

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2017-0559

MONICA ANDERSON

V.

ESTATE OF MARY D. WOOD

PLAINTIFF'S BRIEF; RULE 7 MANDATORY APPEAL OF THE DECISIONS OF THE
BELKNAP SUPERIOR COURT, JUDGE JAMES D. O'NEILL, III

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(b) THE QUESTIONS PRESENTED FOR REVIEW:

1. Did the Trial Court commit error by granting the Defendant's Motion to Dismiss based on its statutory interpretation of R.S.A. 508:4 and R.S.A. 556:1, 5, and 7.

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2. Did the Trial Court commit error when it granted Defendant's Motion to Dismiss and denied the Plaintiff's Motion to Reconsider when it erroneously applied R.S.A. 556:11 to dismiss Plaintiff's complaint.

Appendix page 45-50

3. Did the Trial Court commit plain error when it failed to apply R.S.A. 508:10 to Plaintiff's complaint.

Plaintiff brings this question pursuant to the Order of this Court allowing Plaintiff to add questions and Rule 16-A. Plain Error.

(c) STATUTES AND RULES INVOLVED IN THE CASE:

1. Chapter 508. LIMITATION OF ACTIONS

508:1. Limitation of Chapter

The provisions of this chapter shall not apply to cases in which a different time is limited by statute.

508:4. Personal Actions

I. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

II. Personal actions for slander or libel, unless otherwise provided by law, may be brought only within 3 years of the time the cause of action accrued.

508:10. Second Suit

If judgment is rendered against the plaintiff in an action brought within the time limited therefor, or upon a writ of error thereon, and the right of action is not barred by the judgment, a new action may be brought thereon in one year after the judgment.

2. Chapter 556. SUITS BY AND AGAINST ADMINISTRATORS

556:1. No Action Within Six Months, etc.

No action shall be sustained against an administrator if begun within six months after the original grant of administration, nor unless the demand has been exhibited to the administrator and payment has been demanded.

556:5. Suit Within One Year

No suit shall be maintained against an administrator for any cause of action against the deceased, unless it is begun within one year next after the original grant of administration,

exclusive of the time such administration may have been suspended, except in cases where he has retained estate in his hands for the payment of the claim by order of the judge, and cases provided for by RSA 556:7 and RSA 556:28.

556:7. Right of Action Surviving

If a right of action existed in favor of or against the deceased at the time of his death, and survives, an action may be brought by or against the administrator at any time within one year after the original grant of administration.

556:11. New Action

If an action is not then pending, one may be brought for such cause at any time within 6 years after the death of the deceased party, subject to the provisions of R.S.A. 508.

3. New Hampshire Rules of the Supreme Court

Procedural Rules

Rule 16-A. Plain Error

A plain error that affects substantial rights may be considered even though it was not brought to the attention of the trial court or the supreme court.

(d) STATEMENT OF THE CASE AND STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Plaintiff was injured in a motor vehicle accident on April 5, 2013, in which Mary D. Wood was the driver that injured Plaintiff.

Mary D. Wood died on January 22, 2015, within the statutory three year period of R.S.A. 508. At the time of her death, no one petitioned to open an estate, no obituary was run in any New Hampshire newspaper, no notice was given to Plaintiff by a representative of Mary D.

Wood that she had died, and Plaintiff had no knowledge of the death of Mary D. Wood (Appendix page 40).

On March 30, 2016, Plaintiff filed her complaint for negligence against Mary D. Wood in the Belknap Superior Court, with a courtesy copy of the complaint provided to the Insurance Company for Mary D. Wood, Amica Insurance Company (Appendix pages 4 & 7).

The Attorney for the daughter of deceased Mary D. Wood, filed a Motion to Dismiss for the reason that Mary D. Wood was the daughter, that Mary D. Wood who was involved in the accident was deceased, and that R.S.A. 556:7 required that any action must be brought against the administrator of the estate (Appendix pages 11-12). Plaintiff moved to amend the Writ stating that the Plaintiff had no knowledge of the death of Mary D. Wood. and to name the Estate of Mary D. Wood as Defendant (Appendix page 23). Plaintiff filed an Objection to the Motion to Dismiss. Plaintiff explained that the only asset of the estate was the insurance policy that provided coverage for the accident (Appendix 21). The Trial Court by Order of 6/30/16 held sua sponte that since no estate had been opened for the deceased Mary D. Wood, the Court had to dismiss the complaint because the Court had no subject matter jurisdiction (Trial Court Order appended dated June 30, 2016).

Plaintiff filed a Petition for Estate Administration concerning the Estate of Mary D. Wood dated June 15, 2016 (Appendix pages 38-39). The original grant of Administration was dated June 15, 2016. The Administrator was appointed by Order of August 17, 2016 (Appendix page 35). Plaintiff filed her complaint against the Estate of Mary D. Wood April 3, 2017 and served the Administrator with her complaint May 11, 2017 (Appendix pages 25-29).

The same Defense Attorney who had filed a Motion to Dismiss on behalf of the daughter of Mary D. Wood filed a Motion to Dismiss on behalf of the Estate of Mary D. Wood, stating

that the complaint naming the Estate had not been filed within the three year statute of limitations set out in R.S.A. 508:4 (Appendix 30-32).

Plaintiff filed an Objection to the Motion to Dismiss for the reasons that when Mary D. Wood died in January, 2015, a right of action existed in favor of Plaintiff within the statute of limitations set out in R.S.A. 508:4; the action could be brought “at any time within one year after the original grant of administration”, R.S.A 556:7; that the right of action could not be brought within the first six months after the grant of administration, R.S.A. 556:1; that pursuant to R.S.A. 556:1, 5 and 7, there was a six month window within which to file the complaint against the Estate of Mary D. Wood beginning on December 15, 2016 and ending on June 15, 2017; that Plaintiff filed the complaint against the Estate of Mary D. Wood April 3, 2017, within the six month window (Appendix pages 40-41).

Hearing was held on the Defendant’s motion to dismiss June 22, 2017. At the hearing, Defense counsel argued that R.S.A. 556:11 applied to the complaint; any new action must be filed within 6 years after the date of death “subject to the provisions of RSA 508”; that therefore the new action must be brought within the 3 year period set out in R.S.A. 508:4. Plaintiff argued that the process one must follow to sue an estate in New Hampshire in R.S.A. 556:1, :5 and :7; that those three parts establish a 6 month window after the original grant of administration to sue the estate; that these provisions govern the bringing of a lawsuit against a deceased; that R.S.A. 556:11 did not apply (Appendix pages 42-50).

The Trial Court granted the Defendant’s Motion to Dismiss, finding that the Plaintiff’s negligence claim against the Estate of Mary D. Wood was barred by the three year statute of limitations set forth in R.S.A. 508:4, the three years ending April 5, 2016; that the action was not pending until after the death of Mary D. Wood so that it comes within R.S.A. 556:11; that the

action was therefore “subject” to R.S.A. 508:4 as described in R.S.A. 556:11 (Trial Court Order appended dated August 7, 2017).

Plaintiff filed a Motion to Reconsider. Plaintiff argued that between the date of death in January, 2015 to at least December 15, 2016, 6 months after the original grant of the orders of Administration, there was no person or entity that Plaintiff could bring an action against to toll the statute of limitations, pursuant to R.S.A. 556:1, :5 and :7. The case cited to the Trial Court by Defendant, Coffey v. Bresnahan, 127 N.H. 687, 691-692 (N. H. 1986) does not apply to Plaintiff’s complaint—the Court in Coffey held that in order to bring an action within 6 years of the date of death under R.S.A. 556:11, the suit must not have already been barred by the statute of limitations in R.S.A. 508:4 at the time of death; Plaintiff’s complaint was not barred by the statute of limitations in R.S.A. 508:4 at the time of death of Mary D. Woods; Plaintiff was not trying to extend the statute of limitations for six years under R.S.A. 556:11; Plaintiff was arguing only for the one year period within the original grant of administration set out in R.S.A. 556:7 (Appendix pages 52-53). The Trial Court denied the Plaintiff’s Motion to Reconsider (Trial Court Order appended dated August 29, 2017).

(e) SUMMARY OF ARGUMENT

1. The Trial Court should have applied R.S.A. 556:1, :5 and :7 to Plaintiff’s complaint to order that the complaint was timely filed under these applicable statutes and was not barred by the statute of limitations in R.S.A. 508:4.

2. The Trial Court erred when it applied R.S.A. 556:11 to dismiss Plaintiff’s complaint for the reasons that Plaintiff was not trying to extend the statute of limitations for the six year period in

R.S.A. 556:11 and the Plaintiff's complaint was not barred by the 3 year statute of limitations in R.S.A. 508:4 at the time of Mary D. Wood's death.

3. The Trial Court committed plain error when it did not apply R.S.A 508:10 to Plaintiff's complaint against the Estate of Mary D. Wood where the first judgment of the Trial Court dismissing the complaint was entered June 30, 2016 not on the merits of the complaint, the complaint was brought within the time limited therefor, and Plaintiff filed her new complaint thereon within one year after the first judgment, on April 3, 2017.

(f) ARGUMENT

1. R.S.A. 556:1, :5 and :7 apply to Plaintiff's complaint and therefore the complaint was timely filed and not time barred.

In Martin v. Pat's Peak, Inc., 158 N.H. 735 (N.H. 2009), the Supreme Court held,

“RSA 508:1 (1997) states that ‘[t]he provisions of this chapter shall not apply to cases in which a different time is limited [973 A.2d 339] by statute.’ The purpose of this section ‘is to make RSA chapter 508 the source for ‘catch-all’ statutes of limitations and tolling provisions, and to ensure that more specific statutes found elsewhere remain controlling.’
At Page 741

R.S.A. 556:1, :5 and :7 are the more specific statutes controlling how and when to bring an action against a deceased defendant. R.S.A. 556:1 requires no action within six months after the original grant of administration. R.S.A. 556:5 requires suit within one year after the original grant of administration. R.S.A. 556:7 requires that if a right of action existed against the deceased at the time of his death, an action may be brought within one year after the original grant of administration. It is uncontested that Plaintiff followed these specific statutes. The accident occurred April 5, 2013 and therefore existed under R.S.A. 508:4, stating the “catch-all”

statute of limitations of 3 years, against the deceased Mary D. Wood at the time of her death on January 22, 2015. The original grant of administration for the Estate of Mary D. Wood was June 15, 2016. Plaintiff filed her complaint April 3, 2017—more than 6 months after the original grant of administration and within one year of the original grant of administration. Under the specific statutes R.S.A. 556:1, :5 and :7, Plaintiff's complaint against the Estate of Mary D. Wood was timely filed.

In Desaulnier v. Manchester School District, 140 N.H. 336 (N.H. 1995), the Supreme Court reversed and remanded the dismissal of the suit by the trial court where the trial court had dismissed on the grounds that the suit was barred by the statute of limitations. The Supreme Court found that the plaintiff's attorney notified the city of the claim more than one year before the limitations period expired and sent copies of the writ to the defendant. The Court held,

'The rationale for the statute of limitations, which is to insure that defendants receive timely notice of actions against them, is not applicable in a case such as this one where the defendant actually received notice within the limitation period.' (citations omitted) (wrong defendant served) (citations omitted) At page 338

Plaintiff filed the original complaint against Mary D. Wood without knowledge of her death, March 30, 2016, within the 3 year statute of limitations, sent a courtesy copy of the complaint filed to the Amica Insurance Company the same date. (motion for alternative service of process) The Estate did not likely have any assets other than the insurance policy with Amica that provided coverage for the accident. (objection to motion to dismiss) The Attorney who represented the daughter of Mary D. Wood and also the Estate of Mary D. Wood is in fact insurance defense for Amica—thus, as in Desaulnier, the Defendant actually received notice of the complaint within the limitation period. See also New Hampshire Div. of Human Services v. Allard, 138 N.H. 604 (N.H. 1994), where the Supreme Court reversed the decision of the trial court to dismiss on statute of limitations grounds. The Supreme Court held, "Particularly, we

the main purpose of the statute of limitations—to ‘insure timely notice to an adverse party so that he can assemble a defense while facts are still fresh,’ (citations omitted)—is not frustrated by tolling in this case. As here, the purpose to the statute of limitations to insure timely notice is not frustrated by tolling in this case.

In Stewart v. Farrel, 131 N.H. 458 (N.H. 1989), the Supreme Court reversed the trial court’s dismissal. The Supreme Court interpreted R.S.A. 556 as it relates to the time in which a creditor must file notice of a claim against the estate. The plaintiff had received no notice of the death of the deceased therein. The Court held, “In determining what justice and equity require, the superior court should take into account both that ‘the right to recover for personal injuries is ...an important substantive right,’...” The Court discussed, “Moreover, the Stewarts’ decision not to sue immediately is understandable. It is not unusual for plaintiffs to wait to bring claims until they can determine the full extent of their injuries.” Plaintiff’s right to recover for her personal injuries is an important substantive right which should not be extinguished when she received no notice of the death of the Defendant—especially when she complied with the statutory requirements of R.S.A. 556 for bringing a suit against a deceased, and especially when the Insurance Company involved received notice of the lawsuit within the general statute R.S.A. 508:4.

In Keeton v. Hustler Magazine, Inc., 131 N.H. 6 (N.H. 1988), the Supreme Court held that the statute of limitations are procedural rules, that the defendant did not allege loss of evidence or other disadvantage resulting from the timing of the suit, and, “This view is consistent with New Hampshire’s general preference for decisions on the merits, ...” In Maguire v. Merrimack Mutual Fire Insurance Co., 125 N.H. 269 (N. H. 1984), the Supreme Court held, “That obvious policy of statutory construction is buttressed by our other ‘strong policy in favor

of adjudication of claims on their merits.” At page 272 In Gould v. Concord Hosp., 126 N.H. 405 (1985), the Supreme Court reversed the dismissal of the suit by the trial court, holding that,

The law of torts is premised on the policy that a person who unreasonably interferes with the interests of another should be liable for the resulting injury. (citation omitted) Our constitution provides that all citizens have a right to the redress of their actionable injuries. N.H. CONST. pt.I, art. 14. These principles require that the substantive rights of plaintiffs to maintain actions in tort be accorded solicitous protection. At page 409

Plaintiff’s right to bring her claim against the Estate of Mary D. Wood is an important substantive right under the New Hampshire Constitution, Plaintiff complied with the procedural requirement of R.S.A. 556, the Defendant has alleged no loss of evidence or other disadvantage resulting from the timing of her suit, and the statutory constructions given to R.S.A. 556 should be for preference for decision on the merits. Plaintiff’s claim against the Estate of Mary D. Wood should not have been dismissed by the Trial Court.

2. R.S.A.556:11 does not apply to Plaintiff’s complaint to require dismissal of the complaint

In Coffey v. Bresnahan, 127 N.H. 687 (N.H. 1986), the Supreme Court addressed the application of R.S.A. 556:1, :3, :5 and :11. The Court held,

‘At common law, actions sounding in tort were considered personal and abated upon the death of either party.’ (citations omitted) RSA 556:11 partially abrogates the common law by providing that tort actions not then pending survive the death of a party and, thus, creates a right of action.” ... The primary purpose of RSA 556:11 is to abrogate the common law rule barring tort actions where a party has died and to preserve such actions by allowing the commencement of a suit which was not pending at the time of the death.”

The Court held therefore that the same number of years of the statute of limitations for a tort action must apply to suits of tort plaintiffs in survival actions. The Court further explained R.S.A. 556:11 in relation to its wording and R.S.A. 508:4—that subject to the provisions of RSA 508 means that the action must not have already been barred by the Statute of limitations in RSA

508:4 at the time of the death of the deceased:

This issue was determined by the court in *Perutsakos v. Tarmey*, 107 N.H. 51, 217 A.2d 177 (1966), where we stated that '[w]e think that the words of [section] 112, 'has not already become barred' mean an action which has not become barred at the time of the death of the deceased party....In other words section 11 permits suits within a designated period after the decedents' death on all claims not already barred at the time of such death by the general statute of limitations.'

In Plaintiff's case, her complaint was clearly not barred at the time of the death of Mary D. Wood—the accident occurred April 5, 2013, Mary D. Wood died January, 2015, so the complaint was not barred by the R.S.A. 508:4 three year statute of limitations for a tort action for personal injury at the time of Ms. Wood's death. This requirement of R.S.A. 556:11 was satisfied, and R.S.A. 556:11 did not bar Plaintiff's complaint. Plaintiff's complaint fully complied with R.S.A. 556:11, and with R.S.A. 556:1, :5, and :7 and should not have been dismissed by the Trial Court.

3. The Trial Court should have applied R.S.A. 508:10 to Order that Plaintiff's complaint was timely filed under that statute.

In *Roberts v. General Motors Corp.*, 140 N.H. 723 (N.H. 1996), the Supreme Court provided an in depth explanation of R.S.A. 508:10 as follows:

RSA 508:10. The saving statute is 'designed to insure a diligent suitor the right to a hearing in court until he reaches a judgment on the merits.' (citations omitted) Its broad and liberal purpose 'is not to be frittered away by any narrow construction.' (citation omitted) 'The statute benefits suitors who are compelled to abandon their present action, whether by their own act or the act of the court, when either would leave them with a cause of action, yet undetermined.' ...

The test of RSA 508:10 is whether the right of action is, or is not, barred by the first judgment. (citations omitted) This is the sole test. (citation omitted)

The test is plainly not whether the prior judgment of dismissal was based on any mistake committed by the plaintiff or his counsel: 'A party is protected although the technical judgment against him may be due to his own carelessness or fault.'

At page 725

The sole test for applying R.S.A. 508:10 is whether the right of action is barred by the first judgment—whether the Plaintiff’s complaint against the Estate of Mary D. Wood is barred by the first judgment of dismissal by the Trial Court of the complaint against Mary D. Wood. The first judgment of the Trial Court dismissed the Plaintiff’s complaint against Mary D. Wood on 6/30/16, for the reason, “Nevertheless, the Court finds sua sponte that this action must be DISMISSED for lack of subject matter jurisdiction.” The dismissal was not a judgment on the merits and therefore did not bar the second complaint against the Estate of Mary D. Wood. Pursuant to R.S.A. 508:10, Plaintiff filed her complaint against Mary D. Wood within the time limited therefor—the date of accident was April 5, 2013 and the complaint was filed March 30, 2016, within the statute of limitations period set out in R.S.A. 508:4. The new right of action against the Estate of Mary D. Wood was not barred by the first judgment of dismissal by the Trial Court 6/30/16. The new action against the Estate of Mary D. Wood was brought April 3, 2017, within one year after the first judgment. Pursuant to R.S.A. 508:10, the Plaintiff’s complaint against the Estate of Mary D. Wood was timely filed and should not have been dismissed by the Trial Court in its Order of 8/7/17.

In Berg v. Kelly, 134 N.H. 255 (N.H. 1991), the Supreme Court reversed the dismissal by the Trial Court. The Court held,

Essentially, RSA 508:10 serves ‘to permit an action to be brought after the general limitations ha[s] run (RSA 508:4), where a proper action, seasonably brought, should be dismissed for reasons not barring the right of action or determining it upon its merits.’ (citations omitted) The test of RSA 508:10 ‘is whether the right of action is, or is not, barred by the first judgment.’ ...

...the case before us is in the nature of a dismissal for lack of jurisdiction, because the superior court did not have a proper writ before it. Such a dismissal does not constitute a judgment on the merits. At page 258, 259

Plaintiff’s complaint against the Estate of Mary D. Wood was brought after the general

limitations of R.S.A. 508:4 had run, but was permitted because the right of action was not barred by the first judgment of dismissal. The first judgment of dismissal was because the Trial Court lacked jurisdiction, which does not constitute a judgment on the merits.

R.S.A. 508:10 was not raised before the Trial Court. In Aranosian Oil Co., Inc. & a v. State of New Hampshire, 127 A.3d 665 (N.H. 2015), the Supreme Court held that under Rule 16-A, “under the plain error rule, we may consider errors not raised before the trial court.” The Court held,

To find plain error: ‘(1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.’

In State v. Mueller, 166 N.H. 65 (N.H. 2014), the trial court had erroneously instructed the jury contrary to the wording of the applicable statute. The Supreme Court found plain error—the trial court had committed error in instructing the jury contrary to the statute; the error was plain in that it was clear and obvious that the trial court had instructed the jury on the incorrect mental state. The Supreme Court found that the error affected substantial rights because it affected the outcome of the proceedings. The Supreme Court found that the error seriously affected the fairness, integrity or public reputation of judicial proceedings because the error could have resulted in a miscarriage of justice. In application to Plaintiff’s claim, there was error in the Trial Court failing to apply R.S.A. 508:10 and it was plain error because it was clear and obvious that the Trial Court had failed to apply the statute R.S.A. 508:10. The error affected substantial rights of Plaintiff because it deprived her of her right to have her claim decided on the merits. The error affected the fairness, integrity and public reputation of the judicial proceedings because it resulted in a miscarriage of justice to Plaintiff—she was denied her right to have her valid claim decided on the merits rather than be dismissed. As held in

Gould v. Concord Hospital, *supra*, there is a New Hampshire Constitutional right for a plaintiff to maintain an action in tort.

In State v. Noucas, 165 N.H. 146 (N.H. 2013), the Supreme Court explained the meaning of plain error as follows:

Plain is synonymous with clear or, equivalently, obvious. At a minimum, a court of appeals cannot correct an error ... unless the error is clear under current law. This, an error is plain if it was or should have been obvious in the sense that the governing law was clearly settled to the contrary. (citation omitted) At page 161

As shown in Berg v. Kelly, *supra*, decided in 1991, the law concerning the application of R.S.A. 508:10 was clear and obvious because the law of R.S.A. 508:10, the saving statute, was settled at least by 1991. The error in failing to apply R.S.A. 508:10 to Plaintiff's claim against the Estate of Mary D. Wood was plain.

In Randall v. Abounaja, 164 N.H. 506 (N.H. 2013), the Supreme Court found plain error where the trial court failed to follow the plain meaning of the statute, resulting in an excessive damage award. The Supreme Court analyzed the fourth prong of the plain error test, and held that the error warranted the exercise of the court's discretion to correct the error, where the "damage award was contrary to the express language of the pertinent statute." At page 510 The dismissal of Plaintiff's complaint against the Estate of Mary D. Wood was contrary to the express language of R.S.A. 508:10 and therefore satisfies the fourth prong of the plain error test, and warrants the exercise of the Court's discretion to correct the error. The Court further held,

In effect, the petitioner argues that because the respondent failed to preserve the trial court's error for our review, the error cannot 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' (citation omitted) We disagree. The plain error rule grants us the discretion to correct trial court errors despite an appellant's failure to preserve them for our review, or even to argue them on appeal. At page 511

Thus despite the failure to preserve the Trial Court's error for review, the error can still be found by the Supreme Court to affect the fairness, integrity or public reputation of judicial proceedings.

(g) CONCLUSION

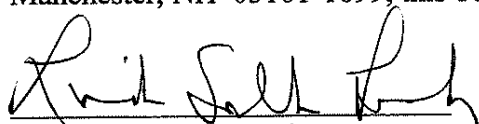
The relief requested by Plaintiff is for the Supreme Court to reverse the decision of the Trial Court that resulted in dismissal of the Plaintiff's complaint against the Estate of Mary D. Wood and Order that the complaint is not time-barred.

(h) PLAINTIFF WAIVES ORAL ARGUMENT

(i) THE APPEALED DECISIONS ARE IN WRITING AND ARE APPENDED TO THIS BRIEF

CERTIFICATION

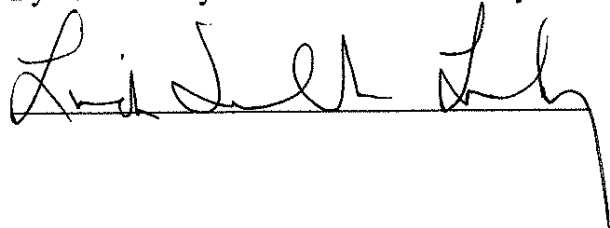
I hereby certify that two copies of the foregoing brief have been sent by first class mail to Counsel for Defendant, James D. Walker, Esq., Walker & Buchholz, P.A., 50 Bridge Street, Manchester, NH 03101-1699, this 16th day of April, 2018.


Linda B. Sullivan Leahy

Respectfully submitted,

Plaintiff Monica Anderson

By her Attorney Linda B. Sullivan Leahy



THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

Monica Anderson

v.

Mary D. Wood

Docket No. 16-CV-074

ORDER

Hearing held (5/24/16) on the defendant's Motion to Dismiss for Failure to State a Claim (filed 4/22/16) and the plaintiff's Objection to same (filed 5/2/16), and the plaintiff's Motion to Amend Writ (filed 5/2/16) and the defendant's Objection to same (filed 5/5/16). Subsequent to review, the Court renders the following determination(s).

By way of brief background, this matter commenced on March 3, 2016, when the plaintiff, Monica Anderson, filed a Complaint against the defendant, Mary D. Wood, seeking to recover for injuries purportedly sustained in an automobile collision. The defendant moves to dismiss this action for failure to state a claim, and the plaintiff objects. The plaintiff moves to amend her Complaint, and the defendant objects.

The defendant asserts that the plaintiff's cause of action must be dismissed because the plaintiff has failed to file the present action against the correct Mary D. Wood. Specifically, the defendant contends that the Mary D. Wood involved in the collision with the plaintiff passed away on January 22, 2015, and that the plaintiff has mistakenly filed this action against her daughter of the same name. The defendant contends that the plaintiff does not have a cause of action against her, as she is not the administrator of her mother's estate nor does she have

relationship with the plaintiff that would give rise to a legal duty. She accordingly requests that this matter be dismissed.

The plaintiff concedes that she filed this action against the incorrect Mary D. Wood. She nevertheless objects to dismissal and seeks to amend her Complaint. She specifically seeks to substitute the Estate of Mary D. Wood as the defendant in this action. She contends that she possesses the right to bring this action against this estate pursuant to RSA 556:7. The plaintiff notes that no estate was opened for Mary D. Wood following her death, but contends that she has sought to open an estate administration in the 6th Circuit Court – Probate Division – Concord. She therefore requests leave to amend her Complaint to include the Estate of Mary D. Wood as a defendant.

The defendant objects to the plaintiff's Motion to Amend. Specifically, the defendant contends that the plaintiff is not merely seeking to amend her Complaint, but rather requesting to substitute parties. While recognizing that New Hampshire law generally allows for the liberal substitution of parties, the defendant argues that such a substitution is improper in the present case because the limitations period has run on the underlying claim. The defendant contends that our precedent bars a plaintiff from substituting a defendant if the statute of limitations has run on the cause of action prior to that substitution.

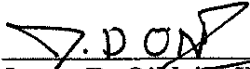
Upon review, the Court concludes that it does not currently have subject matter jurisdiction over the present action. Subject matter jurisdiction is “a tribunal’s authority to adjudicate the type of controversy involved in an action.” *In re Gray*, 160 N.H. 62, 65 (2010) (citation omitted). “A court lacks power to hear or determine a case concerning subject matters over which it has no jurisdiction.” *Id.* (citation omitted). Subject matter jurisdiction cannot be waived. *See id.*

RSA 556:7 provides that “[i]f a right of action existed in favor of or against the deceased at the time of his death, and survives, an action may be brought by or against the administrator at any time within one year *after the original grant of administration.*” RSA 556:7 (2007) (emphasis added). This emphasized language, by its very terms, presumes that the administration of an estate has been opened at the time that the cause of action is brought. In the present case, there is nothing in the record to indicate that an estate has ever been opened for the deceased Mary D. Wood. The parties do not dispute that the deceased Mary D. Wood died intestate and that no estate was opened immediately subsequent to her death. Moreover, while the plaintiff has indicated that she has sought to open such an estate in the 6th Circuit Court, she has not provided this Court with any documentation demonstrating that the 6th Circuit Court ever issued a grant of administration of said estate. There is therefore nothing in the record to suggest to this Court that an Estate of Mary D. Wood presently exists. As such, there is presently no legal entity that can be properly substituted for the current defendant such that this Court would possess subject matter jurisdiction over this action pursuant to RSA 556:7.

Without subject matter jurisdiction over the present action, the Court has no authority to rule on the substance of the parties’ respective Motions. Nevertheless, the Court finds sua sponte that this action must be DISMISSED for lack of subject matter jurisdiction.

SO ORDERED.

Date 6/30/16


James D. O’Neill, III
Presiding Justice

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

Monica Anderson

v.

Estate of Mary D. Wood

Docket No. : 17-CV-99

ORDER

Hearing held (6/22/17) on the defendant's Motion to Dismiss (filed 5/25/17) and the plaintiff's Objection to same (filed 6/5/17). Subsequent to review, the Court renders the following determination(s).

By way of brief background, this matter commenced on April 4, 2017, when the plaintiff, Monica Anderson, filed a Complaint against the defendant, the Estate of Mary D. Wood, for damages resulting from an automobile accident. The plaintiff specifically alleges the defendant negligently rear-ended the plaintiff's vehicle causing permanent and physical injury to the plaintiff. The defendant now moves to dismiss arguing the plaintiff's claim is barred by the three-year statute of limitations set forth in RSA 508:4, and the plaintiff objects.

Factual Background

On April 5, 2013, the plaintiff was stopped in a vehicle on North State Street in Concord, New Hampshire, while waiting for traffic to clear so that she could turn left onto Dolan Street. Before the plaintiff could make the turn, her vehicle was rear-ended by a vehicle driven by Mary Wood. As a result of the collision, the plaintiff suffered injuries, including a permanent back injury that has required ongoing medical treatment.

In March 2016, the plaintiff filed a negligence action against Mary Wood. See Anderson v. Wood, 211-2016-CV-074. However, the Complaint was erroneously served on the daughter

of Mary Wood. See (Pl.'s Obj. ¶ 4.) The defendant filed a Motion to Dismiss in that case, in which the plaintiff learned that Mary Wood had died on January 22, 2015. See (*id.*) Said Motion was GRANTED on June 30, 2016, as the daughter was not a proper party and an estate for Mary Wood had not yet been opened. See (June 30, 2016) (Order, O'Neill, J.) at 2-3.

On April 29, 2016, a Petition for Estate Administration was filed in the 6th Circuit-Probate Division-Concord, which was conditionally granted by the court (Moran, J.) on June 15, 2016. See (Def.'s Mot. Dismiss, Ex. B.) The court issued a Certificate of Appointment on August 17, 2016, indicating that Attorney Richard Heiser was appointed as Administrator to represent the Estate of Mary D. Wood. See (*id.* at Ex. A.) On April 4, 2017, the plaintiff filed the present action against the Estate of Mary D. Wood.

Legal Standard

In ruling on a motion to dismiss, the Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Harrington v. Brooks Drugs, 148 N.H. 101, 104 (2002) (quotation marks omitted). The Court must analyze the facts contained on the face of the complaint to determine whether they assert a cause of action. Williams v. O'Brien, 140 N.H. 595, 597 (1995). "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003). In rendering such a determination, the Court must "assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to him." Harrington, 148 N.H. at 104 (quotation marks omitted).

Discussion

The defendant argues that the plaintiff's claim is barred by the three year statute of limitations set forth in RSA 508:4. Specifically, the defendant asserts the accident giving rise to

plaintiff's claim occurred on April 5, 2013, and her right to bring a claim against the Estate of Mary D. Wood expired on April 5, 2016. Finally, the defendant notes that the plaintiff's Complaint was not filed until April 4, 2017, nearly a year after the statute of limitations expired. For these reasons, the defendant requests that the plaintiff's Complaint be dismissed.

The plaintiff objects, and argues certain provisions of RSA 556 allowed the present action to be filed as late as June 15, 2017, one year after the Estate of Mary D. Wood was opened. More specifically, the plaintiff asserts that her claim was timely because a right of action existed in her favor at the time of Ms. Wood's death and she was permitted to bring that claim "at any time within one year after the original grant of administration." See (Pl.'s Obj. at ¶ 7 (quoting RSA 556:7).) Relying on RSA 556:1, :5 and :7, the plaintiff contends she had a six-month window of opportunity to file the present action against the Estate of Mary D. Wood beginning on December 15, 2016 and ending on June 15, 2017, and that she filed her claim within this requisite timeframe. Finally, the plaintiff asserts that RSA 556:1, :5 and :7 are not subject to the three year statute of limitations set forth in RSA 508:4, and therefore her Complaint filed on April 4, 2017 is not time-barred. For these reasons, the plaintiff argues that her Complaint should survive the pending Motion to Dismiss.

RSA 556:9 governs the statute of limitations on tort suits brought against administrators, stating that "[a]ctions of tort for physical injuries to the person, . . . shall survive to the extent, and subject to the limitations, set forth in RSA 556:10-14, and not otherwise." (2007) (emphasis added). RSA 556:11 goes on to state that such tort actions which are not pending at the time of a party's death "may be brought . . . at any time within 6 years after the death of the deceased party, subject to the provisions of RSA 508." (2007). RSA 508:4, I provides that "all personal actions . . . may be brought only within 3 years of the act or omission complained of." (2010). Therefore, while a plaintiff may bring an action for personal injury within the six-year

period after the death of the defendant, "the suit must not have already become barred by the statute of limitations in RSA 508:4." See Coffey v. Bresnahan, 127 N.H. 687, 691-92 (1986).

Upon review, the Court finds that the plaintiff's negligence claim is barred by the three-year statute of limitations set forth in RSA 508:4. First, the Court notes the present action is one for personal injury, and it was not pending until after Ms. Wood's death. Therefore, the Court concludes said action falls within the purview of RSA 556:11, and is thus subject to the limitations of RSA 508:4. It is undisputed that the accident giving rise to the present cause of action occurred on April 5, 2013. Therefore, in order to satisfy the three-year statute of limitations period set forth in RSA 508:4, the plaintiff was required to file the present action by April 5, 2016. Because the present action was filed April 4, 2017, nearly one year after the three-year statute of limitations had run, the Court finds that the plaintiff's claim is time-barred by RSA 508:4.

In light of this finding, the Court need not address the plaintiff's remaining arguments as they relate to RSA 556:1, .5, and .7, and actions in tort for personal injury survive only to the extent set forth in RSA 556:10-14.

Accordingly, the defendant's Motion to Dismiss is GRANTED, consistent with the above.

SO ORDERED.

Date

8/7/17


James D. O'Neill, III
Presiding Justice

STATE OF NEW HAMPSHIRE

BELKNAP COUNTY

SUPERIOR COURT

MONICA ANDERSON

v

ESTATE OF MARY D. WOOD

Docket No. 17-CV-99

ORDER

Order in reference to the Plaintiff's Motion to Reconsider (filed 8-16-17).

Subsequent to review of said Motion as well as the Objection to same submitted by the Defendant (filed 8-28-17), the Court renders the following determination(s).

The Court finds that the Plaintiff has not provided, with particular clarity, sufficient points of law or fact that the Court either overlooked or misapprehended in rendering the earlier Order (dated 8-7-17) which GRANTED the Defendant's Motion to Dismiss (filed 5-25-17).

Accordingly, the Plaintiff's Motion to Reconsider is DENIED. The provisions of the earlier above-said Order shall remain in full force and effect.

SO ORDERED.

Date

8/28/17


James D. O'Neill III
Presiding Justice

