20120318

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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DEC 27 2012

STATE OF NORTH DAKOTA

Holly Olson, as personal representative of the Estate of Heidi Hanna, deceased, as special conservator of B.H., a minor, and as guardian of B.H., a minor.

Plaintiffs / Appellants,

v.

Estate of Jeremy Rustad, deceased, Ronald Rustad, Personal Representative

Defendant / Appellee & Cross-Appellant

Supreme Court No. 20120318
McLean County
Civil No. 28-11-C-00043

Appeal from Summary Judgment and
Amended Order for Summary Judgment,
Dated January 4, 2012
District Court, South Central Judicial District
Burleigh County, North Dakota
The Honorable Gail H. Hagerty, Presiding

REPLY BRIEF OF APPELLANTS

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LAW AND ARGUMENT

I. GENUINE ISSUES OF MATERIAL FACT

A. Survivorship

Rustad asserts that Hanna did not raise the issue of Rustad's affirmative defense burden until appeal. (Appellee Brief 15.) Hanna's argument was that the issue of survivorship was a genuine issue of fact, necessarily excluding the possibility of summary judgment irrespective of burden. (App. 66; Tr. 18:20–22.) Regardless, this Court considers new issues on appeal if based upon the same facts as an issue addressed at the district court. *Farmers Union Oil Co. of New England v. Maixner*, 376 N.W.2d 43, 47 (N.D. 1985).

In addition, Rustad's reliance on Mann v. Redmon, 145 N.W. 1031 (N.D. 1914) to place the burden on Hanna is both legally and factually inapposite. First, *Mann* construed N.D.R.C. § 8105 (1905), which predates the Century Code and the UPC by over half of a century. Second, the language of section 8105 resembles section 30.1-19-06 of the Century Code rather than section 30.1-19-03. Consequently, *Mann* merely stands for the proposition that the burden only shifts to the claimant *after* disallowance has occurred. Here, Rustad does not dispute the timeliness of Hanna's claim after disallowance but instead calls into question the timeliness of Hanna's presentment under section 30.1-19-03. Therefore, *Mann* does not support Rustad's position either legally or factually.

UPC jurisdictions, whose statutes are analogous to N.D.C.C. § 30.1-19-03, have placed the burden on the decedent-defendant to both plead and prove that the claim is time barred. *See, e.g.*, *Hitt v. J.B. Coghill, Inc.*, 641 P.2d 211 (Alaska 1982) and cases

cited therein; *Saporita v. Litner*, 358 N.E.2d 809, 816–17 (Mass. 1976). Rustad failed to meet his burden for summary judgment, and as importantly, genuine issues of material fact preclude summary judgment regardless of burden, nonetheless.

"Here, where the ***sole evidence*** on record reveals that the order of death between the parties is ***uncertain***, survivorship is a disputed material fact which should be decided by a jury." *Mothershed v. Schrimsher*, 412 S.E.2d 123, 125 (N.C. Ct. App. 1992) (overruling district court's grant of summary judgment) (emphasis added). Rustad's "motion for summary judgment [was] not an opportunity to conduct a mini-trial." *Hamilton v. Woll*, 2012 ND 238, ¶ 13, __ N.W.2d __. All parties agree that "no one can definitively set the time of death of Hanna or Rustad." (Appellee Brief 8.) Those time(s) are necessarily uncertain, and survivorship creates a genuine issue of fact for both the survival and wrongful death actions.

B. Damages

As it relates to the survival action, Rustad erroneously argues that Hanna's recovery of emotional distress and mental anguish requires a physical manifestation. (Appellee Brief 20–21.) Rustad's analysis and supporting case law is devoted exclusively to the distinct cause of action for intentional infliction of emotional distress. (*Id.*) Here, Hanna's claim is simply one of negligence for which her estate is entitled to recover for "emotional distress" and "mental anguish." N.D.C.C. § 32-03.2-04(2).

Indeed, numerous jurisdictions have awarded damages to individuals in circumstances similar to Hanna because there exists "no intrinsic or logical barrier to recovery for fear experienced during a period in which the decedent is uninjured but aware of an impending death." *Shu-Tao Lin. v. McDonnell Douglas Corp.*, 742 F.2d 45,

53 (2d. Cir. 1984) (awarding damages to plane crash victim's estate); *Nelson v. Dolan*, 434 N.W.2d 25, 32 (Neb. 1989); *United States v. Furmizo*, 381 F.2d 965, 970 (9th Cir. 1967).

Further, Rustad asserts that Hanna's inability to prove consciousness warrants summary judgment. Hanna clearly conveyed that the issue of consciousness, even if necessary, is a genuine issue of material fact from which one can further draw reasonable inferences. (Appellants' Brief 32–34.) When discussing inferences that could be drawn from a plane crash, the Fifth Circuit provided as follows:

> [t]he evidence at trial was ***silent*** as to the exact length of time [decedent] was aware of his impending death. Perhaps he did not have knowledge that something was wrong at the time the plane began its descent and roll. The inference is more than "reasonable," however, that [decedent] apprehended his death at least from the time the plane's wing hit the tree.

Haley v. Pan Am. World Airways, Inc., 746 F.2d 311, 317 (5th Cir. 1984) (emphasis added); *Melbourne Airways & Air College Inc. v. Thompson*, 190 So.2d 305, 307–08 (Fla. 1966) (finding that the date of death of December 16th was "the most reasonable inference" where no evidence existed as to the whereabouts of a plane, which departed two days prior). Similarly, one can draw a reasonable inference that Hanna was conscious.

C. Claims Arose at Time of Tort

Rustad proclaims that Hanna failed to argue, until the appeal, that the wrongful death and survival actions arose upon the aircraft striking the television antenna. (Appellee Brief 9.) "A wrongful death action" arises or otherwise "ensues from the injuries which caused his death." *Ness v. St. Aloisius Hosp.*, 301 N.W.2d 647, 652 (N.D. 1981).

This argument could not have been clearer to the district court; "Hanna's survival action arose at the moment of Rustad's negligence, which caused her damages. That moment occurred no later than when Rusted piloted his Cessna into a television antenna." (Br. in Opp'n to Mot. for Summ. J. 10); (App. 66; Tr. 18:13–14.)

II. NON-CLAIM STATUTE

A. Statute of Limitations

Rustad's citation to Linster v. Holman, 116 N.W.2d 616 (N.D. 1962), which the district court did not even cite, predates the adoption of the UPC and construes a statute the Legislature repealed forty years ago. To the extent that this Court relies upon the *Linster* and *Mann* cases, it should further defer to cases citing the Revised Code, which noted that previous non-claim statutes were "special statutes of limitations." In re *Smith*, 101 N.W. 890, 891 (N.D. 1904); *Quinn Wire & Iron Works v. Boyd*, 202 N.W. 852, 854 (N.D. 1924).

Further, Rustad complains that Hanna's analysis of the "other statute of limitations" language in N.D.C.C. § 30.1-19-03 is an improper new argument. (Appellee Brief 13.) Hanna has always argued that N.D.C.C. § 30.1-19-03 is a statute of limitations and "additional arguments" in support of a prior position "does not present a new issue." *Crown Oil & Wax Co. v. Glen Constr. Co.*, 578 A.2d 1184, 1191 (Md. Ct. App. 1990); *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 307 (2d. Cir. 1996).

B. Application

The non-claim statute, as it pertains to minors, permits a level of tolling. *Martz v. McMahon*, 129 N.W. 1049, 1051 (Minn. 1911). Rustad counters this proposition by relying on a factually distinct and abrogated Colorado case. (Appellee Brief 11–12.) First, the material and factual distinction in *In re* Estate of Daigle, 634 P.2d 71, 72 (Colo.

1981) is that the claim was untimely presented by the surviving spouse rather than by parentless children, who have no legal capacity to initiate legal proceedings themselves. (Appellants' Brief 12, 25.) Second, the Supreme Court of Colorado and its progeny have gone on to overrule *Daigle*, explicitly holding that the non-claim statute is not jurisdictional. In re *Estate of Ongaro*, 998 P.2d 1097, 1104 (Colo. 2000). In fact, the overruled *Daigle* opinion was the source of authority for Rustad's two other cited-UPC cases, which found that the non-claim statute was jurisdictional. In re *Estate of Ostler*, 227 P.3d 242, 245 (Utah 2009); *Corlett v. Smith*, 740 P.2d 1191, 1994 (N.M. Ct. App. 1987). Even more concerning is that this Court's "barred as a matter of law" language in Murphy v. Murphy, 1999 ND 118, ¶ 24, 595 N.W.2d 571 is a direct quote from *Corlett*, which again reached its decision based upon what is now overruled case law from Colorado.

These facts support an obvious conclusion, if Colorado case law is the genesis for the foregoing body of law, this Court should continue to give deference to *current* Colorado law. Rustad, consequently, contends that this Court should not consider current Colorado law under the premise that this argument was not raised until the appeal. (Appellee Brief 12.) Yet, Hanna advised the district court of Colorado's evolving precedent. (Br. in Opp'n to Mot. for Summ. J. 8–9.) Hanna has always argued that the non-claim statute is subject to tolling, and "provid[ing] support or legal authority for that proposition . . . is not the same as raising a new issue or theory on appeal." *Majors v. Hous. Auth.*, 652 F.2d 454, 457 n.2 (5th Cir. 1981). In fact, this Court has a "duty to conduct appellate review 'in light of all relevant precedents, not simply those cited to or discovered by the district court.' Otherwise, decisions might turn on 'shortages in

counsels' or the court's legal research and briefing', and 'could occasion appellate affirmation of incorrect legal results.'" *State v. Larsen*, 515 N.W.2d 187, 182 (N.D. 1994); *see also Messiha v. State*, 1998 ND 149, ¶ 21 n.2, 583 N.W.2d 385; *Berg v. Ullman*, 1998 ND 74, ¶ 20 n.3, 576 N.W.2d 218 ("We should apply the right rule of law even if it was not properly presented to the trial court or to this court.").

Additionally, Rustad offers unfounded concerns with applying Colorado's *De Avila* case. Rustad first suggests that there is no evidence as to whether the delay to the estate's administration, if any, warrants *De Avila*'s test. (Appellee Brief 12.) To the contrary, the record reflects that Estate of Rustad was still solidifying its personal representative as late as August 13, 2008. (App. 30.) Hanna's claim was presented just one month later. (*Id.*) As importantly, no action was taken to close the estate until December 21, 2009. (*Id.*) Indeed, Hanna directly stated that "defendant identifies no prejudice that would result from giving Hanna's children their day in court." (Br. in Opp'n to Mot. for Summ. J 8.)

As a result, Rustad's opinion that adopting *De Avila* or otherwise tolling the non-claim statute in this instance would cause a "major shift" in North Dakota law is pure hyperbole. (Appellee Brief 12.) This Court has already identified equitable estoppel and recoupment claims as judicial exceptions to compliance with the non-claim statute. (Appellants' Brief 17.) In fact, Rustad's concern about the "shift" occurring by "judicial fiat" is backwards. (Appellee Brief 12.) Colorado's Supreme Court confirmed that the construction of the non-claim statute as jurisdictional was born out of judicial fiat. (Appellants' Brief 15.)

Yet, Rustad takes his concern further, contending that Hanna's argument could "open the door" for its application to other statutes. (Appellee Brief 14.) This Court has arguably opened that door thirty years ago, holding that, at least with respect to claims against municipalities, substantial rather than technical compliance is all that is necessary. (Appellants' Brief 18.) In the absence of an adult stepping up on behalf of minors, refusing to toll N.D.C.C. § 30.1-19-03 would strip every minor of the protections afforded in both the non-claim statute and N.D. Const. art. I, § 9.

III. CROSS-APPEAL

A. Waiver of Defenses

On January 7, 2009, Hanna served Ronald Rustad, the personal representative of Jeremy Rustad's estate, with a summons and complaint. (App. 4–7; Appellee App. 11.) Although not raised as a defense until thirty-one months later, Rustad argues that he was neither served as the personal representative nor was any action commenced against him as the personal representative. (Appellee Brief 4–5.) Even if correct, Rustad did not argue, in his answer, that process or that service of process was deficient in any manner. (App. 8–9.)

As a result, Rustad waived any defense that he may have had regarding process or service of process. N.D.R.Civ.P. 12(b)(4)–(5), (h)(1); *see also Messer v. Bender*, 1997 ND 103, ¶ 7, 564 N.W.2d 291. In addition, issues regarding "a party's authority to sue or to be sued in a representative capacity" must be raised with a "specific denial." N.D.R.Civ.P. 9(a). "[E]ven had there been no service at all," Ronald Rustad made a general appearance and waived his affirmative defenses by "having failed to appear specially and object." *Froling v. Farrar*, 44 N.W.2d 763, 766 (N.D. 1950).

B. Doctrine of Misnomer

Even if timely offered, Rustad's argument does not warrant a dismissal. Here, Rustad contends that the alleged failure to "commence a proceeding against the personal representative" is fatal to Hanna's case. Appellee Brief 4. Yet, "[u]nder the theory of 'misnomer,' when an intended defendant is sued under an incorrect name, the court acquires jurisdiction after service with the misnomer if it is clear that no one was misled or placed at a disadvantage by the error." 67A C.J.S. Parties § 227 (2009).

Indeed, this Court, along with many others, understands that even if the plaintiff has mistakenly used the wrong name of the defendant in the caption, the claim can proceed so long as the intended defendant was sued. *Goldstein v. Peter Fox Sons Co.*, 135 N.W. 180, 183 (N.D. 1912) (allowing an erroneously pled and served action upon a corporation and its officer to continue against the actual eight-member partnership); *Pears v. Mobile Cnty.*, 645 F.Supp.2d 1062, 1082 (S.D. Ala. 2009) and cases cited therein; *Scraggs v. GPCH-CP, Inc.*, 23 So.3d 1080, 1083 (Miss. 2009); *Reddy P'ship v. Harris Cnty. Appraisal Dist.*, 370 S.W.2d 373, 376 (Tex. 2012).

Here, for all intents and purposes, a proceeding was commenced against the personal representative. (App. 63–64; Tr. 15–16.) As personal representative, Ronald Rustad "represents the entire estate" of Jeremy Rustad. In re *Estate of Rohrich*, 496 N.W.2d 566, 571 (N.D. 1993). Ronald Rustad was served with a summons and complaint to "commence" the subject action. N.D.R.Civ.P. 3; (Appellee App. 11).

In fact, it should come as little surprise that the doctrine of misnomer is common in cases involving claims against an estate. The case of Storey v. Hailey, 441 S.E.2d 602 (N.C. Ct. App. 1994) discussed the effect of a summons and complaint that failed to confirm if service was made upon the recipient in his individual capacity or as personal

representative. The Court found that the omission was immaterial and further agreed that even though "the caption in the summons amounted to a misnomer," the personal representative "had adequate notice that the action was against the estate rather than against [the personal representative] individually." *Id.* at 605; *Inter-City Products Corp. v. Willey*, 149 F.R.D. 563, 570 (M.D. Tenn. 1993) (same). Of further importance, the *Storey* Court referred to its presentment statute as a "statute of limitations." 441 S.E.2d at 607.

In addition, the district court relied upon a Court of Appeals for California case, which analyzed a nearly identical statute to N.D.C.C. § 30.1-19-06. (App. 38.) The California court acknowledged that although the complaint was not served nor captioned as one against the personal representative, "the body of the original complaint clearly indicated that appellant's intention was to commence an action for the purpose of obtaining a judgment which could be satisfied from assets belonging to the decedent at the time of his death." *Plumlee v. Poag*, 198 Cal. Rptr. 66, 70 (Ct. App. 1984).

Similarly, this Court's precedent confirms that Ronald Rustad cannot "rely upon mere technical omissions in the caption or title." *Goldstein*, 135 N.W. at 183; (App. 63; Tr. 15:18–25.) The district court reasoned that any defect could be cured by amendment, making no change in the substance of the action; as such, this Court should affirm the district court's ruling. (App. 38.)

C. Harmless Error

In the event that this Court disagrees with the district court's analysis, it should affirm its ruling, nonetheless. A mere technical deficiency that has no substantive or prejudicial effect on a proceeding does not warrant a dismissal. N.D.R.Civ.P. 61. At its

worst, the district court's decision was a harmless error. *Huesers v. Huesers*, 1998 ND 54, ¶ 11, 574 N.W.2d 880.

Indeed, the cases cited in Part III.B. underscore the fact that technical defects that do not affect a party's substantial rights or otherwise cause prejudice do not warrant dismissal. As the *Plumlee* court stated, upon which the district court relied, amending the caption would result in "no change in the substance of the action." 198 Cal. Rptr. at 70. Consequently, Rustad's position, "which unduly places form over substance," is unavailing, *id.* at 69, as this Court has similarly cautioned against placing "form over substance" when construing a presentment of claims statute in N.D.C.C. § 30.1-19. In re *Estate of O'Connell*, 476 N.W.2d 8, 12 (N.D. 1991). Finally, this Court has always maintained the same "strong preference for deciding cases on the merits" as *Plumlee*. *Wagner v. Miskin*, 2003 ND 69, ¶ 8, 660 N.W.2d 593.

Unlike the issue here, the failure to name the capacity through which the recipient was served in Rustad's-cited *Herzig* case was not the sole basis for the holding. Instead, the Court simply explained that had the subpoena been directed to the personal representative, who was a party to the action, the propounding party should have instead served a Rule 34 request. *Investors Title Ins. Co. v. Herzig*, 2010 ND 169, ¶ 44, 788 N.W.2d 312. In addition, the Court further averred that the subpoena, if directed at the non-party trustee, was deficient under Rule 45 for several reasons, thereby confirming the different procedural protections for non-parties than for parties who, by counsel, knowingly make a general appearance in a civil action and fail to object to insufficient process or insufficient service of process. *Id.*

In summary, this Court should affirm the district court's ruling because Rustad waived his affirmative defense; the doctrine of misnomer precludes dismissal; and/or even if incorrect, the district court's ruling was a harmless error.

CONCLUSION

For the foregoing reasons and those in Appellants' Brief, the Supreme Court should reverse and remand the decision of the district court.

Dated this 27th day of December, 2012.

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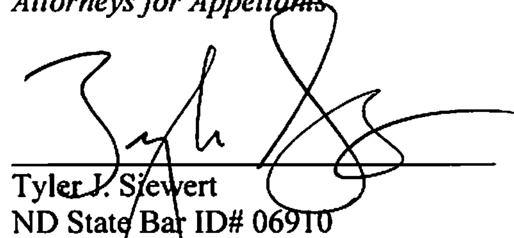

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Defendant / Appellee & Cross-Appellant

AFFIDAVIT OF SERVICE

Supreme Court No. 20120318
McLean County
Civil No. 28-11-C-00043

STATE OF NORTH DAKOTA)
:ss
COUNTY OF BURLEIGH)

Megan Olson, being first duly sworn on oath, deposes and says that she is a secretary in the office of Bucklin, Klemin, McBride & Schweigert, P.C., Attorneys at Law, 116 North 2nd Street, P.O. Box 955, Bismarck, North Dakota, 58502-0955; that on the 27th day of December, 2012, she served the attached **REPLY BRIEF OF APPELLANTS** on the following persons by hand-delivering a copy to the address as follows:

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which address is the last address of said party and/or attorneys known to her.

Megan Olson

Subscribed and sworn to before me this 27th day of December, 2012.

LINDSEY N MILLIKEN
Notary Public
State of North Dakota
My Commission Expires July 10, 2014

Notary Public
Burleigh County, North Dakota

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