

APPELLATE COURT CASE NUMBER A061796

STATE OF MINNESOTA
IN COURT OF APPEALS

Mark A. Christiansen, individually and
As Trustee for the Heirs of Ken J. Christiansen,
Decedent; Lisa Harma and Sherry Christiansen,

Respondent,

v.

University of Minnesota Board of
Regents, Jeramy M. Katchuba, Kevin J.
McGuigan, Wesley W. Omer and
Brian G. Warden,

Appellants.

BRIEF AND APPENDIX OF APPELLANT OMER

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STATEMENT OF ISSUES

- I. ON APRIL 13, 2001, KEN CHRISTENSEN DIED. ON APRIL 9, 2005, WESLEY OMER WAS SERVED WITH A COMPLAINT ALLEGING A VIOLATION OF MINN. STAT. § 340A.90. IS THIS CLAIM BARRED BY MINN. STAT. § 573.02'S THREE-YEAR LIMITATION OR DOES MINN. STAT. § 541.05'S SIX-YEAR LIMITATION APPLY?¹

DISTRICT COURT APPLIED THE SIX-YEAR LIMITATION PERIOD.

AUTHORITY: Minn. Stat. §§ 541.05 and 573.02; *Ford v. Emerson Electric Co.*, 430 N.W.2d 198 (Minn. Ct. App. 1988); *Patton v. Honeywell, Inc.*, 472 N.W.2d 157 (Minn. Ct. App. 1991); *Wollan v. Jahnz*, 656 N.W.2d 416 (Minn. Ct. App. 2003)

¹ Although the notice and motion contained a typographical error indicating § 513.02, all parties understand and recognize that the issue involves Minn. Stat. § 573.02.

STATEMENT OF THE CASE

Mark A. Christensen, Lisa Harma, and Sherry Christensen, father and sisters of Ken J. Christensen, filed suit, individually and as trustee for the heirs, against Wesley Omer and others. The trial court dismissed the Christensens' claims against the University of Minnesota for reasons unrelated to this appeal. Jeremy Katchuba, Kevin McGuigan and Brian Warden were denied summary judgment but did not appeal the decision.

Individual family members asserted a claim against Omer under Minn. Stat. § 340A.90 as a result of Ken Christensen's death which occurred on April 13, 2001. The complaint was served upon Mr. Omer on April 9, 2005. Omer sought dismissal of the claim because it was asserted beyond the 3-year limitation period set forth in Minn. Stat. §573.02.

The Honorable Mark A. Munger denied Omer's summary judgment on March 22, 2006, concluding the six-year statute of limitation applied to claims under § 340A.90.² The matter was certified as important and doubtful on August 29, 2006.³ This appeal followed.⁴

² A1-26.

³ A27-31.

⁴ A31-32.

STATEMENT OF FACTS⁵

On April 13, 2001, Ken Christensen attended a party at a residence over which Wesley Omer had control.⁶ At this time, Ken Christensen was under age 21.⁷ After consuming alcohol, Ken Christensen became intoxicated and subsequently died after falling into a creek as he attempted to walk home.⁸ As a result of Ken Christensen's death, individual claims for property loss, means of support and other pecuniary damage were asserted.⁹ Omer was served with the complaint on April 9, 2005.¹⁰

⁵ For the purposes of summary judgment and this appeal only, Omer accepts the following facts as true. Omer denies any factual basis to support an action under § 340A.90, but this appeal discusses only the applicable statute of limitation.

⁶ Plaintiffs' Complaint, para. 3, A33.

⁷ *Id.* at para. 6, A34.

⁸ *Id.* at para. 8, A34.

⁹ *Id.* at para 9, A34.

¹⁰ A36.

STANDARD OF REVIEW

A reviewing court is not bound by and need not give deference to a trial court's decision on a legal issue.¹¹ The interpretation of a statute is a question of law and is fully reviewable by an appellate court.¹²

In this case, Omer questions the trial court's interpretation of Minn. Stat. § 340A.90. The question of whether this statute is subject to the limitations within Minn. Stat. §§ 573.02 or 541.05 is a question of law.¹³ Accordingly, this court is not bound by the trial court's decision and may review Omer's issue using a de novo standard of review.¹⁴

¹¹ *Frost – Benco Elec Assoc. v. Minn. Public Utilities Comm.*, 358 N.W.2d 639, 642 (Minn. 1984).

¹² *Hibbing Education Assoc. v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985).

¹³ *Id.*; see also *Benigni v County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

¹⁴ *Id.*

ARGUMENT

Wrongful death actions, including those under Minn. Stat. § 340A.90, must be brought within three years of the date of death.

Claims for wrongful death are governed by a three-year limitation.¹⁵ Negligence actions are subject to six-year limitation periods.¹⁶ The Christensens, however, have asserted an action against Omer under § 340A.90, which has no specified limitation. The relevant portion of the statute provides:

Civil Action; intoxication of person under age 21

Subd. 1. Right of action. (a) a spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss, by an intoxicated person under 21 years of age or who incurs other pecuniary loss, by an intoxicated person under 21 years of age or by the intoxication of another person under 21 years of age, has for all damages sustained a right of action in the person's own name against a person who is 21 years or older who:

- (1) had control over the premises and, being in a reasonable position to prevent the consumption of alcoholic beverages by that person, knowingly or recklessly permitted that consumption and the consumption caused the intoxication of that person; or
- (2) sold, bartered, furnished or gave to, or purchased for a person under the age of 21 years alcoholic beverages that caused the intoxication of that person.

This statute, created in 2000, mirrors the language within Minn. Stat. § 340A.801 which imposes liability for damage on those persons who caused intoxication by illegally selling alcoholic beverages.¹⁷ There is no decision discussing the application of a limitation period to § 340A.90.

Without specific statutory authority, the general catchall provisions within § 573.02 must apply to actions based upon wrongful death.¹⁸ In *Patton*, suit was brought against a

¹⁵ Minn. Stat. § 573.02.

¹⁶ Minn. Stat. § 541.05.

¹⁷ Minn. Stat. § 340A.801, subd. 1.

¹⁸ *Patton v. Honeywell, Inc.*, 472 N.W.2d 157, 161 (Minn. Ct. App. 1991).

smoke detector manufacturer after a fire caused several deaths. The court was asked to determine if § 541.051 (two-year of limitation) or § 573.02 (three-year limitation) applied. The case was dismissed when the court applied the shorter statutory term because it was more specific as it applied to improvements to real property.

Similarly, this court applied a shorter limitation when facing issues involving wrongful death and defective improvements to real property.¹⁹ In *Ford*, plaintiff asserted a wrongful death action against Emerson Electric for damages following the death of her husband and two children. Plaintiff alleged a fire, which originated in a water heater manufactured by Emerson, was the cause of her family's death. The action against the manufacturer was dismissed because the complaint was served beyond the two-year statute of limitation for actions arising from defects in improvements to real property.²⁰

In determining what statute to apply, this court stated:

When an irreconcilable conflict exists between two statutory provisions, the more particular provision controls over the general provision.²¹

This court also described when the wrongful death statute will apply:

The wrongful death statute of limitations provision is intended to be a catchall provision for wrongful death actions not specifically mentioned elsewhere in Section 573.02, and it is therefore by its nature general.

Since the two-year statute of limitation arising from defects to improvements was more specific, the three-year statute for wrongful death actions was not applied.²²

These decisions were based upon the language of § 541.051 which specifically references wrongful death.²³ The language within § 541.05 contains no reference to

¹⁹ *Ford v. Emerson Electric*, 430 N.W.2d 198, 201 (Minn. Ct. App. 1988).

²⁰ *Id.*

²¹ *Id.* at 200 (citations omitted)

²² *Id.* at 201.

²³ Minn. Stat. § 541.051 subd. 1(a).

wrongful death. Since the limitation imposed by § 541.051 was more particular, the wrongful death statute did not apply.²⁴

In contrast, the trial court chose to apply the limitations provisions within § 541.05, despite no language indicating a relationship to the damages claimed in § 340A.90. This conclusion, however, wrongfully analyzed the nature of the damages claimed by the Christensens. The trial court presumed damages for personal injury when the claim is actually limited to pecuniary loss stemming from the death of Ken Christensen. Since this specific action does not involve personal injury, the court should have looked to the most applicable statutory limitation, the wrongful death statute.

Contrary to the trial court's conclusions, the six-year statute of limitation was only applied to personal injury actions within the context of § 340A.801, subd. 6.²⁵ In *Wollan*, plaintiffs filed suit against defendants under Minn. Stat. § 340A.801, subd. 6 for injuries sustained after an individual was served alcohol in violation of Minnesota law.²⁶ The claims, however, did not involve an action predicated upon the death of any person.²⁷ The court applied the six-year statute of limitation relying upon prior application of social host liability under the principles of negligence.²⁸

The *Wollan* holding, however, supports the application of a three-year statute of limitation. § 340A.801, subd. 6 was enacted in response to a Minnesota Supreme Court decision precluding common-law actions for negligently serving alcohol to minors.²⁹ "The statute did not overtly create a statutory cause of action, but merely permitted common-law

²⁴ *Ford v. Emerson Electric Co.*, 430 N.W.2d 198 (Minn. Ct. App. 1988).

²⁵ *Wollan v. Jahnz*, 656 N.W.2d 416, 420 (Minn. Ct. App. 2003).

²⁶ *Id.* at 417.

²⁷ *Id.*

²⁸ *Id.* at 419

²⁹ *Id.*

tort claims.”³⁰ Since social host liability has been consistently analyzed using principles of negligence,³¹ the court correctly chose to apply the six-year statute of limitations to actions asserted under § 340A.801, subd. 6.

The Christensen matter is different. First, the claim is asserted under § 340A.90. Second, the action is available only as a result of Ken Christensen’s death. Finally, the damages asserted are entirely economic. The *Wollan* opinion would have been decided differently if that plaintiff had died as a result of injury.³²

Considering the Christensen claims are solely financial, they are not within the required class to expand statutory limitation periods.³³ In *Tiedeken*, plaintiff was involved in an automobile accident on August 23, 1977. She died on October 5, 1977 for injuries attributable to that accident. An action was commenced on August 16, 1983. The case was dismissed as untimely because it was asserted beyond the three-year statute of limitation.³⁴ In so doing, the court stated:

A wrongful death action is solely a creature of statute. Since it would not exist but for the statute, it can be commenced only as the statute provides.

* * *

There is a rational purpose for the shorter period of limitations on wrongful death. People who have themselves suffered personal injury, whether bodily or emotionally, may go through a lengthy period of time before the extent of their injuries is calculable. The claimant in a wrongful death action are the survivors set out by statute and their loss is arguably calculable shortly after death.³⁵

³⁰ *Id.* at 418.

³¹ *Id.* at 419 (citations omitted).

³² *Haugland v. Mapleview Lounge & Bottle Shop, Inc.*, 666 N.W.2d 689, 693 (Minn. 2003) (construing § 340A.801, subd. 1; § 340A.802 and § 573.02); see also *Whitener v. Dahl*, 625 N.W.2d 827, 830 (Minn. 2001) (concluding a claim was barred as untimely under the wrongful death act despite requests to apply the minor tolling provision).

³³ *Tiedeken v. Tiedeken*, 363 N.W.2d 909, 911 (Minn. Ct. App. 1985).

³⁴ *Id.* at 910.

³⁵ *Id.*

This court acknowledged the need to compensate dependents who suffer economic harm as a result of wrongful death.³⁶ The court, however, distinguished between classes of people who actually suffered personal injury with those who have not.³⁷

Similarly, § 340A.90 allows compensation for financial losses.³⁸ More importantly, the Christensen complaint only requests compensation for financial losses as a result of Ken Christensen's death. Thus, they are not entitled to an expanded statutory limitation period.

If this court applies the six-year limitation period, § 573.02 will have no relevance.³⁹ Claims well beyond statutory deadlines will go forward by simply recharacterizing the nature of the allegation. In this case, plaintiffs' losses are caused solely by the death of Ken Christensen. Losses stemming from a death are governed by § 573.02. Plaintiffs' failure to file the claim within three years bars this present action except as is allowed under § 573.02.⁴⁰

The trial court also wrongfully relied on *Miklas* as it has no relevance to this case. The Minnesota Supreme Court stated its decision was "driven by the remedial purpose of the Minnesota no-fault insurance statutes and that fact that the legislature did not clearly state that for uninsured motorist coverage, an insured is legally entitled to recover on a wrongful death claim only if the three-year wrongful death statute could be satisfied."⁴¹ Instead, the phrase "legally entitled to recover damages" was broadly interpreted to allow the application of the six-year contract statute of limitation.⁴²

³⁶ *Id.* at 911.

³⁷ *Id.*

³⁸ Minn. Stat. § 340A.90, subd. 1.

³⁹ Minn. Stat. § 645.17.

⁴⁰ See Minn. Stat. § 573.01 (stating that a cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in § 573.02).

⁴¹ *Miklas v. Parrott*, 684 N.W.2d 458, 462 (Minn. 2004)

⁴² *Id.* at 461.

In this case, the Civil Damage Act is a creature of statute and has no common law counterpart, therefore, the Act must be strictly construed.⁴³ Considering these statutes have differing purposes, *Miklas* has no bearing on the outcome of this dispute. This court must narrowly interpret the statutorily created cause of action. Thus, the three-year limitation period should be applied.

Similarly, the court mistakenly relied upon *Kaiser* in which the court held that a claim against a blood bank was subject to the general-negligence statute of limitation instead of the shorter period applied to health care professionals.⁴⁴ Because blood banks were not expressly listed as a class of defendants under the medical-malpractice statute and the alleged negligence involved administrative or standardizing functions for which a professional license was not required the longer statutory limitation was applied.⁴⁵ The court drew an analytical distinction between “malpractice by professionals acting pursuant to their professional licensure from negligence based upon conduct for which a professional license is not required.”⁴⁶ Since the cause of action stated a garden-variety negligence claim, the six-year limitation was applied.⁴⁷

In this matter, the distinction does not involve differing claims of negligence. Instead, the claim centers upon the death of an involved party without disparate facts to consider. The trial court chose to ignore the basis of the loss and the nature of the damage claim asserted against Omer. There is no need to analyze statutory conflicts as discussed in *Kaiser* because § 541.05 is not related to the specific Christensen facts. The death of Ken

⁴³ *Whitener v. Dahl*, 625 N.W.2d 827, 833 (Minn. 2001).

⁴⁴ See *Kaiser v. Memorial Blood Center*, 486 N.W.2d 762, 767 (Minn. 1992).

⁴⁵ *Id.* at 766, 768.

⁴⁶ *Id.* at 767.

⁴⁷ *Id.* at 768.

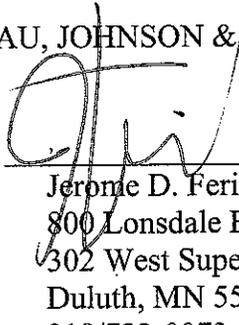
Christensen extinguishes any right to proceed under § 541.05.⁴⁸ This conscious choice to limit the claims against Omer to financial losses distinguishes their claims from those of personal injury. Given the differences, and the fact that the Christensen claim is based entirely upon Ken Christensen's death, the appropriate statutory provision to analyze the limitation period is § 573.02.

CONCLUSION

The damages claimed in this lawsuit are economic. As a result, the Christensens fall into a class of plaintiffs where expanded statutory limitation periods have not been recognized. Considering the statutory claim asserted against Omer has no stated limitation period, the catchall provision within § 573.02 must prevail. Because the allegations relate solely to the death of Ken Christensen, the three-year limitation period of §573.02 specifically addresses the claim while the six-year limitation provision of § 541.05 does not. Accordingly, this case must be dismissed in its entirety.

Dated: 10.13.06

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⁴⁸Minn. Stat. § 573.01

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).