Case Study

Negligence Claim Dismissed When Defendant Misidentified in Complaint
By Robert Smith

Claims Pointer: A plaintiff has not adequately notified the defendant of a lawsuit when she misidentifies the defendant as a deceased person and after the statute of limitations has passed, amends the complaint to name the personal representative of the decedent’s estate as defendant.

Often times, promptly identifying and correcting mistakes prevent molehills from becoming mountains. When the plaintiff in Worthington v. Estate of Davis failed to timely identify and correct the mistakenly stated defendant in her complaint before the statute of limitations had expired on her negligence claim, the Court of Appeals of Oregon dismissed the case. Although the plaintiff may have had a successful negligence claim against the proper defendant, her failure to promptly name the deceased’s estate and its personal representative as the defendant, rather than the decedent himself, resulted in the lawsuit’s dismissal.

Peggy Worthington was involved in a car accident with Milton Davis, a driver of another vehicle, on December 10, 2007. Worthington claimed the accident was caused by Davis’ negligence and filed a complaint naming Davis as the defendant on December 9, 2009. Unknown to Worthington and her attorney at the time, Davis had died in September of 2008. It was not until two days after the complaint was filed that Worthington’s attorney learned of Davis’ death. Davis’ widow, Yvonne Davis, was served the complaint and summons three weeks later. On January 27, 2010, Thomas A. Huntsberger was appointed as the personal representative of Davis’ estate (the Estate). The next day but after the two-year statute of limitations on a negligence claim had passed, Worthington amended her complaint to name Davis’ estate and Thomas A. Huntsberger as defendants.

In trial court, the Estate argued both complaints should be dismissed because the statute of limitations on the negligence claim had ended prior to the filing of the amended complaint, and the name change in the amended complaint did not relate back to the original. The Estate also claimed the Court did not have jurisdiction over a deceased person and serving his widow was insufficient. The trial court agreed with the Estate and dismissed the complaints.

On appeal, Worthington argued the name change did not change the party against whom she filed suit. She claimed this was a “misnomer” case where she had chosen the correct defendant, but simply misnamed it. Thus, the amended complaint related back to the original complaint and should not have been dismissed. The Estate argued the name change was made because Worthington had chosen the wrong defendant. The Estate characterized the case as one of “misidentification” and claimed the amended complaint changed who was being sued.

The Court of Appeals agreed with the Estate that Worthington had misidentified the defendant and not simply misnamed it. Worthington sued a person who had died, rather than the personal representative of the decedent’s estate. The personal representative of a deceased person’s estate is not the decedent by a different name because it cannot assume the legal identity of a decedent until his death. Since Worthington did not file the amended complaint stating the proper defendant until after the two-year statute of limitations had expired, the personal representative did not have proper notice of the litigation, and the amended complaint did not relate back to the date of the original complaint’s filing. Thus, the Estate’s motion to dismiss the complaint was properly granted.

— Full case available at: www.publications.ojd.state.or.us/Publications/A147059.pdf

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ment for a torn meniscus is to either repair it or remove the torn part. Ideally, we repair the meniscus and restore its normal anatomy. Meniscus repairs are done only when the tear is very close to the edge of the meniscus, close to the knee ligaments where there is a good blood supply. Without a good blood supply, tissues do not heal. The failure rate for meniscus repairs may be as high as 50%!

Meniscus surgery has evolved dramatically in recent years.

Knee meniscectomy is an elective, not an emergency surgery. Elective surgery requires a willing patient. Until the introduction of ether anesthesia by William Morton (1844), severe pain during surgery was normal and the patient was strapped to a table for surgery. No surgery was elective, only emergency! There were no “willing patients.” Before Louis Pasteur developed his “germ theory” (1859), there was no understanding of the need for cleanliness. Infections occurred 95% of the time and death was certain. Joseph Lister introduced sterile surgical conditions (1867) by operating with carbolic acid to sterilize instruments, hands and skin. Heat sterilization was introduced later by Louis Pasteur in 1874.

The First Meniscectomy, Meniscus Repair and Arthroscopy

The first reported meniscectomy was by Bernard E. Brodhrust (1867) and the first meniscus repair by Thomas Annandale (1885). Following that time meniscectomy became a very common operation. A world wide debate developed between two orthopedic giants, Melvin Starkey Henderson (Mayo Clinic) and Sir Robert-Jones (Stanley Hospital) over removal of the entire meniscus or only a small part, a partial meniscectomy. This debate continued until the 1970s. Few new surgical techniques appeared. Different types of incisions were commonly discussed.

Knee arthroscopy was introduced by Severin Nordentoft (1912) but arthroscopes were large in that era, adapted from the urologists. Kenji Takagi (1918) introduced a series of arthroscopes designed for the knee, but fragile light bulbs placed inside the knee often broke. Michael S. Burman and Harry Finkelstein (1931) were the first surgeons to re-
move tissue with an arthroscope. New developments were thwarted by efforts around World War II. It was not until 1955 that Masaki Watanabe developed modern arthroscopes using light transmitting fibers (fiber optics) thus eliminating broken light bulbs. Dr. Watanabe is the true father of modern arthroscopy.

In 1948, T. J. Fairbank demonstrated x-ray changes that occur after removal of a meniscus. In 1969, Edward Tapper and Norman Hoover described arthritis that occurs after meniscectomy. In 1980, Kenneth DeHaven reintroduced the concept of meniscus repair in hope of decreasing the incidence of arthritis, and in 1985 C.E. Henning did the first arthroscopic meniscus repair. Today, this is the “state of the art” for knee meniscus surgery. Little has changed over the past 20 years. We have progressed because we do the job better and because we are better technicians, not because of dramatic changes.

So, we have developed anesthesia, sterile technique, progressed from meniscectomy and meniscus repair with large incisions to arthroscopic techniques for disease diagnosis, meniscus removal and now meniscus repair. What advances will the future bring? Glue? Artificial meniscus replacements? Stem cells? Who knows? We are working on it, but you can be assured that we also will stand on the shoulders of the giants who preceded us.

In the words of John of Salisbury: “We are like dwarfs sitting on the shoulders of giants. We see more, and things that are more distant, than they did, not because our sight is superior or because we are taller than they, but because they raise us up, and by their great stature add to ours.”