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Re: Palmer

Dear Robert:

As you requested, we have researched Arizona law to determine whether a judgment in a personal injury action forecloses a later wrongful death action should the plaintiff later die from the injuries on which the personal injury action is based. Unfortunately, while Arizona law does not offer a clear answer to the question, it appears to lean in favor of barring the wrongful death action.

Across the country, courts are divided on whether a wrongful death claim is precluded by a judgment in an earlier personal injury action arising from the same occurrence. *Vitauts M. Gulbis, Annotation, Judgment in Favor or, or Adverse to, Person Injured as Barring Action for his Death*, 16 A.L.R. 4th 1264 (2014). Some states recognize that wrongful death beneficiaries who are not in privity with the decedent have a separate, independent wrongful death claim from that possessed by the decedent before his death, which is not affected by the earlier personal injury judgment. *See, e.g., Secrest v. Pacific Elec. Rwy. Co.*, 141 P.2d 747 (Cal. Ct. App. 1943). Other states bar a subsequent wrongful death claim, reasoning that wrongful death beneficiaries may proceed with the claim only if the decedent could have proceeded with the claim had he not died. *See, e.g., Varelis v. Northwestern Mem. Hosp.*, 657 N.E.2d 997 (Ill. 1994); *Simmons First Nat. Bank v. Abbott*, 705 S.W.2d 3 (Ark. 1986).

Interestingly, Arizona courts have taken both positions in determining whether to dismiss a wrongful death claim, although no Arizona case has been located in which the wrongful death claim followed an earlier judgment in a personal injury action by the decedent. On the one hand, Arizona courts have concluded that a wrongful death action is “not wholly derivative of a decedent’s rights” and the wrongful death statutes “confer[] an original and distinct claim for the damages sustained by named statutory beneficiaries.” *Estate of DeCamacho v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 613 (Ariz. Ct. App. 2014) (quoting *Huebner v. Deuchle*, 109 Ariz. 549, 549-50, 514 P.2d 470, 470-71 (1973)). Naturally, this line of reasoning suggests that, as an original and distinct claim for damages suffered by the wrongful death beneficiaries, the wrongful death claim does not accrue until the decedent’s death, is for different damages than those claimed in a personal injury action, and is therefore not barred because of the earlier judgment. *See James v. Phoenix Gen. Hosp., Inc.*, 744 P.2d 695, 702 (Ariz. 1987) (a wrongful death action accrues on the date of death).

On the other hand, although acknowledging that a wrongful death claim is independent of the personal injury claim, Arizona courts have consistently insisted that, in order to bring a wrongful death claim, the decedent’s survivors must nonetheless “still come within the terms of the wrongful death statute.”

Diaz v. Magma Copper Co., 950 P.2d 1165, 1170 (Ariz. Ct. App. 1997); see also Schoenrock v. Cigna Hlth. Plan of Ariz., Inc., 715 P.2d 1236 (Ariz. Ct. App. 1985). Under Ariz. Rev. Stat. § 12-611, a wrongful death claim may only be brought when the decedent, “if death had not ensued,” would have been entitled to bring the action “to recover damages in respect thereof.” Courts have relied upon this line of reasoning to dismiss wrongful death claims where the decedent and/or decedent’s survivors have previously received workers’ compensation benefits precluding any civil action, Diaz, 950 P.2d 1165, and where the decedent had earlier entered into a settlement agreement releasing the defendant in a personal injury action, Hutton v. Davis, 547 P.2d 486 (Ariz. Ct. App. 1976).

Schoenrock v. Cigna Hlth. Plan of Ariz., Inc., 715 P.2d 1236 (Ariz. Ct. App. 1985), is the most analogous case in this regard. There, Carl Schoenrock brought a medical malpractice action for failure to timely diagnose his lung cancer. In his complaint, Carl alleged that the failure jeopardized and shortened his life and sought past and future damages. Approximately a year later, Carl settled his case and executed an agreement releasing the defendant from any further liability. After Carl died, his widow brought a wrongful death claim against the settling defendants. Relying upon the language of § 12-611, the court dismissed the claim because the release would have prevented Carl from bringing the claim “if death had not ensued.” On appeal, the Arizona Court of Appeals recognized the “minority approach” followed by other states that would allow the widow to bring her own independent claim for post-death damages, although the decedent had released all claims personal to him. Ultimately dismissing that approach, the court claimed that the prospect of double recovery and the chilling effect the rule would have on settlements necessitated dismissal of the widow’s claim.

Based on the language used in the above cases, it is highly likely that any judgment in the personal injury action would bar a later wrongful death claim because, once judgment is entered, the plaintiff would not be able to bring a later claim “if death had not ensued.” However, the logical flaw in applying the statutory language to a wrongful death action following an earlier judgment is that “if death had not ensued,” there would be no wrongful death claim for the decedent to bring. Additionally, because a wrongful death claim is ordinarily “brought by and in the name of the surviving husband or wife, child, parent or guardian, or personal representative of the deceased person for and on behalf of the surviving husband or wife, children or parents,” to compensate them for “their damages,” rather than those of the decedent or estate, neither res judicata nor collateral estoppel should apply. See Ariz. Rev. Stat. § 12-612. “Generally, the doctrine of res judicata is available in the second action as between the parties in the first action. The doctrine of collateral estoppel is usually raised in the second action by a party not involved in the first action and is raised against a party who was part of the first action.” Di Orio v. City of Scottsdale, 408 P.2d 849, 852 (Ariz. Ct. App. 1965).

Under the doctrine of res judicata an existing final judgment rendered upon the merits without fraud or collusion by a court of competent jurisdiction is conclusive as to every point decided and as to every point which could have been raised by the record, and decided with respect to the parties thereto. The doctrine of res judicata binds the same parties standing in the same capacity in the subsequent litigation on the same cause of action, not only upon the facts actually litigated, but also upon those points which might have been (even though not expressly) litigated. Generally, there must be mutuality, not only of the parties, but of the issues to invoke the doctrine of res judicata.

Id. Because, by statute, the wrongful death claim is brought by the decedent's statutory beneficiaries, in their names and capacities, while the personal injury action is brought by the decedent personally, there is no unity of parties between the two actions such that res judicata applies.¹

This statutory distinction between the real parties in interest serves as a potential distinction between those cases in which the decedent would have no action against a defendant because of an earlier settlement release or because of workers' compensation immunity. While those situations arguably establish privity between the decedent and his beneficiaries, § 12-612 specifically negates any such privity in a wrongful death action.

Ultimately, the balance of authority in Arizona suggests that upon a final judgment in a personal injury action, a subsequent wrongful death claim is likely precluded because, had the decedent survived, the claim would be barred by the doctrine of res judicata. No specific Arizona authority was located, however, that clearly resolves the logical conundrum created by the literal application of the court's decisions. In any event, a motion to dismiss in the wrongful death action should be expected.

Yours truly,
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Lee D. Trevis
Managing Director, Litigation Solutions

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¹ It should be noted that, because of the "if death had not ensued" language of § 12-611, unity of parties would exist in the wrongful death claim between the underlying plaintiff and the defendant. Of course, as noted above, without death, the claim itself would not exist.