

IN THE COURT OF APPEALS OF IOWA

No. 6-1006 / 05-1494

Filed March 28, 2007

KAY ELLIOTT and DAVID ELLIOTT,
Plaintiffs-Appellants,

vs.

ABBIE AMENT and WILLIAM AMENT,
Defendants-Appellees.

Appeal from the Iowa District Court for Dubuque County, Monica Ackley,
Judge.

Plaintiffs appeal the district court's dismissal of their tort action against
defendants. **AFFIRMED.**

Paul T. Jensen of Hammer, Simon & Jensen, Dubuque, for appellants.

Gene Yagla of Yagla, McCoy & Riley P.L.C., Waterloo, for appellees.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

Plaintiffs-appellants Kay and David Elliott appeal from the dismissal of their tort action against Abbie Ament and her father, William Ament. The plaintiffs sued after a car driven by Kay collided with a car driven by Abbie Ament. The plaintiffs contended Abbie was negligent and William, the owner of the car Abbie was driving, had negligently entrusted the car to her. The matter was tried to a jury, and at the close of the plaintiffs' evidence, the defendants moved for a directed verdict contending the plaintiffs failed to introduce evidence to show (1) William was the owner of the car Abbie was driving, (2) Abbie was an incompetent or inexperienced driver, and William knew she was inexperienced or incompetent. The defendants also moved for a directed verdict as to Abbie because Abbie was dead, and a dead person cannot be sued. The district court granted the motion on the grounds urged.¹ We affirm.

BACKGROUND. The accident happened on November 9, 2001. The plaintiffs filed suit on September 29, 2003. Abbie died on July 20, 2004. Early in August of 2004, the attorney for the defendants advised the attorney for the plaintiffs that Abbie had died and it was the intention of her family not to open an estate for her. The matter came on for trial on July 7, 2005. Prior to trial, the attorney for the defendants made an offer to confess judgment of \$6500, which was rejected by the plaintiffs.

The plaintiffs basically raise three issues: (1) a directed verdict on the claim against Abbie should not have been permitted on the ground that she is dead where no notice of this defense was filed prior to trial, (2) Abbie's estate

¹ David Elliott's consortium claim was also dismissed because as a derivative claim it failed when the chief claim was dismissed.

was a necessary party to the suit, and (3) it was fraudulent to make a settlement offer on behalf of Abbie when she had not authorized the offer.

CLAIM AGAINST A DECEDENT. The law is clear that a decedent does not have the capacity to be sued. *Jacobson v. Union Story Trust & Sav. Bank*, 338 N.W.2d 161, 163 (Iowa 1983). In *Brubaker v. Estate of Delong*, 700 N.W.2d 323, 326 (Iowa 2005) (citations omitted), the Supreme Court stated:

A party must be legally capable of being sued in order to maintain an action. Causes of action survive the death of a person. [However,] [a]fter the death of a person who may be liable for a tort, [it is] the legal representative of the decedent's estate [that] has the legal capacity to be sued.

See also Iowa Code §§ 611.20 (an action survives the death of a party), 611.22 (2001) (an action may be brought or continued against the legal representative).

The plaintiffs' position appears to be that the district court erred in dismissing the case against Abbie because the attorney who had represented her failed to file a notice in the personal injury suit raising Abbie's death as an affirmative defense. The plaintiffs admit they were advised of Abbie's death. It appears they were so advised nearly a year before trial and were notified at the same time that it was not the family's intention to open an estate for Abbie.² Despite being aware of Abbie's death, the plaintiffs made no effort to open Abbie's estate. The plaintiffs, holding a tort claim against her, had standing to

² The letter of August 2, 2004 giving the notification also provided the name and telephone number of the family's attorney and advised that the insurance company for the defendant or defendants did not provide coverage for expenses occurred in opening an estate.

do so. *Id.* § 633.227.³ There is no basis here to reverse the district court because the defendants did not file an affirmative defense noting Abbie's death. We need not decide whether such a pleading should have been filed for the only evidence here is that the plaintiffs had adequate and admitted notice of Abbie's death, and they were not misled by any failure to file a pleading noting the same in this action. We affirm on this issue.

ESTATE AS AN INDISPENSABLE PARTY. The plaintiffs further contend the district court erred in failing to join the estate of Abbie as a necessary party to the suit under Iowa Rule of Civil Procedure 1.234. There are two problems with this argument. The first is there is no evidence an estate exists to join. Secondly, error was not preserved. A motion for new trial is generally not sufficient to preserve error when no objections were made at trial. *Hobbiebrunken v. G & S Enterprises, Inc.*, 470 N.W.2d 19, 23 (Iowa 1991). This issue was first raised after the suit had been dismissed and the plaintiffs filed a motion for new trial. We affirm on this issue.

ALLEGED FRAUD. The plaintiffs also contend, for reasons not entirely clear, that the attorney for the defendants violated rules of professional conduct and/or was guilty of fraud or fraudulent conduct when he made an offer to confess judgment. Plaintiffs claim in doing so he made an offer of settlement without the authority of either Abbie or her estate, and his failure to have the

³ Iowa Code § 633.227. Administration granted. Where there is no will, administration shall be granted to any qualified person on the petition of:

1. The surviving spouse;
2. The heirs of the decedent;
3. Creditors of the decedent;
4. Other persons showing good grounds therefor.

settlement authorized by Abbie or her estate falsely persuaded the plaintiffs that he had authority to settle. The plaintiffs further claim in their brief:

If it had only been made clear the attorney only had authority to settle the case on behalf of one defendant, plaintiffs would have been alerted to his [the defendant's attorney's] intention to move for a directed verdict on behalf of defendant Abbie Ament. Whereas, by his deceptive act, he [defendants attorney] was able to lull plaintiffs into false security and preserve his own ability to move for a directed verdict at the close of plaintiffs' case in chief. This conduct fits the definition of fraud.

While making an argument accusing adverse counsel of being unethical and guilty of fraud the plaintiffs fail to cite any authority for their position and we find none. Furthermore, plaintiffs offer no proof that the defendants' attorney did not have authority to make the offer or that he needed the consent of Abbie to do so. It appears the defense attorney was hired by the insurance company for one or both defendants and was making the offer with the authority of the company under a policy that may well not have required the insured's consent to settle.

Furthermore, we find no basis for the plaintiffs to say that had the confession of judgment not been made in the manner it was, at that point, the plaintiffs would have known there would be a motion to dismiss as to the deceased, Abbie. To say the attorney for the defendants was somehow guilty of fraud in relation to Abbie's death has no basis in the record particularly where the attorney not only immediately notified plaintiffs of Abbie's death but also advised plaintiffs an estate was not to be opened and noted the insurance company would not pay to open an estate, "so you would have to work out your own financial arrangements with any lawyer you choose to have represent the estate." There is no basis for a charge of fraud or unethical conduct. The plaintiffs had ample opportunity to determine a decedent could not be sued and open an

estate for Abbie and failed to do so. The plaintiffs have failed to show the district court's rulings should be reversed.

AFFIRMED.