

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

MICHIGAN-OHIO-KENTUCKY-TENNESSEE

October 21, 1981

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U.S. COURT HOUSE
DETROIT, MICHIGAN 48226

John P. Hehman, Clerk
United States Court of Appeals
for the Sixth Circuit
Cincinnati, OH 45202

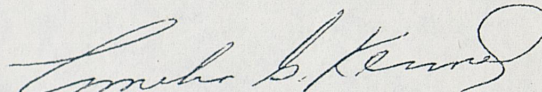
Re: 80-3312, Mesker v. U.S. Gypsum
10/12/81

Dear Mr. Hehman:

Please sign and enter the enclosed order in the above case.

Judges Merritt and Unthank have concurred.

Sincerely,



Cornelia G. Kennedy

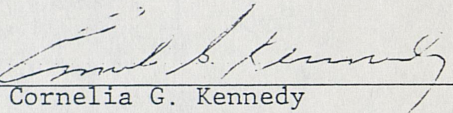
Enc.

cc: Judge Merritt
Judge Unthank ✓

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUITPANEL REPORT

DATE: Monday, October 12, 1981, #1, 1:30 p.m.
PANEL: Merritt, Kennedy, and Unthank
NO: 80-3312, Mesker v. U.S. Gypsum Co., et al.
N.D. Ohio - Krupansky, J.

Attached for your review is an order in the above-entitled case, which is being circulated in lieu of a panel report. It is called to the particular attention of Judges Merritt and Unthank.



Cornelia G. Kennedy

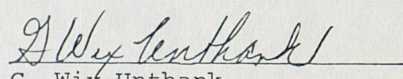
Enc.

cc: All Judges

October 16, 1981

Dear Judge Kennedy:

I concur.



G. Wix Unthank

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CATHERINE MESKER, Executrix of
the Estate of JAMES MESKER,
Deceased,

Plaintiff-Appellant,

v.

O R D E R

U.S. GYPSUM COMPANY, et al.,

Defendants-Appellees.

Before: MERRITT and KENNEDY, Circuit Judges; UNTHANK,
District Judge.*

Catherine Mesker, Executrix of the Estate of James Mesker, deceased, appeals from the judgment of the District Court dismissing her complaint on the basis that "the within survivor's action for bodily injury was not commenced within two years after the cause of action arose." Ohio Rev. Code § 2305.10. Mrs. Mesker filed a motion for reconsideration urging that her complaint is sufficient to state a cause of action for wrongful death as well. Ohio Rev. Code § 2125.01. Although the motion was not timely the District Court ruled upon the motion and denied it. Appellant's notice of appeal, timely filed after the judgment of dismissal, is not affected by the untimely motion for reconsideration. Rule 4(a)(4), Fed. R. App. P.

The complaint alleges all of the requirements for a survival action. However, it also alleges the essential facts to support

*

The Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

an action for wrongful death. It is brought by the personal representative of the deceased; it alleges that plaintiff is the surviving spouse; and it alleges that the deceased's death was caused by the wrongful acts of the defendants.

Although it fails to allege pecuniary loss to the widow it does contain a claim for damages and for any further relief to which the plaintiff is entitled.

The federal rules do not adhere to the ancient principle that a pleading must be construed most strongly against the pleader. Nor do the federal courts require technical exactness or draw refined inferences against the pleader; rather they make a determined effort to understand what he is attempting to set forth and to construe the pleading in his favor, whenever justice so requires.

Wright and Miller, Federal Practice and Procedure, § 1286.

In Ritchie v. United Mine Workers of America, 410 F.2d 827 (6th Cir. 1969), we held that where the underlying basis for plaintiff's claim was the common law tort of wrongful interference with business, plaintiff might proceed on that basis even though he alleged he had been injured by an unlawful conspiracy, a claim barred by the one year statute of limitations.

Rule 8(a)(2), Fed.R.Civ.P., requires only that the plaintiff set forth a short and plain statement of the claims showing that he is entitled to relief. The designation of counts is not controlling of the interpretations to be placed on these claims. Federal pleadings are construed liberally in order to prevent errors in draftsmanship from barring justice to litigants. Rule 8(f), Fed.R.Civ.P. In so construing the complaint in the case before us, we reject the UMW's argument that the State law claim was founded in conspiracy and therefore controlled by the one year limitation period. All the necessary averments were present in the complaint to bring the State claim within the five year limitation period.

410 F.2d 832.

Construing plaintiff's complaint liberally, we find that it gave sufficient notice to defendants that the decedent's widow was claiming her damages for her husband's wrongful death.

We do not pass upon the question of whether the wrongful death claim is barred by the statute of limitations since this issue has neither been argued nor briefed.

The judgment of the District Court is reversed.

ENTERED BY ORDER OF THE COURT

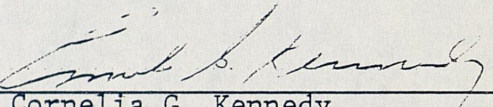
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANEL REPORT

DATE: Monday, October 12, 1981, #1, 1:30 p.m.
PANEL: Merritt, Kennedy, and Unthank
NO: 80-3312, Mesker v. U.S. Gypsum Co., et al.
N.D. Ohio - Krupansky, J.

Attached for your review is an order in the above-entitled case, which is being circulated in lieu of a panel report. It is called to the particular attention of Judges Merritt and Unthank.



Cornelia G. Kennedy

Enc.

cc: All Judges

10-13-81
Seaver
7 copies
5/16/81
Unthank