An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-1554

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

SALENA SPEIGHTS,

Plaintiff,

v. Durham County
No. 09 CVS 2016

RANDOLPH FORBES,

Defendant.

Appeal by plaintiff from order entered 18 May 2009 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 13 May 2010.

Ted A. Greve & Associates, by Justin L. Lowenberger, for plaintiff.

Haywood, Denny & Miller, L.L.P., by George W. Miller, III, for defendant.

ELMORE, Judge.

On 24 February 2006, Salena Speights (plaintiff) and Randolph Forbes (defendant) were involved in a two-car automobile accident. On 28 November 2007, defendant died of causes unrelated to the accident. On 12 February 2009, plaintiff brought suit against defendant for negligence to recover medical costs she had incurred as a result of the accident. On 20 February 2009, the complaint was served on Mary Irma Forbes, defendant's widow. On 31 March 2009, defendant's counsel filed a motion to dismiss, stating that

defendant, being now deceased, was not a proper party. On 24 April 2009, plaintiff filed a motion to amend her complaint and substitute Ms. Forbes, as executor of defendant's estate, for defendant. On 18 May 2009, the superior court granted defendant's motion to dismiss and denied plaintiff's motion to amend. Plaintiff appeals that order.

Plaintiff first argues that, per Rule 15 of the North Carolina Rules of Civil Procedure, she was entitled to amend her complaint because defendant had not filed a responsive pleading before she filed her motion to amend. *See* N.C. Gen. Stat. § 1A-1, Rule 15(a) (2009) ("A party may amend his pleading once as a matter of course at any time before a responsive pleading is served[.]"). Plaintiff filed her complaint on 12 February 2009 and served it on defendant on 20 February 2009. On 31 March 2009, defendant filed his motion to dismiss, but never filed a responsive pleading. While plaintiff is correct that defendant had filed no responsive pleading at the time she filed her motion, defendant's motion to dismiss was properly allowed and plaintiff's motion to amend was properly denied.

One basis that this Court has expressly stated justifies the denial of a motion to amend is the futility of the amendment. *Chicopee, Inc. v. Sims Metal Works,* 98 N.C. App. 423, 430, 391 S.E.2d 211, 216 (1990). Plaintiff's motion to amend would have, if granted, substituted one inappropriate defendant for another, and done so after the statute of limitations had expired.

The amendment plaintiff sought to make was the substitution of one non-existent party for another: her amendment would have replaced Randolph Forbes, deceased, with Mary Irma Forbes, executor of his estate that had closed nine months earlier. Neither a deceased person nor a closed estate is an appropriate defendant in a negligence lawsuit. *See In re Estate of English*, 83 N.C. App. 359, 365, 350 S.E.2d 379, 383 (1986) ("[A]n estate may not ordinarily be reopened for litigation of claims not brought within the six-month period, even in the absence of a bar by some other statute of limitations.").

"The statute of limitations for personal injury due to negligence is three years." *Latham v. Cherry*, 111 N.C. App. 871, 873, 433 S.E.2d 478, 480 (1993) (citing N.C. Gen. Stat. § 1-52(16)). Plaintiff thus had until 24 February 2009 to commence her action against defendant. Her original complaint, naming Randolph Forbes as defendant, was filed on 12 February 2009, but her motion to amend was not filed until 28 April 2009. Per Rule 15(c) of the North Carolina Rules of Civil Procedure,

> [a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2009). Under this Rule, "whether an amendment will relate back does not depend upon whether it states a new cause of action but upon whether the original pleading gave defendants sufficient notice of the proposed new

claim." *Mauney v. Morris*, 316 N.C. 67, 71, 640 S.E.2d 397, 400 (1986) (citations omitted). Our Supreme Court, when considering how such amendments related to the addition or alteration of parties, stated:

> Nowhere in the rule is there a mention of parties. It speaks of claims and allows the relation back of claims if the original claim gives notice of the transactions or occurrences to be proved pursuant to the amended pleading. *When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur.* As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. We hold that this rule does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party.

Crossman v. Moore, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995) (emphasis supplied).

Plaintiff argues that her proposed amendment was the correction of a misnomer rather than a substitution or addition of a party. This Court has expressly excepted the correction of misnomers from the general rule of *Crossman* disallowing amendments that involve alteration of parties to relate back to the original date of filing. *See Pierce v. Johnson*, 154 N.C. App. 34, 37, 571 S.E.2d 661, 663 (2002). Plaintiff points this Court to *Pierce*, wherein this Court reversed the dismissal of an action on similar facts: the defendant's death occurred between the time of the accident and the filing of the complaint; a complaint was filed within the statute of limitations period with decedent as the named

defendant; and service was made on the executor of the estate. *Id.* at 35, 571 S.E.2d at 662. However, in *Pierce*, at the time of service, the estate was still open and being administered by the executor, and thus the executor still maintained the role of representative of the deceased's estate. This Court emphasized the "notice of claims" purpose of Rule 15, citing back to this portion of *Crossman*:

> When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed.

Crossman, 341 N.C. at 187, 459 S.E.2d at 717.

In the case at hand, Ms. Forbes no longer held any legal role related to defendant's estate when she was served with the complaint. Because of this distinction, more on point here is *Reece v. Smith*, which applied the rule from *Pierce*. 188 N.C. App. 605, 655 S.E.2d 911 (2008). There, the same sequence of events occurred except that the amended complaint was not filed nor was service on the executor of the estate properly made until after the statute of limitations had run. *Id.* at 606, 655 S.E.2d at 912. In both *Reece* and the case at hand, then, no defendant was properly named and served within the statute of limitations.

As such, granting plaintiff's motion to amend would have been futile, as even plaintiff's proposed amendments would not have

cured the defects in the complaint; thus the trial court did not err in denying it nor in granting the motion to dismiss.

Plaintiff's final argument is on the grounds of equitable estoppel, relying again primarily on *Pierce*. There, this Court defined the term thus:

> The doctrine of equitable estoppel may be invoked to bar a defendant from relying upon the statute of limitations. Equitable estoppel arises when an individual by his acts, representations, admissions or silence, or when he had a duty to speak, intentionally or through culpable negligence, induces another to believe that certain facts exist and that the other person rightfully relies on those facts to his detriment. When estoppel is based upon an affirmative representation and an inconsistent position subsequently taken, it is not necessary that the party to be estopped have any intent to mislead or deceive the party claiming the estoppel, or that the party to be estopped even be aware of the falsity of the representation when it was made.

Pierce at 43-44, 571 S.E.2d at 667 (internal citations omitted). In *Pierce*, the attorneys for the deceased defendant proceeded with various pre-trial matters – pleadings, discovery, and motions – until the statute of limitations expired, at which point they revealed that defendant was deceased, then moved to dismiss the case based on the expiration of the statute of limitations. *Id.* at 36-37, 571 S.E.2d at 663.

In the case at hand, the failure to speak to which plaintiff points was that of the adjuster, Keith Lee, at the insurance company assigned to her claim against defendant. As she states, Mr. Lee was not informed that defendant was deceased until 13 February 2009, when he was notified of the fact by a field

representative also employed by the insurance company. On 20 February 2009, Mr. Lee received a copy of the complaint in this case from plaintiff's attorney and noted that the named defendant was Randolph Forbes. Per his affidavit, Mr. Lee then called plaintiff's attorney and left a message for the attorney to return his call. When he did not hear back by 23 February 2009, Mr. Lee again called plaintiff's attorney and at that time was able to speak to an associate in the office; Mr. Lee informed him that defendant was deceased. We cannot agree with plaintiff's argument that the delay from 13 February, when Mr. Lee learned of defendant's death, to 23 February, when Mr. Lee informed her attorney of the fact, constitutes the type of culpable negligence this Court found sufficient to reverse the dismissal of the suit in *Pierce*. It appears, at most, to be a delay in communication, and not one whose fault may be fairly assigned to Mr. Lee. This assignment of error is overruled.

Affirmed.

Judges BRYANT and ERVIN concur.

Report per Rule 30(e).