

THE STATE OF NEW HAMPSHIRE RECEIVED
NEW HAMPSHIRE
SUPREME COURT

SUPREME COURT

NO. 2017-0559

2018 MAY 29 P 4:00

MONICA ANDERSON

V.

ESTATE OF MARY D. WOOD

PLAINTIFF'S REPLY BRIEF

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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.

Defendant cites to Hodgdon v. Weeks Memorial Hosp., 122 N.H. 424 (N.H. 1982), that RSA 508:4 bars late entry of a legal action. The case applies to the earlier rule that suit is commenced when the writ is filled out with the intention of having it served on the defendant—not the current rule for commencement of a suit—and holds that the writ therein was withheld for calculated and determined reasons, as a matter of tactics and strategy. But the case further holds that, as to whether the case was commenced timely, “Furthermore, this case does not involve the failure to serve or file in a court a writ because of accident, mistake, or misfortune.”

Defendant cites to Guerin v. New Hampshire Catholic Charities, Inc., 120 N.H. 501 (N.H. 1980). Guerin differs from the case herein because in Guerin, the suit was filed after the statute of limitations had run at the time of the death of the defendant. This is the same holding as in Coffey v. Bresnaham, 127 N.H. 687 (N.H. 1986), that RSA 508:4 applies to whether the statute of limitations has run at the time of the death of the defendant—if it has not run at the time of the death, RSA 556 controls, and an action may be brought within 6 years after the death of the deceased, in conformity with all of the other requirements of RSA 556. It is uncontested that the statute of limitations had not run at the time of the death of Mary D. Wood.

Defendant denies that defendant had received actual notice of the plaintiff's claim. This is belied by the pleadings showing that the Attorney for the deceased's insurance company received actual notice of plaintiff's claim throughout—the Appearance of Counsel for Mary D. Wood filed April 21, 2016 concerning the first complaint filed against Mary D. Wood (Appendix

page 10), that same Counsel's motion to dismiss the claim filed April 21, 2016 (Appendix page 11-15), the same Counsel received notice of the Plaintiff's objection to the motion to dismiss (Appendix page 21-22), the same Counsel received notice of the motion to amend to name the Estate of Mary D. Wood April 29, 2016 (Appendix page 23-24), and the same Counsel received notice of the second complaint filed against the Estate of Mary D. Wood shown by his motion to dismiss filed May 24, 2017 (Appendix page 30-33).

Defendant argues that 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. RSA 556:11 provides a maximum time limit on bringing a suit—it must be brought within 6 years after the death of the deceased party. The Legislature provided the procedure and the maximum time limit and not an “unlimited horizon” within which to bring a claim against an estate.

Defendant cites to Cheever v. Southern New Hampshire Regional Medical Center, 141 N.H. 589 (N.H. 1997). Cheever differs from the action herein because the claim in Cheever was filed after the statute of limitations had run at the time of the death of the deceased. In the action herein, the statute of limitations had not run at the time of the death of Mary D. Wood. The Legislature provided the procedure to be followed to file an action against a deceased—it is not possible to file the action against a deceased defendant unless the statute RSA 556 is followed. Plaintiff followed the procedure mandated by RSA 556—she filed her suit against the Estate of Mary D. Wood after 6 months after the original grant of administration of the Estate required by RSA 556:1, and within 1 year next after the original grant of administration required by RSA 556:5 and RSA 556:7, and within 6 years after the death of Mary D. Wood as required by RSA 556:11. The Court in Coffey v. Bresnahan, *supra*, held that the action therein was timely

when brought within the six-year limit of RSA 556:11: “Dr. Bresnahan died in August 1979, and the plaintiffs commenced this action in the spring of 1984. The action thus was timely under the six-year limitations period.” The Court went on to say that, in addition, the suit must not have already become barred by RSA 508:4, “at the time of the death of the deceased party.” This is the logical interpretation of the statutory scheme set out in RSA 556 and as interpreted by the New Hampshire Courts. Plaintiff had the right to file her suit under the statute of limitations set out in 508:4, 3 years from the act complained of—she did so but the defendant was deceased at the time of filing, the filing was within the 3 years limitations period at the time of the death of the deceased and so was not barred at the time of the death of the deceased, so she had to proceed under RSA 556 and follow that procedure for suit against a deceased.

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

Defendant cites to no cases contrary to the holding of Coffey v. Bresnahan, *supra*, which held concerning RSA 556:11,

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] 11, ‘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 decedent’s death on all claims not already barred at the time of such death by the general statute of limitations. Id. At 53, 217 A.2d at 179 (citations omitted). In the instant case, suit was clearly not barred at the time of Dr. Bresnahan’s death and, thus, the second requirement of RSA 556:11 has been satisfied.

The New Hampshire Supreme Court has already ruled on this issue—RSA 508:4 applies to determine whether the Plaintiff’s suit was barred at the time of the death of Mary D. Wood, which it was not. Since Plaintiff’s suit was not barred by the running of the 3 year statute of limitations of RSA 508:4 at the time of the death of Mary D. Wood, the procedure set out in

RSA 556 must be followed, and Plaintiff followed that procedure. The two requirements of RSA 556:11 were met by the filing of Plaintiff's complaint against the Estate of Mary D. Wood—the suit was brought within the six-year limitations period of RSA 556:11 and the claim was not barred at the time of death of Mary D. Wood—the accident occurred April 5, 2013, Mary D. Wood died January 22, 2015, so the action was not barred by the 3 year statute of limitations period in RSA 508:4 at the time of the death of Mary D. Wood; the action against the Estate of Mary D. Wood was filed April 3, 2017, within 6 years after the death of the deceased.

(Appendix pages 11, 19, 25)

Defendant argues that by not filing a petition to create an estate, the 3 year statute of limitation of RSA 508:4 would be tolled indefinitely. This is not so. The 3 year statute of limitations of RSA 508:4 determines whether the claim is barred at the time of death. If not barred, RSA 556:11 requires that suit be brought within 6 years after the death of the deceased. There is no indefinite tolling. Coffey v. Bresnahan, *supra*.

Defendant argues that Plaintiff did not diligently pursue her right to pursue her claim and filed against the wrong party. This is incorrect. Plaintiff filed within the statute of limitations against the correct party, but that party was deceased, the death unknown to Plaintiff. Defendant admits that he knew of this at the time of his objection to Plaintiff's motion to amend the complaint, page 13 of his brief, and cannot now argue that he was prejudiced by the complaint being brought against the Estate versus against Mary D. Wood.

3. The Trial Court should have applied R.S.A. 598:10 to Order that Plaintiff's complaint was timely filed under that statute.

Defendant argues that Mary D. Wood and the Estate of Mary D. Wood are not the same

defendants. He cites no authority for this statement.

Defendant argues that Plaintiff was not a diligent suitor as required by Roberts v. General Motors Corporation, 140 N.H. 723 (N.H. 1996). Defendant alleges that Plaintiff waited an additional 9 months to file the suit against the Estate of Mary D. Wood—but pursuant to RSA 556:1 Plaintiff was required to wait 6 months after the original grant of administration to file the suit. Defendant argues that the Estate of Mary D. Wood was not aware of the need to preserve its evidence and there was no notice given to the insurance carrier that Plaintiff intended to pursue an action against the Estate—this is not credible as shown by Defendant’s own admission in its brief, page 13, that it had notice of the intention of Plaintiff as early as May 3, 2016 when it filed its objection, Exhibit A to Defendant’s brief. Defendant argues that, “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...” Again, this is not credible, as shown in Defendant’s Exhibit A to its brief, that Defendant knew as early as May 3, 2016 of the intention of Plaintiff to file suit against the Estate of Mary D. Wood.

4. The Supreme Court may consider errors not raised before the trial court under Rule 16-A

Defendant argues that “none of plaintiff’s pleadings, or oral argument, referenced RSA 508.10 in any way.” Plaintiff filed a motion pursuant to Rule 16 to ask the Court to allow her to add the question referencing RSA 508:10; Defendant filed an objection to the motion to add the question; Plaintiff filed a motion pursuant to Rule 21 to ask the Court for permission to reply to the objection; the Court granted Plaintiff’s motion to add the question referencing RSA 508:10. Plaintiff relies on her argument in her brief, pages 11-14, in support of her argument that the Court may and should use its discretion under the plain error rule to consider the application of

RSA 508:10 in the action herein.

Defendant states that Plaintiff argues that RSA 508 et seq. has no application to RSA 556 et seq., that therefore it is not logical for Plaintiff to rely on 508:10. This is not correct. Plaintiff has not argued that RSA 508 has no application to RSA 556—Plaintiff argues that RSA 508:4 determines the statute of limitations for personal injury, that this statute of limitations must not have run at the time of the death of the deceased for the procedure set out in RSA 556 to be followed. This is the logical interpretation of the statutory procedure established by the Legislature in RSA 566 to allow all claims not already barred by the general statute of limitations of RSA 508:4 at the time of death of the deceased to be brought against the deceased party.

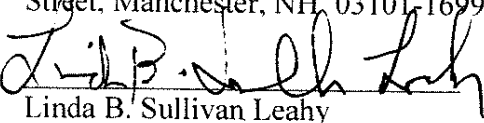
(g) CONCLUSION

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.

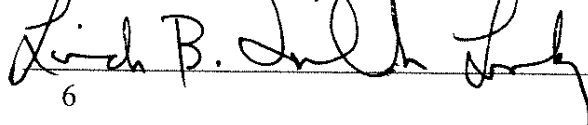
CERTIFICATION

I hereby certify that two copies of the foregoing reply 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 29th day of May, 2018.


Linda B. Sullivan Leahy

Respectfully submitted,
Plaintiff Monica Anderson
By her Attorney,
Linda B. Sullivan Leahy NH Bar # 20529


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