

IN THE COURT OF APPEALS OF MARYLAND

No. 8

September Term, 1994

SUSAN PALMER GREENTREE

v.

NEAL FERTITTA, et al.

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker

JJ.

Dissenting opinion by Karwacki, J.,
in which Rodowsky, J., concurs.

Filed: June 23, 1995

I would affirm the judgment of the Court of Special Appeals in this case. The majority, in an apparent attempt to avoid a harsh result for the petitioner in this case, has arrived at its decision by judicially amending §§ 8-101 through 8-104 of the Estates and Trusts Article which set forth the time limitations for presentation of various claims against the estate of a decedent.

I

In *Burket v. Aldridge*, 241 Md. 243, 216 A.2d 910 (1966), we held that an amendment substituting the personal representative of a decedent in a tort action, mistakenly instituted against the decedent after his death, did not relate back to the time of the filing of the original action so as to prevent the applicable statute of limitations from barring the action. We granted certiorari in this case to reexamine our decision in *Burket* in light of certain changes in the pertinent Maryland statutes.

In *Burket, supra*, this Court provided the history of the right to maintain an action for personal injury where the tortfeasor has died:

"Until 1929, actions for personal injuries abated on the death of the tortfeasor. In 1929, the legislature provided that, where the tort-feasor died before suit, an action could be brought against his personal representatives within six months of the tort-feasor's death.^[1] In 1949, the six months period of limitation on actions against the personal representative was changed to begin on the representative's qualification

¹ Ch. 570 of the Acts of 1929, codified as Md. Code (1924, 1929 Cum. Supp.), Art. 93, § 106.

instead of on the death of the tort-feasor.[²] In 1953, in making certain amendments not here applicable, the legislature stated in the preamble to the amendatory act that the 1949 law had amended the Section in order to extend the time in which certain suits may be brought against an executor or administrator where there is a delay in the appointment or qualification of the executor or administrator."³

Burket, 241 Md. at 427, 216 A.2d at 912.⁴

In *Burket*, the facts were practically identical to those in this case. The issue presented to this Court was whether *Burket*'s suit was time-barred by the three-year limitation applicable to most tort actions imposed by Maryland Code (1957, 1964 Repl. Vol.), Article 57, § 1, or whether it was timely under Md. Code (1957, 1964 Repl. Vol.), Article 93, § 112, which provided that a suit against an executor must be commenced within six months of his qualification.

Judge Oppenheimer, speaking for this Court, explained that the Court affirmed the trial court's judgment because both the six-month limitation on suits against an executor and the original three-year limitation on the cause of action applied – nothing in

² Ch. 468 of the Acts of 1949, amending Md. Code (1939, 1947 Cum. Supp.), Art. 93, § 109. This amended section was not published until it appeared as Md. Code (1951), Art. 93, § 111.

³ Ch. 689 of the Acts of 1953, codified as Md. Code (1951, 1957 Cum. Supp.), Art. 93, § 111.

⁴ At the time *Burket* was decided, the law governing this type of suit was codified as Md. Code (1957, 1964 Repl. Vol., 1965 Cum. Supp.), Art. 93, § 112.

the former tolled the running of the latter. *Burket*, 241 Md. at 427, 216 A.2d at 911. The opinion concludes with the holding of this Court:

"Under the Maryland law, whether suit is brought against the tort-feasor during his life-time, or against his personal representative after his death, it must be filed both within three years from the date of the injuries and within six months from the qualification of the personal representative.

"In this case, the action filed by *Burket* against *Smith*, a few days before the expiration of the three year period from the date of the injuries, had no legal effect. *Smith* was dead, and an action brought against a dead man is a nullity. *Hunt v. Tague*, 205 Md. 369, 378-79, 109 A.2d 80 (1954); *Chandler v. Dunlop*, 311 Mass. 1, 39 N.E.2d 969 (1942). *Smith's* Administrator was appointed after the three year period had run, and, while the Administrator was thereafter substituted as a party defendant, less than two months after his appointment, the substitution was subsequent to the expiration of the three year period.

* * *

"As Judge [Robert E. Clapp, Jr., the trial judge] held in his opinion, where an action, as here, is brought against a dead man, the substitution of his personal representative after the expiration of the period of the Statute of Limitations does not relate back to the time of the filing of the original suit so as to prevent Statute from being a bar to the litigation. *Chandle[r] v. Dunlop, supra*, cited by the Judge, is on all fours with this holding."

Burket, 241 Md. at 430-31, 216 A.2d at 913-14. Under our reasoning in *Burket*, Ms. Greentree's original suit, brought against a dead man, was a nullity, and, therefore, there was nothing to which the amendment substituting the estate, as a party defendant, could

relate back.

II

Md. Code (1957, 1964 Repl. Vol.), Article 93, § 112, as construed in *Burket*, has since been amended in certain particulars, and on the dates material to the issues presented in the case *sub judice*, was codified as §§ 8-101, 8-103 and 8-104 of the Estates and Trusts Article. A most significant change appears in what is now § 8-104(e)⁵ which provides:

"Where insurance exists. - (1) If the decedent was covered by a liability insurance policy which at the time the action is instituted provides insurance coverage for the occurrence, then, notwithstanding the other provisions of this section, an action against the estate may be instituted after the expiration of the time designated in this section, but within the period of limitations

⁵ Other changes, not relevant in this matter, have also been made. In 1969, Ch. 3 of the Acts of 1969 recodified and reorganized § 112 based on the recommendations of the Governor's Commission to Review and Revise the Testamentary Law of Maryland (the Henderson Commission). See *infra* note 9. The law was not amended in substance, but was thereafter codified as Article 93, §§ 8-101, 8-103, and 8-104. Then in 1974, Ch. 11 of the Acts of 1974 enacted the Estates and Trusts Article including §§ 8-101, 8-103, and 8-104 of old Article 93 which were similarly designated in the new Article. More changes have been made after the enactment of the Estates and Trusts Article. See Ch. 464 of the Acts of 1977 (minor change in § 8-104(e)); Ch. 418 of the Acts of 1981 (rewriting § 8-104(e)); Ch. 496 of the Acts of 1989 (amending the limitations period in §§ 8-102(b) and 8-103(a) and rewriting § 8-104(c) with accompanying amendment to § 8-101(a)); Ch. 671 of the Acts of 1989 (reorganizing and rewriting § 8-104(e)); Ch. 55 of the Acts of 1991 (substituting the Maryland Automobile Insurance Fund for the Unsatisfied Claim and Judgment Fund of the State in § 8-104(e)); and Ch. 226 of the Acts of 1992 (changing the limitations period in §§ 8-102(b) and 8-103(a)(1) from nine months to six months).

generally applicable to such actions.

(2) The existence of insurance coverage is not admissible at the trial of the case and if a verdict is rendered against the estate:

(i) The judgment is not limited to the amount of insurance coverage for the occurrence; and

(ii) The amount of the judgment that is recoverable from the estate is limited to the amount of the decedent's liability insurance policy."

These provisions created an exception, where insurance coverage exists, from the usual requirement that suits to enforce a claim against a decedent must be filed within the time limit for filing claims with the personal representative or the register. These provisions were first enacted by Ch. 642 of the Acts of 1966. This legislation was approved, and took effect, after *Burket* was decided by this Court.

The majority opines "that § 8-104(e) of the Estates and Trusts Article is controlling in this case[,]" but it then proceeds to essentially ignore the plain language of that subsection that requires that suits brought under § 8-104(e) be brought "within the period of limitations generally applicable to such actions[.]" The majority reasons that the provisions of § 8-104(e) make the insurer the only real party in interest, and since Fertitta's insurer had notice of the claim, by way of settlement negotiations with Greentree, even the general three-year statute of limitations is inapplicable in this case. We have said on *numerous* occasions that we should not judicially create a new exception to a statute of limitations, in the name of determining legislative intent, where

the Legislature has not provided such an exception. See, e.g., *Garay v. Overholtzer*, 332 Md. 339, 359, 631 A.2d 429, 439 (1993) and cases cited therein. Here, the majority's opinion will have the effect of creating an exception to a statute of limitations, if a defendant was aware, at any time during the limitations period, of a *potential* claim against him.

III

Even if Ms. Greentree's suit was able to escape the limitations bar, it is still procedurally barred. Section 8-101(a) of the Estates and Trusts Article provides:

"Except as provided in § 8-104,⁶ a proceeding to enforce a claim against an estate of a decedent may not be revived or commenced before the appointment of a personal representative."⁷

Therefore, unless, and until, a personal representative is appointed and qualified, there is no party in existence capable of being sued.⁸ See *Cornett v. Sandblower*, 235 Md. 339, 343, 201 A.2d

⁶ The § 8-104 exception, added by Chapter 496 of the Acts of 1989, refers to the § 8-104(c) provision for filing a claim with the register prior to appointment of the personal representative which was enacted by the same legislation. This exception is not applicable in this case because the petitioner did not attempt to file her claim in such a manner.

⁷ This prohibition was derived from the Uniform Probate Code. See Second Report of the Governor's Commission to Review and Revise the Testamentary Law of Maryland at 121 (1968), Comment to proposed § 8-101.

⁸ The existence of a party capable of being sued was within the control of the petitioner. A "Will of No Estate" was filed for Mr. Fertitta with the Register of Wills for Anne Arundel County on

678, 680 (1964) (citing *Behnke v. Geib*, 169 F. Supp. 647 (D. Md. 1959)); *Harlow v. Schrott*, 16 Md. App. 31, 39, 294 A.2d 349, 354, *aff'd sub nom. Blocher v. Harlow*, 268 Md. 571, 303 A.2d 395 (1972).

In constructing § 8-101, the Henderson Commission⁹ simply codified then existing case law. Cases preceding the enactment of this section include, chronologically, *Hunt v. Tague, supra* (plaintiff could not amend complaint to substitute tortfeasor's personal representative as defendant in tortfeasor's place); *Chandlee v. Shockley*, 219 Md. 493, 150 A.2d 438 (1959) (personal representative does not take the place of the decedent but is made amenable, in his representative capacity, to service of process as an original party); *Behnke v. Geib, supra* (plaintiff cannot, by use of fictitious name in complaint, make personal representative, not in existence in that capacity at time of complaint, amenable to suit); *Cornett v. Sandblower, supra* (the appointment and qualification of the administrator brings into existence party capable of being sued); *Burket, supra* (substitution of personal

March 15, 1991, and was a matter of public record. The petitioner was entitled to seek letters of administration under Md. Code (1974, 1991 Repl. Vol.), § 5-104 of the Estates and Trusts Article. She ultimately did so, but four months after the statute of limitations had expired.

⁹ The Henderson Commission conducted a four-year study of the probate and testamentary laws of Maryland and proposed comprehensive changes which were enacted by Ch. 3 of the Acts of 1969. See Shale D. Stiller & Roger D. Redden, *Statutory Reform in the Administration of Estates of Maryland Decedents, Minors and Incompetents*, 29 Md. L.R. 85 (1969).

administrator after expiration of limitations period does not relate back to original filing to prevent limitations bar);¹⁰ *Moul v. Pace*, 261 F. Supp. 616 (D. Md. 1966) (applying *Burket*); and *Cromwell v. Ripley*, 11 Md. App. 173, 273 A.2d 218 (1971) (applying *Burket*).

Furthermore, since 1929,¹¹ whether the limitations period ran from the date of the decedent's death or the date of the personal representative's qualification, suit was required to be commenced within a certain time period¹² after that date. See, e.g., Md. Code (1951) Art. 93, § 111. Any suit commenced prior to that measuring date, therefore, would not be proper under § 8-103(a) or its predecessors.

Finally, § 8-104(e) and its predecessors do not abrogate the requirement of § 8-101(a) as suggested by the majority. As noted in part II *supra*, the legislation creating the insurance exception was enacted three years prior to the legislation creating § 8-101.

¹⁰ The Henderson Commission expressly recognized the holding in *Burket* in its comments to proposed § 8-103(a). See Second Report of the Governor's Commission to Review and Revise the Testamentary Law of Maryland at 123 (1968), Comment to proposed § 8-103(a).

¹¹ See *supra* note 1 and accompanying text.

¹² This period has been amended over the years but had always been either six or nine months. Then Ch. 496 of the Acts of 1989 amended § 8-103(a) to the require commencement within the earlier of nine months after the decedent's death or two months after notice is given by the representative. The nine months in § 8-103(a)(1) was later changed to six months by Ch. 226 of the Acts of 1992. See *supra* note 5.

If the Legislature had intended to create an exception to the § 8-101(a) requirement, for suits filed under § 8-104(e) or its predecessors, it could have done so when it enacted § 8-101 or in the decades following that enactment. It did not. Clearly the Legislature knows how to create exceptions to § 8-101(a), as it has done so in the past.¹³

At the commencement of Ms. Greentree's suit, no personal representative for the estate had been appointed; therefore, the suit, even if it named the estate as defendant at that time, would have been improper, as there was no one in existence who was capable of being sued. The subsequent amendment, therefore, cannot relate back to the original complaint, because the original complaint had no legal effect. While such a holding might cause a harsh result for the petitioner, if changes in this area are appropriate, it is within the province of the General Assembly, not this Court, to make them.

Judge Rodowsky has authorized me to state that he concurs with the views expressed herein.

¹³ See *supra* note 6.