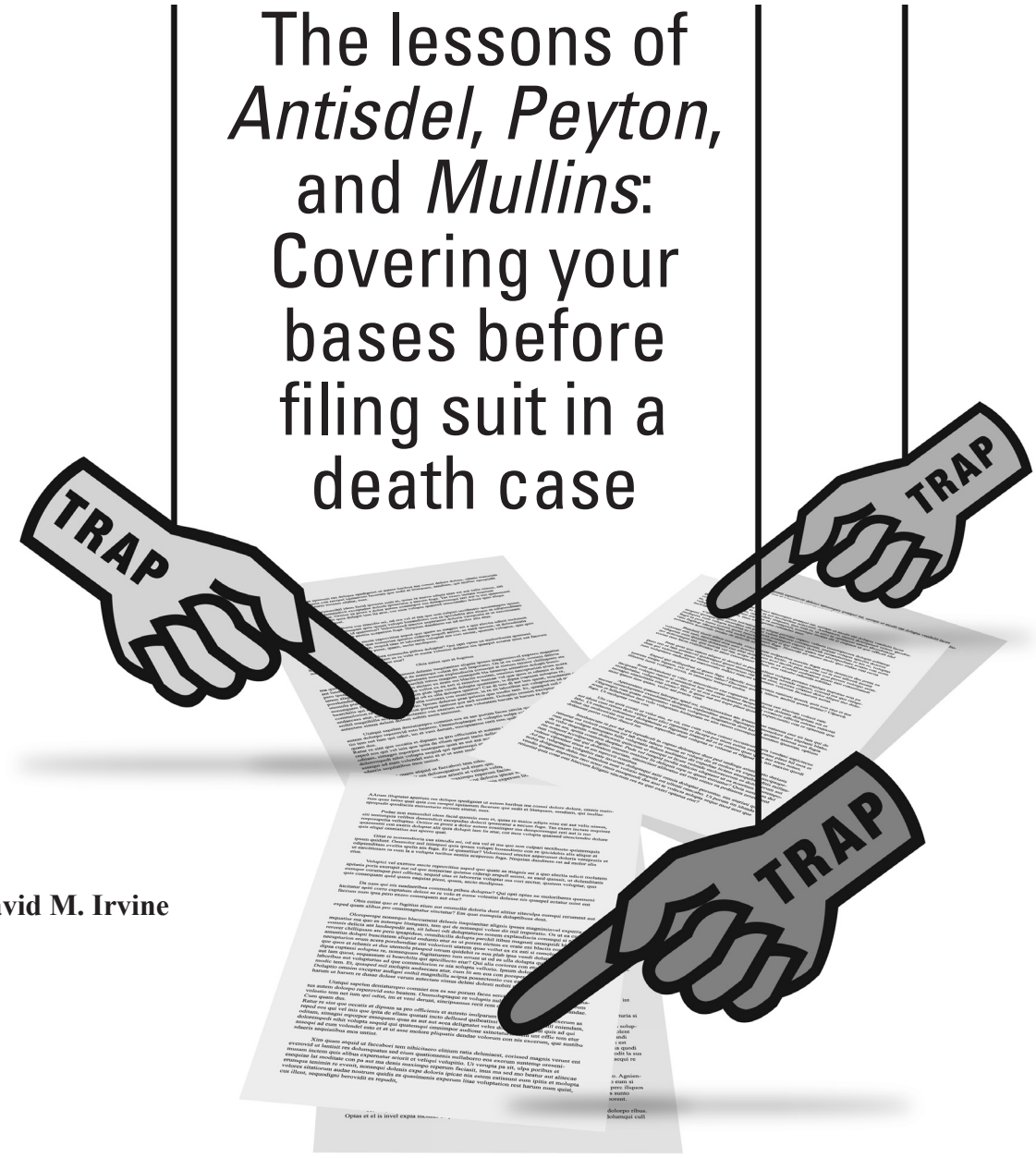
Young Trial Lawyers

The lessons of *Antisdel*, *Peyton*, and *Mullins*: Covering your bases before filing suit in a death case



by David M. Irvine

In recent years, the Supreme Court has spoken on several separate occasions to the various pleading requirements a plaintiff must meet in order to effectively bring a wrongful death or personal injury survival claim. The decisions have sparked procedural changes in circuit court clerks' offices, prompted action by the General Assembly, and generated significant discussion among the plaintiffs' bar. As the dust begins to settle in this area, it is a good opportunity to recap the changes we have seen over the past few years, review the familiar rules of pleading where a decedent's estate is involved, and identify those traps which remain for the unwary.

Wrongful death or survival action?

When presented with a case in which the client's decedent has died as a result of tortious conduct, one often focuses as a matter of instinct on a wrongful death claim pursuant to Va. Code §8.01-50. An attorney is well-advised to consider, however, whether a survival action for personal injuries sustained by the decedent prior to his or her death also may be appropriate to assert based on the facts of the case.

In the context of a wrongful death claim, damages are awarded against the tortfeasor to specified statutory beneficiaries for losses, including sorrow and mental anguish, lost income, and health care and funeral expenses. *See* Va. Code §8.01-52, 53. A survival claim, by contrast, is simply a claim for personal injuries sustained by the decedent prior to his or her death, which may be brought or continued by the decedent's personal representative following his or her death. *See* Va. Code §8.01-25. As a result, damages awarded in a wrongful death action generally are awarded directly to the decedent's beneficiaries, whereas damages from a personal injury survival action pass through and are deemed assets of the estate. *See Antisdel v. Ashby*, 279 Va. 42, 50 (2010).

A plaintiff, however, may not recover damages for the same injury pursuant to both wrongful death and personal injury causes of action. Code §8.01-25 states that if the "decedent dies as a result of the injury complained of with a timely action for damages arising from such injury pending, the action shall be amended in accordance with the provisions of §8.01-56." Section 8.01-56, in turn, provides that if death resulted from the injuries claimed in a pending personal injury action, the pleadings should be revised in accordance with §8.01-50, "and the case proceeded with as if the action had been brought under such section. In such cases, however, there shall be but one recovery for the same injury."

Therefore, where the injured party dies as a result of the injuries at issue, the personal representative is limited to pursuing a wrongful death claim; a personal injury action survives and the estate may recover for the decedent's own pain and suffering only if the decedent's death is attributed to a cause other than the negligent act or omission. *See Lucas v. HCMF Corp.*, 238 Va. 446, 449 (1989) ("Code §8.01-25 entitles a decedent's personal representative to file a motion for judgment seeking damages for personal injuries sustained by the decedent; however, if the injuries cause death, the recovery must be sought under Code §8.01-50, the wrongful death statute.").

In light of this rule, the question which has garnered the Supreme Court's attention most recently is, in a case where the plaintiff has brought a survival action and wrongful death action together in a single lawsuit following the death of the decedent, when exactly must the plaintiff elect which remedy he or she will ultimately seek? In other words, when must the question of proximate causation be determined for purposes of adherence to Code §8.01-25? In *Hendrix v. Daugherty*, 249 Va. 540, 547 (1995), a legal malpractice case involving an underlying medical malpractice action, the Court took the first step toward addressing this issue in stating: "[A]t an appropriate time after discovery has been completed, the plaintiffs must be required to elect whether they will proceed against the defendant attorneys" based on their negligence in prosecuting either the wrongful death action or the survival action.

The Court expounded on this pronouncement in *Centra Health, Inc. v. Mullins*, 277 Va. 59, 79 (2009), explaining that "election is required only at a time when the record sufficiently establishes that the personal injuries and the death arose from the same cause," regardless of whether that time came prior to trial. In *Mullins*, the defendant contested that the decedent had suffered any compensable injury upon which a personal injury claim could be based, and also that any negligence on the part of the hospital's agents had caused the decedent's death. *Id*. The plaintiffs argued that they should be entitled to proceed on both claims for so long as the defendant disputed the issue of proximate causation, and the Court agreed that compelling an election in such a situation would place the plaintiffs in the untenable and unjust position of having to "elect between two potentially viable claims, which [the defendant] was contesting on separate and independent grounds." *Id*.

Accordingly, it was proper for evidence bearing on both causes of action to be presented to the jury at trial, and for the jury to receive alternate instructions which allowed it to award damages for either wrongful death or personal injuries. 277 Va. at 80-81. The Court recognized that the circuit court was "painstaking in its efforts" to instruct the jury on how it could determine liability and what quantum of damages could be assessed, *Id*., at 81, but also noted that when there is any doubt as to whether it is proper to compel an election of remedies before submitting the case to the jury, "bifurcation is the most practical means to assure that each party receives a fair opportunity to present their case to the jury without prejudice to the other." *Id*. at 78.

One effect of the Court's holding in *Mullins* is to place a great deal of importance on the defense theory in a death case involving concurrent claims of wrongful death and personal injury. Where the plaintiff is able to present causation testimony supporting both cases of action, and the defendant in turn challenges both theories, a contested issue of causation is created which becomes a question for the trier of fact under *Mullins*. If, on the other hand, the defense concedes that the injuries sustained in the operating room caused the decedent's death (but still contests, for example, whether there was

a violation of the standard of care), then it will be significantly more difficult for the plaintiff to argue to the court that causation is in doubt and the survival claim still should be submitted to the jury.

Although a defense concession on the question of causation is favorable to the plaintiff insomuch as it places him or her that much closer to proving all necessary elements of the case, the benefits which inure to the plaintiff in being permitted to present evidence for both a wrongful death and personal injury survival claim may make a contest over causation a blessing. The jury is provided with two potential routes to a plaintiff's verdict, and (if there is no bifurcation, which the *Mullins* Court suggested as an option in some cases) the plaintiff may present damages evidence on both the wrongful death claim (e.g., the beneficiaries' sorrow, mental anguish, and solace) and the personal injury claim (pain and suffering of the decedent). The plaintiff's attorney, then, should carefully consider the causation question in a case with concurrent claims, and oppose any defense motion which has the potential to eliminate a viable cause of action from jury consideration.

Qualification of personal representative

In light of the plaintiff's option to develop his or her case in discovery before electing remedies, and potentially present competing theories of causation to the jury, the plaintiff's attorney often will want to sue for both wrongful death and personal injury, in order to keep all options open at the outset of the case. In order for that to approach to be effective, one must be certain before filing suit that the personal representative in whose name the action is brought is appropriately qualified to bring either type of claim.

The starting place often is Virginia Code §64.1-75.1. That statute provides that, where an executor of the estate has not been appointed, an administrator may be appointed solely for purposes of bringing a personal injury or wrongful death claim on behalf of the estate or its beneficiaries. Such appointment may be made by the clerk of the circuit court in the county or city where jurisdiction and venue would have been appropriate in the same action had the decedent survived. *Id*. Accordingly, the circuit court clerk in the jurisdiction where the cause of action arose, for example, would be an appropriate individual to make this appointment. *See* Va. Code §8.01-262.

The Supreme Court applied Code §64.1-75.1 two years ago in the notable decision, *Antisdel v. Ashby*, 279 Va. 42 (2010). In that case, the decedent's mother was appointed by the circuit court clerk as administrator of the estate "for purposes established under Code of Virginia §8.01-50 *et seq*." *Id*. at 45. Thereafter, she filed suit against the defendant physicians, asserting only claims for personal injuries sustained during the decedent's lifetime. The circuit court granted the defendants' pleas in bar on the grounds that the plaintiff lacked standing to bring a survival claim where the order of qualification expressly limited her appointment to the initiation of a wrongful death action under Code §8.01-50. *Id*. at 46. The Supreme Court affirmed, holding that the administrator's powers were limited to those specified in the order of qualification, regardless of the fact that Code §64.1-75.1 permitted the clerk to appoint an administrator to bring both causes of action. In other words, the language of the order was self-limiting, and the statute advanced by the plaintiff did not expand her standing by operation of law.

The lesson is that one must be careful to ensure that the order of qualification permitting the client to sue on behalf of the decedent's estate is inclusive enough to cover both a wrongful death claim under Va. Code §8.01-50 and a personal injury survival claim under Va. Code §8.01-25. In the wake of *Antisdel*, various circuit courts around the Commonwealth have grappled with the appropriate language to use in their orders of qualification, and have adopted different approaches. The Circuit Court for the City of Richmond, for example, has utilized language indicating that the administrator is appointed "for the purposes of civil litigation." The Fairfax County Circuit Court, by contrast, has used the phrase indicating that the administrator is appointed "pursuant to Va. Code §64.1-75.1 . . . for purposes of a wrongful death suit or personal injury suit." A friendly phone call to the clerk's office can go a long way in understanding that office's particular approach to the *Antisdel* problem and allaying any concerns about an overly-restrictive qualification order.

It is still necessary to determine, however, whether a personal representative already has been appointed for the general purposes of administering the affairs and distributing the assets of the estate. Remember, Code §64.1-75.1 applies when "an executor has not been appointed." In such a situation, proceeding solely in accordance with that statute, as outlined above, may be insufficient. In *Bolling v. D'Amato*, 259 Va. 299, 304 (2000), the Court cited the "*Andrews* rule," which provides that "when an administrator ha[s] been appointed and qualified, the power of the court or clerk is exhausted, and no further appointment can be made until a vacancy occurs in the office in some way recognized by law." So, where the decedent's widow qualified as the administrator of the estate and posted bond, and the decedent's brother subsequently qualified as "co-administrator of the estate . . . for the exclusive purpose of bringing legal action on behalf of the estate," the latter appointment was void and the plaintiff's malpractice action therefore was dismissed. *Id*. at 304.

If the decedent died testate, the will most likely will appoint an executor as a personal representative, and set forth the executor's powers. As it

relates to bringing a civil suit for damages, this language often will be broad in scope, permitting, for example, the executor to "settle and handle any and all claims, either in favor of or against the estate." The order of qualification, in turn, usually will indicate in general terms that the individual is appointed as executor of the estate, with no discussion of any specific actions the executor is authorized to bring. So long as the will grants to the executor sufficient powers, and the order of qualification does not include restrictive language, one can be confident that the executor appointed in the will may properly bring both a wrongful death and personal injury survival claim as personal representative of the estate under the authority of *Antisdel*.

If the named executor refuses to serve or to post bond, or the will appoints no executor at all, the Code provides that an administrator may be appointed as personal representative. See Va. Code §64.1-116. Similarly, if the decedent dies intestate, an administrator may be appointed to administer the affairs of the estate. *See* Va. Code §64.1-118. Section 64.1-118 sets forth the chronological order in which various categories of persons (e.g., distributees, nonprofit conservators/guardians, creditors, or any other individuals) become eligible to qualify as administrator. *Id*. at 64.1-118(A). Once again, in these situations one must simply be certain that the language of the order of qualification (and will, if applicable) is sufficiently inclusive to permit the administrator to bring all necessary claims as personal representative of the estate under the *Antisdel* rule.

Note that when the executor or administrator is appointed to administer the affairs of the estate generally (as opposed to an appointment to bring a wrongful death or personal injury claim pursuant to Va. Code §64.1-75.1), jurisdiction belongs to the circuit court and clerks in the city or county where the decedent resided, where the decedent owned real estate if he or she had no such residence, or where the decedent died if he or she owned no such real estate. *See* Va. Code §§64.1-75, -118.

Finally, if the executor or administrator appointed to administer the affairs of the estate declines to act as the plaintiff for purposes of bringing a wrongful death or personal injury survival action, the lesson from *Bolling* is that the appointment of that personal representative must be revoked by the court or clerk before appointing a new sole or joint personal representative to bring suit under Code §64.1-75.1. *See* 259 Va. at 303-04 ("[T]here must be an office, and that office must be vacant, in order to [have] a valid appointment of a personal representative.").

Naming the correct party

Once the attorney has an appropriately qualified personal representative of the estate, he or she still must be sure to correctly name that individual as the plaintiff in the style of the complaint. This task is generally straightforward, yet not without its perils. One must make certain that the plaintiff asserting the wrongful death or personal injury survival claim is the personal representative of the estate, and not the estate itself. It is axiomatic that Virginia does not authorize an action by or against an "estate." *See Swann v. Marks*, 252 Va. 181, 184 (1996); Va. Code §8.01-229 (B)(1), (2) (stating that an action may be filed by or against the decedent's personal representative). Accordingly, a complaint filed by or against an estate "is a nullity." *Swann*, 252 Va. at 184.

The phrasing used in the caption of the complaint, as well as throughout the pleading as a whole, is critical. In *Estate of James v. Peyton*, 277 Va. 443, 447-48 (2009), the plaintiff originally sued the tortfeasor and, upon learning of his death, filed a "Motion for Leave to Amend Motion for Judgment / Substitute Estate for Defendant," and an amended motion for judgment naming the defendant "the Estate of Robert Judson James, Administrator, Edwin F. Gentry, Esq." After the statute of limitations deadline had passed, the defendant moved for summary judgment on the grounds that the named defendant was an estate. The plaintiff argued that listing the name of the estate before the name of the personal representative was a mere "syntactical difference" and that the meaning of the phrase was the same. The Court disagreed, stating:

> While the caption of the pleading goes on to identify Gentry as the administrator of the estate and the body of the pleading recites the fact of his qualification as administrator at best these references only serve to identify James' estate more specifically. They simply do not name Gentry, rather than the estate, as the party defendant when the pleading is read as a whole. *Id*., at 455. *But see Estate of Curry v. Anderson*, 80 Va. Cir. 39, 40 (Rockingham County 2010) ("Examining the pleading as a whole and not merely based on the caption, the Court finds that [the executor] was properly named in the pleading. The first sentence of the complaint reads: 'The Executor of the Estate of Naomi F. Curry brings this action . . .'").

Furthermore, the *James* Court held that that the error represented a "misjoinder" rather than a "misnomer," and therefore was not subject to correction by amendment. 277 Va. at 456. A misnomer occurs where the right person or entity was made a party but was incorrectly named in the pleading; a misjoinder occurs where the person or entity identified by the pleading was not the person by or whom the action could, or was intended to, be brought. *Id*., at 452. Code §8.01-6 permits correction of a misnomer by amendment, and allows for relation back to the date of the original pleading in certain

circumstances. Code Section 8.01-5, by contrast, controls the misjoinder situation, and allows for the addition of nonjoined parties and removal of misjoined parties, but *not* substitution of the correct party where the original suit was a nullity as a result of the misjoinder. *See James*, 277 Va. at 456 ("[A] misjoinder is simply not subject to being legitimized by substituting the correct party.").

The outcome in the *James* decision was harsh for the plaintiff, because the statute of limitations had passed before the defendant moved for summary judgment, and without the ability to amend his pleading to correct the named defendant, the plaintiff's case was dismissed with prejudice. The General Assembly responded in 2010 by enacting Virginia Code §8.01-6.3. The goals of that statue are twofold: to clarify the appropriate phrasing to use when suing on behalf of or against a fiduciary, and to provide recourse for the plaintiff who deviates from that model. Subsection (A) states:

> In any action or suit required to be prosecuted or defended by or in the name of a fiduciary, including a personal representative . . . the style of the case in regard to the fiduciary shall be substantially in the following form: "(Name of fiduciary), (type of fiduciary relationship), (Name of the subject of the fiduciary relationship)."

Subsection (B), in turn, states: "In any pleading filed that does not conform to the requirements of subsection A but otherwise identifies the proper parties shall be amended on the motion of any party or by the court on its own motion. Such amendment relates back to the date of the original pleading." Va. Code §8.01-6.3.

The statute squarely addresses the problem at issue in the *James* decision. It seems unlikely, however, that Code §8.01-6.3(B) would provide a free pass to the attorney who names the decedent's estate as a party, but fails to reference the personal representative at all. The phrase in subsection (B) "otherwise identifies the proper parties," coupled with the stringent rule that "actions may only be filed against the decedent's personal representative," *Swann*, 252 Va. at 184, suggests that the amendment and relation-back provision will apply to a mix-up in sequence, but not an outright failure to name the fiduciary at all. *See also Idoux v. Helou*, 279 Va. 548 (2010) (holding that Virginia Code §8.01-6.2(B) did not toll the statute of limitations for purposes of amending a complaint which named "the estate of [the decedent]" as the defendant, because the estate's personal representative had been appointed prior to the expiration of the limitations period and there was no reason why that fiduciary could not receive service of the invalid complaint).

The lesson, therefore, is to keep a copy of Code §8.01-6.3 handy when drafting your wrongful death and/or personal injury survival complaint. Adhere closely to the formatting model provided in subsection (A), in order to prevent future recourse to the amendment and relation-back provision of subsection (B) or, much worse, dismissal of a null and void action.

Conclusion

Over the past few years, the Supreme Court has devoted considerable attention to the logistical prerequisites for filing suit in a death case, and as a result the cautious attorney must do the same. One should strive at the outset of a new case to analyze all potential explanations for the decedent's death, anticipate potential defense theories on the causation issue, and contrast the measure of potential damages as between the decedent's suffering and the beneficiaries' grief. As for other logistics such as qualifying the personal representative and naming that individual in the Complaint, there is no substitute for developing a working understanding of the interplay between relevant sections of Code Titles 8.01 and 64.1, discussed above, and judicial interpretation of those statutes. Because the consequences for missteps in this area have the potential to be dire, an ounce of prevention truly is worth a pound of cure.

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