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Alistair D. Edwards

Suing a Dead Defendant and Avoiding Timing Problems

By Alistair D. Edwards

How should a plaintiff proceed when the defendant dies before the action can be filed? What timing issues should the plaintiff be concerned about? The relevant statute appears to be Virginia Code § 8.01-229(B)(2), entitled "Death of person against whom personal action may be brought."

> Subsection (a) provides:
>
> If a person against whom a personal action may be brought dies before the commencement of such action and before the expiration of the limitation period for commencement thereof then a claim may be filed against the decedent's estate or an action may be commenced against the decedent's personal representative before the expiration of the applicable limitation period or within one year after the qualification of such personal representative, whichever occurs later.

Va. Code § 8.01-229(B)(2)(a).

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Subsection (a) only applies if the defendant "dies before the commencement of such action and before the expiration of the limitation period." Also, the plaintiff should disregard the above language talking about a claim against the decedent's estate, which should not be confused with an action against the person. "[T]he statute . . . allows **claims** to be filed against the property of the estate, but provides that **actions** may only be filed against the decedent's personal representative." *Swann v. Marks,* 252 Va. 181, 184, 476 S.E.2d 170, 171 (1996) (emphasis in original). *See also* Va. Code § 8.01-6.3 (enacted in 2010 to address pleading in a fiduciary capacity).

The language that the plaintiff should focus on is that referring to an action against the personal representative – "an action may be commenced against the decedent's personal representative before the expiration of the applicable limitation period or within one year after the qualification of such personal representative, whichever occurs later." Va. Code § 8.01-229(B)(2)(a). This language applies when there is a personal representative in place before the statute of limitations expires. The plaintiff cannot allow the statute of limitations to run, and if a personal representative is appointed after that point, then use subsection (a) to sue the personal representative.

What happens if a personal representative cannot be appointed before the statute of limitations runs? For example, the defendant dies within a week of the limitations period expiring and no personal representative can be put in place before the period runs. Under these circumstances, subsection (a) is of no help. But this is where Virginia Code § 8.01-229(B)(2)(b) could come into play.

> Subsection (b) provides:
>
> If a person against whom a personal action may be brought dies before suit papers naming such person as defendant have been filed with the court, then such suit papers may be amended to substitute the decedent's personal representative as party defendant before the expiration of the applicable limitation period or within two years after the date such suit papers were filed with the court, whichever occurs later, and such suit papers shall be taken as properly filed.

Va. Code § 8.01-229(B)(2)(b).

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If there is no personal representative and the statute of limitation is about to expire, the plaintiff would be wise to file suit papers with the court naming the decedent as the defendant prior to the limitations period expiring. Then, when a personal representative is subsequently appointed, the papers can be amended to substitute the personal representative for the decedent. There is a two-year window to amend the suit papers after filing.

> As explained by the Supreme Court of Virginia:
>
> Prior to the enactment of subparagraph (b) [of Virginia Code § 8.01-229(B)(2)] in 1991, Virginia law provided that a suit filed against a deceased party was a nullity and, as such, could not operate to toll the statute of limitations. See, e.g., *Rennolds v. Williams,* 147 Va. 196, 198-200, 136 S.E. 597, 597-98 (1927). Furthermore, because the personal representative was a person distinct from the decedent, the mistaken naming of the decedent was not a misnomer and substitution of the personal representative did not relate back to the initial filing of the lawsuit. *See Rockwell v. Allman,* 211 Va. 560, 561, 179 S.E.2d 471, 472 (1971). Thus, if a litigant filed a personal action against a defendant who, possibly unbeknownst to the plaintiff, had died, that action was a nullity and the statute of limitations would continue to run. Subparagraph (b) addresses this circumstance by providing that a suit filed against a defendant who was deceased when the action was filed could be amended to substitute the decedent's personal representative and would be considered timely filed if the substitution occurred within two years of the original filing date.

Parker v. Warren, 273 Va. 20, 24, 639 S.E.2d 179, 181 (2007).

In sum, if there is a personal representative in place before the statute of limitations has run, the plaintiff can use subsection (a) of Code § 8.01-229(B)(2). Subsection (a) gives the plaintiff one year from the date of appointment of the personal representative to file and this is the case even if the statute of limitations runs before the one-year period.

However, if the plaintiff cannot use subsection (a) and if it is not possible to get a personal representative in place before the statute of limitations runs, the plaintiff can fall back on subsection (b) of Code § 8.01-229(B)(2). The plaintiff can file a timely action naming the deceased defendant and then amend when there is a personal representative in place. There is a two-year window to amend (measured from the original filing).

If a plaintiff relies on the two-year window afforded by subsection (b), the plaintiff should be aware of Rule 3:5(e) of the Rules of the Supreme Court of Virginia. "No order, judgment or decree will be entered against a defendant who was served with process more than one year after the institution of the action against that defendant unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on that defendant." Va. Sup. Ct. R. 3:5(e). Thus, it could be problematic if the plaintiff files suit against the deceased defendant and fails to serve the complaint within a year of filing. The best strategy would be to amend and serve the complaint against the personal representative within a year of the original filing.


Daniel E. Savage

Contributory Negligence and The Sliver of Paper Trick

By Daniel E. Savage[1]

Assume the following facts: Nancy Smith was involved in a two-vehicle collision with Frank Jones who drove 45 miles per hour the wrong way on a single lane one-way street in a 25 mile per hour zone. Frank Jones' vehicle collided with Nancy Smith's vehicle which was headed in the correct direction down the same street. Smith concedes that prior to the crash she had set her cruise control at 27 miles per hour and her vehicle was traveling at that speed as it approached the area of the crash. But that minor violation seems irrelevant when weighed against Jones's clear negligence.

Smith files a personal injury action against Jones. Smith and her counsel are surprised to learn that the Defendant and his counsel assert a defense of contributory negligence. At trial, during his cross of Smith, the only questions defense counsel raises relate to how fast Smith was traveling relative to the speed limit at the time of the collision, which your client admits was two miles over the speed limit. Plaintiff's counsel shrugs off this questioning as inconsequential to the Defendant's core negligence in driving at high speed the wrong way down a one-way street and colliding with the Plaintiff's vehicle.

After Smith's counsel gives closing arguments, defense counsel springs into action. He holds up a sheet of paper and tears off a tiny sliver of it at the edge. He holds that small sliver in front of the jury and states that under the law if the Plaintiff was negligent in the slightest degree she is not entitled to compensation. He reminds the jury that the Plaintiff actually admitted that she was going two miles over the speed limit and points the jury to an instruction that states, "The maximum speed limit at the time and place of the collision was 25 miles per hour. If a driver was driving his vehicle faster than this limit, then he was negligent." Defense counsel tells the jury that Smith's own testimony proves that she was negligent and as a result she cannot recover.

Does Virginia law actually bar Smith from recovery because she had admitted she was going two miles over the speed limit? Is the sliver of paper argument correct? Fortunately, for Smith and her counsel, defense counsel in this scenario is misstating the law.

[1]The author wishes to thank Brooke A. Norton for her valuable assistance on this article. Ms. Norton served as a law clerk at Marks & Harrison in the summer of 2024 and she anticipates graduating from Washington and Lee University School of Law in May of 2025.

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Civil Model Jury Instruction No. 6040 states, "When the defendant claims contributory negligence as a defense, he has the burden of proving by the weight of the evidence that the plaintiff was negligent, **and** that this negligence was a proximate cause of the plaintiff's injuries." 1 *Virginia Model Jury Instructions* - Civil Instruction No. 6.040 (2024) (emphasis added).

In the hypothetical described above, although defense counsel has proved that the Plaintiff was technically negligent at the time of the collision by traveling two miles over the posted speed limit, he has not proved that the Plaintiff's speed was a proximate cause of the crash. Under Virginia law, the trial court has the responsibility to reject a contributory negligence defense as a matter of law whenever the connection between the alleged negligence and the plaintiff's injury is too attenuated to constitute a legal, proximate cause. Furthermore, the Virginia Supreme Court has long maintained that it is erroneous and misleading to tell the jury that a plaintiff who is negligent "in the slightest degree" is guilty of contributory negligence. *See Yeary v. Holbrook*, 171 Va. 266, 287, 198 S.E. 441, 451 (1938).

Rather, the Plaintiff's negligence must be a substantial factor in contributing to the injury before her negligence will bar recovery. *See id.* "[M]ore than a scintilla of evidence is necessary to establish each of the elements of contributory negligence before such instruction may be given to a jury." *Sawyer v. Comerci,* 264 Va. 68, 75, 563 S.E.2d 748, 753 (2002) (holding that the trial court erred in submitting contributory negligence defense to the jury). *See also Rice v. Charles,* 260 Va. 157, 532 S.E.2d 318 (2000) (trial court properly struck contributory negligence defense); *Rose v. Jaques,* 268 Va. 137, 597 S.E.2d 64 (2004) (same). In other words:

> **The evidence tending to show causal connection must be sufficient to take the question out of the realm of mere conjecture, or speculation**, and into the realm of legitimate inference before a question of fact for submission has been made out.

Beale v. Jones, 210 Va. 519, 522, 171 S.E.2d 857, 858 (1970) (emphasis added).

Furthermore, "[t]he proximate cause of an event is that act or omission which, in **natural** and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred." *Cohn v. Knowledge Connections, Inc.,* 266 Va. 362, 369, 585 S.E.2d 578, 582 (2003) (quoting earlier decision) (emphasis added). In the hypothetical above, even though the Plaintiff was technically negligent, her negligence was not the natural cause of the crash. Instead, the Defendant's conduct in driving the wrong way at high speed down a one-way street was the efficient intervening cause which defeats any proximate cause argument based upon the Plaintiff's slight negligence. Therefore, the trial court should rule as a matter of law that the Plaintiff's slightly excessive speed was not a proximate cause of the Plaintiff's injuries and thus the Defendant cannot establish that the Plaintiff was contributorily negligent.

Defense counsel's dramatic argument involving tearing off a tiny sliver of a piece of paper is a mischaracterization of Virginia law. The defense argument misleads the jury into believing that any negligence, no matter how minor and remote, bars a Plaintiff from compensation. But that is not the law. At trial, attorneys representing plaintiffs should promptly object to any defense contentions or arguments which involve this type of mischaracterization of Virginia law. Furthermore, if defense counsel has a reputation for making this type of argument, plaintiff's counsel should file a motion *in limine* to prevent this argument at trial.

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