



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

September 20, 2018

To:

Hon. Dennis P. Moroney
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

Janet E. Cain
Nathan K. Johnson
Peterson, Johnson & Murray, S.C.
788 N. Jefferson Street, Suite 500
Milwaukee, WI 53202-4792

John Barrett
Clerk of Circuit Court
Room G-8
901 N. 9th Street
Milwaukee, WI 53233

David G. Kingstad
Jon Erik Kingstad
Kingstad Law Firm LLC
8081 W. Layton Ave., Ste. C
Greenfield, WI 53220-3712

You are hereby notified that the Court has entered the following opinion and order:

2017AP362

Louis D. Nowicki v. Michael Corrigan (L.C. # 2016CV5056)

Before Brennan, Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Louis D. Nowicki appeals the circuit court's order dismissing his negligence action against Michael Corrigan and United Services Automobile Association (USAA). Nowicki argues: (1) the circuit court should not have dismissed without first allowing substitution of the real party in interest pursuant to WIS. STAT. § 803.01(1) (2015-16)¹; (2) his action was timely under the statute of limitations, WIS. STAT. § 893.22; and (3) the circuit court erred in dismissing

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

this action based on WIS. STAT. § 803.10(1)(a). After reviewing the briefs and record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We reverse and remand for further proceedings.

Nowicki died on July 1, 2015. Exactly one year later, Attorney David G. Kingstad commenced this action on Nowicki's behalf. The circuit court dismissed, concluding that Kingstad did not have authority to commence the lawsuit.

Nowicki argues that the circuit court erred in dismissing without first allowing a reasonable time for substitution and ratification by the real party in interest under WIS. STAT. § 803.01(1), which provides: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by ... the real party in interest."

During the hearing on the motion to dismiss, Corrigan and USAA moved to dismiss on the ground that Nowicki was not a proper party to the litigation because he was deceased, citing *Brickley v. Neuling*, 256 Wis. 334, 336, 41 N.W.2d 284 (1950), which provides: "It is elementary that one deceased cannot be a party to an action." The circuit court agreed, and explained to Attorney Kingstad that he had no authority to commence the lawsuit because he had no agency relationship with Nowicki after his death.

Although it is true that a deceased person cannot be a party to an action, *Brickley* was decided before WIS. STAT. § 803.01(1) was enacted. We addressed the impact of § 803.01 on *Brickley* in *Hamm v. LIRC*, 223 Wis. 2d 183, 189, 588 N.W.2d 358 (Ct. App. 1998). Joyce Hamm's attorney filed an action in the circuit court on her behalf after she died. *Id.* at 188. The defendant moved to dismiss because Hamm was deceased and, therefore, lacked the capacity to

commence the action. *Id.* We ruled that the action survived as long as it was ratified within a reasonable period of time by substituting the real party in interest pursuant to § 803.01(1). *See Hamm*, 223 Wis. 2d at 189. We explained: “While we agree that a deceased person cannot be a party to an action, *see Brickley* ... we nevertheless conclude that the circuit court acquired jurisdiction in this case based on ... ratification of the action” by the proper party. *See Hamm*, 223 Wis. 2d at 189.

The circuit court did not address WIS. STAT. § 803.01(1) or *Hamm* when it dismissed this case. Therefore, we reverse and remand for the circuit court to consider Corrigan and USAA’s motion to dismiss in light of the relevant statute and case law.

Nowicki next argues that his action was timely under the statute of limitations, WIS. STAT. § 893.22. Corrigan and USAA do not argue that Nowicki’s action was untimely filed; instead, they argue that the action was not timely filed *by the correct party*. Because the circuit court will consider on remand whether this action was timely filed by a proper party under WIS. STAT. RULE 803.01(1), we need not address this argument further.

Finally, Nowicki argues that his action should not be dismissed based on WIS. STAT. § 803.10(1)(a). The circuit court did not rely on this statute in dismissing this case. Therefore, we do not address Nowicki’s argument. *See Maryland Arms Ltd. P’ship v. Connell*, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15 (cases should be decided on the narrowest possible grounds).

Upon the foregoing,

IT IS ORDERED that the order of the circuit court is summarily reversed and the cause is remanded for further proceedings consistent with this opinion. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals