THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 Term

Docket No. 2017-0559

Monica Anderson

v.

Estate of Mary D. Wood

APPEAL FROM THE
ORDER ON THE RECONSIDERATION OF THE DISMISSAL

BELKNAP COUNTY SUPERIOR COURT

DEFENDANT APPELLEE'S BRIEF

James G. Walker, Esquire
New Hampshire Bar #4134
O'Shaughnessy, Walker & Buchholz, P.A.
50 Bridge Street, Suite 205
Manchester, NH 03101
(603) 634-5090

To Be Argued By: James G. Walker, Esquire

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

QUESTIONS PRESENTED

I. Did the trial court commit error by granting the defendant's Motion to Dismiss based on its statutory interpretation of RSA 508:4 and RSA 556:1, RSA 556:5 and RSA 556:7?

II. Does RSA 556:11 apply to the plaintiff's complaint?

III. Does RSA 508:10 allow the plaintiff to bring a second action within one year after the dismissal of her initial complaint?

STATEMENT OF FACTS

This litigation arises from a motor vehicle accident which occurred on April 5, 2013 in Concord, NH. The plaintiff Monica Anderson and the defendant's decedent, Mary D. Wood, were operators of motor vehicles which were involved in a collision.

The original complaint asserts that Mary D. Wood resides at 11 Tremont Street in Boscawen, NH and also identifies the defendant's mailing address as P.O. Box 639, Holderness, NH.

Mary D. Wood of Boscawen, NH died on January 22, 2015. The individual whose mailing address was recited in the original complaint is the decedent's daughter, also named Mary D. Wood.

The plaintiff attempted to perform service upon Mary D. Wood of Holderness, NH via registered mail and filed a Motion for Alternative Service of Process. The plaintiff also sought to extend the deadline for service of the Verified complaint dated March 25, 2016.

Counsel for the deceased Mary D. Wood filed an Appearance and Motion to Dismiss for Failure to State a Claim dated April 21, 2016.

The plaintiff then moved to Amend her "writ" seeking to replace "Mary D. Wood" as a defendant and substitute the Estate of Mary D. Wood. Plaintiff's Motion to Amend stated that "Mary D. Wood passed away on January 22, 2015." (Plaintiff's Motion to Amend Writ, Pg. 2).

The defendant objected to the Motion to Amend on the grounds that no "Estate of Mary D. Wood" existed to substitute as a party, and that service could not be performed upon a non-existent legal entity. The defendant's objection also noted that if an estate was created to respond to the plaintiff's complaint, it would have a substantive defense based upon the statute of limitations.

On May 24, 2016 the trial court (O'Neill, PJ) held a hearing regarding the defendant's Motion to Dismiss and the plaintiff's Motion to Amend.

The trial court dismissed the complaint on the grounds that no evidence had been presented to the Court to establish that "the Estate of Mary D. Wood" existed, and therefore, the Court lacked subject matter jurisdiction over a legal action brought against a non-existent defendant. The trial court did not rule on either the Motion to Dismiss or on the plaintiff's Motion to Amend.

The plaintiff filed a new complaint dated March 30, 2017 identifying the Estate of Mary D. Wood as the defendant. The complaint asserted that plaintiff's counsel had filed a Petition for the Administration of the Estate of Mary D. Wood, and that the 6th Circuit – Probate Division – Concord Court appointed Attorney Richard Heiser as Administrator of the Estate on August 17, 2016. Attached as an exhibit to the complaint was a Certificate of Appointment dated August 17, 2016 appointing Richard Heiser, Esquire as Administrator of the Estate of Mary D. Wood. A Return of Service filed with the Court indicated that Attorney Heiser had been served in hand with a copy of the complaint on May 11, 2017 by the Merrimack County Sheriff's Department.

Counsel for the estate filed a Motion to Dismiss asserting that the statute of limitations applicable to the plaintiff's action had expired on April 5, 2016, and that t dated March 30, 2017 was untimely and subject to dismissal pursuant to RSA 508:4.

Following a hearing held on June 22, 2017, regarding the estate's Motion to Dismiss, the Trial Court (O'Neill, P.J.) granted the Motion to Dismiss on the grounds that the statute of limitations barred the plaintiff's suit.

This Appeal followed.

PROCEDURAL HISTORY

As described in the Appellee's Statement of Facts, the plaintiff's complaint is dated March 30, 2017 and was served upon the Administrator of the Estate of Mary D. Wood on May 11, 2017.

This is the only complaint filed on the behalf of the plaintiff identifying the Estate of Mary D. Wood as a defendant. The original complaint identified Mary D. Wood as the defendant, and no amendment to that complaint was allowed by the trial court.

In response to the defendant's Motion to Dismiss the complaint, the plaintiff raised various statutory defenses asserting that, regardless of the date that the plaintiff's cause of action arose, the plaintiff was entitled to bring a legal action against the Estate of Mary D. Wood within one year after the original grant of administration, and the plaintiff was entitled to bring legal action against the estate anytime between December 15, 2016 and June 15, 2017 (Objection to Defendant's Motion to Dismiss, ¶ 9).

The trial court disagreed holding that RSA 508:4 was controlling and that it required the plaintiff to file an action on or before April 5, 2016. Since the plaintiff had failed to bring a legal action against the Estate of Mary D. Wood within the statutorily prescribed time-frame, the plaintiff's action was dismissed.

SUMMARY OF ARGUMENT

The trial court did not err in dismissing the plaintiff's complaint brought against the Estate of Mary D. Wood. The applicable statute of limitations relating to personal actions, RSA 508:4, barred the plaintiff's action. The plaintiff's complaint could not be construed to allow recovery against the Estate of Mary D. Wood as the plaintiff raised no basis to toll the applicable statute of limitation and had misconstrued the application of statutory law relating to actions against estates.

The plaintiff's attempt to utilize the "saving statute" to avoid the three-year statute of limitation imposed by RSA 508:4 fails on multiple fronts.

In the first instance, the parties to the first and second complaints filed on the behalf of the plaintiff are not identical. The plaintiff's original complaint identified "Mary D. Wood" as the defendant. Her second complaint identifies "the Estate of Mary D. Wood" as the defendant. Each of the complaints filed on the behalf of the plaintiff are separate and independent from each other as are the defendants separate legal entities. In this case, the plaintiff delayed filing her second action for approximately one year following the date that the first action was filed. During the intervening year, the applicable statute of limitations expired. Despite the fact that the putative defendant, the Estate of Mary D. Wood, intended to raise the statute of limitations as a defense, the plaintiff delayed filing a new complaint against the estate until long after the expiration of the statute of limitations.

Secondly, the application of RSA 508:10 was not raised by the plaintiff until after her Notice of Appeal was filed with this court. No argument was made on the behalf of the plaintiff to the trial court suggesting that RSA 508:10 would allow the plaintiff to refile her action within one year of the date of its dismissal. In this case, no judgment was entered against the plaintiff

with respect to the dismissal of the original complaint filed by the plaintiff. The trial court dismissed the action on the grounds that it possessed no subject matter jurisdiction over a legal action brought by the plaintiff against a deceased individual where no estate had been established. Following dismissal of the original complaint, the plaintiff waited an additional nine months to bring a new complaint identifying the Estate of Mary D. Woods as the Defendant. The plaintiff's delay in pursuing her alleged right of recovery against the estate disqualifies her from the status of a "diligent suitor". The sole argument advanced by the plaintiff at the hearing, which resulted in dismissal of the plaintiff's second action, was that statutory provisions relating to claims against an estate were not subject to the general statute of limitations, and that therefore, dismissal of the second complaint filed on the behalf of the plaintiff would be improper. Plaintiff now seeks to raise RSA 508:10 as a shield against the application of the general statute of limitations but failed to preserve this issue for review.

ARGUMENT

I. DID THE TRIAL COURT COMMIT ERROR BY GRANTING THE DEFENDANT'S MOTION TO DISMISS BASED ON ITS STATUTORY INTERPRETATION OF RSA 508:4 AND RSA 556:1, RSA 556:5 and 556:7?

STANDARD OF REVIEW

The standard of review applicable for dismissal of an action by a trial court is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery. However, as the defendant in this matter moved for dismissal on the grounds of the general statute of limitations, the dismissal was based upon an affirmative defense and the defendant is required to bear the burden of demonstrating that the applicable statute applies. State of New Hampshire v. Lake Winnipesaukee Resort, LLC, 159 NH 42 (2009). "In reviewing the trial court's grant of a motion to dismiss, our standard of review is whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *(citation omitted).* "We assume that the plaintiff's pleadings are true and construe all reasonable inferences in the light most favorable to the plaintiff. We then engage in a threshold inquiry that test the facts alleged by the plaintiff against the applicable law, and if the allegations constitute a basis for legal relief, we must hold that it was improper to grant the motion to dismiss." Slania Enterprises, Inc. v. Appledore Medical Group, Inc., 167 NH 108 (2018).

RSA 508:4 has been described by this court as New Hampshire's general statute of limitations. Fastrack Crushing Services, Inc. v. Abatement International/Advatex Associates, Inc., 153 NH 284 (2006). In her brief, the plaintiff suggests that RSA 556:1, *et. seq.* relates specifically to claims for or against estates, and that the statutory provisions are more specific

than the general statute of limitations, and therefore control when claims may be brought against an estate. While the statutes relied upon by the plaintiff do specifically relate to claims made by, or against estates in this jurisdiction, the specific statutory provision applicable to the plaintiff's cause of action, specifically references RSA 508 and makes clear that the statute is subject to the general statute of limitations.

RSA 556:11, which controls the filing of new actions against an estate is by its own terms, "subject to the provisions of RSA 508". Not only does the statute explicitly reference and make claims by or against an estate subject to the general statute of limitations, this court has previously ruled that RSA 508:4 applies to tort actions and would act to bar the late entry of legal actions. Hodgdon v. Weeks Memorial Hospital, 122 NH 424 (1982). Additionally, this court has also held that the limitation described in RSA 556:11 is distinguishable from other procedural limitations. This court has explained that since traditionally common law actions could not be maintained after the death of a party, RSA 556:11 constitutes a condition precedent to the right of recovery. "Because this provision creates a right not known at common law, this court has consistently viewed the requirement that suit be initiated within two years of the death of the decedent as a condition of the right to recover rather than as a mere limitation upon the remedy." Guerin v. New Hampshire Catholic Charities, Inc., 120 NH 501, 504 (1980). Indeed, this court has ruled that, even where a defendant has fraudulently concealed a cause of action or right of recovery, that the limitation contained in RSA 556:11 would be enforced, at least with respect to tort actions. Id. at 505. Because of the unique nature of this statutory provision, this court has held that facts sufficient to toll the running of a general statute of limitations have no effect upon the survival of actions as the statute defines and limits the existence of the right itself." Id. at 504 *citing* Poff v. Company, 72 NH 104 (1903).

This court has recognized that, even though the application of strict statutes of limitations relating to claims by or against estates may result in harsh implications for a claimant, the applicable statutory mandates must be enforced. "However harsh might be the established rule, we are not now disposed to change it." Guerin, pg. 505. The courts have also held that where a conscious decision has been made to not enter a complaint, the failure to do so does not constitute accident, mistake or misfortune. Hodgdon v. Weeks Memorial Hospital, 122 NH 424 (1982). In Hodgdon, the plaintiff withheld the service of a writ of summons pending efforts to reach a settlement agreement in an associated case which had been filed in the federal district court. Plaintiff then moved for late entry of her action against the hospital and was granted relief by the trial court. This court reversed the trial court's Order holding that "[to] sanction such an approach would result in the judicial repeal of the statute of limitations and the substitution of ad hoc, judge-made rules that would vary from case to case.... because the statute of limitations had run, the court should not have allowed late entry of the writ." Hodgdon, pg. 427, *citing* Guerin v. New Hampshire Catholic Charities, Inc., 120 NH 501, 504 (1980).

In her brief, the plaintiff suggests that because the decedent's daughter was on notice of the plaintiff's claims, and the fact that a suit had been filed in the Belknap County Superior Court, this information somehow translates into knowledge shared by the non-existent estate. The plaintiff's argument that the defendant, i.e., the Estate of Mary D. Wood, was somehow on notice of the plaintiff's claims is incongruous, given the fact that Mary D. Wood had died in January of 2015. Likewise, the plaintiff's suggestion that since the decedent's insurance carrier had received notice of the complaint, notice should somehow be imputed to the estate is completely without legal justification. The plaintiff cites Desaulnier v. Manchester School District, 140 NH 336 (1995) for the proposition that where a defendant has received actual notice

of a claim the application of the statute of limitations may be waived. Plaintiff's suggestion that tolling the statute of limitations would not prejudice the estate is also without legal or factual foundation and is contrary to the holding in Guerin.

The plaintiff also suggests that tolling of the statute of limitations will protect her important substantive legal rights. Plaintiff does not address the opposite side of this argument, that a party should not be able to pursue stale claims in perpetuity. This court has recognized that a purpose of the statute of limitations is to provide defendants with timely notice of claims against them in order to allow them to prepare a defense to those claims. Dupuis v. Smith Properties, Inc. 114 NH 625 (1974). In this case, not only is the defendant's decedent not available to participate in the defense of the plaintiff's suit, the plaintiff's construction of the applicable statutes relating to claims against estates would result in an unlimited horizon for a plaintiff to bring a claim in circumstances where an estate had not been established. When asked by the trial court to address the fact that, under circumstances presented by this case, there would effectively be no statute of limitations, counsel for the plaintiff conceded that unless or until an estate had been established there would be no limitation upon the amount of time which could expire before a claim was brought against an estate. (*See:* Hearing Transcript, pg. 9, line 1.)

In this action, the plaintiff's right to bring a legal action against the Estate of Mary D. Wood, expired on April 5, 2016. Under New Hampshire law, the three-year statute of limitation applies to any claims which constitute a personal action. "The plain meaning of the phrase 'subject to' indicates that the six-year period set forth in the statute is subservient to or governed by the provisions of RSA Chapter 508." Cheever v. Southern New Hampshire Regional Medical Center, 141 NH 591 (1997). In Cheever, this court found that RSA 556:11 must be read in conjunction with RSA 508:4, and that the plain meaning of the statute language required that

RSA 556:11 be interpreted as being subservient to the general statute of limitations contained in RSA 508:4. The plaintiff's arguments to the contrary notwithstanding, this issue has previously been addressed by this court in the Cheever decision and the application of the general statute of limitations has been upheld.

II. DOES RSA 556:11 APPLY TO THE PLAINTIFF'S COMPLAINT?

As the plaintiff notes in her brief, personal actions which survive the death of a party are a creature of statutory construction not the common law. RSA 556:11 reflects a statutory mandate that a new legal action may be brought following the death of a party "subject to the provisions of RSA 508." Not only does the statute expand upon the common law right to pursue a new legal action against a decedent, it also acknowledges the State of New Hampshire's interest in the efficient and prompt administration of estates. In this case, the plaintiff's construction of the applicable statutes would allow a legal action against the Estate of Mary D. Wood until an undefined period of time into the future. The only limiting factor would be the date upon which the estate had been created.

Had the plaintiff delayed filing a petition to create the Estate of Mary D. Wood, the three-year statute of limitation would be tolled indefinitely. Such a result is clearly contrary to any legislative intent which can be gleaned from RSA 556:11, RSA 556:1 or RSA 556:5. The purpose of these statutes is to allow an administrator of an estate an opportunity to evaluate the estate, marshal assets, pay claims and otherwise proceed with the administration of the estate. Saurman v. Liberty, 116 NH 73 (1976). "The policy of RSA 556:1 is to ensure the orderly and expeditious presentation of claims and settlement of an estate. The purpose of the six-month rule is not to deprive creditors of their rights, but to allow the administrator a sufficient amount of time to examine the estate, gather the assets, and to pay just claims and thus be spared from unnecessary suits." Id. at 76 (*citations omitted*).

To allow stale claims against estates to be pursued by plaintiffs who have not diligently acted to protect their rights, would not assist in the efficient administration of estates or encourage the orderly or expeditious presentation of claims. The only barrier to a party pursuing

a claim ten, twenty or thirty years following the death of a defendant would be whether or not the defendant's estate had been probated.

The facts of this case are particularly relevant to the question of whether a plaintiff must diligently pursue her right to pursue a claim against a non-existent estate. The plaintiff in this matter moved to amend the original complaint to substitute the "Estate of Mary D. Wood" for "Mary D. Wood" as the defendant. The defendant made a timely objection to the plaintiff's Motion to Amend and argued that the statute of limitations would be raised as a substantive defense to the plaintiff's claim, if the amendment was allowed. (Objection to Motion to Amend ¶ 8).[1]

As the original defendant pointed out in her Objection to Plaintiff's Motion to Amend, "[t]he plaintiff's whole difficulty lies in the fact that he sued the wrong party, and this error cannot be cured by an amendment that would abridge the rights of the [new defendant], which accrued before the amendment making it a party was applied for." Lewis v. Hines, 81 NH 24, 27 (1923).

[1] Objection to Motion to Amend Exhibit A

III. DOES RSA 508:10 ALLOW THE PLAINTIFF TO BRING A SECOND ACTION WITHIN ONE YEAR AFTER THE DISMISSAL OF HER INITIAL COMPLAINT?

RSA 508:10 known as the "saving statute" allows an action to be refiled within one year in circumstances where a judgment is rendered against the plaintiff and where the right of action brought by the plaintiff is not barred by the original judgment. RSA 508:10 is entitled "second suit". The statute allows a party to refile a suit in circumstances where the action would be barred by the general statute of limitations. "Essentially, RSA 508:10 serves 'to permit an action to be brought after the general limitation ha[s] run (RSA 508:4), where a prior action, seasonably brought, should be dismissed for reasons not barring the right of action or determining it upon its merits.'" Berg v. Kelley, 134 NH 255, 257 (1991) *quoting* Huges v. Hebert, 106 NH 177 (1965).

The defendant contends that RSA 508:10 is inapplicable to it, as the Estate of Mary D. Wood had not previously been a party to any litigation involving the plaintiff. The defendant identified in the plaintiff's original complaint was "Mary D. Wood". The original complaint was dismissed for lack of subject matter jurisdiction, as the trial court had been provided with no evidence that either "Mary D. Wood" or the "Estate of Mary D. Wood" existed at the time suit was brought or at any time while the litigation was pending. The original complaint was not amended to identify the Estate of Mary D. Wood as a party, nor was the Estate of Mary D. Wood substituted for Mary D. Wood. The plaintiff cannot institute a "second suit" against the defendant, where no original suit has ever been filed against it. No judgement was entered by the Court with regard to the plaintiff's claims against the Estate of Mary D. Wood until the trial court dismissed the complaint brought against it. The grounds for dismissal were the expiration of the applicable statute of limitations. If the trial court is correct, and the statute of limitations had expired prior to the entry of the complaint versus the Estate of Mary D. Wood, the plaintiff's

right of action would be barred by the trial court's judgment of dismissal, and therefore, the statute would not apply.

The plaintiff relies upon Roberts v. General Motors Corporation, 140 NH 723 (1996) to support her contention that RSA 508:10 allows her to pursue a second suit against the Estate of Mary D. Wood. The plaintiff's reliance is misplaced. The Roberts decision considered whether a diligent party is entitled to a court hearing where a decision is rendered on the merits. The statute allows a litigant to proceed "where a prior action, seasonably brought, should be dismissed for reasons not barring the right of action or determining it upon its merits. The test of RSA 508:10 is whether the right of action is, or is not, barred by the first judgment." Id. at 725. Based upon this court's interpretation of the statute, the plaintiff in this matter is not a diligent suitor nor was the dismissal of her original complaint against a different party either a result of a procedural error or a result of a decision made by the plaintiff.

The Court's original decision was that it had no subject matter jurisdiction over the plaintiff's cause of action. The plaintiff then waited an additional nine months to file a second complaint, naming the Estate of Mary D. Wood as the defendant. The plaintiff clearly did not diligently pursue her claim against the estate, but rather, she intentionally delayed bringing an action against the estate, apparently relying upon the misplaced legal argument that an action may be filed against an estate within one year of the date of administration. Unlike the defendant in Roberts, the Estate of Mary D. Wood had not previously been a party to any litigation and would not be aware that "it needed to preserve its evidence and marshal witnesses." Id. at 726. Likewise, there is no evidence that the Estate of Mary D. Wood was placed on notice of the plaintiff's intention to pursue a legal action against it, nor did the plaintiff notify the decedent's insurance carrier that she intended to pursue an action against the estate. The first notice of the

plaintiff's legal action against the Estate of Mary D. Wood was provided by service of process upon the administrator of the estate on May 15, 2017, more than two years after the date of Mary D. Wood's death, January 22, 2015 and nearly four years after the date of the accident involving the defendant. The plaintiff in this matter was anything but a diligent suitor.

Unlike the defendant in Roberts, the Estate of Mary D. Wood was clearly prejudiced by the plaintiff's delay, especially in light of the fact that the estate's most important witness would be unable to testify at trial. The estate had not been "on notice of the allegations against it, and of its need to secure and preserve evidence to prepare its defense." Supra at 727. The plaintiff's allegations are not only stale, the passage of time and the circumstances surrounding the plaintiff's claim make it virtually impossible for the estate to "secure and preserve evidence and to prepare its defense."

PLAINTIFF'S ARGUMENTS REGARDING RSA 508:10 WERE NOT PRESERVED

Assuming arguendo that RSA 508:10 would apply in circumstances involving different defendants, the plaintiff has failed to preserve this issue for review. "It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial." Singer Asset Finance Co., LLC v. Wyner, 156 NH 468, 472 (2007) *citing,* Bean v. Red Oak Prop. Mgmt., 151 NH 248 (2004). "This court has consistently held that we will not consider issues raised on appeal that were not presented in the lower court." In the matter of Tammy Ruppa and Alan Ruppa, 161 NH 311, 314 (2010) *quoting,* LaMontagne Builders v. Brooks, 154 NH 252, 258 (2006). "As the appealing party, the petitioner bears the burden of demonstrating that she raised her issues before the trial forum. In this instance, appellate counsel for the petitioner conceded at oral argument that her constitutional claims had not been raised at the trial level. accordingly, we will not address them." Id. at 314-315.

Not only did the plaintiff not raise the applicability of RSA 508:10, she did not include the applicability of RSA 508:10 as an issue in her Notice of Appeal. Neither the trial court, nor the defendant had an opportunity to address the applicability of the "savings statute" and therefore, the plaintiff's arguments concerning RSA 508:10 should not be addressed by this court. "We require issues to be raised at the earliest possible time, because trial forums should have a full opportunity to come to sound conclusions and to correct errors in the first instance." Tiberghin v. B.R. Jones Roofing Co., 151 NH 391, 393 (2004) *quoting,* Star Vector Corp. v. Town of Windham, 146 NH 490 (2001).

In this case, none of the plaintiff's pleadings, or oral argument, referenced RSA 508:10 in any way. Indeed, in her brief, the plaintiff argues that RSA 508 et seq. has no application to RSA 556 et seq. According to the plaintiff, RSA 556:1, RSA 556:5 and RSA 556:7 are the more

specific statutes concerning actions against estates and therefore are not subject to the provisions of RSA 508:4 (Plaintiff's Brief, Pg. 7). That being the case, it does not appear logical to rely upon RSA 508:10 to provide a grace period for a second suit to be filed on the behalf of the plaintiff.

CONCLUSION

The decision of the trial court should be upheld, and its dismissal of this action affirmed. The application of the statute of limitations to the plaintiff's action against the Estate of Mary D. Wood concerns substantive rather than procedural issues.

This court has previously interpreted the application of RSA 508:4 to actions by or against estates and has ruled that the general statute of limitations, which is expressly referenced in RSA 556:11, is controlling, especially within the context of legal actions not recognized at common law.

This court has ruled that the phrase "subject to" RSA 508 clearly limits the reach of RSA 556:11. Therefore, the applicable statute of limitations for the plaintiff's action must be three-years.

The plaintiffs' effort to perform an "end-around" the applicable statute of limitations by arguing that RSA 508:10 allows her to bring an action within one year of the dismissal of her original complaint is misplaced. In the first instance, the Estate of Mary D. Wood was not a party to the plaintiff's original complaint. The estate was not made a party to any suit until the instant complaint was filed with the trial court. This action is not a "second suit", it is the original complaint brought against the Estate of Mary D. Wood. Unfortunately for the plaintiff, the complaint was brought outside of the applicable statute of limitations, and therefore, is subject to dismissal.

The trial court properly ruled that RSA 508:4 applies to this action, that the statute of limitations had expired, and that the plaintiff's construction of statutory provisions regarding claims by or against administrators was unsound and would result in an unlimited amount of time to make claims against estates.

The Appellee requests oral argument.

Respectfully submitted by,
THE ESTATE OF MARY D. WOOD

By and through its attorneys,
O'SHAUGHNESSY, WALKER & BUCHHOLZ, P.A.

Dated: May 16, 2018

By: _____

James G. Walker, Esquire
New Hampshire Bar #4134
50 Bridge Street, Suite 205
Manchester, NH 03101-1699
(603) 634-5090

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were this day forwarded to:

Peter J. Leahy
Linda Sullivan Leahy, Esquire
Leahy & Leahy, PLLC
347-C Village Street
Penacook, NBH 03303

Dated: May 16, 2018

_____
James G. Walker, Esquire

APPENDIX CONTENTS

State of New Hampshire

BELKNAP, SS *SUPERIOR COURT*

Monica Anderson

v.

Mary D. Wood

Docket # 211-2016-CV-00074

Objection to Motion to Amend

NOW COMES the defendant in the above captioned matter, Mary D. Wood, by and through counsel, Walker & Buchholz, P.A., and respectfully submits the following Objection to the plaintiff's Motion to Amend. In support of her objection, the defendant states as follows:

1. This litigation arises from a motor vehicle accident which occurred on April 5, 2013 in Concord, New Hampshire. The plaintiff and defendant were operators of motor vehicles which were involved in a collision.

2. The complaint asserts that the defendant resides at 11 Tremont Street in Boscawen, New Hampshire. However, the defendant is in fact deceased, having died on January 22, 2015. Thus, the defendant's death preceded the date of the complaint by approximately 14 months.

3. Despite having learned on the day that the complaint was filed that the defendant was deceased[1], the plaintiff took no action to correct the failure to identify a proper party as a defendant until she filed a Motion to Amend her "Writ" via a pleading dated April 29, 2016, which seeks to substitute the Estate of Mary D. Wood for Mary D. Wood as the defendant. (See: Prayer for Relief subparagraph A. Plaintiff's Motion to Amend Writ).

4. Clearly the plaintiff is not seeking to amend her complaint, but rather is seeking to substitute parties.

5. Under New Hampshire law, the substitution of parties is liberally granted and amendments to pleadings are allowed pursuant to RSA 514:9.

6. In order to be successful, an objection to a motion to amend, must demonstrate that the allowance of the amendment or substitution would prejudice the new party to the litigation. "A New Hampshire court will allow almost any substitution if it perceives that the case involves a meritorious claim and that the defendant has no substantial defense to the claim." NH Civil Practice and Procedure section 6.33.

7. The substitution of a deceased party for the estate of that party would normally be considered to procedural, rather than substantive. However, in this case, the

[1] See paragraph number 1 Objection to Motion to Dismiss.

defendant originally named in the complaint had been deceased for approximately 14 months prior to the date that the complaint was filed with the court, and the party which the plaintiff seeks to substitute for the deceased defendant does not exist. There is no "Estate of Mary D. Wood". Plaintiff's counsel has apparently filed a Motion for Administration of the Estate of Mary D. Wood, but as of this date no estate exists and a non-existent entity cannot be made a party to this action.

8. Assuming that the probate court grants the Petition for Administration of the Estate of Mary D. Wood, the estate would have a substantive defense to the plaintiff's claim based upon the statute of limitations. The motor vehicle accident which is the subject of this matter occurred on April 5, 2013. No action may be maintained against the estate of the defendant more than three years following the date the tort was committed pursuant to RSA 508:4.

9. In circumstances where there is a substitution of parties, "the situation as to [the newly added party's] rights and liabilities is what it would be if an original action against him were brought at that time. As to him, this is the beginning of the suit. At the time when the present motion to amend was made, the cause of action against the [new defendant] expired... The situation presented by the motion was that of a plaintiff who asked leave to institute a suit which it conclusively appeared could not be maintained." Lewis v. Hines, 81 NH 24 (1923).

10. The plaintiff's failure to identify and bring a legal action against the correct party prior to the expiration of the statute of limitations relieves the estate of any liability for the tort allegedly committed by Mary D. Wood. "The plaintiff's whole difficulty lies in the fact that he sued the wrong party, and this error cannot be cured by an amendment that would abridge the rights of the [new defendant], which accrued before the amendment making it a party was applied for." *Supra* page 27.

11. The prejudice to the putative defendant is obvious as is the fact that the non-existent defendant estate could have no knowledge of the suit instituted against the decedent. Therefore, the substitution of parties would be futile and constitute both a waste of judicial resources and a waste of resources on the behalf of the estate.

12. Defendant requests a hearing in regard to this objection.

WHEREFORE, the defendant, Mary D. Wood, respectfully prays that the Honorable Court will deny the plaintiff's Motion to Amend and for such other and further relief as may be just under the circumstances.

Respectfully submitted,
Mary D. Wood
By her attorneys,
WALKER & BUCHHOLZ, P.A.

Dated: May 3, 2016

By _____
James G. Walker, Esquire
NH Bar# 4134
50 Bridge Street, Suite 205
Manchester, NH 03101-1699
603-634-5090

Certificate of Service

I hereby certify that a copy of the foregoing was this day forwarded to Peter Leahy, Esquire.

Dated: May 3, 2016

_____
James G. Walker, Esquire