

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 2256

ALVIN ANDERSON

VERSUS

NILES B. HAYMER

DATE OF JUDGMENT: SEP 19 2014

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 575,924, SECTION 26, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE KAY BATES, JUDGE

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

Disposition: REVERSED AND REMANDED.

KUHN, J.

Appellant, Tempia Anderson (Mrs. Anderson), appeals a judgment dismissing the legal malpractice action filed by Alvin Anderson, Sr., now deceased, due to the purported failure of a legal representative to timely appear and substitute herself as party plaintiff following Mr. Anderson's death. For the following reason, we reverse.

FACTS AND PROCEDURAL BACKGROUND

In 2006, Mr. Anderson hired Niles B. Haymer as his attorney to represent him in a lawsuit against the Louisiana Department of Social Services (DSS). On March 2, 2009, Mr. Anderson filed the instant legal malpractice claim, naming Mr. Haymer as defendant. He alleged that his lawsuit against DSS was dismissed, with prejudice, because defendant failed to have it timely served upon the proper parties. On February 7, 2010, Mr. Anderson died during the pendency of this lawsuit.

On April 25, 2011, Mrs. Anderson, asserting that she was the decedent's wife, filed a joint motion to enroll Lori D. Brown as counsel and to be substituted as party plaintiff in the instant matter. Attached to the motion was a certified copy of Mr. Anderson's death certificate, which reflected that Tempia Anderson was his spouse at the time of his death. Defendant opposed the substitution, arguing that Mrs. Anderson failed to provide proof that she was the succession representative of the decedent or was entitled to inherit from him. Defendant maintained that, except in the case of wrongful death survival claims, La. C.C.P. art. 801(2) requires a motion to substitute to contain proof such as an affidavit of death and heirship or a judgment of possession to establish a party's status as the decedent's legal successor. Following a hearing on August 8, 2011, the district court denied

the motion to substitute on the basis that Mrs. Anderson failed to provide proof of sufficient quantity to allow her substitution as party plaintiff.

Subsequently, defendant twice placed a legal notice in the local newspaper summoning the decedent's legal representative to come forward and substitute as party plaintiff within sixty days of the first publication; the notices were published on August 31, 2011, and September 16, 2011. Neither Mrs. Anderson nor her attorney was advised of the notices. On November 2, 2011, defendant filed an ex parte motion to dismiss the decedent's lawsuit due to the failure of a legal representative to appear in response to the notices. Mrs. Anderson opposed the motion and on February 8, 2012, filed a second motion to substitute party plaintiff in which she alleged she had been appointed and confirmed as the administrator of the decedent's estate.

Following a hearing on defendant's motion to dismiss on February 13, 2012, the district court dismissed Mr. Anderson's lawsuit, without prejudice. In its oral reasons, the court stated that dismissal was warranted because no legal representative appeared within sixty days in response to defendant's published summons. The court made no reference to Mrs. Anderson's second motion to substitute as party plaintiff.

Mrs. Anderson filed a motion for new trial. She also filed a motion for appeal and, without ruling on the motion for new trial, the court granted an appeal. This court, however, dismissed the appeal as premature and remanded for further proceedings due to the absence of a ruling on the motion for new trial. See *Anderson v. Haymer*, 12-1214 (La. App. 1st Cir. 3/22/13) (unpublished). Upon remand, the district court denied the motion for new trial, and Mrs. Anderson took the instant appeal. She argues in five assignments of error that the district court erred in improperly applying the provisions of La. C.C.P. arts. 801 – 804, in failing

to rule on her second motion to substitute, in rendering a judgment of dismissal against the decedent, in not finding the legal notices published by defendant to be deficient, and in denying her motion for new trial.

DISCUSSION

Mrs. Anderson contends that, since her identity as the decedent's surviving spouse was known, the district court misapplied La. C.C.P. arts. 801 – 804 in dismissing this lawsuit. Specifically, she argues that, as the decedent's surviving spouse, she is his legal successor entitled to substitute as party plaintiff. We agree.

According to La. C.C.P. art. 801, when a party dies during the pendency of an action that is not extinguished by his death,¹ his legal successor may have himself substituted for the deceased party. For purposes of La. C.C.P. arts. 801-804, "legal successor" means: "(1) [t]he survivors designated in [La. C.C. art.] 2315.1, if the action survives in their favor; and (2) [o]therwise, it means the succession representative of the deceased appointed by a court of this state, if the succession is under administration therein; or the heirs and legatees of the deceased, if the deceased's succession is not under administration therein." La. C.C.P. art. 801. The decedent's surviving spouse and/or children constitute the first category of survivors designated in La. C.C. art. 2315.1 as qualified to recover damages for injury to a deceased person.²

¹ The present lawsuit is an action for legal malpractice, which states a cause of action in tort under La. C.C. art. 2315. See *Taylor v. Babin*, 08-2063 (La. App. 1st Cir. 5/8/09), 13 So.3d 633, 637, writ denied, 09-1285 (La. 9/25/09), 18 So.3d 76; *Branton v. Fox*, 06-1353 (La. App. 1st Cir. 11/21/07) (unpublished). Since such tort actions are not strictly personal in nature, the instant action did not abate upon the decedent's death. See La. C.C.P. art. 428; *Nathan v. Touro Infirmary*, 512 So.2d 352, 354 (La. 1987).

² Article 2315.1 sets forth a hierarchy ranking categories of potential survivors, each of which takes precedence over subsequent categories. Thus, the existence of a member of a higher category precludes recovery by survivors in a lower category. In addition to the first category of spouses and/or children, the remaining categories delineated in Article 2315.1, in order of preference, are: the surviving father and/or mother of the deceased; the surviving brothers and sisters of the deceased, or any of them; the surviving grandfathers or grandmothers of the deceased; or the deceased's succession representative, in the absence of any survivors in the first four listed categories.

In the instant case, the record establishes that Mrs. Alexander is the decedent's widow. A certified copy of the decedent's death certificate attesting to her status as his wife was attached to the original motion to substitute filed by Mrs. Anderson. Under La. R.S. 40:42(A),³ this certificate was *prima facie* proof of the facts stated therein, including the designation of Mrs. Anderson as decedent's wife. See *Brown v. Hobson*, 30,131 (La. App. 2d Cir. 1/21/98), 706 So.2d 1030, 1034, writ denied, 98-0479 (La. 4/3/98), 717 So.2d 1132. The defendant offered no evidence to rebut the *prima facie* showing of Mrs. Anderson's status established by the death certificate. Thus, as the decedent's wife, Mrs. Anderson was the decedent's legal successor under Article 801(1). See *Short v. Plantation Management Corporation*, 99-0899 (La. App. 1st Cir. 12/27/00), 781 So.2d 46, 51-52; *Carl v. Naquin*, 93-1725 (La. App. 1st Cir. 5/20/94), 637 So.2d 736, 738. As the Supreme Court pronounced in *Nathan v. Touro Infirmary*, 512 So.2d 352, 355 (La. 1987), "[i]f there are C.C. art. 2315 beneficiaries in existence, they are the legal successors" to a tort claim instituted by a decedent prior to his death.

Defendant contends that Mrs. Anderson was not entitled to substitute as party plaintiff under Article 801(1) because that provision, as well as La. C.C. art. 2315.1, is applicable only to wrongful death or survival actions. He maintains that the present lawsuit, which is neither a wrongful death nor survival action, is governed instead by Article 801(2). Under Article 801(2), in the absence of a legal successor under Article 801(1), the decedent's legal successor is either his succession representative (if the succession is under administration) or his heirs and legatees (if the succession is not under administration). Defendant argues that, since Mrs. Anderson failed to prove she was the decedent's succession

³ This provision states, in pertinent part, "[e]xcept for delayed or altered certificates, every original certificate on file in the vital records registry is prima facie evidence of the facts therein stated." A death certificate is a certificate maintained on file in the vital records registry. See La. R.S. 40:32(18) & (19); La. R.S. 40:33(A).

representative, heir, or legatee, she failed to prove she was the decedent's legal successor.

We disagree. By its express terms, however, Article 801 is broadly applicable “[w]hen a party dies *during the pendency of an action which is not extinguished by his death...*,” which, as previously noted, includes the present action. (Emphasis added.) Nor does Article 801(1) include any language restricting its application to wrongful death or survival actions only. Rather, the provision merely provides that, *for purposes of Articles 801 – 804*, “legal successor” mean the survivors designated in La. C.C. art. 2315.1. When a law is clear and unambiguous and its application leads to no absurd consequences, the law shall be applied as written. *Benjamin v. Zeichner*, 12-1763 (La. 4/5/13), 113 So.3d 197, 202. Since we conclude that Article 801(1) is applicable herein by its clear language, we reject defendant's contentions to the contrary. Mrs. Anderson is the decedent's legal successor under Article 801(1) and should be allowed to substitute as party plaintiff. The district court erred in dismissing the decedent's lawsuit for failure of a legal successor to appear.⁴

Additionally, we find no merit in defendant's further assertion that he properly summoned decedent's legal successor to appear and substitute as party plaintiff. Article 803(C) permits summons by publication only when the decedent's legal successor is unknown. If the legal successor is known, Article 803(A) & (B) require the summons be to be personally served (if he resides in state) or served by registered or certified mail (if he is a nonresident). Thus, defendant's argument that his published summons were proper is contingent on the identity of the decedent's legal successor being unknown.

⁴ In view of this conclusion, we pretermit consideration of Mrs. Anderson's remaining assignments of error.

Having already found that the record establishes Mrs. Anderson status as legal successor, we obviously disagree with defendant's contention that the identity of the decedent's legal successor was unknown in this case. Accordingly, the district court erred in dismissing the decedent's lawsuit under Article 804⁵ on the basis that no legal successor appeared and substituted "within the delay allowed in the summons." Since Mrs. Anderson was never summoned to appear as required by Articles 803(A), the time delays for her appearance never commenced against her. See *Sarratt v. Cappaert Enterprises*, 442 So.2d 783, 787 (La. App. 5th Cir. 1983), writ denied, 446 So.2d 1225 (La. 1984).

Finally, even if Mrs. Anderson had been properly summoned, the dismissal of this lawsuit still would constitute an abuse of the district court's discretion under the circumstances. Even disregarding the unrefuted evidence provided by the death certificate, both the district court and defendant were well aware of Mrs. Anderson's claim to be the decedent's surviving spouse. Nevertheless, defendant declined to advise her of the publication of the summons. Moreover, the district court dismissed the lawsuit on the basis that no legal successor had appeared, even though Mrs. Anderson had filed a second motion to substitute shortly before the hearing on the motion to dismiss. Given the circumstances, dismissal of the decedent's lawsuit was an unduly harsh result contrary to the interests of justice.

⁵ Article 804 provides, in pertinent part, as follows:

When the legal successor fails to appear and substitute himself for the deceased party within the delay allowed in the summons, on ex parte written motion of any other party, the court may:

(1) Dismiss the action as to the deceased party, with or without prejudice, if the deceased was a plaintiff; ...

CONCLUSION

For the reasons assigned, we reverse the judgment of dismissal, which dismissed the lawsuit filed by Mr. Alvin Anderson, and remand this matter to the district court for further proceedings consistent with this opinion. All costs of this appeal are to be paid by defendant, Niles Haymer.

REVERSED AND REMANDED.