

Surviving Wrongful Death Part III:

Timing is Everything

By Mark McGrath

The statutes of limitation enacted by the North Carolina General Assembly appear at first blush to be paradigms of clarity. But don't let that fool you. North Carolina's sunset statutes can be mighty tricky critters, especially when they are applied to wrongful death cases.

The basics are clear enough. Under N.C. Gen. Stat. section 1-53(4), plaintiffs have two years from the date of death in which to commence an action for wrongful death under N.C. Gen. Stat. section 28A-18-2. Section 1-53(4) further provides that a cause of action does not accrue until the date of death, unless, were the decedent was still living, the claim would have been time-barred on the date of death.

For example, assume a decedent is injured on January 1, 2000. He languishes for three years and then succumbs to those injuries on January 2, 2003. By operation of N.C. Gen. Stat. section 1-53(4), any wrongful death action that might have been brought by the decedent's personal representative would be time barred.

Dunn v. Pacific Employers Insurance Co., 332 N.C. 129, 418 S.E.2d 645 (1992), provides a useful illustration of this principle. In Dunn, the decedent was diagnosed with liver cancer in August 1985, and died from that disease on June 24, 1987. Plaintiff alleged that the decedent's death was the result of exposure to hazardous materials that occurred prior to the August 1985 cancer diagnosis, and filed suit for wrongful death on June 23, 1989. Defendant argued that, because more than three years had passed between the date of diagnosis (August 1985) and the filing of suit (June 23, 1989), the claim was time-barred by the three-year statute of limitations applicable to personal injury actions. Defendant reasoned that in order to file an action for wrongful death, the action must be filed (1) within two years of the date of death, and (2) that on that filing date, an action for personal injuries arising from the alleged negligence would not have been time barred.

The supreme court disagreed, holding that the claim for wrongful death was distinct and separate from the claim for personal injuries, the only relationship between the two being the fact that both the injury and the death flowed from the same wrongful conduct. The court held that the appropriate inquiry is determining whether, on the date of death, the decedent could have timely filed an action for his personal injuries. If so, the personal representative would have two years in which to file suit for the decedent's wrongful death. Put another way, if more than three years had passed between the date of the negligent act and the date of death, an action for wrongful death arising out of that same negligence would be barred by the statute of limitations.

Taking Dunn at its word, one would presume that if an action were viable on the date of death, a personal representative would have two years in which to file a wrongful death suit. Enter Udzinski v. Lovin, 358 N.C. 534, 597 S.E.2d 703 (2004). Udzinski arose from an alleged failure to diagnose cancer. The complaint alleged that on February 17, 1997 the defendant misinterpreted a chest x-ray that revealed a suspicious mass in the decedent's lung. The decedent was diagnosed with advanced cancer on February 23, 1998, and subsequently died of metastatic liver cancer on April 1, 1999. In March 2001, well within two years of the decedent's death, the plaintiff obtained a Rule 9(j) order that extended by

120 days the time in which to file his medical malpractice action. The plaintiff filed his complaint on July 27, 2001, safely within the 120-day extension that was granted in March 2001.

There is no question that a claim for personal injuries (as opposed to wrongful death) by the decedent would have expired three years from the last act of actionable negligence. The last act of negligence in Dunn took place on February 17, 1997, the date when the misdiagnosis occurred. Accordingly, on April 1, 1999, the date of the decedent's death, the claim would not have been time barred, and some ten months would remain on the three-year statute of limitations. Keep in mind, however, that N.C. Gen. Stat. section 1-15(c) establishes a four-year statute of repose for medical malpractice actions. Because it is triggered by the last act of alleged negligence, the statute of repose would not expire until February 17, 2001 (date of misdiagnosis plus four years). Because the decedent passed away on April 1, 1999, she died well before the repose period ran. Accordingly, an action for injuries arising from the alleged negligence would not have been time-barred on April 1, 1999 (the date of death) by operation of either the three-year statute of limitations or the four-year statute of repose.

Applying Dunn, precedent would seem to indicate that a wrongful death claim could have been filed at any time within two years of April 1, 1999, the date of death. Not so, according to the North Carolina supreme court. The court held that the four-year statute of repose continued to run from the date of trigger, unaffected by the intervening of the decedent's death. Consequently, the court held that the action became time barred on February 17, 2001, four years from the defendant's last act of negligence. According to the court, the fact that the claim could have been timely filed on the date of death was irrelevant.

If the court did not confuse things enough with Udzenski, the subsequent decision of the court of appeals in *Alston v. Britthaven, Inc.*, ___ N.C. App. ___, 628 S.E.2d 824 (2006), complicated things even further. In *Alston*, the court held that when a plaintiff alleges claims for both wrongful death and pre-death injuries in one suit, and where the pleadings and evidence support a distinct survival claim for pre-death personal injuries, the survivorship claim should be submitted to the jury separate and apart from the wrongful death issue. This decision raises hair raising possibilities.

Consider, for example, the following scenario. Decedent is injured by negligence on January 1, 2000. After nearly three years of incessant suffering, the decedent dies on December 31, 2002. In this scenario, when would the statute of limitations run?

Clearly, under Udzenski any claim filed after January 1, 2004 would be barred by the four-year statute of repose. For the sake of making things interesting, suppose a case like *Alston* comes through the door, one involving a death, with slam-dunk liability but questionable causation. In this situation, a bold and imaginative trial attorney might elect to eschew the wrongful death claim altogether and pursue only an *Alston*-type survival claim for pre-death injuries and damages under N.C. Gen. Stat. section 28A-18-1(a). When would the statute of limitations run on this claim? Applying the standard three-year negligence statute of limitations, one might conclude that the personal representative would only have until January 1, 2003 in which to file the survival claim, or only one day after the decedent's death.

One needs to consider, however, operation of N.C. Gen. Stat. section 1-22. This section provides that, as long as an action is not time barred on the date of death, the decedent's personal representative has an additional one year from the date of death in which to file a survival action. Using our prior example, the personal representative would have until December 31, 2003 in which to file his survivorship claim.

In other words, a claim filed on December 31, 2003 would be timely, even though one day shy of four years had passed since the last act of negligence by the defendant.

Confused yet? Timing issues in wrongful death cases can be vexing. In our firm, whenever there is potential for a statute of limitations or statute of repose issue in a death case, we meet and hash it out. Invariably, the discussion begins simply and ends with the three of us scratching out time lines.

And when in doubt, we hit the books.