

2009

William Berneau v. Cameron D. Martino, aka David M. Cameron; and The Estate of Cameron D. Martino : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Todd A. Turnbloom; Victoria K. Kidman and Associates; Attorneys for Defendants/Appellees.
Mark T. Flickinger; Brett R. Boulton; Flickinger and Sutterfield, P.C.; Attorneys for Plaintiff/
Appellant.

Recommended Citation

Brief of Appellant, *William Berneau v. Cameron D. Martino, aka David M. Cameron; and The Estate of Cameron D. Martino*, No. 20090134.00 (Utah Supreme Court, 2009).
https://digitalcommons.law.byu.edu/byu_sc2/2901

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF UTAH

WILLIAM BERNEAU,

Plaintiff/Appellant,

v.

CAMERON D. MARTINO, aka
DAVID M. CAMERON; and THE
ESTATE OF CAMERON D. MARTINO
aka DAVID M. CAMERON,

Defendants/Appellee.

Case No.: 20090134-SC

BRIEF OF APPELLANTS

APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT
JOSEPH C. FRATTO

Todd A. Turnbloom
Victoria K. Kidman & Associates
P.O. Box 457000
Salt Lake City, Utah 84145
Attorneys for Defendants/Appellees

Mark T. Flickinger
Brett R. Boulton
Flickinger & Sutterfield, P.C.
3000 N. University Ave., Suite 300
Provo, Utah 84604
Attorneys for Plaintiff/Appellant

FILED
UTAH APPELLATE COURTS
MAY 13 2009

PARTIES AND COUNSEL

APPELLANT:

WILLIAM BERNEAU

APPELLEES:

CAMERON D. MARTINO, aka DAVID
M. CAMERON; and THE ESTATE OF
CAMERON D. MARTINO aka DAVID
M. CAMERON

Counsel for Appellants:

Kevin J. Sutterfield
FLICKINGER & SUTTERFIELD, P.C.
3000 N. University Ave., #300
Provo, UT 84604
(801) 370-0505
(801) 343-0954 - Fax

Counsel for Appellee:

Todd A. Turnbloom
VICTORIA K. KIDMAN & ASSOC.
P.O. Box 457000
Salt Lake City, Utah 84145
(801) 257-7200
(801) 257-7215- Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES	1
STATEMENT OF JURISDICTION	4
CONTROLLING STATUTORY PROVISIONS	5
STATEMENT OF THE CASE	8
STATEMENT OF RELEVANT FACTS	9
SUMMARY OF ARGUMENT	12
ARGUMENT	13
CONCLUSION AND PRECISE RELIEF SOUGHT	21
ADDENDUM	23

TABLE OF AUTHORITIES

UTAH CASES

<u>H.U.F. v. W.P.W.</u> , 2009 UT 10, ¶32, 203 P.3d 943	14
<u>Heiner v. S.J. Groves & Sons Co.</u> , 790 P.2d 107 (Utah Ct. App. 1990)	4
<u>Prows v. State</u> , 822 P.2d 764 (Utah 1991)	9
<u>Russell v. Standard Corp.</u> , 898 P.2d 263 (Utah 1995)	4, 5
<u>Salt Lake Bd. of Equalization v. Tax Comm’n</u> , 106 P.3d, 182, 185 (Utah App. 2004)	14, 15
<u>St. Benedict’s Dev. Co. v. St. Benedict’s Hosp.</u> , 811 P.2d 194 (Utah 1991)	4
<u>Watkiss & Campbell v. Foa & Son</u> , 808 P.2d 1061 (Utah 1976)	12
<u>Whipple v. American Fork Irrigation Co.</u> , 910 P.2d 1218 (Utah 1996)	4
<u>Wright v. University of Utah</u> , 876 P.2d 380 (Utah Ct. App. 1994)	5

UTAH STATUTES

Utah Code Ann. § 75-3-801	15
Utah Code Ann. § 75-3-104	16, 17, 21
Utah Code Ann. § 75-3-107	9, 17
Utah Code Ann. § 75-3-802	16
Utah Code Ann. § 75-3-803	17

Utah Code Ann. § 75-3-803(1)	15
Utah Code Ann. § 75-3-803(4)(b)	11, 15, 21
Utah Code Ann. § 78B-2-111	9, 11
Utah Code Ann. § 78B-2-307(3)	9, 16
Utah Code Ann. §75-3-104	5
Utah Code Ann. §75-3-107	6, 12
Utah Code Ann. §75-3-802	7
Utah Code Ann. §75-3-803	8, 13
Utah Code Ann. §75-3-803(4)(b)	4, 12, 13
Utah Code Ann. §78B-3-107	8

STATE RULES

Utah R. Civ. P. 12(h)	12
-----------------------------	----

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §78A-3-102(3)(j).

ISSUE PRESENTED AND STANDARD OF REVIEW

Whether a case may be dismissed for failure to appoint a personal representative, notwithstanding statutory language under Utah Code Ann. §75-3-803(4)(b) allowing an injured person to bring a case after the death of a tortfeasor against either the deceased, or a personal representative.

Standard of Review: When reviewing a judgment entered on Rule 12(b)(6) motion to dismiss under the Utah Rules of Civil Procedure the appellate court is obliged to construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194 (Utah 1991); Heiner v. S.J. Groves & Sons Co., 790 P.2d 107 (Utah Ct. App. 1990).

Because the propriety of a Rule 12(b)(6) dismissal is a question of law, the appellate court gives the trial court no deference and reviews it under a correctness standard. Whipple v. American Fork Irrigation Co., 910 P.2d 1218 (Utah 1996); Russell v. Standard Corp., 898 P.2d 263 (Utah 1995); St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194 (Utah 1991); Wright v. University of Utah, 876 P.2d 380 (Utah Ct. App. 1994).

This issue was raised in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss (R. 52-63).

CONTROLLING STATUTORY PROVISIONS

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this Chapter 3. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in Section 75-3-1004 or from a former personal representative individually liable as provided in Section 75-3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

Utah Code Ann. §75-3-104.

(1) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

(a) If a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding.

(b) Appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared, or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person.

c) A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve months from the informal probate or three years from the decedent's death.

(2) The limitations provided in Subsection (1) do not apply to proceedings to construe probated wills or determine heirs of an intestate. In cases under Subsection (1)(a) or (b), the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this title which relate to the date of death.

(3) If no will is probated within three years from death, the presumption of intestacy is final and the court shall enter an order to that effect and provide for the distribution of the decedent's property in accordance with the laws of intestacy under Title 75, Chapter 2, Part 1, The court has continuing jurisdiction to handle all matters necessary to distribute the decedent's property, including jurisdiction to determine what property was owned by the decedent at the time of death.

Utah Code Ann. §75-3-107.

Unless an estate is insolvent the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid. The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the three months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow. For purposes of any statute of limitations, the proper presentation of a claim under Section 75-3-804 is equivalent to commencement of a proceeding on the claim.

Utah Code Ann. §75-3-802.

(1) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision of it, whether due

or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:

(a) one year after the decedent's death; or

(b) within the time provided by Subsection 75-3-801(2) for creditors who are given actual notice, and where notice is published, within the time provided in Subsection 75-3-801 (1) for all claims barred by publication.

(2) In all events, claims barred by the nonclaim statute at the decedent's domicile are also barred in this state.

(3) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any of its subdivisions, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) a claim based on a contract with the personal representative within three months after performance by the personal representative is due; or

(b) any other claim within the later of three months after it arises, or the time specified in Subsection (1)(a).

(4) Nothing in this section affects or prevents:

(a) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

(b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or

c) collection of compensation for services rendered and reimbursement for

expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

Utah Code Ann. §75-3-803.

(1) (a) A cause of action arising out of personal injury to a person, or death caused by the wrongful act or negligence of another, does not abate upon the death of the wrongdoer or the injured person. The injured person, or the personal representatives or heirs of the person who died, has a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages, subject to Subsection (1)(b).

(b) If, prior to judgment or settlement, the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representatives or heirs of the person have a cause of action against the wrongdoer or personal representatives of the wrongdoer for special damages, and general damages not to exceed \$100,000, which resulted from the injury caused by the wrongdoer and which occurred prior to death of the injured party from the unrelated cause.

c) If the death of the injured party from an unrelated cause occurs more than six months after the incident giving rise to the claim for damages, the claim shall be limited to special damages unless, prior to the expiration of the six months, written notice of intent to hold the wrongdoer responsible has been given or is the subject of ongoing negotiations between the parties or persons representing the parties or their insurers.

Under Subsection (1) neither the injured person nor the personal representatives or heirs of the person who dies may recover judgment except upon competent satisfactory evidence other than the testimony of the injured person.

(3) This section may not be construed to be retroactive.

Utah Code Ann. §78B-3-107.

STATEMENT OF THE CASE

This case arises out of an automobile collision involving Plaintiff William Berneau and Cameron Martino. Plaintiff timely filed suit prior to four years following the collision pursuant to the four year statute of limitations found at Utah Code Ann. § 78B-2-307(3). Plaintiff thereafter refiled his Complaint pursuant to Utah Code Ann. § 78B-2-111 after the Complaint had been dismissed without prejudice for failure to timely serve, and thereafter effected service of the Summons and Complaint. Defendant thereafter filed a Motion to Dismiss the Complaint, arguing Plaintiff failed to appoint a personal representative within the three year time period found at Utah Code Ann. § 75-3-107. The trial court agreed and entered its Order Granting Motion to Dismiss on February 17, 2009, from which Plaintiff now appeals.

STATEMENT OF RELEVANT FACTS

In determining whether the trial court properly granted a motion to dismiss, the appellate court must accept the factual allegations in the complaint as true and consider all reasonable inferences to be drawn from those facts in the light most favorable to the plaintiff. Prows v. State, 822 P.2d 764 (Utah 1991).

1. On or about September 23, 2003, Cameron Martino negligently caused an automobile collision with Plaintiff proximately causing William Berneau to suffer personal injuries. (R. 2.)

2. At the time of the auto collision, Mr. Martino was insured by State Farm Insurance (“State Farm”). (R.11.)

3. Mr. Martino, due to causes unrelated to the auto collision, passed away December 3, 2003, at the age of 22. (R.10).

4. No probate was filed, and no notice was given to Mr. Berneau of Mr. Martino’s death, either actual or constructive. (R.11.)

5. On April 29, 2004, Plaintiff through his counsel sent a letter to State Farm indicating Plaintiff’s intention to bring a claim for personal injuries arising out of the auto collision involving their insured Mr. Martino, and advising of representation by counsel of Plaintiff. (R.21.)

6. From this point forward, Plaintiff’s attorney and State Farm had an ongoing dialogue, both written and verbal, concerning Plaintiff’s claim. (R.53.)

7. Plaintiff’s treatment following the collision with Defendant has been complicated and ongoing, and Plaintiff remains uncertain whether he will require surgery to correct the injuries he sustained in the collision with Defendant. (R.59.)

8. Plaintiff timely filed his original Complaint in this matter on September 14, 2007, but did not serve the Complaint due to the ongoing nature of Plaintiff’s treatment for his injuries sustained in the collision. (R.10.)

9. State Farm did not learn of the death of its insured until October 4, 2007,

more than four years after the date of the collision with Plaintiff. (R.35.)

10. On February 4, 2008, Plaintiff's received a letter from State Farm indicating their insured Cameron Martino had died in 2003. (R.53.)

11. After Plaintiff received notification of Defendant's death by State Farm, Plaintiff's Complaint was dismissed without prejudice for failure to serve on February 27, 2008; Plaintiff timely refiled his Complaint on August 1, 2008 pursuant to the savings statute, Utah Code Ann. § 78B-2-111. (R.53.)

12. As Plaintiff was not certain whether a personal representative had been appointed for the estate of Defendant, Plaintiff filed suit against both the Defendant and his estate, explicitly seeking recovery strictly up to the limits of the insurance proceeds held by decedent by invoking Utah Code Ann. § 75-3-803(4)(b). (R.54.)

13. Plaintiff's Complaint was served upon State Farm after the trial court granted Plaintiff's Motion to Allow for Alternative Service of Process, which motion was filed because Plaintiff was unaware of the appointment of any personal representative and Plaintiff was only seeking recovery on the decedent's insurance proceeds pursuant to Utah Code Ann. § 75-3-803(4)(b). (R.27-29.)

14. State Farm, through its staff counsel and on behalf of Defendant, subsequently filed a responsive pleading in the form of a Motion to Dismiss, arguing Plaintiff's claim was time barred for failing to appoint a personal representative within

three years pursuant to Utah Code Ann. § 75-3-107. (R. 30-51.)

15. State Farm did not object to service in its responsive pleading, and service therefore was valid in the underlying action. (R. 30-51.) See Utah R. Civ. P. 12(h); Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 (Utah 1976).

16. The trial court granted Defendant's Motion, reasoning that Plaintiff had failed to appoint a personal representative within three years, and entered its Order Granting Motion to Dismiss on February 17, 2009, from which Plaintiff now appeals. (R. 102-110, 118-120.)

SUMMARY OF ARGUMENT

A case cannot properly be dismissed for failure to timely appoint a personal representative where the Plaintiff's Complaint seeks recovery exclusively under Utah Code Ann. §75-3-803(4)(b), which allows an injured plaintiff to recover up to the limits of a deceased tortfeasor's insurance protection in "any proceeding to establish liability of the decedent **or** the personal representative." Id. (emphasis added).

Simply stated, Utah Code Ann. §75-3-803(4)(b) allows for claims to be against a decedent **or** the personal representative of the decedent's estate. Therefore, there is no requirement for a plaintiff, when a plaintiff is making no claim against a decedent's estate, to appoint a personal representative of the decedent's estate. Under Utah Code Ann. §75-3-803(4)(b), the plaintiff may simply bring the claim against the decedent.

ARGUMENT

The sole issue before this Court is whether a case may be dismissed for failure to appoint a personal representative, notwithstanding statutory language allowing an injured person to bring a case after the death of a tortfeasor against either the deceased, or a personal representative.

The controlling statute at issue is found at Utah Code Ann. § 75-3-803, which states in relevant part:

Limitations on presentation of claims.

(1) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision of it, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:

(a) one year after the decedent's death; or

(b) within the time provided by Subsection 75-3-801(2) for creditors who are given actual notice, and where notice is published, within the time provided in Subsection 75-3-801 (1) for all claims barred by publication.

...

(4) Nothing in this section affects or prevents:

...

(b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which

he is protected by liability insurance;

Id. (emphasis added). This Court has repeatedly held when interpreting statutory language the Court will “look first to the statute’s plain language to determine its meaning.” H.U.F. v. W.P.W., 2009 UT 10, ¶32, 203 P.3d 943. When determining the meaning of a statute’s plain language, the court is to “presume that the statute is valid and the words and phrases were chosen carefully and advisedly.” Salt Lake Bd. of Equalization v. Tax Comm’n., 2004 UT App 472, ¶15, 106 P.3d 185 (internal quotations omitted).

According to the plain language of this statute, all claims which arise before the death of a defendant tortfeasor not otherwise barred by earlier statutes of limitations are barred as against the estate and heirs unless brought within one year or less where notice is given to creditors under Utah Code Ann. § 75-3-801. See Utah Code Ann. § 75-3-803(1).

However, under subsection (4), the plain language of this same statute further states these deadlines do not apply “to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.” Id. at -803(4)(b). Accordingly, notwithstanding the time limits of the probate code to present claims, an injured plaintiff may still bring a claim against “the decedent or the personal representative” for the insurance proceeds.

Id.

As it is presumed “words and phrases were chosen carefully and advisedly” in the statute, Salt Lake Bd. of Equalization v. Tax Comm’n, 2004 UT App 472, ¶15, the word “or” between “the decedent” and “the personal representative” means the legislature has specifically provided proceedings against a decedent can proceed to establish the decedent’s liability “to the limits of the insurance protection.” Under the plain language of the statute, Plaintiff need not proceed against the personal representative of the estate of the decedent, and Plaintiff respectfully submits to hold otherwise requires ignoring the plain language of the statute allowing proceedings against either “the decedent,” or “the personal representative.”

Finally, as to the language in section 803 allowing a claim “not barred earlier by other statute of limitations,” section 75-3-802, “Statutes of limitations,” establishes that the usual statutes of limitations for claims which had not expired at the time of the decedent’s death control: “The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the three months following the decedent’s death but resumes thereafter as to claims not barred pursuant to the sections which follow.” Utah Code Ann. § 75-3-802. As stated above, Plaintiff’s claim is for personal injuries arising out of an automobile collision, and not the Defendant’s death. Plaintiff’s claim is therefore controlled by the

four year statute of limitations found in Utah Code Ann. § 78B-2-307(3), and suit was timely filed within four years. (R. 10.)

The plain language of section 803 notwithstanding, Defendant argued to the trial court below that a personal representative was nevertheless required. (R. 34-35.) The trial court agreed. In support of this holding the trial court stated: “Utah Code Ann. § 75-3-104 prohibits a claim against a decedent or his successors until a personal representative can be appointed. In this instant [sic], it is undisputed no probate or other proceeding to appoint a personal representative has ever been presented.” (R. 106.) (emphasis added). The trial court then cited to Utah Code Ann. § 75-3-107, which generally provides a three year time limit to appoint a personal representative. *Id.* Finding this time limit had not been met to appoint a personal representative, the trial court dismissed Plaintiff’s case.

Plaintiff respectfully submits the above emphasized language of the trial court’s only reasoning for its decision demonstrates the error in the trial court’s holding. Utah Code Ann. § 75-3-104 does not require a personal representative be appointed in claims being made against a decedent; rather, it applies only in claims being made against the estate: “No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative.” *Id.* (emphasis added).

Unlike section 803 of the Probate Code, section 104 does not apply to “any

proceeding to establish liability of the decedent or the personal representative,” Utah Code Ann. § 75-3-803; instead section 104 by its plain language only applies to proceedings “to enforce a claim against the estate of a decedent or his successors,” Utah Code Ann. § 75-3-104. The trial court therefore erred by holding section 104 “prohibits a claim against a decedent” without the appointment of a personal representative, as such holding is contrary to the plain language of the statute.

The legislature’s explicit decision to allow claims to proceed against a decedent, and not strictly against the estate, benefits the public in two ways. First, allowing an injured party to proceed strictly against the insurance proceeds, and not against the estate of a deceased, allows an injured plaintiff to still seek redress for damages done without disturbing an aggrieved family. Indeed, even if a plaintiff were to present a claim within the one year (or shorter) time periods set forth in section 803, one can easily imagine how a plaintiff might find it highly repugnant to proceed against the estate of a family whose loved one was killed in that same auto wreck which injured the plaintiff.

However, should the holding of the trial court be upheld, a Plaintiff would be required to disturb the family of the deceased in order to appoint a personal representative and seek compensation for damages. This result would at the very least be contrary to the spirit of subsection 803(4)(b)’s provisions allowing claims to proceed to the extent of liability limits only.

Second, allowing an injured party to proceed against a decedent up to the limits of liability only even where there is no personal representative prevents a fundamental unfairness to the injured victim. In this instance, Plaintiff was in contact with Mr. Martino's insurer State Farm shortly after the collision. (R. 53.) Although this first contact was after Mr. Martino's death, no notice was given to Plaintiff of this fact. (R. 53.) Plaintiff's treatment has been complicated, and it remains uncertain whether he will require surgery; however Plaintiff has maintained regular contact with State Farm throughout. (R. 53, 59.) Although State Farm could have immediately discovered Mr. Martino's death by contacting its insured upon receipt of notice of the claim by Plaintiff, State Farm itself did not know of Mr. Martino's death until more than four years after the date of the collision, and far beyond the three year time period to appoint a personal representative. (R. 35.)

As there was no probate filed, there was no constructive notice of Mr. Martino's death for Plaintiff, nor was there any actual notice given until more than four years after the collision. Accordingly Plaintiff did not know, nor did he have any reason to know, that the young man involved in the collision with him was deceased. And even though State Farm also did not know of this unfortunate event, State Farm has nevertheless argued Plaintiff's claim should be barred for failure to react to an unknown event.

There are potentially numerous other instances where, as a practical matter, a

plaintiff could not reasonably hope to discover whether a defendant were alive or dead.

In today's highly mobile society, defendants can readily be expected to leave the State of Utah, or the United States. Auto collisions commonly involve defendants who are not citizens of the United States, who are non-resident students, or who are traveling temporarily on Utah roads, to name only a few examples. Deaths which have occurred out of state are highly unlikely to be discovered by a plaintiff; deaths out of the country are all but impossible for a plaintiff to discover. Defendants with common names also would be virtually impossible to identify as deceased or alive.

Such a rule requiring a tort victim to discover the death of a defendant would in essence dramatically shorten the statute of limitations for any claim against defendants which are covered by liability insurance. As even the most cautious litigant is not always capable of ascertaining whether a defendant is alive or deceased even after initiating litigation, a rule requiring a litigant to appoint a personal representative where a defendant is deceased would effectively shorten any three year statute of limitations or greater to far less than three years, so a plaintiff would have sufficient time to ascertain the status of the defendant and appoint a personal representative within three years. This interpretation would not only effect tort claims, but any claim where liability coverage may apply, including contractual claims to perform services, construction liability claims, and so on.

Surely the legislature was aware of the fundamental unfairness which could befall

an injured party, negotiating in good faith with an insurer, who neither knew nor had reason to know of a tortfeasor's death. Section 803 allows claims to proceed against the decedent up to the limits of the insurance policy, and not just against a personal representative, eliminating this potential unfairness to plaintiffs while simultaneously providing the family of the deceased freedom from involvement in the appointment of a personal representative and in any subsequent litigation. These sound public policy concerns establish a clear reason for the above plain language of section 803 allowing claims to continue against the decedent, and not solely against a personal representative.

CONCLUSION AND PRECISE RELIEF SOUGHT

The trial court erred by holding Utah Code Ann. § 75-3-104 requires appointment of a personal representative for claims against a decedent; rather, this requirement only exists for claims against the estate of a decedent. Utah Code Ann. § 75-3-803(4)(b) explicitly allows claims to proceed against a decedent. The trial court should therefore be reversed, and the case remanded for proceedings to establish the liability of the decedent consistent with section 803 of the Probate Code.

DATED this 13 day of May, 2009.

FLICKINGER & SUTTERFIELD



Mark T. Flickinger
Brett R. Boulton

ADDENDUM

1. Third Judicial District Court Memorandum Decision, January 16, 2009.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WILLIAM BERNEAU,

Plaintiff,

vs.

CAMERON D. MARTINO, AKA DAVID
M. CAMERON; AND THE ESTATE OF
CAMERON D. MARTINO AKA DAVID M.
CAMERON,

Defendant.

FILED

JAN 21 2009

THIRD DISTRICT COURT
SALT LAKE DEPARTMENT

Case No. 080915531

Hon. JOSEPH C. FRATTO, JR.

January 16, 2009

The above-entitled matter comes before the Court pursuant to Defendant's Motion to Dismiss and Plaintiff's Motion to Strike. The Court heard oral argument with respect to the motions on January 9, 2009. Following the hearing, the matters were taken under advisement.

The Court having considered the motions and memoranda and for the good cause shown, hereby enters the following ruling.

Specifically, this matter presents itself the result of an automobile accident occurring on September 23, 2003.

With the motion to dismiss, Defendant asserts the driver who would have been the proper defendant, Cameron Martino, died from causes unrelated to the accident on December 3, 2003. No probate or other proceeding to appoint a personal representative was ever

presented. This is critical, argues Defendant, as the Utah statutes are explicit about the method to bring an action for claimed damages against the estate of a decedent. Indeed, asserts Defendant, Utah Code Ann. § 75-3-104 controls claims made against a decedent or his successors and provides:

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this Chapter 3. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in Section 75-3-1004 or from a former personal representative individually liable as provided in Section 75-3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

Utah Code Ann. § 75-3-104.

Moreover, contends Defendant, the statute of limitations for when such an action may be commenced is found in Utah Code Ann. § 75-3-107, which provides the following in relevant part:

(1) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the

decedent's death. . . .

Utah Code Ann. § 75-3-107.

In the instant, argues Defendant, no probate or other proceeding to appoint a personal representative was ever presented. Accordingly, asserts Defendant, the Utah statutes now bar any proceeding to appoint a special administrator or personal representative as well as any claims against the estate of the decedent. Consequently, contends Defendant, the Plaintiff's claims fail as a matter of law.¹

Plaintiff opposes the motion arguing the limitations on presentations of claims for creditors under the Utah Uniform Probate Code explicitly allows proceedings to establish the

¹Plaintiff has filed a Motion to Strike Defendant's Reply Memorandum in Support of Motion to Dismiss arguing Defendant first asserted that a claim may not be made unless a personal representative has been appointed and in the Reply, Defendant now argues that the claim has abated. Because Defendant's reply argument is new and not rebuttal, contends Plaintiff, such should be stricken.

Defendant opposes the motion arguing he did not raise new issues in his Reply. Indeed, asserts Defendant, his argument has always been that (1) Section 75-3-104 prohibits a claim against a decedent or his successors until a personal representative can be appointed, and (2) Section 75-3-107 prohibits that from occurring more than three years after the death.

While the wording may not be optimal, the Court is not persuaded Defendant raised new issues with his Reply Memorandum. Accordingly, Plaintiff's Motion to Strike is, respectfully, denied.

liability of a decedent up to the limits of insurance protection for this auto collision after one year following the death of Defendant. Specifically, asserts Plaintiff, "The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the three months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow." Utah Code Ann. § 75-3-802. In this case, contends Plaintiff, his claim is for personal injuries arising out of an automobile collision and not the Defendant's death. Therefore, argues Plaintiff, his claim is controlled by the four year statute of limitations found in Utah Code Ann. § 78B-2-307(3) and suit was timely filed within four years.

Indeed, asserts Plaintiff, in the sections that follow Section 802, the time limits for presenting any and all claims are, again, explicitly set forth under Utah Code Ann. § 75-3-803 which provides:

(1) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision of it, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates.

(a) one year after the decedent's death;
or

(b) within the time provided by Subsection 75-3-801(2) for creditors who are given actual notice, and where notice is published, within the time provided in Subsection 75-3-801(1) for all claims barred by publication.

(2) In all events, claims barred by the nonclaim statute at the decedent's domicile are also barred in this state.

(3) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any of its subdivisions, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) a claim based on a contract with the personal representative within three months after performance by the personal representative is due; or

(b) any other claim within the later of three months after it arises, or the time specified in Subsection (1)(a).

(4) Nothing in this section affects or prevents:

(a) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

(b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal

representative for which he is protected by liability insurance; or

(c) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

Utah Code Ann. § 75-3-803 (Emphasis added).

This action arises from an accident which occurred more than five years ago. Utah Code Ann. § 75-3-104 prohibits a claim against a decedent or his successors until a personal representative can be appointed. In this instant, it is undisputed no probate or other proceeding to appoint a personal representative has ever been presented. This said, Utah Code Ann. § 75-3-107 prohibits the presentation of such an action from occurring more than three years after the decedent's death.

While Plaintiff seems to imply that he is bringing this action against the insurer (who is not a party) such an effort is contrary to Utah law in the absence of a contractual provision, statute or ordinance to the contrary.

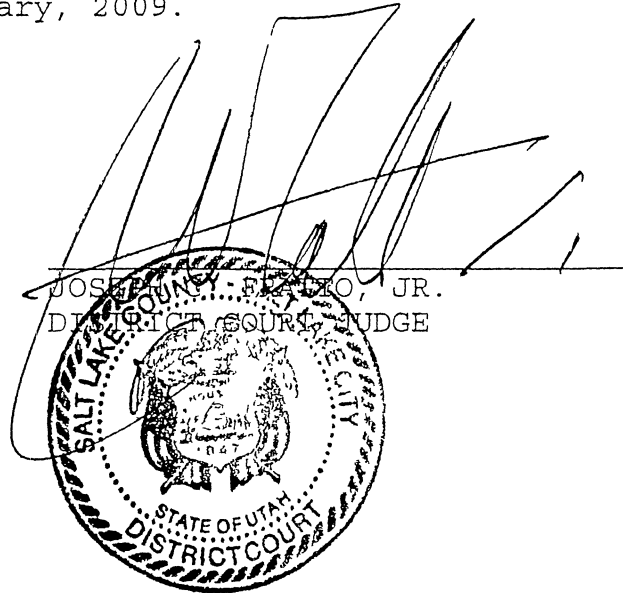
Finally, while Plaintiff has argued § 75-3-803 should apply as such sets forth the statute of limitations as to creditors, which he claims he is, it is important to note that in the Editorial Board Comment to Section 75-3-107 the following is stated:

All creditors' claims are barred after three years from death. See § 75-3-803(1)(b) [which now prescribes shorter periods after notice to creditors]. Because of this, and since any possibility that letters may be issued at any time would be seen as a "cloud" on the title of heirs or devisees otherwise secure under § 75-3-101, the three-year statute of limitations applies to bar appointment of a personal representative after the basic period has passed. Section 83 of the Model Probate Code barred probate and administration after five years, and other statutes imposing time limits on these proceedings are cited at pp. 307-310 of Model Probate Code. A qualification covers the situation where a closed administration is sought to be reopened to administer after-discovered assets. See § 75-3-1008. If there has been no probate or appointment within three years, and if either exception to § 75-3-102 applies, devisees under a late-discovered will may use a will to establish their title. But, they may not secure probate of the will, nor may they obtain appointment of a personal representative. The same pattern applies to heirs who, in a case where there has been no administration discover assets after the three-year period has run. Such persons will not be able to protect purchasers with the ease of those interested in an estate where a personal representative has been appointed.

Utah Code Ann. § 75-3-107 (Emphasis added).

In sum, after reviewing the record in this matter, as well as the relevant statutory and case law, the Court finds Defendant's Motion to Dismiss is well taken and grants the same.

DATED this 16th day of January, 2009.




CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 080915531 by the method and on the date specified.

METHOD NAME

Mail	MARK T FLICKINGER Attorney PLA 3000 N UNIVERSITY AVE STE 300 PROVO, UT 84604
Mail	TODD A TURNBLOM Attorney DEF 111 E BROADWAY STE 750 P O BOX 457000 SALT LAKE CITY UT 84145

Dated this 21 day of Jan, 2009.



Deputy Court Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this 13 day of May, 2009 the foregoing **BRIEF OF APPELLANT** was mailed for filing with the Third Judicial District Court at the address below, and that a true and correct copy of the foregoing was delivered via first class mail, postage prepaid, to each of the following additional parties:

Sent Via:

- ☒ U.S. Mail (postage prepaid)
☐ Personal Delivery
☐ Facsimile to _____

Clerk of the Court

THIRD JUDICIAL DISTRICT COURT

In and For Salt Lake County

P.O. Box 1860

Salt Lake City, UT 84114

Sent Via:

- ☒ U.S. Mail (postage prepaid)
☐ Personal Delivery
☐ Facsimile to _____

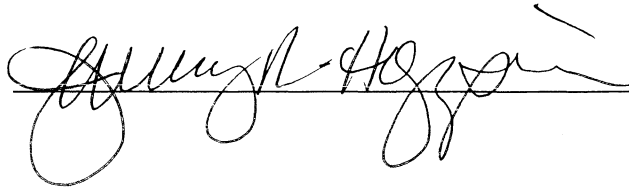
Todd A. Turnblom

Victoria K. Kidman & Associates

P.O. Box 457000

Salt Lake City, UT 84145

Attorneys for Cameron Martino

A handwritten signature in black ink, appearing to read "Cameron Martino", is written over a horizontal line.