FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-901

SAMANTHA ELAINE TSUJI and
CRYSTAL IVY WILLIAMS,

Appellants,

v.

H. BART FLEET, as the duly
appointed Personal
Representative of the Estate of
Thomas E. Morton, Jr.,
Deceased, and THE LEWIS BEAR
COMPANY,

Appellees.

On appeal from the Circuit Court for Escambia County.
Jan Shackelford, Judge.

August 4, 2021

ROWE, C.J.

Samantha Elaine Tsuji and Crystal Ivey Williams (Appellants) appeal an order granting summary judgment for The Lewis Bear Company (LBC). The trial court determined that Appellants' vicarious liability claims against LBC were time-barred because Appellants' negligence claims against the estate of LBC's deceased agent were time-barred. Finding no reversible error by the trial court, we affirm.

I. Facts

In June 2014, Appellants were injured in a motor vehicle accident. Thomas E. Morton Jr., while he was working for LBC and driving an LBC-owned vehicle, collided with Appellants' car. Within four years of the accident, Appellants sued Morton and LBC, alleging that Morton was negligent and caused injury to Appellants. Appellants alleged that LBC was vicariously liable for Morton's actions. Not long after they sued, Appellants learned that Morton died a few weeks after the accident. Appellants moved to substitute H. Bart Fleet, as the personal representative of Morton's estate, for Morton.

LBC then moved for summary judgment, arguing that Appellants' claims were barred by sections 733.702(5) and 733.710(1), Florida Statutes (2013), of the Florida Probate Code. Those statutes require creditors to present claims against a decedent's estate within two years of the decedent's death. In support of its motion, LBC cited this Court's decision in *Buettner v. Cellular One, Inc.*, 700 So. 2d 48 (Fla. 1st DCA 1997). Appellants opposed the motion. Citing the Fourth District's decision in *Pezzi v. Brown*, 697 So. 2d 883 (Fla. 4th DCA 1997), they argued that a plaintiff may bring a cause of action against a tortfeasor's estate more than two years after the tortfeasor's death when the plaintiff seeks to recover damages only from the tortfeasor's casualty insurance. Appellants argued that their claim against Morton's estate was not barred because they were not seeking to hold the estate liable. Rather, they sought to recover damages from Morton's casualty insurer, and only up to the limits of the insurance policy.

After considering the parties' arguments and determining that *Buettner* was dispositive, the trial court entered summary judgment for LBC. The trial court found that if Appellants could not hold Morton's estate liable, LBC could not be vicariously liable for Morton's negligence. The court found that under section 733.710(1), Appellants had to file any claims against Morton's estate within two years of his death. Because Appellants sued outside the time limits in section 733.710(1), the court determined that the claims against Morton and LBC were time-barred. This timely appeal follows.

II. Analysis

Appellants argue that the trial court erred in granting summary judgment for LBC based on its conclusions that: (1) Appellants had to sue within two years of Morton's death to recover under the casualty insurance policy; and (2) Appellants' vicarious liability suit against LBC could not proceed absent a judgment holding Morton liable. We review the trial court's grant of summary judgment de novo. *Wilson v. Jacks*, 310 So. 3d 545, 546 (Fla. 1st DCA 2021).

A. Section 733.710 Bars an Action Against a Decedent's Casualty Insurer if Not Filed Within Two Years of the Decedent's Death

Florida's Probate Code serves many purposes. Chief among them is to promote the timely settlement of a decedent's estate. *See In re: Brown's Estate*, 117 So. 2d 478, 480 (Fla. 1960) ("Public policy requires that estates of decedents be speedily and finally determined. It is pursuant to this policy that statutes of non-claim have been enacted by the Legislature."); *In re Jeffries' Estate*, 181 So. 833, 837 (Fla. 1938) (explaining that the Probate Code "should be interpreted and applied so as to facilitate the settlement of estates in the interest of the public welfare, without unreasonably or unduly restricting the rights of creditors of such estates").

Chapter 733 of the Florida Probate Code covers the "Administration of Estates." Part VII of that chapter explains how "Creditors' Claims" may be presented against an estate. At issue are sections 733.702 and 733.710. Both fall under Part VII and limit the time for a creditor to present claims against an estate. Section 733.702(1) requires creditors to present most claims within three months after the first publication of the notice to creditors or within thirty days after service on a creditor. § 733.702(1), Fla. Stat. Section 733.702(2) provides that no cause of action will survive the decedent's death unless the creditor files the claim within the time set out in the statute. § 733.702(2), Fla. Stat.

As for the limitations on claims under section 733.702, there are exceptions. Subsection (4) of the statute exempts from the time limits for presenting a claim in subsection (1), "[t]o the limits of casualty insurance protection only, any proceeding to establish

liability that is protected by the casualty insurance." § 733.702(4)(b), Fla. Stat. (2013). In other words, when a creditor files an action to establish liability of the estate and casualty insurance covers that liability, the creditor need not present its claim against the estate within the time for presenting claims under section 733.702(1). But if the creditor presents a claim that seeks recovery **beyond the limits** of the casualty insurance policy, the creditor must present the claim to the estate within time limits established in section 733.702(1).

Even so, while allowing for certain exceptions to the short time periods under section 733.702 for **presenting** claims against an estate under section subsection (1), the Legislature emphasized in subsection (5) that nothing in section 733.702 extends the limitations period set out in section 733.710. That section, which cuts off the estate's liability for claims presented more than two years after the decedent's death, is entitled, "Limitations on claims against estates." Subsection (1) of the statute provides:

> Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries **shall be liable** for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.

§ 733.710(1), Fla. Stat. (2013) (emphasis supplied).

"[S]ection 733.710 is a jurisdictional statute of nonclaim[1] that automatically bars untimely claims and is not subject to waiver or extension in the probate proceedings." *May v. Illinois Nat'l Ins.*

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[1] Whereas statutes of limitations "bar actions by setting a time limit within which an action must be filed as measured from the accrual of the cause of action, after which time obtaining relief is barred," statutes of repose or nonclaim "bar actions by setting a time limit within which an action must be filed as measured from a specific act, after which time the cause of action is extinguished." *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 695 (Fla. 2015) (quoting *Merkle v. Robinson*, 737 So. 2d 540, 542 n.6 (Fla. 1999)).

Co., 771 So. 2d 1143, 1157 (Fla. 2000); *see also Brooks v. Fed. Land Bank of Columbia*, 143 So. 749, 753 (Fla. 1932) ("A statute of nonclaim while partaking of the nature of a statute of limitations is not wholly such. It constitutes part of the procedure of the court, the orderly, expeditious, and exact settlement of the estates of decedents, and constitutes part of the procedure which courts must observe in the settlement of estates of deceased persons. . . .").

Under the plain language of the statute, the estate, the personal representative, and the beneficiaries of the estate are not liable for any claim or cause of action against the tortfeasor decedent unless the creditor presents the claim within two years of the death of the decedent. *See Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163, 168 (Fla. 4th DCA 1996) ("[T]here is no ambiguity in the words used in section 733.710. They say that, in spite of anything contained in any other statute, the estate is simply not liable on any claim filed more than 2 years after the decedent's death."). The purpose of section 733.710 aligns with the Probate Code's central purpose of fostering the expeditious settlement of the estate of decedents. This goal of expediency explains why plaintiffs have four years to bring tort actions against living tortfeasors but only two years to bring the same claim against decedent tortfeasors. *Compare* § 95.11(3)(a), Fla. Stat. (2013), *with* § 733.710, Fla. Stat. (2013). Thus, to hold Morton's estate liable for his negligence, Appellants had to file their cause of action within two years of Morton's death.

Even so, Appellants contend that while the nonclaim statute, section 733.710, bars untimely claims against the estate, the personal representative, and the beneficiaries of the estate, the statute does not bar claims against a decedent's casualty insurer—even when filed beyond the statute's two-year limitations period. Appellants argue that if the Legislature intended to limit claims against a decedent's casualty insurer, it could have included insurers among the parties not liable for claims filed beyond the two-year limit in section 733.710. We disagree. Although section 733.710(1) does not list casualty insurers among the parties who are not liable for untimely claims against an estate, an insurer cannot be liable for such claims until a creditor seeks and perfects a claim against the decedent tortfeasor through the entry of a judgment establishing the decedent's liability.

Under Florida's non-joinder statute, section 627.4136(1), Florida Statutes, a plaintiff may not file a "direct action" against a liability insurer without first obtaining a settlement or a verdict against the insured. *See Lexington Ins. Co. v. James*, 295 So. 3d 367, 372 (Fla. 1st DCA 2020) (explaining that, under the nonjoinder statute, an injured party has no interest in the tortfeasor's liability policy until a court enters judgment against the insured). Thus, until a plaintiff establishes the liability of the decedent tortfeasor (through his estate) and then obtains a settlement or verdict against the insured decedent tortfeasor (through his estate), the plaintiff cannot proceed against the insurer. But to present a claim against a decedent tortfeasor and his estate, the plaintiff must present their claims against the estate within the limitations period set out in Part VII of the Probate Code. Thus, to present their claim against Morton's estate (and ultimately hold Morton's casualty insurer liable), Appellants had to file their claim seeking to establish the liability of Morton and his estate within two years of Morton's death.

Our holding and construction of the relevant statutes appear to conflict with the Fourth District's decision in *Pezzi*. There, the Fourth District construed section 733.710(1) to limit only the liability of the estate, the personal representative, and its representatives. *Id.* The Fourth District acknowledged the non-joinder statute and that "plaintiffs were prohibited from initiating a direct action against the insurer." *Id*. at 885. The court also recognized that "the personal representative was still the proper nominal party in a lawsuit to establish liability of the decedent tortfeasor." *Id*. Still, the Fourth District held that the nonclaim statute did not bar an action against an insurer because the limitation on liability under the statute "is specific to the decedent's estate, the personal representative, and the beneficiaries; the limitation does not extend to the decedent's insurance policy." *Id*. But in reaching its holding, the Fourth District never addressed the limitation on claims expressed in section 733.702(5). And thus the *Pezzi* court did not consider whether an action seeking to hold a decedent's casualty insurer liable up to the policy limits is barred by sections 733.702(5) and 733.702(10) if filed more than two years after the decedent's death. We also disagree with the Fourth District's reasoning in *Pezzi*

because until Appellants established Morton's liability through an action against his estate, they could not establish the liability of the casualty insurer.

At the same time, we recognize that in *May*, our supreme court cited *Pezzi* with approval and observed that "the total failure to file a timely claim against an estate does not prevent a creditor from recovering up to the policy limits of a decedent's casualty insurance." 771 So. 2d at 1159. But that observation was dicta, "pure and simple." *See Doherty v. Brown*, 14 So. 3d 1266, 1267 (Fla. 1st DCA 2009) (quoting *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975)). It was not necessary to the supreme court's decision in answering the question certified to it by the United States Court of Appeals for the Eleventh Circuit. *See May*, 771 So. 2d at 1145; *Pedroza v. State*, 291 So. 3d 541, 547 (Fla. 2020) ("Any statement of law in a judicial opinion that is not a holding is dictum.").[2] But more importantly, the *May* court, like the Fourth District in *Pezzi*, never addressed or considered section 733.702(5)'s express limitation on claims under section 733.702. For these reasons, the statements in *May* on the timeliness of claims against an estate when a claimant seeks to recover only to the limits of a decedent's casualty insurance policy do not control the disposition of this appeal. *See Cohens v. Virginia*, 19 U.S. 264, 399 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

B. An Employer Cannot Be Vicariously Liable if Claims Against its Agent are Time-Barred

We also reject Appellants' argument that they could hold LBC liable for Morton's negligence. The trial court did not err when it

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[2] Two justices concurred in the *May* decision, but did not join the part of the opinion addressing *Pezzi*, because that part of the opinion was "beyond th[e] Court's jurisdiction pursuant to article V, section 3(b)(6) of the Florida Constitution"). 771 So. 2d at 1162.

concluded that because Appellants' claims against Morton's estate were time-barred, their vicarious liability claims against LBC were also time-barred. "Under the doctrine of respondeat superior, an employer may be liable for an employee's acts that are committed within the course and scope of employment." *Samiian v. Johnson*, 302 So. 3d 966, 985 (Fla. 1st DCA 2020), *reh'g denied* (Sept. 18, 2020), *review denied,* SC20-1505, 2021 WL 872300 (Fla. Mar. 9, 2021). But a plaintiff may not hold an employer liable until the employee is found to be liable. For this principle, the trial court correctly relied on *Buettner*.[3] There, this Court held that "Appellant's vicarious liability action against Appellees is barred by the well-settled doctrine that 'when a principal's liability rests solely on the doctrine of respondeat superior, a principal cannot be held liable if the agent is exonerated.'" *Buettner*, 700 So. 2d at 48 (quoting *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 532 (Fla. 1985)). That holding followed a decision of the Florida Supreme Court. *See Mallory v. O'Neil*, 69 So. 2d 313, 315 (Fla. 1954) ("[I]f the employee is not liable[,] the employer is not liable.").Thus the trial court was correct in its conclusion that LBC was not vicariously liable for Morton's negligence because the claims against Morton were time-barred.

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[3] Even so, the trial court incorrectly relied on *Buettner* as authority for its conclusion that Appellants' claims against Morton's estate were time-barred. Although the trial court in *Buettner* entered summary judgment for the estate of the deceased employee based on the two-year limitations period in 733.710(1), the plaintiff never appealed that portion of the summary judgment. *Id.* at 48 n.1. Thus, the *Buettner* court never addressed whether the plaintiff's claims against the deceased employee's estate were time-barred. Even so, as explained above, the trial court reached the right result when it concluded that Appellants' claims against Morton's estate were time-barred. *See Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) ("[T]he 'tipsy coachman' doctrine[ ] allows an appellate court to affirm a trial court that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'" (quoting *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999))).

In conclusion, we affirm the judgment entered in favor of LBC. We also certify conflict with the Fourth District's decision in *Pezzi v. Brown*, 697 So. 2d 883 (Fla. 4th DCA 1997).

AFFIRMED and CONFLICT CERTIFIED.

LEWIS and WINOKUR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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No appearance for H. Bart Fleet, as the duly appointed Personal Representative of the Estate of Thomas E. Morton Jr., deceased.