

**IN THE COURT OF APPEALS OF IOWA**

No. 8-019 / 07-0708  
Filed March 14, 2008

**MICHAEL DENNIS DOMMER and KATHY  
JEAN DOMMER, Husband and Wife,**  
Plaintiffs-Appellants,

**vs.**

**THE ESTATE OF LUETTA K. WILLIAMS and its  
Executor DONALD R. WILLIAMS, and UNITED  
SERVICES AUTOMOBILE ASSOCIATION,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Wapello County, Michael R.  
Mullins, Judge.

Plaintiffs appeal from the district court's dismissal of their personal injury  
suit against the Estate of Luetta K. Williams and Donald R. Williams. **AFFIRMED  
AND REMANDED.**

Eric Loney of Walker & Billingsley, Des Moines, for appellants.

Mark King of Patterson Law Firm, L.L.P., Des Moines, and Robert Box,  
Ankeny for appellee-estate.

Rene Lapierre of Klass Law Firm, L.L.P., Sioux City, for appellee-insurer.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

**SACKETT, C.J.**

Plaintiffs Michael and Kathy Dommer appeal from a district court ruling dismissing because it was not timely filed their personal injury suit against the estate of Luetta K. Williams and its executor, Donald R. Williams. We find certain issues raised by plaintiffs in this appeal were decided in the estate proceedings from which no appeal was taken; consequently, we have no jurisdiction to address them. Plaintiffs' other challenges on appeal are not preserved for appellate review. We affirm and remand.

**BACKGROUND.** Plaintiffs filed a petition at law on September 6, 2006, alleging that on September 10, 2004, a collision occurred between a motor cycle driven by Michael Dommer and a car driven by Luetta Williams. Plaintiffs contended that Williams was negligent in operating her vehicle and as a proximate result of her negligence Michael was injured and Kathy, his wife, suffered a loss of consortium.

On November 15, 2006, plaintiffs applied to the court in the personal injury action for additional time to serve Luetta Williams, noting they had recently become aware Williams had died and an estate needed to be opened to effectuate service. On December 14, 2006, the district court granted plaintiffs' motion giving plaintiffs until January 5, 2007, to effectuate service and finding good cause for the relief requested.

Plaintiffs apparently subsequently learned that Luetta's estate had been opened, but was closed. On December 15, 2006, plaintiffs petitioned in Luetta's estate to reopen it. Plaintiffs noted Luetta died on February 7, 2005, and a petition for probate of her will and appointment of an executor was filed on

February 28, 2005. Donald R. Williams, her son, was appointed executor and on July 31, 2006, the estate was closed. Plaintiffs contended they did not receive a notice of the probate of the will, the appointment of the executor, and notice of creditors.

On December 21, 2006, plaintiffs amended their petition in the personal injury action to substitute for defendant, Luetta K. Williams, her estate and its executor, Donald R. Williams.

On December 26, 2006, the district court filed an order in the estate granting plaintiffs' motion to reopen Luetta's estate and reinstating Donald R. Williams as executor of the estate. The court further said Donald may accept service on behalf of the estate. The court also held that plaintiffs could request an evidentiary hearing if they believed they were entitled to additional equitable relief due to peculiar circumstances, and the request should be filed within fourteen days of the December 26, 2006 order. The court made the further finding that the plaintiffs' claim in the civil action "shall be limited to the extent of the policy limits."

Then on January 9, 2007, plaintiffs filed a motion in Luetta's estate asking for an evidentiary hearing, noting Luetta's death and the fact that they did not receive a notice to creditors though they were reasonably ascertainable creditors and should have been notified. They argued because of the lack of notice their claim was not barred by the four-month period in Iowa Code section 633.410 (2005).<sup>1</sup> Plaintiffs contended they first learned of Luetta's death from

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<sup>1</sup> Iowa Code section 633.410 (2005) provides in applicable part:

1. All claims against a decedent's estate, other than charges, whether due or to become due, absolute or contingent, liquidated or

her insurance company in November 2006. Plaintiffs asked for additional equitable relief due to peculiar circumstances.

On January 18, 2007, the executor filed a motion to dismiss plaintiffs' personal injury petition. He contended that Luetta was dead and a decedent cannot be sued. He further claimed (1) plaintiffs' amended petition filed on December 21, 2006, naming Luetta's estate did not relate back pursuant to Iowa Rule of Civil Procedure 1.402(5), in that the amendment to the petition was not filed within the period for commencing a personal injury action under Iowa Code section 614.1(2); (2) plaintiffs did not satisfy the provisions of section 614.2, as the petition was not filed within six months of Luetta's death; and (3) section 633.415 does not apply, as the personal injury action was not filed prior to Luetta's death.

**PLAINTIFFS' MOTION FILED IN LUETTA WILLIAMS'S ESTATE.** On February 26, 2007, a hearing was held in Luetta's estate on plaintiffs' request for equitable relief. The district court filed on March 12, 2007 in the estate an order dated March 7, 2007, addressing the issues raised at that hearing. The court found there was no dispute that the executor never mailed to plaintiffs a notice of probate under Iowa Code section 633.410(1) despite the fact that the executor had been aware prior to Luetta's death that she had been involved in an accident in September of 2005. The court noted the executor testified his recollection was that Luetta told him the damage from the accident was minor and no one was

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unliquidated, founded on contract or otherwise, are forever barred against the estate, the personal representative, and the distributees of the estate, unless filed with the clerk within the later to occur of four months after the date of the second publication of the notice to creditors or, as to each claimant whose identity is reasonably ascertainable, one month after service of notice by ordinary mail to the claimant's last known address.

hurt and they had no further conversation concerning it. The court also found that Michael did not seek medical attention until four days after the accident and there was no showing Luetta had any knowledge plaintiffs were making a claim as a result of the accident. The court further found no evidence that Luetta's liability insurance company knew of her death prior to the fall of 2006, and there was no evidence the company intentionally or fraudulently concealed Luetta's death from plaintiffs or notified Luetta of the pendency of any claims against her.

Based on these findings the district court concluded there was insufficient evidence to establish that the executor would have believed the plaintiffs were claimants entitled to notice under section 633.410(1). The court denied the equitable relief sought under section 633.410(3), limited plaintiffs' claim in the civil action to the extent of the limits of Luetta's liability policy, and determined the ruling entered on December 26, 2006, that limited plaintiffs' claims in the civil action to the extent of the policy limits stands. No appeal has been taken from these rulings in the estate proceedings.

**DEFENDANT ESTATE'S MOTION TO DISMISS PERSONAL INJURY PETITION.** On March 13, 2007,<sup>2</sup> the district court filed a ruling dated March 7, 2007, ruling on defendant's motion to dismiss the personal injury action. The judge first indicated the motion had been on file for more than fourteen days and he had reviewed the motion and the plaintiffs' response. The judge then addressed only two issues finding (1) that the personal injury suit against the estate was barred by the two-year statute of limitations pursuant to Iowa Code

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<sup>2</sup> In the order filed on March 12, 2007, the district court referenced this making reference to seeing the Ruling on Motion to Dismiss in the personal injury case.

section 614.1(2)<sup>3</sup> and section 633.410<sup>4</sup> does not save the action. The court granted the motion to dismiss filed by the executor and the estate and dismissed as to the executor and the estate. On April 7, 2007, the plaintiffs filed a notice of appeal from “the ruling on defendant’s motion to dismiss entered March 13, 2007, and all other rulings and orders therein.”

**ISSUES ON APPEAL.** Plaintiffs contend here the district court erred in granting the motion to dismiss and they raise five issues arguing: (1) they should have been allowed to substitute the executor for Luetta, (2) they were ascertainable creditors and should have had notice, (3) the suit should relate back to the original filing date, (4) the executor is the real party in interest, (5) they are entitled to equitable relief as there is a fact question as to whether Luetta’s insurance company concealed her death until after the two-year statute of limitations expired. The defendant argues error preservation and contends the district court should be affirmed.

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<sup>3</sup> Iowa Code section 614.1 provides in applicable part:

Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

. . . .

2. Injuries to person or reputation—relative rights—statute penalty. Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

<sup>4</sup> Iowa Code section 633.410 provides in applicable part:

1. All claims against a decedent's estate, other than charges, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, are forever barred against the estate, the personal representative, and the distributees of the estate, unless filed with the clerk within the later to occur of four months after the date of the second publication of the notice to creditors or, as to each claimant whose identity is reasonably ascertainable, one month after service of notice by ordinary mail to the claimant’s last known address.

3. . . . This section does not bar claims for which there is insurance coverage, to the extent of the coverage, or claimants entitled to equitable relief due to peculiar circumstances.

**A. Motion to Dismiss.** A court can grant a motion to dismiss if the plaintiff fails to state a claim upon which any relief may be granted. Iowa R. Civ. P. 1.421(1)(f). On appeal we review a district court's ruling on a motion to dismiss for correction of errors at law. See Iowa R. App. P. 6.4; *Turner v. Iowa State Bank & Trust Co.*, 743 N.W.2d 1, 3 (Iowa 2007); see also *Mlynarik v. Bergantzel*, 675 N.W.2d 584, 586 (Iowa 2004). A court cannot consider factual allegations contained in the motion or the documents attached to the motion. *Berger v. Gen. United Group, Inc.*, 268 N.W.2d 630, 634 (Iowa 1978). The court must ignore these facts, except those of which the court may take judicial notice. *Winneshiek Mut. Ins. Ass'n v. Roach*, 257 Iowa 354, 365, 132 N.W.2d 436, 443 (1965). In determining whether to grant the motion to dismiss, a court views the well-pled facts of the petition in the light most favorable to the plaintiff, resolving any doubts in the plaintiff's favor. *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004). The purpose of the motion is to test the legal sufficiency of the petition. *Berger*, 268 N.W.2d at 634.

**B. Jurisdiction.** We first need to decide whether we have jurisdiction to address each issue raised on appeal. Pursuant to Iowa Rule of Appellate Procedure 6.1(a), only final judgments may be appealed. A final judgment is one that conclusively adjudicates all of the rights of the parties, *In re J.J.A.*, 580 N.W.2d 731, 735 (Iowa 1998), and places the case beyond the power of the court to return the parties to their original positions. *Ahls v. Sherwood/Div. of Harsco Corp.*, 473 N.W.2d 619, 621 (Iowa 1991). Pursuant to rule 6.5(a), appeals must be filed with the supreme court within thirty days from entry of the order, judgment, or decree. Any appeals not so filed will be dismissed for lack of

appellate jurisdiction. *In re Marriage of Welp*, 596 N.W.2d 569, 571-72 (1999). The remedy is dismissal of the appeal when the appellate court has no jurisdiction to consider the appeal. *Id.*

Issues three and five were specifically addressed by the district court in denying plaintiffs' claim for equitable relief in Luetta's estate. No appeal having been taken from that ruling in the estate we do not have jurisdiction to address them.

**C. Preservation of error.** It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998). The reason for this principle relates to the essential symmetry required of our legal system. It is not a sensible exercise of appellate review to analyze facts of an issue "without the benefit of a full record or the district court's determination." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). If the district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). Iowa Rule of Civil Procedure 1.904 permits a party to file a motion to request the district court to amend or enlarge its findings and conclusions, and to enable the court to modify its judgment or enter a new judgment. Thus, it is a procedural mechanism that permits parties to request reconsideration of a ruling, and authorizes the court to change its ruling. *Meier*, 641 N.W.2d at 537. The claim or issue raised does not actually need to be used as the basis for the

decision in order to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it. *Id.*

**D. Request to Substitute Executor for Decedent.** Plaintiffs contend the motion to dismiss should not have been granted because the personal injury case was filed before the two-year statute of limitations ran, it is a continuing case, and substitution of the executor for the decedent is in accord with section 611.22.<sup>5</sup> The executor contends there is no merit to this argument and error on it was not preserved because the district court did not rule on the issue. The record fails to show this claim was considered by the district court, and plaintiffs failed to call to the attention of the district court its failure to consider the issue and to give the court an opportunity to pass upon it. Accordingly, the issue was not preserved. *Id.* at 542. We affirm on this issue.

**E. Relation Back to Original Filing.** Plaintiffs next contend the district court erred in not going back to the original filing date. The record fails to show this claim was considered by the district court and plaintiffs failed to call to the attention of the district court its failure to consider the issue, and to give the court an opportunity to pass upon it. Accordingly, the issue is not preserved. *Id.*

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<sup>5</sup> Iowa Code section 611.22 provides in applicable part:

Any action contemplated in sections 611.20 and 611.21 may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the time it would have accrued to the deceased if the deceased had survived. If such is continued against the legal representative of the defendant, a notice shall be served on the legal representative as in case of original notices.

***F. Real Party in Interest.*** Plaintiffs contend the motion to dismiss should not have been granted because the estate is the real party in interest. This issue was not addressed by the district court and is not preserved. *See id.*

The dismissal of plaintiffs' action against the executor and the estate is affirmed. We remand to the district court to consider the action of United Services Automobile Association.

**AFFIRMED AND REMANDED.**