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IN THE
COURT OF APPEALS OF INDIANA

Aaron Brugh,
Appellant-Plaintiff,

v.

Milestone Contractors, LP,
Appellee-Defendant.

January 11, 2023

Court of Appeals Case No.
22A-CT-845

Appeal from the Morgan Superior
Court

The Honorable Peter R. Foley,
Judge

Trial Court Cause No.
55D01-2101-CT-122

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Plaintiff, Aaron Brugh (Aaron), by and through surviving spouse, Rachelle Brugh (Brugh), appeals the trial court's entry of Orders and Judgment, in which the trial court denied Brugh's motion to substitute real party in interest and granted Appellee-Defendant's, Milestone Contractors LP (Milestone), motion to strike appearance of nonparty and motion for judgment on the pleadings, thereby terminating Brugh's wrongful death action against Milestone.
- [2] We reverse and remand for further proceedings.

ISSUE

- [3] Brugh presents two issues on appeal, which we consolidate and restate as: Whether Brugh timely substituted herself as the real party of interest in light of our supreme court's tolling of time limits in response to the COVID-19 pandemic.

FACTS AND PROCEDURAL HISTORY

- [4] On October 9, 2019, Aaron died in a rear-end collision on State Road 67 in Morgan County, Indiana. On January 26, 2021, Brugh, as Aaron's surviving spouse, filed a wrongful death Complaint against Milestone, alleging that Milestone's backup in construction traffic due to lane closures, funneling of traffic, and warning practices caused or contributed to Aaron's death. Between Aaron's death and the filing of the wrongful death action on January 26, 2021, the Indiana Supreme Court issued multiple orders concerning the COVID-19

pandemic after Governor Holcomb declared a public health emergency in Indiana.

[5] On March 16, 2020, the supreme court issued its first of several COVID-19 orders, in which the court invited the trial courts to “consider” petitioning for “[t]olling for a limited time all laws, rules, and procedures setting time limits for speedy trials []; and in all other civil and criminal matters before all State of Indiana trial courts.” (Appellant’s App. Vol. II, p. 92). The Morgan County courts accepted the supreme court’s invitation the following day and filed a “petition for relief under Indiana Administrative Rule 17,” in which they proposed to toll various deadlines and time limits through April 10, 2020. (Appellant’s App. Vol. II, pp. 95-96). On March 18, the Indiana Supreme Court approved Morgan County’s emergency plan retroactively to March 17, 2020.

[6] Over the subsequent weeks, the Indiana Supreme Court issued various orders, extending the relief it had previously granted. On April 3, 2020, the supreme court extended “the effective date of all orders granting emergency relief to trial courts under Administrative Rule 17, including but not limited to tolling of time limits,” to May 4, 2020. (Appellant’s App. Vol. II, p. 102). The Indiana Supreme Court’s April 24, 2020 order, using similar language, extended the emergency relief granted to trial courts until May 17, 2020. On May 13, 2020, the supreme court again extended emergency relief to trial courts until May 30, 2020, and for the final time reiterated that all existing orders “under

Administrative Rule 17 remain in full force and effect.” (Appellant’s App. Vol. II, p. 112).

[7] On May 29, 2020, the Indiana Supreme Court, without mentioning statutory time limitations, authorized “the tolling, through August 14, 2020, of all laws, rules, and procedures setting time limits for speedy trials in criminal and juvenile proceedings; public health and mental health matters; all judgments, support, and other orders; and in all other civil and criminal matters before Indiana trial courts.” (Appellant’s App. Vol. II, p. 113). At the same time, the Morgan County courts filed their “amended transition plan for expanded operations,” pursuant to which all provisions of the Administrative Rule 17 emergency plan would terminate on July 6, 2020. (Appellant’s App. Vol. II, p. 121). The supreme court approved Morgan County’s amended transition plan retroactive to May 29, 2020.

[8] On January 11, 2022, approximately a year after she commenced the wrongful death action, Brugh filed a petition for appointment of personal representative of Aaron’s estate and was appointed to this capacity by the court on January 18, 2022. On January 24, 2022, Milestone filed its motion for judgment on the pleadings, alleging in its supporting brief that the wrongful death action had not been instituted by the personal representative of the estate within two years of Aaron’s passing, as required by statute. On February 8, 2022, Brugh filed a motion to substitute real party in interest, to which Milestone responded on the same day by moving to strike Brugh’s appearance as personal representative for Aaron’s estate. On February 22, 2022, Milestone filed a brief in opposition to

the motion to substitute. On March 3, 2022, the trial court conducted a hearing on the parties' pending motions. On March 18, 2022, the trial court issued its entry of Orders and Judgment, in which it concluded that Brugh's motion to substitute real party in interest was untimely, and granted Milestone's motion to strike Brugh's appearance as personal representative of the estate and motion for judgment on the pleadings.

[9] Brugh now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

[10] Contending that in light of the tolled time limitations due to the COVID-19 pandemic, she timely filed her motion to substitute real party in interest in which she requested to appear as personal representative of Aaron's estate, Brugh challenges the trial court's dismissal of the wrongful death action pursuant to Indiana Trial Rule 12(C).

I. *Standard of Review*

[11] A motion for judgment on the pleadings pursuant to Indiana Trial Rule 12(C) attacks the legal sufficiency of the pleadings. *Davis ex rel. Davis v. Ford Motor Co.*, 747 N.E.2d 1146, 1149 (Ind. Ct. App. 2001), *trans. denied*. In reviewing a trial court's decision on a motion for judgment on the pleadings, this court conducts a *de novo* review. *Id.* The test to be applied when ruling on an Ind. T.R. 12(C) motion is whether, in the light most favorable to the non-moving party and with every intendment regarded in his favor, the complaint is sufficient to constitute any valid claim. *Id.* This court will affirm the trial court's grant of a T.R. 12(C)

motion for judgment on the pleadings when it is clear from the face of the pleadings that one of the parties cannot in any way succeed under the operative facts and allegations made therein. *Id.*

[12] Brugh initially contended that the trial court should have characterized Milestone’s motion on the pleadings as a motion for summary judgment because the trial court, in reaching its conclusion, considered matters outside the pleadings. *See Steele v. McDonald’s Corp.*, 686 N.E.2d 137, 141 (Ind. Ct. App. 1997) (when “a motion for judgment on the pleadings is predicated upon matters extraneous to the pleadings, the motion should be treated in the same manner as a motion for summary judgment”), *trans. denied*. In applying T.R. 12(C), “the court may look only at the pleadings, with all well-pleaded material facts alleged in the complaint taken as admitted, supplemented by any facts of which the court will take judicial notice.” *Davis*, 747 N.E.2d at 1149. Pursuant to Indiana Evidence Rule 201, a court may take judicial notice of a fact that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned” or that is contained in “records of a court of this state.” Mindful of this evidentiary rule, Brugh conceded—and we agree—that the trial court was entitled to take judicial notice of the Indiana Supreme Court’s COVID-19 orders. In her reply brief, and after reflection, Brugh likewise admitted that the trial court was allowed to take judicial notice of the docket in Aaron’s estate case. Accordingly, we shall analyze the trial court’s entry of Orders and Judgment *de novo* within the confines of a T.R. 12(C) review.

II. *Analysis*

A. *Indiana's Wrongful Death Statute*

[13] Indiana's Wrongful Death Statute (IWDS) provides that

[w]hen the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she, as the case may be, lived, against the latter for an injury for the same act or omission. When the death of one is caused by the wrongful act or omission of another, the action shall be commenced by the personal representative of the decedent within two (2) years[.]

Ind. Code § 34-23-1-1. The right to maintain an action for wrongful death did not exist at common law and is therefore purely statutory. *Gen. Motors Corp. v. Arnett*, 418 N.E.2d 546, 548 (Ind. Ct. App. 1981). Because this is a statutory right, the two-year time period within which the action must be commenced by the personal representative is a “condition attached to the right to sue.” *Id.* (citing *Bocek v. Inter-Insurance Exchange of Chicago Motor Club*, 369 N.E.2d 1093, 1097 (Ind. Ct. App. 1977)). As the IWDS creates an enforceable right of action, “unknown to the common law,” only if commenced within the prescribed timeframe, the statute is regarded as a non-claim statute. *Blackford v. Welborn Clinic*, 172 N.E.3d 1219, 1224 (Ind. 2021). While “statutes of limitation create defenses that must be pleaded and may be waived,” a non-claim statute is self-executing and “imposes a condition precedent to the enforcement of a right of action.” *Id.* (citing *Bahr v. Zahm*, 219 37 N.E.2d 942, 944 (Ind. 1941)). Unless a

party files a claim within the prescribed time, “no enforceable right of action is created.” *Id.* (citing *Donnella v. Crady*, 185 N.E.2d 623, 624 (Ind. Ct. App. 1962)). “Non-claim statutes generally are not subject to equitable exceptions.” *Id.*

[14] Here, Aaron passed away on October 9, 2019, with Brugh filing the wrongful death Complaint against Milestone on January 26, 2021, in her capacity as Aaron’s surviving spouse. Brugh opened a wrongful death estate and was appointed personal representative on January 18, 2022; she filed her motion to substitute real party in interest in this cause on February 8, 2022. Concluding that Brugh’s motion to substitute real party was filed after the expiration of the two-year non-claim period of the IWDS, the trial court granted Milestone’s motion for judgment on the pleadings and dismissed Brugh’s cause.

[15] Advocating that the trial court improperly dismissed her wrongful death action, Brugh contends that she possessed the legal capacity to bring the cause at the moment she was appointed legal representative of Aaron’s estate on January 18, 2022, which, considering the tolling of the time limit instituted by the supreme court’s COVID-19 orders, fell within two years after Aaron’s passing. Focusing on the statutory language of the IWDS and Indiana’s jurisprudence, Brugh contends that “a plaintiff widow’s appointment as the personal representative—in and of itself and without requiring the widow formally to change the caption, or to re-appear—is what must occur during the statutory [two]-year period,” to successfully commence a wrongful death action. (Appellant’s Br. p. 24).

[16] In *Arnett*, Arnett represented herself as her deceased husband's personal representative in her complaint against General Motors, even though she was not appointed as the personal representative of his estate until four months after the statutory period had expired. *Arnett*, 418 N.E.2d at 547. In its motion for summary judgment, which was denied by the trial court, General Motors contended that Arnett could not maintain her action against the company as the legal existence of the plaintiff and the capacity to sue did not coexist during the statutory period. *Id.* at 548. Relying on the IWDS's language that "[i]t was a condition precedent that the action against [General Motors] be brought by someone in the capacity of the personal representative," this court concluded that because Arnett did not have that capacity within two years of her husband's death, she lost her statutorily conferred right to bring a wrongful death action. *Id.*

[17] Similarly, in *Hosler ex rel. Hosler v. Caterpillar, Inc.*, 710 N.E.2d 193, 195 (Ind. Ct. App. 1999), we were requested to analyze whether Hosler's wrongful death action was barred, where the claim was filed within two years of the decedent's death but where the decedent's estate was not opened and no personal representative for the estate was appointed for more than two years following the decedent's death. Finding *Arnett* dispositive, the *Hosler* court concluded that because Hosler's appointment as the personal representative of the decedent's estate within two years of his death was a condition precedent to prosecuting a wrongful death action, Hosler's failure to meet this statutory condition precedent barred his claim against Caterpillar. *Id.* at 197. Latching onto the

language in both *Arnett* and *Hosler* that the legal capacity of personal representative must be obtained within two years of the wrongful death, Brugh contends that the case law supports her position that it is sufficient that the “legal status” is altered within the two years after the wrongful death, without any requirement to also amend or re-appear in a lawsuit that is already filed within that time period. (Appellant’s Br. p. 25).

[18] Brugh asserts that her interpretation of *Arnett* and *Hosler* is bolstered by *Rogers v. Grunden*, 589 N.E.2d 248, 258 (Ind. Ct. App. 1992). In *Rogers*, we explained that:

Here, the record reveals that Rogers died on April 7, 1986. Elsie Lucille Rogers qualified as personal representative of Rogers on November 9, 1987. On March 4, 1988, Representative filed her wrongful death action [in which she did not affirmatively identify herself as Rogers’ personal representative in the caption]. Thus, Elsie Lucille Rogers was the personal representative of [Rogers] at the time she filed the complaint and she did so within two years of Rogers’ death.

Id. Finding that “[t]he nature of an action is determined by its substance, not its caption or formal denomination,” we affirmed the trial court which allowed the Complaint to be amended to reflect that Elsie Lucille Rogers was the duly and timely appointed personal representative of the decedent for purposes of the wrongful death action. *Id.*

[19] Decided in the framework of the survivor statute, I.C. § 34-9-3-4, a companion statute to the IWDS, we have more recently stated in *Faris v. AC and S, Inc.*, 842 N.E.2d 870 (Ind. Ct. App. 2006), that:

In response, Appellees point us to *Gen. Motors Corp. v. Arnett*, 418 N.E.2d 546 (Ind. Ct. App. 1981) and *Hosler v. Caterpillar, Inc.*, 710 N.E.2d 193 (Ind. Ct. App. 1999). But, as we noted in *Johnson [v. Parkview Health Sys., Inc.]*, 801 N.E.2d 1281 (Ind. Ct. App. 2004)], “[i]n both *Arnett* and *Hosler*, we found that the complaint could not be amended because the claimant did not have the appropriate legal status when the two-year period for initiating the claim had passed and amending the claim could not change the legal status of the claimant.” *Johnson*, 801 N.E.2d at 1287. From these cases, we can extrapolate the rule that an amended complaint will relate back if the claimant gains the appropriate legal status within the statute of limitations. As such, the question becomes whether *Faris* became the personal representative of her husband’s estate before the statute of limitations passed.

Id. at 875 (some alterations in original, emphasis added, footnote omitted).

[20] Accordingly, based on our opinion in *Rogers* and the guidance offered in *Faris*, the legal status of personal representative needs to be obtained within the two-year timeframe. Because the legal capacity of personal representative of the estate was not attained within two years of the decedent’s passing in *Arnett* and *Hosler*, those actions were properly barred. In the cause before us, Aaron passed away on October 19, 2019. Brugh filed the Complaint on January 26, 2021, on behalf of “Aaron Brugh, by and through surviving spouse, [Brugh],” well within the original two-year time limit required under the IWDS. (Appellant’s

App. Vol. II, p. 9). However, Brugh did not become the personal representative of Aaron's estate until January 18, 2022, after the original two-year time limit had passed.

B. COVID-19 Orders

[21] Next, Brugh contends that the COVID-19 orders, issued by our supreme court during the height of the global pandemic, tolled all laws, rules, and procedures setting time limits from March 17, 2020 through August 14, 2020, for a total of 150 days, thereby extending the two-year filing limit of the IWDS and making Brugh's Complaint timely. In response, Milestone argues that the COVID-19 orders did not expressly address the tolling of a non-claim statute and alternatively, if the statute was tolled, the IWDS tolling ended either on May 19, 2020, after 67 days, or on July 6, 2020, after a total of 111 days.

[22] Generally, the IWDS "is a non-claim statute, not subject to tolling." *Southerland v. Hammond*, 693 N.E.2d 74, 77 (Ind. Ct. App. 1998). However, beginning in March 2020, our supreme court issued a number of orders as a result of the COVID-19 pandemic. In those orders, our supreme court authorized "the tolling . . . of all laws, rules, and procedures setting time limits . . . in all other civil . . . matters before Indiana trial courts." (Appellant's App. Vol. II, p. 113). While the orders did not specifically provide for the tolling of time limits in non-claim statutes, such as the IWDS, the supreme court similarly did not limit the application of the orders to statutes of limitations. Rather, the orders, by their language, were broad, tolling *all laws and rules* that

set time limits in civil matters. Therefore, the COVID-19 orders were clearly meant to apply to any time limit, including the two-year time limit provided in the IWDS, such that the time limit within which Brugh had to meet the criteria of the statute was extended.

[23] Under Morgan County’s “amended transition plan for expanded operations,” as approved by the supreme court, the tolling applicable to the IWDS terminated on July 6, 2020, resulting in 111 days of tolling. (Appellant’s App. Vol. II, p. 121). A tolling period of 111 days starting on October 9, 2021—the two-year filing deadline under the IWDS—brings us to an expiration date of January 28, 2022. Brugh became the personal representative of Aaron’s estate on January 18, 2022, ten days before the time period lapsed.

[24] Accordingly, Brugh met both conditions of the IWDS statute—by filing her wrongful death action and becoming the personal representative of the estate—prior to the expiration of the time limit as tolled by the supreme court’s COVID-19 orders. The fact that Brugh did not seek to amend the caption to substitute herself as personal representative until after the tolled two-year time limit had expired is not relevant. The action is determined by its substance, not its caption. And, in substance, Brugh timely filed her Complaint, and she timely became the representative of Aaron’s estate.

CONCLUSION

[25] Based on the foregoing, we conclude Brugh timely substituted herself as the real party in interest within the prescribed time limitations of the IWDS, as tolled by

the supreme court's orders. We therefore reverse the trial court's order and remand with instructions for the trial court to reinstate Brugh's claim.

[26] Reversed and remanded with instructions.

[27] Bailey, J. and Vaidik, J. concur