IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO. 2008-CA-00690

JOHN CLAYTON KABBES **APPELLANT**

V.

JOHN BAXTER BURNS **APPELLEE**

Appeal From the Chancery Court
of the First Judicial District of Hinds County, Mississippi
Honorable Denise S. Owens, Judge

BRIEF OF APPELLEE

J. Kevin Watson (MSB [redacted]
C. Stephen Stack, Jr. (MSB #[redacted]
WATSON & JONES, P.A.
Post Office Box 23546
Jackson, Mississippi 39225
Telephone: (601) 939-8900
Facsimile: (601) 932-4400
Attorneys for Appellee, John Baxter Burns

ORAL ARGUMENT REQUESTED

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JOHN CLAYTON KABBES **APPELLANT**

V.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellee, John Baxter Burns, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. John Baxter Burns, Appellee/Defendant
2. J. Kevin Watson, Esq. and C. Stephen Stack, Jr., Esq., Counsel for Appellee/Defendant
3. John Clayton Kabbes, Appellant/Plaintiff
4. L. Breland Hilburn, Esq. C. Louis Clifford IV, Esq., and Patrick J. Schepens, Esq., Counsel for Appellant
5. Honorable Denise S. Owens, Chancellor, Hinds County, Mississippi
6. Lynn Macon, Executrix of the Estate of Martha Thomas Kabbes Burns;
7. A.M. Edwards, III, Esq., Counsel for Lynn Macon
8. James H. Herring, Esq., Counsel for the Estate of Martha Thomas Kabbes Burns
9. Honorable Stuart Robinson, Sr., retired Hinds County Chancellor

C. STEPHEN STACK, JR.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

STATEMENT REGARDING ORAL ARGUMENT.....1

STATEMENT OF THE CASE.....2

SUMMARY OF THE ARGUMENT.....4

ARGUMENT.....6

A. The antenuptial agreement has no bearing on Mr. Burns' claim as a wrongful death beneficiary 6

B. The fact that Mr. Burns and the other wrongful death beneficiaries settled a "doubtful" claim does not mean there was no wrongful death.....7

C. The chancellor was not required to conduct a hearing as to what share of the settlement proceeds Mr. Burns was entitled.....11

CONCLUSION.....13

CERTIFICATE OF SERVICE.....15

TABLE OF AUTHORITIES

Cases

Anglin v. Gulf Guaranty Life Ins. Co., 956 So.2d 853 (Miss. 2007).....8

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2nd Cir.1974).....10

In re Estate of Blanton, 824 So.2d 558 (Miss. 2002).....9

In Re Estate of England, 846 So. 2d 1060 (Miss.Ct.App. 2003).....5, 6, 7, 10, 13

In re Guardianship of Holmes, 965 So.2d 662 (Miss. 2007).....9

In re Guardianship of Savell, 876 So.2d 308 (Miss. 2004).....9

Jones v. Fluor Daniel Services Corp., 959 So.2d 1044 (Miss.2007).....7

Jones v. Shaffer, 573 So.2d 740 (Miss.1990).....8

Madison v. Madison, 922 So.2d 832 (Miss.Ct.App.2006).....8

McBride v. Chevron U.S.A., 673 So.2d 372 (Miss.1996).....8

Murphy v. State, 253 Miss. 644, 178 So.2d 692 (1965).....12

Nelson v. Waring, 602 F.Supp. 410 (N.D. Miss.1983).....9, 10

Newman v. Stein, 464 F.2d 689 (2nd Cir.1972).....10

Pannell v. Guess, 671 So. 2d 1310 (Miss. 1996).....4, 5, 6, 8, 11, 12, 13

Partyka v. Yazoo Development Corp., 376 So.2d 646 (Miss. 1979).....5, 10

Planters Bank & Trust Co. v. Sklar, 555 So.2d 1024 (Miss.1990).....12

Riley v. Wiggins, 908 So.2d 893 (Miss.Ct.App.2005).....9

River Region Med.Corp. v. Patterson, 975 So.2d 205 (Miss. 2007).....13

Young v. Katz, 447 F.2d 431 (5th Cir.1971).....10

Statutes

Miss. Code Ann. § 11-7-13.....5, 7, 12, 13, 14

STATEMENT REGARDING ORAL ARGUMENT

Appellee requests oral argument in this matter and submits it will be helpful to the Court for the following reason:

1. Oral argument will help the Court understand the background of this case and why the settlement proceeds recovered in this matter are wrongful death proceeds and thus not part of Mrs. Burns' estate or otherwise controlled by the antenuptial agreement signed by Mr. and Mrs. Burns prior to her death.

STATEMENT OF THE CASE

On July 18, 2002 Martha Kabbes Burns died as a result of a one-vehicle accident which occurred in Foster, Green County, Alabama. At the time of her death, she was survived by her husband, Appellee, John Baxter Burns, her two daughters, Lila K. Strode and Carmen K. Goforth, and her son, Appellant, John Clayton Kabbes. Subsequent to the accident, suit was filed in the Circuit Court of the First Judicial District of Hinds County, Mississippi on behalf of the wrongful death beneficiaries of Mrs. Burns by Appellant Kabbes against General Motors Company, Michelin of North America, Inc. [Michelin] and others. R. 4-18. An estate for Mrs. Burns was also opened. Having reached a settlement agreement with Michelin, a Petition to Determine Heirs and For Authority to Settle a Doubtful Claim was filed by Kabbes in the estate. R. 39. Mrs. Burns' two daughters and Appellee Burns joined in that petition. R. 47-52. The chancellor granted the Petition approving the settlement and finding that Appellee Burns, Appellant Kabbes and Mrs. Burns' two daughters were the sole and only heirs at law. R. 53-61. As part of the Decree, the chancellor ordered that any unpaid expenses of the estate should be satisfied from the settlement proceeds. R. 61.

Kabbes contemporaneously therewith filed a Petition for Enforcement of Antenuptial Agreement and Damages wherein he claimed Mr. Burns had released any right to any claim he had as a wrongful death beneficiary by entering into an antenuptial agreement. R. 19-26.[1] The antenuptial agreement provided in pertinent part that: "Each of the parties hereto agree that on the death of the other, the surviving party will not have and will not in any way assert any claim, interest, estate or title of any kind or nature whatsoever in or to any property, real, personal or mixed, of which the other party may die seized or possessed...." The chancellor denied

[1] Mrs. Burns' daughters did not contest Mr. Burns' right to participate as a wrongful death beneficiary and in fact filed waivers indicating such. R. 33-38.

Kabbes' motion and found that the settlement proceeds were wrongful death proceeds, and thus, the antenuptial agreement had no bearing on those proceeds or Mr. Burns' right to claim a portion of same. R. 62-63. Kabbes filed a Motion to Reconsider [R. 64-66] which was denied. R. 92. He subsequently filed this appeal. R. 93.

SUMMARY OF THE ARGUMENT

1. The antenuptial agreement signed by Mr. Burns has no bearing on Mr. Burns' right to share in the proceeds derived from the settlement of the wrongful death suit filed following Mrs. Burns' death. That agreement provides that neither party will make any claim against the other's estate. "[A] wrongful death action is not part of the estate of the deceased." *Pannell v. Guess*, 671 So. 2d 1310, 1313 (Miss. 1996).

2. Because Mr. Kabbes, Mr. Burns and the other wrongful death beneficiaries agreed to settle the wrongful death suit, they were not required to prove that the defendant Michelin caused Mrs. Burns' death. *Pannell*, 671 So. 2d 1313. Requiring a settling party to prove his case would defeat one of the primary purposes for settlement...the expeditious closure of cases...and would have a chilling effect on the practice. A wrongful death suit is no different from any other in this regard.

3. The fact that the beneficiaries in seeking approval for the settlement filed a petition to settle a "doubtful" claim and that this language was incorporated into the decree is of no consequence. Such language simply indicates that a jury has not found the defendant liable and that the beneficiaries are willing to forgo a possible bigger recovery in exchange for the certainty and finality of settlement. It does not mean that no wrongful death occurred or that the defendant was not negligent. Moreover, the chancellor's recognition of the doubtfulness of the claim and approval of the settlement based on this fact does not somehow transform a wrongful death action into one held by the estate.

4. In fact, the proceeds from the settlement cannot pass through the estate of Martha Kabbes Burns, as any claim against Michelin is necessarily a wrongful death claim

and not one held by the estate of Martha Kabbes Burns. "[A] wrongful death action cannot become a part of the wrongful death victim's estate except in the circumstance when, as provided by statute, no statutory heirs survived the wrongful death victim." *In Re Estate of England*, 846 So. 2d 1060, 1067 (Miss.Ct.App. 2003) (citing *Partyka v. Yazoo Development Corp.*, 376 So.2d 646, 650 (Miss. 1979)). Here, Mr. Burns and Martha Kabbes Burns' children were established as the sole heirs at law and wrongful death beneficiaries. Any claim Mrs. Burns' estate might have had against Michelin instantly became part of the wrongful death claim upon her death. *In re England*, 846 So.2d at 1068. The chancellor was correct in finding that the settlement monies represented wrongful death proceeds.

5. Having correctly found that the settlement proceeds were those for wrongful death, the chancellor was not required to have a hearing to determine the amount of the settlement to which each beneficiary was entitled. This was squarely addressed in *Pannell v. Guess*, 671 So. 2d 1310 (Miss. 1996). The wrongful death statute states clearly that "damages for the injury and death of a married woman *shall be equally* distributed to the husband and children." *Miss. Code Ann.* § 11-7-13 (Rev. 2004) (emphasis added). Mr. Burns was entitled to his pro rata share, and the chancellor correctly so found. That decision should be affirmed.

ARGUMENT

A. The antenuptial agreement has no bearing on Mr. Burns' claim as a wrongful death beneficiary.

Appellant Kabbes' entire argument for excluding Mr. Burns from participating in the wrongful death recovery is based upon language found in the antenuptial agreement signed by Mr. and Mrs. Burns prior to their marriage. That document provides in pertinent part:

> Each of the parties hereto agree that on the death of the other, the surviving party will not have and will not in any way assert any claim, interest, estate or title of any kind or nature whatsoever in or to any property, real, personal or mixed, of which the other party may die seized or possessed....R. 28

Mr. Burns does not dispute the validity of the agreement, and he has made no claim as to Mrs. Burns' estate.[2] However, "[A] wrongful death action is not part of the estate of the deceased." *Pannell v. Guess*, 671 So. 2d 1310, 1313 (Miss. 1996). As the Court of Appeals explained in *In Re Estate of England*, 846 So. 2d 1060, 1066 (Miss.Ct.App. 2003):

> States originally enacted wrongful death statutes based on either of two lines of authority, the survival theory or the new cause of action theory. Under the survival theory, a wrongful death statute perpetuates the right to sue which the negligently injured decedent had until death. **Mississippi's wrongful death statute is based on the new cause of action theory. Under that theory, the statute creates a new cause of action that accrues at death in favor of the heirs listed in the statute**.
>
> Thus, wrongful death has been recognized as a tort separate and distinct from other personal injury actions. The distinction is reflected by the purposes underlying recovery of damages in each type of action. In a suit for personal injury, the damages are intended to compensate the injured person for the injuries sustained. **In a suit for wrongful death, the damages are intended to compensate the statutory wrongful death heirs for**

[2] In fact, Mr. Burns filed a Disclaimer specifically revoking "any and all rights which I might have to participate in the distribution of the estate of Martha Thomas Kabbes Burns as her spouse." R. 75-76.

their losses resulting from the death. [emphasis added and internal quotes and citations omitted].

Obviously, the wrongful death action against Michelin is not something "of which [Mrs. Burns] died seized and possessed" as the cause of action did not even accrue until her death.[3] The proceeds are intended to compensate Mr. Burns for his losses resulting from Mrs. Burns' death. *In Re Estate of England*, supra. His participation in the wrongful death suit and claim to the proceeds derived therefrom in no way runs afoul of the agreement.

B. **The fact that Mr. Burns and the other wrongful death beneficiaries settled a "doubtful" claim does not mean no wrongful death occurred.**

Kabbes argues that "in order to recover any damages for wrongful death, the heirs were required to prove that the negligence or wrongful acts...caused the death." Br. p.10. He states further that "there was never an adjudication of any wrong on the part of defendant Michelin" and that "[a]ll of the heirs at law and wrongful death beneficiaries joined in a petition which asserted any claim against and any liability as to Michelin was doubtful." Br. p.11. In essence, Kabbes' argument is that since the case settled there was no adjudication of any wrongdoing on the part of Michelin and thus it does not represent a recovery "for the injury and death of a married woman" as per *Miss. Code Ann.* § 11-7-13 (Rev. 2004).

First, this argument was never raised before the chancellor. As such, it should not even be considered on appeal. See *Jones v. Fluor Daniel Services Corp.*, 959 So.2d 1044, 1048

[3] For this same reason, Mrs. Burns could not devise or assign the cause of action through the agreement prior to her death. See *In re England*, 846 So.2d at 1070 ("Because the claim accrues at death, it is impossible for the deceased to assign any interest in the claim.").

(Miss.2007) ("We do not consider issues raised for the first time on appeal.") (citing *Anglin v. Gulf Guaranty Life Ins. Co.*, 956 So.2d 853 (2007)).

Nevertheless, the argument is totally without merit. If the wrongful death suit had proceeded to trial then Kabbes would be absolutely correct in his assertion that the beneficiaries would have had to have proven that Michelin's negligence proximately caused Mrs. Burns' death. Instead, however, the beneficiaries...including Kabbes...made a decision to settle with Michelin beforehand. They therefore were relieved of this obligation. See *Pannell*, 671 So.2d at 1313 ("The lower court approved [the] settlement, and neither Shelly's parents nor her half-siblings...had to prove damages for loss of companionship or pain and suffering.") (citing *Jones v. Shaffer*, 573 So.2d 740, 743 (Miss.1990)). It is ludicrous to suggest that wrongful death beneficiaries could somehow lose their statutory right to recover by settling a case rather than enduring protracted and costly litigation. Such a result obviously would discourage settlement (which the law favors) and defeat one of the primary purposes for it...the prompt resolution of cases. See *Madison v. Madison*, 922 So.2d 832, 835 (Miss.Ct.App.2006) ("[O]ur law favors settlement for many reasons, not the least of which includes the expeditious closure of cases.") (citing *McBride v. Chevron U.S.A.*, 673 So.2d 372, 379 (Miss.1996)).[4] There is simply no basis for treating proceeds recovered from a settlement any different from those recovered through trial and judgment...and Kabbes has offered none.

He makes a futile attempt to do so, however, by seizing upon the "doubtful claim" language contained in the Petition to Determine Heirs and For Authority to Settle a Doubtful

[4] Although Kabbes' argument is not clear, in the absence of trial, he apparently would have Mr. Burns and the other beneficiaries prove up their entire case before the chancellor prior to approval for the settlement being granted. See Br. p.11 ("Here there were no findings [by the chancellor] that the settlement was for the death of Martha Kabbes Burns...."). No such a hearing or proof is required. See discussion *infra*. Moreover, if litigants were required to prove their case despite settlement this would have a similar chilling effect on out-of-court resolution of cases.

Claim [R. 39-46] and speciously argues that "the decree granting the petition...does not contain any finding that the proceeds were wrongful death proceeds" and that "a wrongful or negligent act ...was not established...thus the proceeds must pass through the Estate of Martha Thomas Kabbes Burns..." Br. 11-12.

Obviously, any claim where liability is in dispute is "doubtful" until such time as a jury returns a verdict in one party's favor, and this type of verbiage is typically included in any petition asking a court to approve a settlement. See, e.g., *In re Guardianship of Holmes*, 965 So.2d 662, 664 (Miss. 2007)("...chancery court granted Copeland's petition to settle doubtful claim...."); *In re Guardianship of Savell*, 876 So.2d 308, 311 (Miss. 2004) ("petition in the Scott County Chancery Court...for authority to settle a doubtful claim on behalf of the estate...."); and *In re Estate of Blanton*, 824 So.2d 558, 559 (Miss. 2002) (Co-executrixes filed "petition to determine heirs and wrongful death beneficiaries" and "petition for authority to settle doubtful claims" in chancery court following settlement of federal wrongful death suit). This does not mean that a negligent act did not occur; it simply means the wrongful death beneficiaries are willing to settle with the negligent party in order to avoid the uncertainty of litigation and the burden and expense of proving their case. See *Riley v. Wiggins*, 908 So.2d 893, 899 (Miss.Ct.App. 2005) ("The parties to litigation may by compromise and settlement not only save the time, expense, and psychological toll but also avert the inevitable risk of litigation."). As the district court in *Nelson v. Waring*, 602 F.Supp. 410, 413 (N.D. Miss.1983) explained:

> Compromise is the essence of settlement and the Court should not make the proponents of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of which concessions might have been gained; inherent in compromise is a yielding of absolutes and abandoning of highest hopes....

> "In examining a proposed compromise ... the Court does not try the case. The very purpose of compromise is to avoid the delay and expense of such a trial." *Young v. Katz,* 447 F.2d 431, 433 (5th Cir.1971). As more recently stated, "The trial court in approving the settlement ... [does not] have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute...." *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 456 (2d Cir.1974). A settlement hearing is not a "rehearsal of the trial." *Newman v. Stein,* 464 F.2d 689, 692 (2d Cir.1972).

Likewise, here, the chancellor in approving the settlement "did not have the right or the duty to reach any ultimate conclusions on the issues of fact and law," *Nelson, supra*, and the absence of these findings does not somehow transform this action into one which passes through the decedent's estate.

In fact, contrary to Kabbes' assertion, the proceeds from this settlement cannot pass through the estate of Martha Kabbes Burns, as any claim against Michelin is necessarily a wrongful death claim and not one held by the estate of Martha Kabbes Burns. "[A] wrongful death action cannot become a part of the wrongful death victim's estate except in the circumstance when, as provided by statute, no statutory heirs survived the wrongful death victim." *In re Estate of England*, 846 So.2d at 1067 (citing *Partyka v. Yazoo Development Corp.*, 376 So.2d 646, 650 (Miss. 1979)). Here, Mr. Burns and Martha Kabbes Burns' children were established as the sole heirs at law and wrongful death beneficiaries. See Paragraph 16 of Decree of Chancellor [R. 53-61]. Any claim Mrs. Burns' estate might have had against Michelin instantly became part of the wrongful death claim upon her death. *In re England*, 846 So.2d at 1068. ("When the same wrongful conduct causes both personal injury and death, at the instant of death, the recovery for the personal injury is embraced by the 'one suit' for wrongful death and **is not actionable by the estate**...") (emphasis added). The beneficiaries, including Mr. Kabbes

and Mr. Burns, filed and subsequently settled this "one suit". Clearly, the chancellor was correct in finding that the proceeds of the settlement with Michelin were wrongful death proceeds.[5]

C. **The chancellor was not required to conduct a hearing as to what share of the settlement proceeds Mr. Burns was entitled.**

Kabbes contends that even if the chancellor was correct in finding that the settlement funds represented wrongful death proceeds, she nevertheless should have conducted a hearing to make a determination as to what portion of the proceeds Mr. Burns was entitled. Br., p.15-16. This contention was squarely addressed... and rejected...by this Court in *Pannell v. Guess*.[6]

There, Shelly Pannell, an unmarried minor, was killed in an automobile accident when the car in which she was a passenger collided with another vehicle. Shelly was survived by her mother, father and four half-siblings from her father's previous marriage. *Pannell*, 671 So.2d at 1312. Shelly's father hired an attorney who negotiated a settlement with the driver's insurance company. *Id.* The chancellor authorized the chancery clerk to receive the settlement proceeds into the registry pending approval of the settlement and a determination of wrongful death

[5] Kabbes argues that Chancellor Owens lacked authority to make this finding as such a finding "was in essence overruling the prior decision of Chancellor Robinson which found any liability on the part of Michelin to be doubtful." Br. 12-13. As explained, *supra*, Chancellor Robinson's finding that the claim against Michelin was "doubtful" does not equate with a finding of no wrongful death. In fact, Chancellor Robinson's decree specifically states that "it is in the best interests of the estate, heirs at law and **the wrongful death beneficiaries** that the...settlement be accepted...."[emphasis added] R. 59. It is hard to fathom how a settlement, in which Kabbes now claims only the estate and heirs could participate, could be "in the best interests" of the wrongful death beneficiaries.

[6] In fact, as the Court no doubt has recognized from the repeated citations to *Pannell* throughout this brief, that case is dispositive of virtually all of the issues raised by Appellant Kabbes in this appeal.

beneficiaries. *Id.* [7] The chancellor ultimately determined that all four half-siblings and the mother and father should share the settlement proceeds equally under the wrongful death statute. He determined that he had no authority to hold an evidentiary hearing to determine how the proceeds of the settlement should be disbursed. *Id.* at 1312-1313. This Court affirmed and noted:

> Contrary to Appellants' argument, the wrongful death statute does not provide that the lower court may conduct a hearing to determine how to divide the proceeds. In fact, the statute provides that the funds "*shall be equally* distributed" (emphasis added). A basic tenet of statutory construction is that "shall" is mandatory and "may" is discretionary. *Planters Bank & Trust Co. v. Sklar,* 555 So.2d 1024, 1027 (Miss.1990); *Murphy v. State,* 253 Miss. 644, 649, 178 So.2d 692 (1965).
>
> In the case at bar, Shelly was not survived by a husband or children. Therefore, under Miss.Code Ann. § 11-7-13 (Supp.1991), the chancellor had no choice but to distribute the insurance settlement proceeds to Shelly's father, mother, half-sisters and half-brother, equally. Accordingly, we cannot say that the chancellor's refusal to hold a separate hearing in which each wrongful death beneficiary could attempt to prove his or her individual damages (and therefore, the right to receive a larger or smaller portion of the insurance proceeds) was erroneous.
>
> David and Betty Pannell do not cite any Mississippi case law or statutory law that would allow or require the lower court to conduct a hearing at which the wrongful death beneficiaries would be required to "justify" their damages. Moreover, this Court could find no such authority under our statutory or case law. Therefore, we find that the lower court correctly applied Miss.Code Ann. § 11-7-13.

Id. at 1314.

[7] It should be noted that the funds were deposited in the registry "pending settlement of a doubtful and disputed claim" (See discussion in Section B, *supra*). The funds nevertheless were ultimately distributed by the chancellor as wrongful death proceeds, and this Court affirmed.

Similarly, as relates to the case at bar, the statute provides that "damages for the injury and death of a married woman *shall be equally* distributed to the husband and children." *Miss. Code Ann.* § 11-7-13 (Rev. 2004) (emphasis added). The chancellor did not err in not conducting a hearing to have Mr. Burns "justify" his damages. *Panell, supra.*[8] The settlement proceeds were properly distributed equally among the beneficiaries as per the statute.

CONCLUSION

The antenuptial agreement signed by Mr. Burns has no bearing on his right to recover in a wrongful death suit. Such a suit is not part of the estate of Mrs. Burns and does not represent property of which she "died seized and possessed". The settlement proceeds obtained from such a suit are monies to compensate Mr. Burns for his losses and thus are his separate property not subject to the agreement.

By agreeing to compromise and settle the wrongful death suit filed herein, the beneficiaries were relieved of their obligations to prove fault on the part of the defendant. Likewise, the chancellor was not required to conduct a "rehearsal of the trial" wherein the beneficiaries could prove their case. The beneficiaries...including appellant Kabbes...made a decision to settle to avoid this very burden. This decision does not transform the wrongful death suit into one held by the estate. Indeed, "a wrongful death action cannot become a part of the wrongful death victim's estate except in the circumstance when, as provided by statute, no statutory heirs survived the wrongful death victim." *In re Estate of England, supra.* Such is obviously not the case here.

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[8] Incidentally, Kabbes in support of his argument that a hearing is necessary cites to language in this Court's opinion in *River Region Med.Corp. v. Patterson*, 975 So.2d 205, 208 (Miss. 2007) that all wrongful death damages "are not due to the same claimants" and that "the estate is entitled to recover funeral costs and final medical expenses." No one disputes that the estate ordinarily would have been entitled to recoup these expenses from the settlement proceeds and the chancellor ordered as much in his decree. R. 61. However, a review of the record in this case reveals that no claim was made to recover such expenses, as they were paid by Mr. Burns himself out-of-pocket.

Having correctly found that the settlement proceeds were those for wrongful death, the chancellor was not required to have a hearing to determine the amount of the settlement to which each beneficiary was entitled. The wrongful death statute states clearly that "damages for the injury and death of a married woman *shall be equally* distributed to the husband and children." *Miss. Code Ann.* § 11-7-13 (Rev. 2004) (emphasis added). Mr. Burns was entitled to his pro rata share, and the chancellor correctly so found. That decision should be affirmed.

This the 21st day of October, 2008.

Respectfully submitted,

JOHN BAXTER BURNS

BY: _____
C. Stephen Stack, Jr. (MSB [redacted]

OF COUNSEL:

J. Kevin Watson (MSB [redacted]
C. Stephen Stack, Jr. (MSB [redacted]
WATSON & JONES, P.A.
Post Office Box 23546
Jackson, Mississippi 39225
Telephone: (601) 939-8900
Facsimile: (601) 932-4400

CERTIFICATE OF SERVICE

I, C. Stephen Stack, Jr., the undersigned attorney, do hereby certify that I have served a true and correct copy of the above and foregoing document via U.S. Mail, to the following counsel of record:

L. Breland Hilburn, Esq.
P.O. Box 2114
Jackson, MS 39225

C. Louis Clifford, Esq.
Ware Clifford PLLC
2625 Ridgewood Road, Suite 100
Jackson, MS 39216

Patrick J. Schepens, Esq.
Eaves Law Firm
101 North State St.
Jackson, MS 39201
ATTORNEYS FOR APPELLANT

and

Honorable Denise Owens
P.O. Box 686
Jackson, MS 39205-0686

This the 21st day of October, 2008.

C. Stephen Stack, Jr.