the substitution of counsel. Court's gonna grant the oral motion made by Ms. Kivett for substitution of counsel. The Court will allow – what's the young man's name?
>
> MS. KIVETT: His name is Mathieu and it's spelled Ma-t-h-i-e-u and the last name is spelled B-o-n-i-n.
>
> THE COURT: B-o what?

MS. KIVETT: N as in Nancy, I as in ice cream, N as in Nancy.

THE COURT: All right. The Court's gonna allow Mathieu Bonin to be substitute party over the objection --

MR. RITCHIE: Thank you, Your Honor.

THE COURT: -- of the petitioner.

(R. 4 at 12).

The law of Kansas is that this is all Husband had to do to preserve his third issue for appeal. In the words of § 60-246, first Son made a request for a "ruling or order" substituting him for Wife. In response, Husband "stat[ed] the action that [he] want[ed] the court to take" (i.e., denying the motion) and the "action that he … object[ed] to" (i.e., Son's proposed substitution), "along with the grounds for the request or objection" (i.e., among other things, that only the estate could be substituted, not Son) (R. 4 at 6-8). And he specifically said he was doing this to preserve the issue for appeal (R. 4 at 8). The trial court granted Son's request and recognized that it was doing so over Husband's objection (R. 4 at 12). This preserved Husband's argument for appeal. *Robinson*, 16 Kan.App.2d at 122-23, 818 P.2d 1184.

Son argues that during this, Husband somehow "withdrew his objection" and therefore "failed to preserve the issue for appeal" because he "requested the court proceed over his objection" (Aple.Br. 34) (citing R. 4 at 7-8).

Son's argument is without merit. Husband did no such thing. The court brought up the idea of "continu[ing] today's hearing and allow[ing] briefs to be made" (R. 4 at 7). Mr. Ritchie suggested the court simply "take that matter under advisement" (R. 4 at 8). At no point did Mr. Ritchie

"withdraw" his objection or "reques[t] the court to proceed over his objection", as Son suggests (Aple.Br. 34). Instead, the court granted Son's request and overruled Husband's objection (Aple.Br. 34).

Son also points the Court to another hearing months later in November 2017, at which the parties (with Husband represented by a different lawyer, Stephanie Schutt) and the court were trying to remember whether Son previously had been allowed to file new pleadings after substitution (Aple.Br. 34-35) (citing R. 6 at 131).

When the court asked Son's lawyer whether there was anything else bearing on whether Son should be allowed to file a pleading out of time, Son's lawyer claimed there had been no transcript at the August 31 hearing where he had been substituted in and "no objection was stated at that time" to substitution (R. 6 at 130). Obviously, that was not true, as Record Volume 4 is that transcript, and Husband did object to the substitution on the same basis he now argues on appeal (R. 4 at 6-8).

Husband, through Ms. Schutt, rather than Mr. Ritchie, stated she was unsure about this but that

> [i]t's my recollection that we did not object to him as a substitute party, but it -- it was -- it's my understanding or my recollection that it was only for purposes of the motion to dismiss, not to bring up new claims that we hadn't heard of as of the August date. Again, no objection to him as a substitute party whatsoever, but it was our understanding -- and again, I don't recall if there was a record made either, but it would be for the purposes of the motion to dismiss that we had pending and was to be heard that day.

(R. 6 at 131). The court then went on and let Son file a pleading out of time (R. 6 at 131-32).

Ms. Schutt's statement plainly was not a withdrawal of Husband's express objection on the record August 31 or a waiver of it. It was just a second lawyer not recalling – or misunderstanding – what a first lawyer had done at a previous hearing months earlier, especially without a record readily available.

Son cites no authority that failing to remember an overruled objection months later negates that objection's ability to preserve error for appeal. And this is because the law of Kansas is to the contrary. In Kansas, once an objection is overruled, repeated objections are not required. *McKissick v. Frye*, 255 Kan. 566, 582, 876 P.2d 1371 (1994). After having an objection overruled once, a lawyer does not have to make an objection every time the issue comes up or request a "continuing objection". *State v. Winston*, 281 Kan. 1114, 1126, 135 P.3d 1072 (2006).

All § 60-246 required Husband do to preserve for appeal his argument that only Wife's estate, and not Son as mere heir, could be substituted for Wife was object to Son's motion for substitution on this basis. He did so timely and properly, and the trial court overruled his objection.

The law of Kansas is that Husband's third issue on appeal is preserved for appellate review. Son's argument otherwise is without merit.

B. If Husband somehow did not properly preserve his third issue for appeal, then it still is properly before the Court because it involves only a question of law arising on admitted facts and is finally determinative of the case.

If Son somehow were right that Husband failed to preserve his third issue for appeal, the law of Kansas is that it is still appealable because it concerns a pure issue of law on admitted facts that is finally determinative of the case. Either way, the trial court had no authority to substitute Son for Wife when by Son's own admission he was not an authorized representative of Wife's estate. Even if not properly preserved, this remains reversible error, requiring dismissal of Son's action.

"[T]here are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, including: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case …." *Estate of Broderick*, 286 Kan. at 1082, 191 P.3d 284 (quoting *State v. Kirtdoll*, 281 Kan. 1138, 1149, 136 P.3d 417 (2006)).

This exception applies where (a) the district court decides an issue "based solely upon the pleadings, and there were no disputed facts on" it, (b) the issue "involves only a question of law", and (c) if the appellant "is successful in [his] argument, [the] question will result in a final resolution of the appeal." *Fisher v. DeCarvalho*, 45 Kan.App.2d 1133, 1148, 260 P.3d 1218 (2011), *reversed on other grounds*, 298 Kan. 482, 493, 314 P.3d 214 (2013) (reversing Court of Appeals' ultimate legal holding but accepting that the issue fit this exception to preservation).

If Husband somehow did not properly preserve his third issue below, it easily fits this exception.

First, both below and on appeal, it is undisputed that Son is not and never was the personal representative or executor of Wife's estate, and no material facts as to this ever have been in dispute. Below, during her argument in support of substituting Son for Wife at the August 2017 hearing, Son's counsel conceded that he was not then Wife's executor or her estate's representative (R. 4 at 8-9). And at the November 2017 hearing over Son's petition to enforce Wife's settlement that resulted in the journal entry now being appealed, Son himself testified that he still was not Wife's "legal executor" (R. 6 at 91). Even now, in his brief, Son concedes he is not Wife's legal executor (Aple.Br. 36).

Second, Husband's third issue on appeal involves only a question of law. Husband's point is that as a matter of law, under § 60-225(a)(1) "the proper party" to be substituted *only ever* can be the executor or administrator of the party's estate, *not* a self-described heir, just as all the decisions he cited and discussed held (Aplt.Br. 46-48).

Finally, if Husband's third issue on appeal is successful, the question will result in a final resolution of this appeal. As Husband explained in his opening brief, Son's lack of standing to continue Wife's action means that every action Son took – and decision that resulted – was void as a matter of law, meaning this Court must reverse the trial court's judgment and remand this case with instructions to dismiss the action below (Aplt.Br. 49). This always has been the remedy when a person without standing to act for a

deceased party attempts to do so. *See, e.g.*, *Cory v. Troth*, 170 Kan. 50, 52-53, 223 P.2d 1008 (1950) (affirming dismissal of fraud case brought by victim's heir, rather than the authorized representative of his estate); *Howe v. Mohl*, 168 Kan. 445, 449-50, 214 P.2d 298 (1950) (same re: personal injury action); *Presbury v. Pickett*, 1 Kan.App. 631, 42 P. 405, 405-06 (1895) (reversing judgment on promissory note when action was brought improperly by plaintiff's heir, rather than the representative of his estate).

Even if Husband somehow failed to preserve his third point for appeal, it is still appealable because it concerns a pure issue of law on admitted facts that is finally determinative of the case. Either way, the trial court had no authority to substitute Son for Wife, requiring dismissal of Son's action.

Conclusion

This Court should reverse the district court's judgment and remand with instructions to dismiss the action below.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Service

I certify that on September 24, 2018, I electronically filed a true and accurate Adobe PDF copy of the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following:

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