

**IN THE COURT OF APPEALS OF IOWA**

No. 7-665 / 96-1980

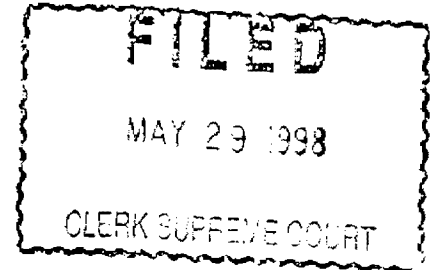
**LINDA MUHLBAUER, LYLE MUHLBAUER,  
and SARA MUHLBAUER,**

Plaintiffs-Appellants,

vs.

**WILLIS W. NELSON and/or DWAIN H. HACK, as Administrator of the  
ESTATE OF WILLIS W. NELSON,  
STATE FARM INSURANCE COMPANIES, and STATE FARM MUTUAL  
AUTOMOBILE INSURANCE CO,**

Defendants-Appellees.



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Appeal from the Iowa District Court for Harrison County, Charles L. Smith,  
Judge.

The plaintiffs appeal from the district court's grant of the defendants' motion  
for summary judgment. **AFFIRMED.**

Robert Kohorst and William Early of Kohorst Law Firm, Harlan, for appellant.

Dennis M. Gray of Peters Law Firm, Council Bluffs, for appellee Hack.

William R. Hughes, Jr. of Stuart, Tinley, Peters, Thorn & Hughes, Council  
Bluffs, for appellees State Farm Insurance Companies and State Farm Mutual  
Automobile Insurance Company.

Considered by Streit, P.J., Vogel, J., and Hayden, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

**PER CURIAM**

The plaintiffs appeal from the district court's grant of the defendants' motion for summary judgment. They argue the court erred in finding their action was barred by the statute of limitations. In our review, we conclude the district court correctly concluded the two-year statute of limitations applied and barred their claim.

On April 7, 1994, defendant Willis W. Nelson struck a vehicle driven by the plaintiff, Linda Muhlbauer. Nelson died February 15, 1995 from causes unrelated to the accident. Defendant Dwaine Hack was appointed administrator of Nelson's estate on March 16, 1995. The estate published notice to creditors having claims against the estate on March 23 and 30, 1995. The final report for the estate was filed on March 13, 1996. The court closed the estate on March 25, 1996, and discharged Hack from his duties as administrator.

In the course of negotiations with Nelson's insurer, State Farm, Muhlbauer's counsel learned of Nelson's death. In order to ascertain the name of the administrator, Muhlbauer's counsel checked out the probate file from the clerk of court on March 18, 1996. On April 1, 1996, Muhlbauer, her husband, and child filed suit against Nelson and/or Hack as administrator of Nelson's estate. In his amended answer, Hack asserted the statute of limitations as a defense. Hack subsequently filed a motion for summary judgment claiming the action was barred by the two-year statute of limitations. Iowa Code § 614.1(2). On July 24, 1996, the district court granted the motion, finding the action named defendants who either were deceased

(Nelson) or nonexistent (Hack as administrator) and there no longer was an estate. The plaintiffs filed a rule 179(b) motion to reconsider which the court denied on October 3, 1996.

Our review is on assigned error. Iowa R. App. P. 4. In determining whether summary judgment is appropriate, we apply the following standards:

Summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to the judgment as a matter of law. The burden of showing the nonexistence of a material fact is upon the moving party. While an adverse party generally cannot rest upon his pleadings when the moving party has supported his motion, summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. In this respect, summary judgment is functionally akin to a directed verdict; every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved.

*Healy v. Carr*, 449 N.W.2d 883, 884 (Iowa App. 1989) (quoting *Knapp v. Simmons*, 345 N.W.2d 118, 121 (Iowa 1984)).

On appeal the plaintiffs claim the district court erred in holding their action was barred by the statute of limitations. They argue their claims were not barred because they had been involved in negotiations with Nelson's insurer and Hack should have been aware of their claim against the estate and should have provided them with notice under Iowa Code section 633.410 and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). They contend their claim falls within the exception for claims covered by insurance under

section 633.410 and the relation back doctrine of Iowa Rule of Civil Procedure 89 prevents their action from being untimely. The plaintiffs claim Hack had a duty to reopen the estate once he became aware of their claims. They also contend they are entitled to equitable relief under section 633.410.

Iowa Code section 633.410 was amended after the *Pope* decision to provide for mailed notice to “reasonably ascertainable” claimants and creditors. It sets the time for filing claims as the later of four months after published notice or one month after notice by mail. Section 633.410 exempts claims covered by insurance from the time limits of the section. Iowa Code section 633.415 provides an action may be filed against the administrator of an estate “in lieu of filing a claim in the estate.” *Id.* A deceased person does not have the capacity to be sued. *Jacobson v. Union Story Trust and Sav. Bank*, 338 N.W.2d 161, 163 (Iowa 1983) (citing 67A C.J.S. *Parties* § 41 at 741 (1978) and 59 Am.Jur.2d *Parties* § 46 at 407 (1971)).

We conclude section 633.410 is inapplicable to the undisputed facts before us. Nothing in section 633.410 acts to extend the two-year statute of limitations for injuries to the person set forth in Iowa Code section 614.1(2). *Healy*, 449 N.W.2d at 884. Although section 633.410 does not provide any time restriction for filing claims covered by insurance, section 614.1(2) does set the outside time boundary beyond which a claim is barred.

Although the suit was initiated a week before the statute of limitations ran, it was after the estate was closed and named as defendants the decedent, Nelson, and

the discharged administrator of the estate, Hack. Nelson was incapable of being sued. Hack, as administrator, did not exist. Muhlbauers assert Hack had a duty to reopen the estate once he was served with notice of the lawsuit. We disagree. Iowa Code section 633.489 provides a closed estate may be reopened by the court upon the petition of an interested person. *Id.* Upon reopening the estate, the court may reappoint the former administrator or appoint a different administrator. *Id.* Nothing in section 633.489 places a duty on any interested person to petition to reopen an estate. Hack, as a discharged administrator, had no further duty or responsibility to the closed estate. Iowa Code § 633.479. Muhlbauers, as tort claimants, could have petitioned to reopen the estate but did not. Their claim is now barred by section 614.1(2).<sup>\*</sup>

Muhlbauers argue Iowa Rule of Civil Procedure 89 permits them to amend their suit and have the amendment relate back to the time of filing. This assertion fails for two reasons. First, Muhlbauers do not seek to amend the suit by changing a party against whom the claim is asserted, so rule 89 does not apply. They correctly named the administrator, but he no longer was in existence. Second, Hack *as administrator* did not receive notice within the time provided by law for commencing the action. Iowa Code § 614.1(2); Iowa R. Civ. P. 89. Even if the estate were reopened and a different administrator appointed, any amendment to change the named defendant to the new administrator would not relate back under rule 89 and

Muhlbauers' claim still would be barred. *See Jacobson*, 338 N.W.2d at 164 and *Healy*, 449 N.W.2d at 885 (both discussing the requirements of rule 89).

From our review of the record, we conclude the district court correctly applied the law in sustaining the motion for summary judgment and dismissing the Muhlbauers' petition. Like *Jacobson*, this case illustrates the risks of commencing a lawsuit close to the end of the limitations period. If Muhlbauers had been able to have the estate reopened before the two-year statute of limitations ran on April 7, 1996, then section 633.410 would have allowed a claim to be filed in the estate or section 633.415 would have permitted a suit against the administrator. However, it would have been necessary to file either the claim or the suit *after* the estate was reopened and an administrator appointed and *before* April 7, 1996. Iowa Code section 614.1(2) now bars their claim.

**AFFIRMED.**