

2009

# William Berneau v. Cameron D. Martino, David M. Cameron : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

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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

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REPLY BRIEF OF APPELLANTS

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

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**UTAH APPELLATE COURTS**

**JUL 14 2009**

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## **TABLE OF CONTENTS**

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
CONCLUSION .....	12

## TABLE OF AUTHORITIES

### UTAH CASES

<u>DOIT, Inc. v. Touche, Ross &amp; Co.</u> , 926 P.2d 835 (Utah 1996) .....	11
<u>Gray Realty Co. v. Robinson</u> , 111 Utah 521, 184 P.2d 237 (1947) .....	8
<u>Menzies v. Galetka</u> , 150 P.3d 480, 502 (Utah 2006) .....	8
<u>Speros v. Fricke</u> , 2004 UT 69, ¶¶54-55, 98 P.3d 28 .....	6
<u>State v. Weaver</u> , 2005 UT 49, ¶19, 122 P.3d 566 .....	4

### MAINE CASES

<u>In re Estate of Kruzynski</u> , 744 A.2d 1054 (Me. 2000) .....	6, 7
-------------------------------------------------------------------	------

### FEDERAL CASES

<u>Kessler v. Southeast Permanente Med. Group.</u> , 165 F.R.D. 54, 56 (E.D.N.C. 1995) ....	5
<u>Young v. Patrice</u> , 832 F.Supp. 721, 724-25 (S.D.N.Y 1993) .....	5

### UTAH STATUTES

Section 75-3-802 of the Utah Uniform Probate Code .....	8
Utah Code Ann. § 31A-22-201 .....	6
Utah Code Ann. § 71-3-803(b)(2) .....	1
Utah Code Ann. § 75-3-104 .....	3
Utah Code Ann. § 75-1-102 .....	8

Utah Code Ann. § 75-1-201(14) .....	3
Utah Code Ann. § 75-3-803(4) .....	9
Utah Code Ann. § 75-3-803(4)(b) .....	4, 5
Utah Code Ann. § 78B-2-111 .....	12
Utah Code Ann. §75-3-803(4)(b) .....	3, 8, 12
Utah Code Ann. §75-1-201(14) .....	1
Utah Code Ann. §75-1-201(36)(a) .....	1
Utah Code Ann. §75-3-104 .....	1, 2, 7
Utah Code Ann. §75-3-107 .....	2
Utah Code Ann. §75-3-802 .....	8, 9, 12
Utah Code Ann. §75-3-803 .....	1-5, 7, 9, 11, 12
Utah Code Ann. §78B-2-105 .....	8

### UTAH RULES

Rule 25(a) of the Utah Rules of Civil Procedure .....	5
Utah R. Civ P. 25(a)(1) .....	5

## **I. ARGUMENT**

### **A. Mr. Berneau Has Made His Claim Against a Decedent, Therefore a Personal Representative Is Unnecessary**

Defendant has argued Mr. Berneau's claim must fail because he did not appoint a personal representative. Brief of Appellee, p. 7. The fundamental assumption of Defendant's argument is that a personal representative must be appointed. However, in making this argument Defendant consistently ignores the plain language of the Utah Code which provides claims can be made against either a decedent, or against a personal representative. See Utah Code Ann. § 71-3-803(b)(2).

Utah Code Ann. §75-1-201(14) defines an estate as follows: "'Estate' includes the property of the decedent, trust, or other person whose affairs are subject to this title as originally constituted and as it exists from time to time during administration." The code further states: "'Personal representative' includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status." Utah Code Ann. §75-1-201(36)(a). "Decedent" is not within the definition of "personal representative" under the Utah Code, and there is clearly therefore a distinction between a decedent and a decedent's estate.

Utah Code Ann. §75-3-104 addresses how claims are to be made "against the estate," which requires the appointment of a personal representative, but does not address claims made against a "decedent." Id. Mr. Berneau has clearly established his contention that section §75-3-



803 of the probate code allows a claim to be brought against either an estate, or a decedent when the claim is limited to damages covered by liability insurance. Nevertheless, Defendant ignores this distinction throughout, as best exemplified in Defendant's Summary of the Argument:

The Utah Uniform Probate Code provides several limitations on the time periods during which a person making a claim against a deceased person must present or file their claims. Specifically, Utah Code Ann. §75-3-104 requires a personal representative to be appointed before commencing or reviving a claim. Utah Code Ann. §75-3-107, with certain irrelevant exceptions, prohibits appointing a personal representative more than three years after the death of the decedent. These two sections together create a statutory bar to any claim against a decedent if no personal representative is appointed within three years from the death of a decedent.

Brief of Appellee, p. 7 (emphasis added).

Plaintiff Berneau respectfully submits Defendant erroneously claims Utah Code Ann. § 75-3-104 and -107 govern claims made “against a decedent.” Rather, the plain language of these statutes limits their applicability strictly to claims made against an estate, and **not** “any claim,” or claims against a decedent. As further evidence to the inapplicability of these sections to Plaintiff's claims in general, and of the inapplicability of the three year statute of limitations in particular, the types of proceedings listed in the three year statute of limitations in section 75-3-107 are limited to informal probate or appointment proceedings and formal testacy or appointment proceedings. See Utah Code Ann. § 75-3-107. These proceedings are not at issue in Plaintiff's claims.

Section 75-3-803 of the Utah Code instead provides that claims against a deceased

tortfeasor may exist either against a decedent “or” against a personal representative. This plain language of the statute cannot be ignored, but is in fact ignored throughout Defendant’s argument. Defendant’s argument therefore must fail.

**B. Utah Law Provides Multiple Ways for Resolving  
Claims Against Deceased Tortfeasors**

In Defendant’s brief, Defendant argues allowing a claim to proceed against a decedent as set forth under Utah Code Ann. § 75-3-803(4)(b) is tantamount to creating “a new cause of action.” Brief of Appellee, p. 13. This section of Utah’s probate code no more creates a “new cause of action” than other sections of the probate code which allow for proceeding against a personal representative.

Rather, Utah’s probate code simply provides two ways for claims to proceed. First, if a plaintiff wishes to seek the assets of a decedent, the plaintiff may proceed against the estate. See Utah Code Ann. § 75-1-201(14) (defining “estate” to include the property of the decedent). As noted by Defendant, in order to proceed against the estate, a plaintiff must proceed against the personal representative of that estate. See Utah Code Ann. § 75-3-104.

Where a Plaintiff does not wish to “enforce a claim against the estate of a decedent,” id., but instead only wishes to make a claim to the amount of liability insurance protection only, Section 75-3-803 allows for claims to proceed directly against the decedent, without involving the personal representative and estate. This is no more a “new action” than proceeding against a personal representative is a “new action,” and what Defendant dismisses as “a fiction” of

proceeding against a decedent, Brief of Appellee, p. 14, is in fact no different than the “fiction” of proceeding with a claim against a deceased person via a personal representative.

Both procedures are ways for claims to continue following the death of the tortfeasor. Claims against estates allow a Plaintiff to seek a portion of the estate property, and are properly subject to shorter time limitations in order to assure the efficient and timely distribution of estate assets to the heirs and creditors of that estate. Claims against a decedent up to the limits of liability insurance only under section 75-3-803, by contrast, allow for procedures involving liability insurance alone, without bothering family members of the deceased, or interfering with the distribution of estate assets. These claims are not properly subject to shorter time limitations since they do not interfere with the estate, thus the statute itself provides deadlines for claims against the estate do not apply. Utah Code Ann. § 75-3-803(4)(b).

Defendant nevertheless repeatedly claims a necessary predicate to the application of Section 75-3-803 is the appointment of a personal representative. See Brief of Appellee, pp. 13-14 (“Section 75-3-803 generally deals with how creditors of an estate must present claims when a personal representative has been appointed, and provides time limits when a personal representative is appointed.”) (emphasis added). Nothing in the plain language of the statute, however, supports this argument, and Defendant does not provide statutory support suggesting 75-3-803 only applies “when a personal representative has been appointed.” Rather, the statute explicitly provides section 75-3-803 applies in “any proceeding to establish liability of the

decedent or the personal representative.” Utah Code Ann. § 75-3-803 (emphasis added).

To further Defendant’s argument that a personal representative is required, Defendant states if this case were to be remanded to the trial court for further proceedings “a suggestion of death would be appropriate.” Brief of Appellee, p.15. Plaintiff respectfully submits this issue was not raised by Defendant at the trial court below, and is therefore not properly raised for the first time on appeal. See, e.g., State v. Weaver, 2005 UT 49, ¶19, 122 P.3d 566. Rather, the issue properly on appeal is 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.

Plaintiff nevertheless notes Rule 25(a) of the Utah Rules of Civil Procedure does not mandate a substitution of parties upon the filing of a suggestion of death as implied by Defendant. Instead, Rule 25(a) provides: “If a party dies and a claim is not thereby extinguished, the Court may order substitution of the proper parties.” Utah R. Civ P. 25(a)(1) (emphasis added). A court may, therefore, seek the substitution only of a “proper party.” In exercising this judicial discretion, multiple courts have held under the equivalent Federal rule a substitution is only appropriate where the suggestion identifies a representative or successor who could be substituted as a party. See, e.g., Kessler v. Southeast Permanente Med. Group., 165 F.R.D. 54, 56 (E.D.N.C. 1995); Young v. Patrice, 832 F.Supp. 721, 724-25 (S.D.N.Y 1993). Here, the

proper party is in fact the decedent pursuant to section 75-3-803. Accordingly, as the “proper party” is already named a substitution under Rule 25(a)(1), a substitution would be inappropriate and inapplicable to the case before the Court.

Defendant also argues proceeding against a decedent “is simply a de facto direct action against the insurer of a tortfeasor.” Brief of Appellee, p. 15. This is no more true than in any tort action against an insured. State Farm holds a contractual obligation to both defend and indemnify the decedent Cameron Martino. This obligation has not changed upon the death of the insured tortfeasor.<sup>1</sup> The probate statute allows for proceeding against the decedent up to the amount of liability insurance. If State Farm were to refuse to defend or indemnify the decedent in this case, Plaintiff may proceed by obtaining a default judgment in this matter; if Plaintiff were to encounter any difficulty in the collection of any judgment, Plaintiff could then proceed with a direct action against State Farm as allowed under section 31A-22-201 of the Utah Code, which subjects insurers to direct action by a third party where “execution against the insured is returned unsatisfied.” Utah Code Ann. § 31A-22-201; see also Speros v. Fricke, 2004 UT 69, ¶¶54-55, 98 P.3d 28 (discussing the requirements to bring a direct action against an insurer where a defendant is deceased). All of these matters pertaining to how Plaintiff may proceed are in fact provided by statute and the Rules of Civil Procedure, but regardless are not properly brought before the Court

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<sup>1</sup>Any issues which may exist pertaining to the contractual provisions of State Farm’s coverage and its duty to defend and indemnify the decedent may be properly brought before a trial court in an action for declaratory judgment under Rule 57 of the Utah Rules of Civil Procedure, and are not properly brought before this Court on appeal.

on this appeal.

**C. The Legislature Has Demonstrated a Clear Policy to Extend  
Time Limits Rather than Shortening Time Limits When  
Dealing with Claims Involving Deceased Persons.**

**1. Non-controlling authority cited by Defendant is not applicable to the issue on appeal.**

Defendant cites to In re Estate of Kruzynski, 744 A.2d 1054 (Me. 2000), arguing this case stands for the proposition that “claims against a decedent cannot be revived or commenced until a personal representative is appointed.” Brief of Appellee, p.11. However, this was not the issue on appeal in Kruzinski; rather, the Maine Supreme Court was faced with an appeal from a county probate court, which had dismissed a petition for appointment of a personal representative after the statutory deadline to do so. Kruzinski, 744 A.2d at 1055, ¶1. The Court held a Maine statute which is similar to Utah Code Ann. § 75-3-803 was not applicable to expand the time limit to appoint a personal representative. Id. at 1056, ¶7. The Kruzinski court did not, however, address whether a personal representative is required for claims made against a decedent only, and not the estate.

**2. Utah law shows a clear policy toward allowing claims against deceased persons and expanding, not shortening, statutes of limitations to allow the proper resolution of claims where a party dies.**

Defendant also cites the editorial board comments to some of Utah's statutes in the probate code, arguing this “supports a statute of limitations that bars Plaintiff’s claim.” Brief of Appellee, p. 12. Defendant then states: “The key to these comments is that there are a number of

statutory provisions that act as statutes of limitation. They are not mutually exclusive, and any may bar the claims of an untimely claimant.” Id. This, however, does not address whether the sections of the Utah Code requiring the appointment of a personal representative, which by its plain language applies only to “a claim against the estate of a decedent or his successors,” Utah Code Ann. § 75-3-104, apply in this case, creating a three year time limit. As discussed above and in Appellant’s Brief, these statutes by their plain language are not applicable to Plaintiff’s case, as he is not making claims against the estate.

Reviewing the entirety of applicable statutes pertaining to the death of a tortfeasor instead shows a clear policy of expanding statutes of limitations in favor of resolving claims on the merits, and not shortening the applicable statute as argued by Defendant. Section 75-3-802 of the Utah Uniform Probate Code states: “The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended for three months following the decedent’s death but resumes thereafter. . . .” Utah Code Ann. § 75-3-802. In addition, chapter two of the Judicial Code (dealing with statutes of limitations) provides statutes of limitations are extended to last at least one year following the death of either the plaintiff or the defendant, regardless of the normal expiration of the statute of limitations. Utah Code Ann. § 78B-2-105; see also Gray Realty Co. v. Robinson, 111 Utah 521, 184 P.2d 237 (1947) (explaining the operation of then section 104-2-38, now at section 78B-2-105).

When taken together these statutes show the legislature’s intent to: 1) provide clear,

explicit language pertaining to the effect of a party's death on the normal statute of limitations for claims; and 2) to lengthen, and not shorten, these statutes of limitations. This is consistent with the public policy principle favoring resolving claims on the merits, and not on technicalities.

See, e.g., Menzies v. Galetka, 150 P.3d 480, 502 (Utah 2006).

There is nothing in Utah's Probate Code indicating the legislature intended to undermine the rights of plaintiffs to recover under tortfeasors' insurance policies. Instead, precisely the opposite is indicated by the plain language of the statute: these claims are allowed to proceed without effect of the deadlines normally applicable to the efficient administration of decedents' estates. Utah Code Ann. § 75-3-803(4)(b). This interpretation is also consistent with the purpose of the probate code to effect the speedy settlement of estates, so distribution of assets will not be delayed or disrupted. See Utah Code Ann. § 75-1-102.

In the present case, Mr. Berneau timely made his claim within the four years allowed by the Legislature for actions based in negligence. Defendant seeks to assert a shortened time limit of three years upon Mr. Berneau through a somewhat convoluted and circuitous reading of the Utah Uniform Probate Code. This reading stands in contrast to the sections of the Utah Code cited above, which provide explicit, clear, and unequivocal statements of the effect of the death of a party upon statutes of limitations.

Surely if the legislature intended to shorten the normal statute of limitations for claims covered by liability insurance, based upon a triggering event which even State Farm did not



know about before the passing of the three year time limit to appoint a personal representative, the legislature would clearly and explicitly set forth such an intent when addressing the death of a party in the above statutes. Instead section 75-3-802 explicitly states the normal statute of limitations “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.” Id. In “the sections that follow,” section 75-3-803 explicitly exempts claims made against decedents which are covered by liability insurance. Id. at -803(4). In short, rather than a clear, explicit statement that the normal statute of limitations does not apply, but as argued by Defendant is shorter, the code instead provides clear, explicit statements that the normal statute of limitations does apply, and in fact may be longer.

Under Utah Code Ann. § 75-1-103, a general provision of the Utah Uniform Probate Code, the code states that “[u]nless displaced by the particular provisions of the code the principles of law and equity supplement its provisions.” Mr. Berneau asserts that his claim has comported with the necessary statutory requirements and provisions and that any finding which would terminate his claim on the grounds that his statute of limitation had been silently shortened when neither he nor State Farm had any knowledge of Mr. Martino’s passing would be in contradiction to principles of equity and public policy evidenced by the legislature in the Utah Code.

**D. Both Parties Raised Public Policy Issues at the Trial Court,  
and Are Properly Considered by this Court on Appeal**

Perhaps uncomfortable with the manifest inequities of Defendant's argument that Plaintiff's claim is barred based upon a shorter statute of limitations, triggered by an event about which State Farm itself was not aware until one year after the passing of this alleged deadline, Defendant has complained Plaintiff may not raise claims for equitable relief and alleges they were not brought before the court below. Brief of Appellee, pp. 18-20. Mr. Berneau respectfully disagrees, and submits these issues are properly before the Court on appeal.

Defendant responded to Plaintiff's Complaint with a Rule 12(b)(6) Motion to Dismiss under the Utah Rules of Civil Procedure. In its supporting Memorandum of this motion, Defendant introduced evidence, public policy, and equitable arguments beyond the allegations in Plaintiff's Complaint that were not excluded by the trial court in order to bolster Defendant's position, such as arguments that this claim inconvenienced the decedent's family, and further attached exhibits. R. 32-51. Mr. Berneau in response also presented various public policy arguments regarding his claim in his Memorandum in Opposition, R. 52-63, which were not objected to by Defendant, and were not excluded from evidence by the trial court. Finally, Defendant in his Reply Memorandum again made public policy and equitable arguments; presented additional evidence in the form of a letter dated February 1, 2008 from State Farm; and admitted in briefing State Farm was unaware of its insured's death until more than four years after the collision. R. 64-70.

When other evidence is presented to support a motion to dismiss under Rule 12(b)(6) of the Utah Rules of Civil Procedure and the court does not exclude them, the motion is generally treated as a motion for summary judgement. See, e.g., DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835 (Utah 1996). Defendant's contention that this Court must only consider the applicable statutory language and the pleadings is therefore incorrect. All facts and public policy arguments Plaintiff raised in his brief were properly made, included citations to the record, and were brought before the trial court. Defendant, not having objected to the trial court, may not properly object at this time to reference of issues which both parties have addressed to this Court.

Regardless, however, of the specific facts in this case before the Court, both parties agree this issue is one of first impression for the Court. Public policy considerations, such as the effect of applying a shorter statute of limitations based upon events which are unknown and perhaps unknowable to a litigant, are properly considered when evaluating the plain language of section 75-3-803, the intended effect of the statute, and the overall purposes and intent of the Probate Code.

Finally, Defendant does make the equitable argument that Plaintiff is culpable of not "diligently pursuing" his claims. However, Plaintiff has brought his claim within the four year statute of limitations allowed by law, and further refiled suit within the time period provided by Utah's "saving statute," Utah Code Ann. § 78B-2-111. Utah's statute of limitations and savings statute affords parties the opportunity to discover the totality of damages, and affords

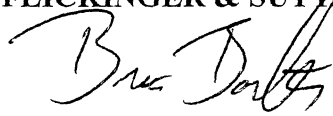
opportunities to resolve disputes outside of the litigation process, which can be expensive both for the parties and the State. Needless filing of suits prior to Plaintiff's claim being ripe cannot be called dilatory; Utah law allows such time to a litigant, and a party cannot equitably be deprived of such law by operation of an event unknown even to State Farm within the time period it argues should apply.

## **II. CONCLUSION**

Defendant's argument hinges upon ignoring the plain language of Utah Code Ann. § 75-3-803, allowing for claims to be brought either against a decedent or against a personal representative. Claims can and should be allowed to proceed directly against decedents up to the limits of liability insurance without involving the personal representative of an estate to prevent disruption of the heirs with matters which have no bearing upon the estate as a matter of law. When the legislature has established law effecting the statute of limitations upon the death of a party, it has done so clearly and explicitly, and has expanded time limits, not shortened them. The only clear and explicit language addressing the statute of limitations for Plaintiff's claims states the normal statute of limitations applies in this case or may otherwise be lengthened, Utah Code Ann. § 75-3-802, and that Plaintiff's claim may proceed against the decedent up to the limits of liability insurance, Utah Code Ann. § 75-3-803(4)(b). As Plaintiff timely filed his Complaint, the trial court erred in dismissing Plaintiff's Complaint and should therefore be reversed.

DATED this 14 day of July, 2009.

**FLICKINGER & SUTTERFIELD**

A handwritten signature in black ink, appearing to read "Brett Boulton", written over a horizontal line.

Mark T. Flickinger

Brett R. Boulton

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of July, 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:

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**THIRD JUDICIAL DISTRICT COURT**

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