IN THE

# Supreme Court Virginia

**RECORD NO. 090674**

THOMAS IDOUX,

*Appellant,*

v.

ESTATE OF RAJA ALEXANDER HELOU,

*Appellee.*

## BRIEF OF APPELLEE

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## I. STATEMENT OF THE CASE

This action for personal injuries arises out of a motor vehicle accident that occurred on September 19, 2006. The Plaintiff/Appellant, Thomas Idoux ("Idoux"), alleges that his vehicle was struck by a motor vehicle operated by Raja Alexander Helou, deceased, and that he suffered personal injuries as a result of the accident.

On March 29, 2007, prior to the initiation of any lawsuits by Idoux, Raja Alexander Helou died from causes unrelated to the accident. On October 15, 2007, Mr. Helou's wife, Rosemary L. Helou, was appointed Administrator of the Estate of Raja Alexander Helou by order of the Circuit Court of Fairfax County (J.A. at 47).

Idoux filed his initial lawsuit on August 14, 2007, in the General District Court of Fairfax County, Small Claims Division, Case No. GV07-21756. He named "Raja A. Helou" as the defendant (J.A. at 48). As a result of the improper naming of the decedent as the defendant, that case was dismissed, without prejudice, by the General District Court of Fairfax County on November 20, 2007.

On September 2, 2008, Idoux filed the present action, naming the "Estate of Raja Alexander Helou" (the "Estate") as the defendant (J.A. at 1). The Defendant/Appellee filed a Plea in Bar on the grounds that the Estate

was not a proper party, that the Complaint could not be amended to substitute the personal representative for the Estate, and that the applicable statute of limitations had expired (J.A. at 4-5). In response, Idoux filed a Motion for Leave to Amend Complaint and Opposition to Defendant's Plea in Bar (J.A. at 7-13). The Estate filed an opposition to the motion (J.A. at 41-46), and a hearing was held on January 9, 2009, before the Honorable Dennis J. Smith of the Circuit Court of Fairfax County. After considering the pleadings and hearing argument from both parties, Judge Smith sustained the Plea in Bar, denied the Motion for Leave to Amend, and dismissed the case with prejudice. The Order was entered on January 9, 2009 (J.A. at 50-51), and Idoux noted his appeal to this Court on February 3, 2009.

## II. QUESTIONS PRESENTED

A. Whether the trial court properly sustained the Plea in Bar and dismissed the lawsuit filed against the decedent's estate when the provisions of Section 8.01-6.2(B) of the Code of Virginia did not apply, the statute of limitations was not tolled by the filing of the lawsuit, and the statute of limitations had expired.

B. Whether the trial court properly sustained the Plea in Bar and dismissed the lawsuit when Section 8.01-229(B)(2)(b) of the Code of Virginia did not apply because the case was filed against the estate of the decedent, not the decedent himself, and the plaintiff was not permitted to substitute the personal representative as the defendant.

## III. PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

### A. THE TRIAL COURT CORRECTLY SUSTAINED THE PLEA IN BAR BECAUSE THE LAWSUIT WAS FILED AGAINST AN IMPROPER DEFENDANT AND COULD NOT BE AMENDED UNDER VIRGINIA CASELAW OR UNDER SECTION 8.01-6.2(B) OF THE CODE OF VIRGINIA.

The Complaint filed by Idoux improperly names the Estate of Raja Alexander Helou, rather than the decedent's personal representative, as the defendant. Under Virginia law, an action against an estate is a legal "nullity" and does not operate to toll the statute of limitations. Furthermore, the personal representative cannot be substituted for the Estate of Raja Alexander Helou as these are separate legal entities and not a simple misnomer. Accordingly, Idoux cannot amend his Complaint to substitute parties and, further, any subsequent lawsuit against the personal representative is barred by the applicable statute of limitations.

#### 1. Idoux improperly named the Estate as the defendant in his lawsuit when Virginia law requires the lawsuit to be filed against Helou's personal representative.

The Honorable Dennis J. Smith of the Circuit Court of Fairfax County properly sustained the Plea in Bar filed by the Defendant/Appellee, Estate of Raja Alexander Helou (the "Estate"). The Complaint filed by the Plaintiff/Appellant, Thomas Idoux ("Idoux"), improperly named the Estate instead of the personal representative as the defendant. When, as here, a

party against whom a personal action may be brought dies prior to the initiation of a lawsuit, Section 8.01-229(B)(2)(a) of the Code of Virginia specifies the correct defendant to be named and the applicable time period in which to file an action. That statute provides, in relevant part:

> 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 <u>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</u>.

Va. Code Ann. § 8.01-229(B)(2)(a) (2009) (emphasis added).

As this Court has stated, any action or suit brought under the circumstances outlined in Section 8.01-229(B)(2) must be filed against the personal representative of the decedent's estate, not against the estate itself:

> Virginia statutes do not authorize an action against an "estate." Code §§ 8.01-229(B)(1) and (B)(2) direct the decedent's personal representative to file any personal action which the decedent may have been entitled to bring and to defend any personal action which could be brought against the decedent. This limitation is further highlighted by the language of the statute which 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.

<u>Swann v. Marks</u>, 252 Va. 181, 184, 476 S.E.2d 170, 171 (1996). Idoux has repeatedly admitted that the Estate was not the proper defendant and that

the suit should have been brought against Rosemary Helou, as the personal representative of the Estate. (Br. of Appellant at 5-6; Pet. for Appeal at 5; J.A. at 8.) Idoux, therefore, acknowledges his error in filing against the wrong party.

**2. The naming of the Estate as the defendant is not a misnomer, and the Complaint cannot be amended to name the personal representative.**

Although, by statute, pleadings may be amended to correct a misnomer, the naming of the Estate in place of the personal representative does not constitute a misnomer:

> [T]he substitution of a personal representative for the "estate" is not the correction of a misnomer. Misnomer arises when the right person is incorrectly named, not where the wrong defendant is named. The personal representative of a decedent and the decedent's "estate" are two separate entities; the personal representative is a living individual while the "estate" is a collection of property. Thus, one cannot be substituted for another under the concept of correcting a misnomer.

Swann, 252 Va. at 184, 476 S.E.2d at 172 (citing Rockwell v. Allman, 211 Va. 560, 561, 179 S.E.2d 471, 472 (1971)). Furthermore, Idoux does not argue that naming the Estate as the defendant is a misnomer. (Br. of Appellant at 10; Pet. for Appeal at 9.) Idoux neither requested that the Circuit Court of Fairfax County grant him the ability to amend a misnomer nor raised it in his assignments of error. Indeed, he specifies in the Brief of

Appellant that he "never sought to amend his suit papers under the misnomer statute" (Br. of Appellant at 10) and "does not rely on the old misnomer statute" (Br. of Appellant at 13).

### 3. Pursuant to Sections 8.01-243(A) and 8.01-229(B) of the Code of Virginia, the time period when Idoux could file a lawsuit against the personal representative expired prior to Idoux's Complaint being served.

This is a personal injury action arising out of a motor vehicle accident, and the applicable limitations period is two years from the date of injury. Va. Code Ann. § 8.01-243(A) (2009); Va. Code Ann. § 8.01-230 (2009).[1] The underlying motor vehicle accident occurred on September 19, 2006, and, accordingly, the statute of limitations period expired on September 19, 2008.

In cases where the defendant is deceased, Section 8.01-229(B)(2)(a) potentially provides additional time for the commencement of a suit. That statute allows a lawsuit to be commenced "before the expiration of the applicable limitation period or within one year after the qualification of such

[1] Section 8.01-230 of the Code of Virginia states: "In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided. . . ."

personal representative, whichever occurs later." In this case, Rosemary L. Helou, the decedent's wife, was appointed as the Administrator of the Estate of Raja Alexander Helou on October 15, 2007 (J.A. at 47). Because the date of qualification of the personal representative occurred after the expiration of the statute of limitations on September 19, 2008, Section 8.01-229(B)(2)(a) granted Idoux a year from the date of qualification to file this action. Therefore, any lawsuit brought against Rosemary Helou, as the Administrator of the Estate, must have been filed no later than October 15, 2008. No such lawsuit was timely filed by Idoux as required by statute. In fact, as of October 15, 2008, Rosemary Helou had not been served with the improperly-styled Complaint. She did not receive process for this lawsuit until November 17, 2008.

**4. The filing of Idoux's Complaint did not toll the statute of limitations, and any amendment of the Complaint to name the personal representative would not relate back to the initial pleading.**

The filing of the present lawsuit is a legal "nullity" and does not operate to toll the statute of limitations. Swann, 252 Va. at 184, 476 S.E.2d at 171-72 ("A motion for judgment against an 'estate' is a nullity and cannot toll the statute of limitations"). Accordingly, the statute of limitations expired on October 15, 2008, and any substitution or addition of parties to the suit would not relate back to the initial pleading.

Idoux argues that Section 8.01-6.2(B) of the Code of Virginia overrules, at least in part, the holding of Swann v. Marks and allows him to amend his Complaint to substitute the personal representative for the Estate. (Br. of Appellant at 13-14; Pet. for Appeal at 10.) That position constitutes a misreading of the statute, which provides:

> In the event that suit is filed against the estate of a decedent, and filed within the applicable statute of limitations, naming the proper name of estate of the deceased and service is effected or attempted on an individual or individuals as executor, administrator or other officers of the estate, such filing tolls the statute of limitations for said claim in the event the executor, administrator or other officers of the estate are unable to legally receive service at the time service was attempted, or defend suit because their authority as executor, administrator or other officer of the estate excludes defending said actions, or their duties as executor, administrator or other officer of the estate had expired at the time of service or during the time of defending said action.

Va. Code Ann. § 8.01-6.2(B) (2009) (emphasis added). No language in this statute authorizes Idoux to substitute a personal representative for an improperly named estate. The sole effect of this provision is to toll the statute of limitations in three very specific circumstances: When an administrator (or another officer of the estate) (1) is unable to legally receive service at the time service is attempted, (2) is unable to defend suit because his or her authority excludes such action, or (3) his or her duties expired when service was attempted or subsequent thereto. None of these

circumstances applies in the case at bar. Rosemary Helou was duly qualified as the Administrator of the Estate on October 15, 2007 (J.A. at 47), well before this litigation was filed. Her authority did not exclude defending lawsuits, and her duties had not expired. Idoux does not allege that either the second or third condition listed above apply. Instead, he contends that the first condition is a "catch-all" provision (Br. of Appellant at 8).

Under Idoux's interpretation of Section 8.01-6.2(B), the filing of any lawsuit against an estate would always toll the applicable statute of limitations because a personal representative would never be able to "legally receive service" on behalf of the Estate. Idoux argues that, because a suit against an estate is a nullity, a personal representative cannot legally receive service of the suit "because there is no suit to receive service for or defend against." (Br. of Appellant at 6.)

This interpretation is in direct conflict with the Supreme Court of Virginia's recent analysis in Estate of James v. Peyton, 277 Va. 443, 674 S.E.2d 864 (2009). The plaintiff in that matter, Peyton, claimed that he was injured as a result of a motor vehicle accident involving the defendant, James. James subsequently died as a result of injuries sustained in the accident; unaware of this fact, Peyton named the decedent as the

defendant in his initial pleading. Peyton soon filed a motion seeking leave to amend his pleading by substituting "The Estate of Robert Judson James, Administrator, Edwin F. Gentry, Esq." as the defendant. The motion was granted by the Circuit Court of Culpeper County. Relying on Swann v. Marks, 252 Va. 181, 476 S.E.2d 170 (1996), the defendant moved for summary judgment on the grounds that the suit was a nullity because it was filed against the estate and that the reference to the administrator was not adequate to identify him as a party. Although the motion for summary judgment was granted, the circuit court later vacated its order upon reconsideration. An interlocutory appeal was certified on the issue of whether "The Estate of Robert Judson James, Administrator, Edwin F. Gentry, Esq." was a proper party. The Supreme Court of Virginia held that, as styled, the pleading named the estate and not the administrator as a party and, furthermore, this did not constitute a misnomer and the error could not be corrected. In its analysis, the Court reviewed the various statutes that authorize corrections to relate back to the original pleading. In a footnote to that section of the opinion, the Court quoted Section 8.01-6.2(B) and stated: "While we express no opinion with regard to the scope of the application of [Section 8.01-6.2(B)], we note that by its express terms it is inapplicable in this case because Gentry was legally able to receive

service of the suit under the proper name of James' estate." 277 Va. at 453, 674 S.E.2d at 868 n.3. Although no administrator had been appointed at the time Peyton filed his lawsuit, Gentry had qualified as the Administrator of the Estate of Robert Judson James prior to the filing of Peyton's motion for leave to amend and substitute the name of the estate for the name of the decedent.

In the present case, Mrs. Helou qualified as the Administrator for the Estate of Raja Alexander Helou on October 15, 2007 (J.A. at 47), nearly a year prior to the filing of the Complaint. At all times since her appointment, she has had full authority to accept service and defend suit. There are no facts in this case to distinguish Gentry's ability to "legally receive service" within the meaning of Section 8.01-6.2(B) and Mrs. Helou's ability to do so.

Idoux's misreading of Section 8.01-6.2(B) would render it applicable to any lawsuit that is improperly filed against an estate. Had the Virginia legislature intended to toll the statute of limitations in every case where a lawsuit was wrongly filed against an estate rather than the personal representative, there would have been no need to specify the additional circumstances to which Section 8.01-6.2(B) applies. Yet, in addition to the alleged "catch-all" provision, the statute expressly applies in two specific instances: when the personal representative is unable to defend suit

because his or her authority excludes such action and when his or her duties expired when service was attempted or subsequent thereto.

The applicability of this provision is limited by its language to occasions when the plaintiff cannot accomplish effective service on the personal representative because of some defect of or limitation on the appointment of that personal representative. Essentially, the statute operates to ensure that the plaintiff's claims are preserved when, through no fault of his or her own, there is no personal representative that can be named as the defendant and served. Section 8.01-229(B)(2) requires that the lawsuit name the personal representative and that it be filed within the statute of limitations or within a year after the personal representative is appointed. However, if the personal representative's authority is limited, flawed, or expired, the plaintiff might be unable to toll the statute of limitations by filing a lawsuit naming that personal representative. In that unique instance alone, Section 8.01-6.2(B) permits the plaintiff to toll the statute by naming the estate instead.

Those are not the facts in the case at bar. Mrs. Helou was legally capable of receiving service, the Estate was improperly named as the defendant, the Complaint cannot be amended to substitute Mrs. Helou for the Estate, and the statute of limitations has expired. The Honorable

Dennis J. Smith, therefore, properly granted the Estate's Plea in Bar and dismissed this case with prejudice.

B. THE TRIAL COURT CORRECTLY SUSTAINED THE PLEA IN BAR BECAUSE IDOUX IS NOT PERMITTED TO AMEND THE COMPLAINT PURSUANT TO SECTION 8.01-229 OF THE CODE OF VIRGINIA.

Although Section 8.01-229(B)(2)(b) of the Code of Virginia permits a complaint to be amended to substitute the personal representative as a party within two years of filing, that statutory provision applies only when "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." (Emphasis added.) Idoux has named the Estate of Raja Alexander Helou, not the decedent himself, as the defendant. Therefore, subsection (B)(2)(b) of the statute is inapplicable.

As discussed by this Court in Parker v. Warren, 273 Va. 20, 639 S.E.2d 179 (2007), Section 8.01-229(B)(2)(b) addresses a specific problem:

> Prior to the enactment of subparagraph (b) 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. 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. 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.

273 Va. at 24, 639 S.E.2d at 181 (citing Rennolds v. Williams, 147 Va. 196, 198-200, 136 S.E. 597, 597-98 (1927); Rockwell v. Allman, 211 Va. 560, 561, 179 S.E.2d 471, 472 (1971)) (emphasis added).

The effect of Section 8.01-229(B)(2)(b) was more recently discussed in Estate of James, 277 Va. at 450-51, 674 S.E.2d at 867 (2009). In its opinion, the Supreme Court of Virginia quoted Parker v. Warren with approval and stated that, "[p]ursuant to Code § 8.01-229(B)(2)(b), Peyton's July 6, 2004 motion to amend the original motion for judgment was clearly authorized under the circumstances of this case." As discussed above, James had died prior to the filing of Peyton's lawsuit, and the original pleading named the decedent as the defendant. Under Section 8.01-229(B)(2)(b), Peyton was permitted to amend the pleading to substitute the personal representative as the defendant for up to two years after the initial filing date.

The concern rectified by Section 8.01-229(B)(2)(b) is not present when an estate is the named defendant. A plaintiff who has named the

estate instead of the decedent must clearly be aware that the individual against whom an action may be brought is deceased. In this case, Idoux initially filed a lawsuit in the General District Court of Fairfax County on August 14, 2007, naming "Raja A. Helou" as the defendant (J.A. at 48). Had he requested leave to amend to substitute Mrs. Helou, the decedent's personal representative, as the defendant, that relief should have been granted. However, he made no such request, and his case was dismissed without prejudice on November 20, 2007 for naming an improper party. Idoux was certainly aware of Mr. Helou's death by November 20, 2007 but failed to properly act on that knowledge.

The present case, filed on September 2, 2008, did not name the decedent. It instead named the Estate, and Section 8.01-229(B)(2) does not grant Idoux the ability to substitute the personal representative for the Estate. There are no Virginia statutes or caselaw that authorize Idoux to substitute the personal representative for the Estate or to relate any subsequent naming of the personal representative back to the initial pleading. His present suit is a legal nullity, and the trial court's dismissal of the action was correct.

## IV. CONCLUSION

For the foregoing reasons, the Defendant/Appellee, Estate of Raja Alexander Helou, asks this Honorable Court to deny the Plaintiff/Appellant's appeal and to affirm the trial court's dismissal of this action with prejudice.

**ESTATE OF RAJA ALEXANDER HELOU**
By Counsel

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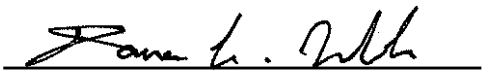

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## V. CERTIFICATE

I hereby certify that, pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, fifteen (15) copies of the foregoing Brief of Appellee, along with an electronic copy of the same, were filed with the Clerk of the Supreme Court of Virginia via hand-delivery on September 28, 2009, and three (3) copies of the same were mailed on September 28, 2009, to:

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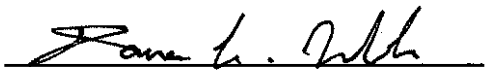

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