

Docket No. 128468

IN THE ILLINOIS SUPREME COURT

<p>JAMIE LICHTER,</p> <p style="text-align: center;">Plaintiff-Appellee,</p> <p style="text-align: center;">v.</p> <p>KIMBERLY PORTER CARROLL, as special administrator of the Estate of DONALD CHRISTOPHER,</p> <p style="text-align: center;">Defendant-Appellant.</p>	<p style="text-align: center;">On Acceptance of Petition for Leave to Appeal from the Illinois Appellate Court, First Judicial District</p> <p style="text-align: center;">Docket No 1-20-0828</p> <p style="text-align: center;">There Heard on Appeal from Circuit Court of Cook County, Illinois County Department, Law Division</p> <p style="text-align: center;">No. 2018 L 000696</p> <p style="text-align: center;">The Honorable John H. Ehrlich, Judge Presiding</p>
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**SUPPLEMENTAL BRIEF FILED FOLLOWING ACCEPTANCE OF PETITION
FOR LEAVE TO APPEAL PURSUANT TO IL. SUP. CT. R. 315 FOR
DEFENDANT-APPELLANT KIMBERLY PORTER CARROLL, as special
administrator of the Estate of Donald Christopher**

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES**I. The First District Appellate Court's Interpretation and Application of Subsection (b)(2) of 735 ILCS 5/2-1309 as an Independent Subsection that Can Stand Alone Contradicts this Court's Interpretation of the Statute**

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INTRODUCTORY PARAGRAPH

Plaintiff filed a lawsuit sounding in negligence against Donald Christopher following a vehicle accident. C14 The circuit court granted Defendant's motion to dismiss and dismissed Plaintiff's complaint pursuant to 735 ILCS 5/2-619. A18-C26 C297-C305 Plaintiff appealed the trial court's dismissal order. C314 The First District appellate court overturned the trial court's dismissal order. A1-A16

There is an issue raised regarding the pleadings as pertains to 735 ILCS 5/13-209. After learning that Defendant Donald Christopher was deceased following the filing of her lawsuit and after the statute of limitations had expired, Plaintiff filed a motion pursuant to 735 ILCS 5/2-1008(b) asking the court to "cure a defect" in complaint and for leave to appoint a special representative. A18, C50-C51 Section 2-1008(b) was inapplicable because it applies only in the situation when a party dies while a lawsuit is already pending. *Relf*, 2013 IL 114925 at ¶ 43 The circuit court allowed Plaintiff to amend her complaint. C70 On May 22, 2018, Plaintiff amended her complaint to substitute Kimberly Porter Carroll, an employee of Plaintiff counsel's law firm, as special representative of the Estate of Donald Christopher. C76

The circuit court subsequently granted Defendant's motion to dismiss with prejudice because Plaintiff failed to name a special representative under 13-209(c) before the expiration of the statute of limitations. A26, C297-C305 The appellate court reversed the lower court's dismissal order and held that 13-209(b)(2) was the proper statute section to be applied. A1-A16

ISSUE PRESENTED FOR REVIEW

1. Did the appellate court's decision improperly contradict the Supreme Court's ruling in *Relf v. Shatayeva*, 2013 IL 114925 when it ruled that subsection (b)(2) of 735 ILCS 5/13-209 can stand "separate and apart" and further determined that subsection (b)(2) was the proper section to be applied under the undisputed facts of the case?

STANDARD OF REVIEW

The granting of a 2-619 motion to dismiss is reviewed *de novo*. *Ferguson v. City of Chicago*, 213 Ill.2d 94, 99 (2004)

JURISDICTIONAL STATEMENT

Defendant filed a motion to dismiss pursuant to 735 ILCS 5/2-619. Defendant's motion was based on her argument that Plaintiff did not comply with Section 735 ILCS 5/13-209. A2, C168-C190 On June 4, 2020, the circuit court granted Defendant's motion to dismiss. A4, C297-C305

Plaintiff filed an appeal and the First District Appellate Court rendered its decision on March 31, 2022, reversing the dismissal order entered by the Circuit Court of Cook County. A1-A16 A true and accurate copy of the decision is attached in the Appendix, A-1. A petition for rehearing was not filed. Defendant filed a Petition for Leave to Appeal pursuant to Illinois Supreme Court Rule 315(a) on June 6, 2022. The Illinois Supreme Court accepted Defendant's Petition on September 28, 2022. (Appendix, A27)

STATUTE INVOLVED

The relevant statute involved in this matter is 735 ILCS 5/13-209. It states in its entirety as follows:

13-209 Death of party.

(a) If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives:

(1) an action may be commenced by his or her representative before the expiration of that time, or within one year from his or her death whichever date is the later;

(2) if no petition for letters of office for the decedent's estate has been filed, the court may appoint a special representative for the deceased for the purpose of prosecuting the action. The appointment shall be on verified motion of any party who appears entitled to participate in the deceased's estate, reciting the names and last known addresses of all known heirs and the legatees and executor named in any will that has been filed. The court's determination that a person appears entitled to participate in the deceased's estate shall be solely for purposes of this Section and not determinative of rights in final disposition. Within 90 days after appointment, the special representative shall notify the heirs and legatees of the following information by mail: that an appointment has been made, the court in which the case was filed, the caption of the case, and a description of the nature of the case. The special representative shall publish notice to unknown heirs and legatees as provided in the Probate Act of 1975.¹ If a will is filed within 90 days after the appointment of the special representative, the same notice shall be given to any additional executors and legatees named in the will. At any time that an estate is opened with a representative other than the special representative, the court may upon motion substitute the representative for the special representative. In this case, the court shall allow disbursements and fees of the special representative and his or her attorney as a claim against any proceeds received. The proceeds of any judgment or settlement shall be distributed under the provisions of the Probate Act of 1975.

(b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred:

(1) an action may be commenced against his or her personal representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death;

(2) if no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action. If a party elects

to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims.

(c) If a party commences an action against a deceased person whose death is unknown to the party before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, the action may be commenced against the deceased person's personal representative if all of the following terms and conditions are met:

(1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.

(2) The party proceeds with reasonable diligence to serve process upon the personal representative.

(3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.

(4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action.

IL ST CH 735 § 5/13-209

STATEMENT OF FACTS

The vehicle accident out of which this lawsuit arose occurred on February 27, 2016; Donald Christopher was driving one of the vehicles involved. C58 Defendant Donald Christopher died the following year in June 2017. A2, A18, C297 On January 19, 2018, after Donald Christopher's death, Plaintiff Jamie Lichter filed her original complaint at law sounding in negligence against Donald Christopher. C13 It is undisputed that Plaintiff was unaware of the death of Donald Christopher when the lawsuit was filed. C57-C58,

On April 3, 2018, Plaintiff filed a motion pursuant to 736 ILCS 5/2-1008(b) asking the circuit court for leave to appoint a special administrator. C56 The circuit court allowed Plaintiff to amend her complaint. A2, C70 On May 22, 2018, Plaintiff amended her complaint to substitute Kimberly Porter Carroll as special representative of the Estate of Donald Christopher. A18-A19, C75 Kimberly Porter Carroll was served with the complaint at summons at the address of Plaintiff counsel's law firm; Ms. Porter Carroll was an employee of Plaintiff counsel's law firm. A18-A19, C80-C82

An appearance was filed on behalf of Defendant on January 4, 2019. A19, C89 On March 3, 2020, Defendant filed a motion to dismiss pursuant to 735 ILCS 5/2-619. Defendant's motion to dismiss argued that Plaintiff's amended complaint did not meet the requirements of 5/13-209(c) because Plaintiff did not name a personal representative as required under 13-209(c) prior to the expiration of the statute of limitations to do so. A3, A19, C168-C190 Citing *Relf v. Shatayeva*, the circuit court ruled that Plaintiff did not comply with the requirements of 735 ILCS 13-209(c) because Plaintiff failed to move to appoint a personal representative as defendant within the time required pursuant to subsection (c). A3, A18-A26, C297-C305

Plaintiff filed an appeal of the circuit court's dismissal. A3, C314 The appellate court reversed the dismissal and remanded the case to the circuit court. A16

ARGUMENT

I. The First District Appellate Court’s Interpretation and Application of Subsection (b)(2) of 735 ILCS 5/2-1309 as an Independent Subsection that Can Stand Alone Contradicts this Court’s Interpretation of the Statute

The First District appellate court’s opinion in this case reversed the circuit court’s dismissal of Plaintiff’s amended complaint. A16 In reversing the circuit court’s order, the appellate court ruled that subsection (b)(2) of 735 ILCS 5/13-209 – and only subsection (b)(2) – was the applicable sub-subsection to be applied. A13-A16 The appellate court’s application of subsection (b)(2), however, is incorrect; the appellate court improperly applied the provisions of 5/13-209 in contradiction to this Court’s decision in *Relf v. Shatayeva*, 2013 IL 114925. In *Relf v. Shatayeva*, this Court explained the distinction between subsections (b) and (c). The Court clearly stated that “the provisions of section 13-209(b) presuppose that the plaintiff is aware of the defendant’s death at the time he or she commences that action,” *Relf*, 2013 IL 114925 at ¶ 27 In the present case, it is undisputed that Plaintiff was *unaware* of Donald Christopher’s death when she filed her lawsuit. C50 Given this undisputed fact, the appellate court’s reversal of the circuit court’s dismissal order through its application of subsection (b) of 13-209(b), and specifically only sub-subsection (2) of subsection (b), was incorrect and contradicts this Court’s ruling in *Relf*.

Because Donald Christopher was deceased at the time of the lawsuit was filed, the filing of the original lawsuit that named Mr. Christopher as a defendant did not invoke the circuit court’s jurisdiction and did not preserve Plaintiff’s personal injury claim. In granting Defendant’s motion to dismiss, the circuit court correctly ruled that subsection (c) and its provisions were applicable based on the statute and this Court’s decision in *Relf*. A18-A26,

C297-C305 Because subsection (c) was applicable, the circuit court ruled that Plaintiff was required to name a personal representative for Donald Christopher's estate; the statute of limitations had expired under subsection (c)(4) for Plaintiff to do so. A26, C305

In reversing the circuit court's dismissal order, the appellate court ruled "we find that subsection (b)(2) stands apart from subsection (b)(1) and (c), which must be read together because they both cover the issue of naming a personal representative." A15, ¶ 43 There is no support in the statute, however, for the appellate court's determination that sub-subsection (b)(2) "stands separate and apart" thereby permitting a party to appoint a special representative rather than a personal representative under the facts in the present case.

The decision of the appellate court to apply subsection (b)(2) contradicts this Court's construction and application of 13-209 as stated in *Relf v. Shatayeva*. 735 ILCS 5/13-209 contains three subsections: (a), (b), and (c). Subsection (a) provides for when a party who is entitled to bring an action dies prior to suit, which is not at issue here. IL ST CH 735 § 5/13-209 The language in both subsections (b) and (c) is instructive but as the circuit court correctly ruled, it is subsection (c) that is applicable in the present case based on the language of the statute and this Court's construction and application of this statute in *Relf*. A22-A26, C302-C305 Subsection (b) states as follows:

(b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred:

(1) an action may be commenced against his or her personal

representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death;

(2) if no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims.

Subsection (c) states:

(c) If a party commences an action against a deceased person whose death is unknown to the party before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise time barred, the action may be commenced against the deceased person's personal representative if all of the following terms and conditions are met:

(1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.

(2) The party proceeds with reasonable diligence to serve process upon the personal representative;

(3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recover to the extent the estate is protected by liability insurance.

(4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action. 735 ILCS 5/13-209(b), (c) (emphasis added)

The appellate court ruled that subsection (b)(2) – *and only (b)(2)* - is applicable here and because of this, Plaintiff’s appointment of a special representative was proper and timely. A12-A16 The Supreme Court’s ruling and interpretation of 13-209 in *Relf*, however, does not support the appellate court’s decision. Based on this Court’s construction of 13-209, subsection (c) – not (b) - is the applicable subsection under the undisputed facts of this case because subsection (b) applies to situation where the death of a defendant is known by plaintiff prior to filing suit; (c) applies to factual situations in which a plaintiff learns of the death of defendant after suit has already been filed. *Relf v. Shatayeva* 114925 at ¶27-¶28

As this Court stated in *Relf*, subsection (c) is a savings clause; it applies when a lawsuit is filed without a plaintiff knowing of the defendant’s death and when plaintiff only learns of defendant’s death only after statute of limitations has expired. *Id.* If the four conditions of subsection (c) are met, an action may be commenced against a defendant’s personal representative; one of these conditions in subsection (c) requires that a personal representative

be named within two years of the time limited for the commencement of the original action; Plaintiff failed to do so. 735 ILCS 5/2-13-209(c) The naming of a “special representative” is not included anywhere in subsection (c). Subsection (c) specifically requires the naming of a “personal representative;” the *Relf* decision talked at length about the difference between the two. *Relf*, 2013 IL 114925 at ¶ 31-¶ 42 This Court has stated that “Section 13-209(c) deals specifically and unambiguously with the situation where a party has commenced an action against a deceased person and that person’s death is unknown to the party before the statute of limitations expires.” *Id.* at ¶ 28, See also *Minikon v. Escobedo*, 324 Ill.App.3d 1073, 1078 (1st Dist. 2001)

Despite this Court’s clear ruling in *Relf*, the appellate court ruled in the present case that subsection (b)(2) – standing alone - applies in this case. A13-A16 The appellate court stated that the 1997 amendment which allowed for a “special representative” to be appointed by the trial court “was placed into a new paragraph (2) of subsection (b) of section 13-209.” A6, ¶19 Despite the fact that this amendment was inserted only in subsection (b) and not (c), the appellate court determined that (b)(2) – *and only (b)(2)* - applied and allowed Plaintiff to name a special representative rather than a personal representative as clearly stated in subsection (c). A12-A16

Sub-subsection (b)(2) does not stand “separate and apart” from the remainder of 13-209. The appellate court’s decision is in contradiction to the Supreme Court’s decision in *Relf*. Based on this Court’s construction of 13-209, subsection (c) – not (b) - is the applicable subsection under the undisputed facts of this case because subsection (b) applies to situation where the death of a defendant is known by plaintiff prior to filing suit; (c) applies to factual situations in which a plaintiff learns of the death of defendant after suit has already been filed.

Relf v. Shatayeva 114925 at ¶ 27 The appellate court’s decision that sub-subsection (b)(2) can stand alone and allow Plaintiff to name a special representative is not supported by the statute and contradicts the holding in *Relf*.

In its decision, the appellate court focused incorrectly on the fact that *Relf* involved a situation in which a petition for letters of office was filed for the decedent’s estate prior to suit being filed against defendant. A13-A16 This fact was seen as a distinguishing fact that leads to a different result in the present case. The appellate court’s decision also found that the requirement of a plaintiff to “open an estate, get a personal representative appointed, and sue that personal representative” was a holding that would be “extreme.” A13, ¶ 37-¶ 38 In its holding that (b)(2) could “stand alone.” the appellate court stated that “Rather than force the plaintiff to file a probate action to open an estate solely for the purpose of litigating this one lawsuit, the plaintiff may simply ask the court presiding over the lawsuit to appoint a special representative for this purpose.” A15, ¶ 42

The appellate court’s reliance on the factual difference that an estate was already opened in *Relf* was misplaced because this fact was not a determinative fact in the Supreme Court’s decision. This Court’s decision in *Relf* did not turn on the fact that an estate had been opened for decedent prior to suit being filed. The Court stated clearly in *Relf* that “Under the express terms of section 13-209(c), the issue is simply whether Mr. Grand Pre’s death was unknown to Plaintiff.” *Id.* at ¶ 29 The Supreme Court stated that:

We turn then to the central issue in this case: whether plaintiff’s action once she did learn of Mr. Grand Pre’s death complied with the conditions required by 13-209(c). If those conditions were not satisfied, the circuit court was correct to conclude that section 13-

209(c) could not be invoked by plaintiff in aid of her otherwise invalid and untimely cause of action. If the statute's conditions were met, as the appellate court believed, plaintiff's cause of action remains viable and the circuit court should not have dismissed it. *Id.* at ¶30

The fact that was relevant in *Relf* as to whether subsection (b) or (c) is applicable is *not* whether a petition for letters of office was filed prior to suit being filed. Instead, the relevant fact in *Relf* which determines whether the provisions of subsection (b) or subsection (c) apply is when plaintiff learned of the death of the party and whether that knowledge was prior to or after the commencement of the lawsuit. *Id.* It is this fact that is relevant in determining whether subsection (a) or (b) applies, and based on *Relf*, it is this fact that makes subsection (c) – and not (b) - applicable here because it is undisputed that Plaintiff did not learn of Defendant's death until after the lawsuit was filed and after the statute of limitations had expired.

This Court has explained the important differences between subsections (b) and (c):

The provisions of section 13-209(b) presuppose that the plaintiff is aware of the defendant's death at the time he or she commences the action. A separate set of requirements apply where, as in this case, the defendant's death is not known to the plaintiff before expiration of the limitations period and, unaware of the death, the plaintiff commences the action against the deceased defendant directly. This scenario is governed by section 12-209(c). Assuming that the cause of action survives the defendant's death and is not otherwise barred, section 13-209(c) permits a plaintiff to preserve his or her cause of action by substituting the deceased person's "personal representative" as the defendant. *Id.* at ¶27

The Supreme Court stated in *Relf* that “Section 13-209(c) deals specifically and unambiguously with the situation where a party has commenced an action against a deceased person and that person’s death is unknown to the party before the statute of limitations expires.” *Id.* at ¶28 *This is exactly the situation in the present case:* A party (Plaintiff) commenced an action against a deceased person (Donald Christopher) and Mr. Christopher’s death was unknown to the party (Plaintiff) before the statute of limitations expired. A2 Because subsection (c) is the applicable section to the undisputed facts of this case, Plaintiff was *required* to have a personal representative for Mr. Christopher’s estate appointed by the court; it is undisputed that Plaintiff failed to do prior to the expiration of the statute of limitations stated in the statute.

Despite this Court’s construction and application of Section 13-209 as discussed in *Relf*, the First District appellate court stated here in its decision that:

But nothing in the language of subsection (c) suggests that a plaintiff must name the personal representative when the option of appointing a special representative is available under subsection (b)(2) – that is, when no estate has been opened and no personal representative has yet been named. *We read subsection (c) as differing from subsection (b)(1), based on the timing of when the plaintiff discovered the defendant’s death. We do not read subsection (c) as having any bearing on the effect of subsection (b)(2), which stands separate and apart.* (emphasis added)

A9, ¶ 28

There is no support in 13-209 for the appellate court’s determination in its decision that sub-subsection (b)(2) stands “separate and apart” and allow a plaintiff to name a special

representative despite the fact – an undisputed fact – that the remainder of subsection (b) does not apply because Plaintiff was not aware of Donald Christopher’s death prior to commencing the lawsuit.

The First District appellate court’s interpretation and application of 13-209 in its decision is not supported by this Court’s construction of this statute found in *Relf*. This Court has never ruled that subsection (b)(2) is a section that is “standing separate and apart” from the remainder of subsection (b). Further, this Court has made clear that subsection (c) applies, as the statute language states, “when a lawsuit is commenced against a deceased person whose death is unknown to the party before the expiration of the time limited for the commencement of the action.” 735 ILCS 13-209(c) This Court’s discussion of 13-209(b) and (c) do not need to be “placed in context,” as the appellate court stated in its decision. A13, ¶ 38 There is nothing in the statute’s language that supports the appellate court’s determination that only sub-subsection (b)(2) is applicable under the undisputed facts.

In its decision, the appellate court has, in essence, reorganized Section 13-209 in its ruling that sub-subsection (b)(2) can exist “separate and apart” from the remainder of (b) and, further, that (b)(2) can be applied in a factual situation where a plaintiff was not aware of the death of the plaintiff prior to commencement of the lawsuit. Without support from the language in the statute itself, the appellate court is legislating and modifying the statute; this is not the court’s role.

As the circuit court stated in its order granting Defendant’s motion to dismiss, “In sum, the statute of limitations has long passed under section 13-209(c)(4) for Lichter to name personal representative for Christopher’s estate and file an amended complaint. To permit Lichter to correct her errors at this point would read *Relf* out of existence.” A26, C305 The

appellate court's decision contradicts this Court's decision in *Relf v. Shatayeva*. The appellate court's statement that, "We thus find nothing in the language of subsection (b)(2), nor in its purpose, to indicate that it applies only if the plaintiff knows of the defendant's death before the limitations period ran" is directly contradictory to this Court's holding in *Relf* that subsection (b) "presuppose[s] that the plaintiff is aware of the defendant's death at the time he or she commences the action." A15 ¶ 28

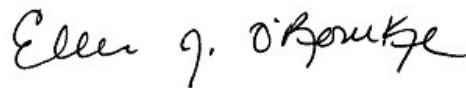
Based on this Court's application and construction of 13-209 in *Relf*, Plaintiff was required to appoint a personal representative pursuant to 13-209(c); Plaintiff failed to do so prior to the expiration of time allowed by the statute to do so. There is simply no support for the appellate court's determination here that 13-209(b)(2) is applicable under the facts here and, further, not support for the appellate court's determination that sub-subsection (b)(2) can be applied "separate and apart" from the remainder of subsection (b) and (c) as well.

Plaintiff never appointed a personal representative for Donald Christopher. Plaintiff instead improperly appointed Porter-Carroll, a person who has no connection to Mr. Christopher and who was at the time an employee of Plaintiff's law firm, as a special representative of Decedent Christopher. A18-A19 The Supreme Court stated in *Relf* that, "If those conditions [under 209(c)] were not satisfied, the circuit court was correct to conclude that section 13-209(c) could not be invoked by plaintiff in aid or her otherwise invalid and untimely cause of action." *Id.* at ¶30. The circuit court in the present case properly dismissed Plaintiff's lawsuit for this same reason. A23-A26, C305 The appellate court's decision overruling the circuit court's dismissal is improper and is in direct contradiction to this Court's ruling in *Relf v. Shatayeva*.

CONCLUSION

For all the foregoing reasons, Defendant KIMBERLY PORTER CARROLL as Special Representative of the Estate of Donald Christopher, respectfully requests that this Honorable Court reverse the appellate court's order and opinion of March 31, 2022 that reversed and remanded the trial court's dismissal order of June 4, 2020. Defendant requests that this Court affirm the trial court's dismissal order of June 4, 2020.

Respectfully submitted,



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APPENDIX

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2022 IL App (1st) 200828

THIRD DIVISION
March 31, 2022

No. 1-20-0828

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMIE LICHTER,)	
)	
Plaintiff-Appellant,)	Appeal from the
)	Circuit Court of
v.)	Cook County.
)	
)	18 L 696
KIMBERLY PORTER CARROLL as Special)	
Representative of the Estate of Donald)	Honorable
Christopher,)	John H. Ehrlich
)	Judge Presiding.
Defendant-Appellee.)	

JUSTICE ELLIS delivered the judgment of the court, with opinion.
Presiding Justice Gordon and Justice Burke concurred in the judgment and opinion.

OPINION

¶ 1 Approximately two years after a car accident, plaintiff Jamie Lichter filed a personal-injury claim against Donald Christopher. At the time she filed the complaint, plaintiff did not know that Christopher had died. After learning of his death, she filed a motion to appoint a special representative for Christopher’s estate to defend the lawsuit.

¶ 2 Two years into the lawsuit, the special representative moved to dismiss the action, claiming that state law required plaintiff to sue Christopher’s *personal* representative, not his *special* representative. And since the repose period for suing his personal representative had passed, the case was time-barred. The circuit court reluctantly agreed and dismissed the action,

believing that the disposition was controlled by the decision of our supreme court in *Relf v. Shatayeva*, 2013 IL 114925. We find *Relf* distinguishable and hold that plaintiff sued the correct party. We reverse the dismissal of the action and remand for further proceedings.

¶ 3

BACKGROUND

¶ 4 On February 27, 2016, the vehicle Donald Christopher was driving rear-ended the vehicle of Jamie Lichter “with great force” while he was trying to merge onto Interstate 294. On January 19, 2018, she filed a personal-injury suit against Christopher, within the two-year limitations period for a personal-injury suit. See 735 ILCS 5/13-202 (West 2016) (action for personal injury must be filed “within 2 years next after the cause of action accrued”); *Doe v. Hastert*, 2019 IL App (2d) 180250, ¶ 28.

¶ 5 Unbeknownst to plaintiff, Christopher had died in June 2017, about fifteen months after the accident and before the lawsuit was filed. No letters of office were ever issued to open an estate on Christopher’s behalf.

¶ 6 In April 2018, plaintiff moved the trial court to appoint a special representative, namely Kimberly Porter-Carroll, to defend the action on Christopher’s behalf. Plaintiff indicated in her motion that her investigation revealed that an estate had not been opened for Christopher. The court granted the motion, appointing Porter-Carroll as special representative to replace Christopher as defendant. Ultimately, an attorney for Christopher’s insurer, State Farm, entered an appearance on behalf of the special representative.

¶ 7 Over the next two years of litigation, the parties engaged in written and oral discovery, including at least two depositions. A trial was scheduled for April 2020, though it was then postponed indefinitely due to the COVID-19 pandemic.

¶ 8 In early March 2020, however, defendant moved to dismiss the complaint with prejudice. Defendant argued that, under section 13-209 of the Code of Civil Procedure, plaintiff had been required to sue the *personal* representative of Christopher’s estate, not a *special* representative. See 735 ILCS 5/13-209 (West 2016). And because suits against personal representatives must be filed no later than two years after the running of the limitations period (*id.* § 13-209(c)(4)), and the two-year anniversary of the expiration of the limitations period was February 27, 2020, it was now too late, in March 2020, to cure the mistake; the suit was incurably time-barred.

¶ 9 Plaintiff responded that she properly sued a special representative; that any error was a misnomer subject to cure; that she should be permitted to amend the complaint and relate it back to the timely-filed complaint; and that defendant engaged in gamesmanship and should not be rewarded for sitting on its hands for two years’ worth of litigation, only to seek dismissal after two years beyond the limitations period had come and gone.

¶ 10 The circuit court was sympathetic, noting that “State Farm is not an entirely innocent party in this controversy,” as State Farm had litigated the *Relf* decision and knew it well, but sat back and waited until two years had run beyond the limitations period before moving to dismiss. Noting that the law did not require “professional courtesy,” however, the court agreed with State Farm that *Relf* controlled the disposition. Though the court found the discussion in *Relf* to be “questionable” insofar as it applied to the facts of this case, it ultimately concluded that *Relf*’s reasoning precluded any outcome other than dismissal.

¶ 11 While the court issued its dismissal on June 4, 2020, it was not circulated to the parties until June 16, 2020, after the 30-day limit to appeal. We granted leave to file a late notice of appeal.

¶ 12

ANALYSIS

¶ 13 This appeal requires us to construe subsections (b) and (c) of section 13-209 of the Code of Civil Procedure, which govern the procedure when a defendant or potential defendant dies before the expiration of the applicable limitations period. See *id.* § 13-209(b), (c). It is a question of law we review *de novo*, owing no deference to the trial court’s interpretation of the statute. *Relf*, 2013 IL 114925, ¶ 21.

¶ 14 Before we examine the details of the language, we provide some context. As the supreme court explained in *Relf*, section 13-209 addresses two different types of representatives that may be appointed in the stead of a deceased defendant. One is a “personal representative,” who is appointed after an estate is opened in a probate action and letters of office are issued naming that personal representative. See *id.* ¶¶ 34-38. The term “personal representative” can be broken down further into two categories—executors named in the decedent’s will, or administrators, appointed when the decedent died without a will or without a surviving executor—but they all share the common trait of requiring the issuance of letters of office. *Id.* ¶ 33. Section 13-209 uses the umbrella term “personal representative.” *Id.* ¶ 33.

¶ 15 Then there are “special representatives.” A special representative is not appointed for the purpose of settling an estate writ large; a special representative, as the term suggests, is appointed for the limited purpose of representing the decedent’s estate in a particular proceeding where no personal representative has been named. *Id.* ¶ 34. That last detail is important—a special representative is named only when an estate has not been opened, no letters of office have been issued, and no personal representative has been named. *Id.* Were it otherwise, the special representative’s role would be redundant; she would be performing the same function—representing the estate—as the personal representative. *Id.* ¶ 54. The terms “personal

representative” and “special representative” are thus not interchangeable. *Id.* ¶ 35. They are, in fact, mutually exclusive.

¶ 16 Before 1997, section 13-209 only mentioned “personal representatives.” *Id.*; see 735 ILCS 5/13-209 (West 1996). Subsection (c) governed the appointment of a personal representative in the specific instance when the plaintiff did not discover the defendant’s death until after the limitations period had run. *Relf*, 2013 IL 114925, ¶ 27; 735 ILCS 5/13-209(c) (West 1996). Subsection (b) covered the situation where the plaintiff knew of the defendant’s death before filing suit or, at a minimum, before the limitations period expired. *Relf*, 2013 IL 114925, ¶ 27; 735 ILCS 5/13-209(b) (West 1996).

¶ 17 Though subsections (b) and (c) differed in some respects, generally speaking, if a defendant died before the limitations period expired, the plaintiff was required to name the personal representative as a defendant in the stead of the deceased individual defendant. *Relf*, 2013 IL 114925, ¶ 35. If an estate had been opened, that task would be simple enough; the plaintiff would identify the estate’s personal representative through court records and name that personal representative in the lawsuit. *Id.* ¶ 56. If, however, an estate had *not* been opened, and thus no personal representative had been named, the plaintiff would be required to open the estate *herself* under the Probate Act of 1975, seeking the appointment of a personal representative to defend the estate in the lawsuit. See, e.g., 755 ILCS 5/9-3(i), (j), 13-1 (West 2016).

¶ 18 In 1997, the General Assembly amended section 13-209, providing a more efficient and streamlined option for plaintiffs in the event that no letters of office had been issued and, thus, no personal representative had been named for the deceased defendant. Rather than requiring that a plaintiff file a probate action to open the estate and have a *personal* representative appointed to

represent the interests of the deceased defendant, the plaintiff could simply move the court presiding over the lawsuit to appoint a “special representative” for the limited purpose of defending that lawsuit only. *Relf*, 2013 IL 114925, ¶ 35; see Pub. Act 90-111, § 5 (eff. July 14, 1997) (amending 735 ILCS 5/13-209). The sponsor of the 1997 amendment explained that the purpose was to avoid the additional time and cost of opening a probate action just to litigate a single lawsuit: “[N]o one would have to go to probate court, this would allow the judge in a civil case to appoint such a representative.” 90th Ill. Gen. Assem., House Proceedings, Mar. 13, 1997, at 49 (statements of Rep. Lang). “Rather than open a probate estate and expend a lot of time, attorney fees, and costs, this would enable the court to appoint someone so that this civil case could continue.” Ill. Gen. Assem., House Proceedings, Mar. 13, 1997, at 50 (statements of Rep. Lang).

¶ 19 This 1997 amendment was placed into a new paragraph (2) of subsection (b) of section 13-209. See Pub. Act 90-111, § 5 (eff. July 14, 1997) (amending 735 ILCS 5/13-209). So whereas section 13-209 previously had provided for two different scenarios in which a personal representative could be appointed—one in subsection (b) and one in subsection (c)—the amendment provided for the two different circumstances in which a *personal* representative could be appointed in subsections (b)(1) and (c), with the option of a *special* representative now provided for in subsection (b)(2). *Id.*; see 735 ILCS 5/13-209 (West 1998).

¶ 20 With that background in mind, we consider subsection (b) of the statute, with the reminder that plaintiff argues that this action is governed by subsection (b)(2):

“(b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred:

(1) an action may be commenced against his or her personal representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death;

(2) *if no petition has been filed for letters of office for the deceased's estate*, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs *and without opening an estate*, may appoint a *special representative* for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims." (Emphases added.) 735 ILCS 5/13-209(b) (West 2016).

¶ 21 Plaintiff finds subsection (b)(2) applicable because no petition for letters of office was ever filed for Christopher's estate, and thus it was proper for the court, on plaintiff's motion, to appoint a "special representative." *Id.* § 13-209(b)(2).

¶ 22 Defendant, on the other hand, argues that the matter falls within the purview of subsection (c), which reads as follows:

"(c) If a party commences an action against a deceased person *whose death is unknown to the party before the expiration of the time limited for the commencement thereof*, and the cause of action survives, and is not otherwise barred, the action may be commenced against the deceased person's *personal representative* if all of the following terms and conditions are met:

(1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.

(2) The party proceeds with reasonable diligence to serve process upon the personal representative.

(3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.

(4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action.” (Emphases added.) *Id.* § 13-209(c).

¶ 23 Defendant’s argument is that plaintiff did not know of Christopher’s death until after the expiration of the limitations period—that much is undisputed—and thus she was required to sue a *personal* representative, not a special representative, of Christopher’s estate, per subsection (c). And because paragraph 4 of subsection (c) contains a repose period, providing that in no event may a personal representative be sued more than two years after the expiration of the limitations period (*id.* § 13-209(c)(4)), plaintiff’s action was subject to dismissal on February 28, 2020, two years after the limitations period expired. Thus, when defendant moved for dismissal in March 2020, dismissal with prejudice was the only recourse.

¶ 24 We first note that the actions plaintiff took squarely tracked the language of paragraph (2) of subsection (b). It is undisputed that the “person against whom an action may be brought”—Christopher—“die[d] before the expiration of the time limited for the commencement

thereof.” *Id.* §13-209(b). There is no dispute that “the cause of action survive[d]” and was “not otherwise barred.” *Id.* The opening provisions of subsection (b) were clearly satisfied.

¶ 25 As for subsection (b)(2), it is likewise undisputed that “no petition ha[d] been filed for letters of office for the deceased’s estate.” *Id.* § 13-209(b)(2). Thus, “upon the motion of a person entitled to bring [the] action”—plaintiff—the trial court properly “appoint[ed] a special representative for the deceased party for the purposes of defending the action.” *Id.*

¶ 26 Defendant at no time disputes that plaintiff’s actions complied with subsection (b)(2). Instead, defendant argues, not without support, that subsection (c) was plaintiff’s exclusive remedy because the opening language of subsection (c) more specifically applies. That is, subsection (c) applies when “a party commences an action against a deceased person *whose death is unknown to the party before the expiration of the time limited for the commencement thereof.*” (Emphasis added.) *Id.* § 13-209(c).

¶ 27 It is, indeed, undisputed that plaintiff did not learn of Christopher’s death until after the expiration of the limitations period. In defendant’s view, then, plaintiff’s exclusive recourse was to follow the dictates of subsection (c), which provides that “the action may be commenced against the deceased person’s *personal* representative” if certain criteria are satisfied. (Emphasis added.) *Id.* And plaintiff did not meet the last of those criteria—she did not sue the personal representative within two years of the running of the limitations period. *Id.* § 13-209(c)(4).

¶ 28 But nothing in the language of subsection (c) suggests that a plaintiff must name the *personal representative* when the option of appointing a special representative is available under subsection (b)(2)—that is, when no estate has been opened and no personal representative has yet been named. We read subsection (c) as differing from subsection (b)(1), based on the timing

of when the plaintiff discovered the defendant's death. We do not read subsection (c) as having any bearing on the effect of subsection (b)(2), which stands separate and apart.

¶ 29 Defendant's argument is based on language in *Relf*, 2013 IL 114925, which the trial court found controlling, too. We turn to that decision now.

¶ 30 Relf was injured in a car accident and sued the decedent to recover damages for personal injuries she suffered. *Id.* ¶ 1. She was unaware that the decedent had died, much less that "his will had been admitted to probate, and letters of office had been issued" to the decedent's son to serve as the personal representative of the estate. *Id.* Upon learning of the decedent's death, and without notice to the estate, Relf successfully moved for the appointment of a secretary in her lawyer's office as " 'special administrator' " to defend the lawsuit. *Id.*

¶ 31 The supreme court held that defendant was required to sue the personal representative of the estate—the decedent's son. Relf had argued that a "special administrator" sufficed, but the supreme court noted that the term "special administrator" "is not used anywhere in section 13-209." *Id.* ¶ 42. The court recognized that the term "special *representative*" appeared in section 13-209 and might be considered roughly "equivalent" to a special administrator, but that fact did not assist Relf, as the portions of section 13-209 that concerned the appointment of personal representatives was entirely distinct from those governing special representatives. *Id.* ¶ 35.

¶ 32 Indeed, the court went to great lengths to emphasize that personal and special representatives are not interchangeable. *Id.* Personal representatives are appointed through the issuance of letters of office to settle an estate, while special representatives are appointed for specific purposes when no letters of office have been issued. See, *e.g., id.* ¶ 34 (" 'Special representatives' are referenced only with respect to situations where 'no petition for letters of office for the decedent's estate has been filed.' "); *id.* ¶ 36 ("a 'personal representative' means

one appointed pursuant to a petition for issuance of letters of office”); *id.* ¶ 37 (“ ‘personal representative’ as used in section 13-209 was intended by the legislature to refer specifically to individuals appointed to settle and distribute a decedent’s estate pursuant to a petition for issuance of letters of office”); *id.* ¶ 45 (“a ‘personal representative’ refers specifically to an individual appointed to settle and distribute an estate pursuant to a petition for issuance of letters of office”). The court’s discussion of the 1997 amendment that added the appointment of “special representatives” to section 13-209 underscored this point. *Id.* ¶ 35.

¶ 33 Thus, even if Relf were correct that her motion to appoint a “special administrator” were akin to the appointment of a “special representative” under section 13-209, her argument still failed, because Relf had no right to appoint a special representative once letters of office had issued and a personal representative was named. *Id.* ¶ 45. The supreme court explained why the law did not allow the appointment of a special representative once a personal representative had been named pursuant to the issuance of letters of office:

“Having two separate individuals attempting to operate simultaneously and independently on behalf of the same decedent poses obvious problems for the prompt, efficient and final settlement of the decedent’s affairs. Moreover, Illinois law is clear that a testator has the right to designate by will who shall act as his personal representative, and a court may not ignore his directions and appoint someone else to act in that capacity. Where, as here, the testator has designated such a representative, the appointment of another party to serve as special administrator impermissibly infringes on that right and is not allowed.” *Id.* ¶ 52.

¶ 34 The lesson we take from *Relf* is that if letters of office have issued, and thus a personal representative is appointed, that personal representative *must* be the party sued by a plaintiff.

Suing a special representative or a “special administrator” (in the case of *Relf*) is insufficient if an estate has been opened, letters of office have issued, and a personal representative is named.

¶ 35 Defendant does not dispute the distinction between a personal representative and a special representative. Defendant points, instead, to the general discussion of section 13-209 at the outset of the supreme court’s analysis. In initially breaking down section 13-209, the court wrote:

“Subsection (b) sets forth the basic procedures and time requirements that must be followed in situations where a person against whom an action may be filed dies before the limitations period runs out, the action survives the person’s death, and it is not otherwise barred. If no petition has been filed for letters of office for the decedent’s estate, the court may appoint a ‘special representative’ for the deceased party for the purposes of defending the action. 735 ILCS 5/13-209(b)(2) (West 2010).

Otherwise, *i.e.*, if a petition *has* been filed for letters of office for the decedent’s estate, an action may be commenced against the “personal representative” appointed by the court. 735 ILCS 5/13-209(b)(1) (West 2010).

The provisions of section 13-209(b) presuppose that the plaintiff is aware of the defendant’s death at the time he or she commences the action. A separate set of requirements apply where, as in this case, the defendant’s death is not known to plaintiff before expiration of the limitations period and, unaware of the death, the plaintiff commences the action against the deceased defendant directly. This scenario is governed by section 13-209(c) [citation]. Assuming that the cause of action survives the defendant’s death and is not otherwise barred, section 13-209(c) permits a plaintiff to

preserve his or her cause of action by substituting the deceased person’s ‘personal representative’ as the defendant.” (Emphases in original and added.) *Id.* ¶¶ 26-27.

¶ 36 Focusing on that italicized language, defendant says that subsection (b)(2) cannot apply here, because in the supreme court’s own words, subsection (b) “presuppose[s] that the plaintiff is aware of the defendant’s death at the time he or she commences the action.” *Id.* ¶ 27. And plaintiff here, of course, was *not* aware of Christopher’s death until long after she filed suit. Thus, in defendant’s view, subsection (b) is inapplicable, leaving only subsection (c)—which requires that a *personal* representative be sued, even if one does not currently exist.

¶ 37 If defendant is right, then *Relf* stands for the proposition that, if a plaintiff does not learn of a defendant’s death until after the limitations period has expired, that plaintiff must open an estate, get a personal representative appointed, and sue that personal representative. The new option of suing a special representative, created in 1997 for situations where no estate has been opened, would be strictly limited, in defendant’s mind, to situations where the plaintiff knows of the defendant’s death before the limitations period has expired. The trial court read *Relf* that way, too, though the trial court found that interpretation of subsection (b) “troubling.”

¶ 38 We do not read *Relf* as holding anything so extreme. First, that supposed bright-line rule defendant posits was clearly not the holding in *Relf*. Again, the supreme court held that if an estate *has* been opened and a personal representative *has* been appointed, that personal representative must be the party sued in lieu of the deceased defendant. Second and more to the point, the supreme court’s general discussion of subsections (b) and (c) must be placed in context. Defendant ignores that, as we already noted, both subsections (b) and (c) contain provisions regarding suits against personal representatives—more specifically, subsections (b)(1) and (c)—and it was necessary for the supreme court to determine which of those two applied.

Again, the supreme court found that the specifically-worded subsection (c) covered the instance when the plaintiff first learns of the defendant's death after the limitations period has expired, and thus, by extension, the more generally-worded subsection (b)(1) covers all other scenarios.

Id. ¶ 27.

¶ 39 We do not read that portion of *Relf* as referring in any way to the very different (and, in *Relf*, factually inapplicable) provision of subsection (b)(2), governing the appointment of a special representative if letters of office have not been issued. The supreme court could not have been more emphatic in explaining the differences between a special and personal representative.

¶ 40 Nor, for that matter, would it have made sense for the supreme court to be referring to subsection (b)(2) in that discussion because, unlike the contrast in language between subsections (b)(1) and (c), the language of subsection (b)(2) says nothing about the timing of when the plaintiff discovers the defendant's death:

“(b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred:

(2) if no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action.” 735 ILCS 5/13-209(b)(2) (West 2016).

¶ 41 Unlike the contrast between subsections (b)(1) and (c), which could not possibly apply at the same time—else one of them would be superfluous—there is nothing in the language of

subsection (b)(2) placing a limit on the circumstances in which a plaintiff may avail herself of the streamlined option of asking the court presiding over the lawsuit to appoint a special representative, when no personal representative has been named.

¶ 42 Indeed, to place such a limit on subsection (b)(2) would be contrary to its very purpose. As the language makes clear and as the House sponsor stated on the House floor, the purpose of subsection (b)(2) is to provide a less costly, more efficient, and streamlined option to a plaintiff when an estate has not already been opened and a personal representative has not already been named for the deceased defendant. Rather than force the plaintiff to file a probate action to open an estate solely for the purpose of litigating this one lawsuit, the plaintiff may simply ask the court presiding over the lawsuit to appoint a special representative for this special purpose. We can think of no reason, nor does the language admit of any, why that option should only be available, as defendant claims, when the plaintiff knows that the defendant has died before the limitations period has run.

¶ 43 We thus find nothing in the language of subsection (b)(2), nor in its purpose, to indicate that it applies only if the plaintiff knows of the defendant's death before the limitations period runs. Just as the supreme court in *Relf* noted in repeatedly and emphatically distinguishing between personal representatives and special representatives, we find that subsection (b)(2) stands apart from subsections (b)(1) and (c), which must be read together because they both cover the issue of naming a personal representative.

¶ 44 In sum, the facts of *Relf* are obviously distinguishable, and so too is its holding. *Relf* held that, if a personal representative has been named, that personal representative must be named in the lawsuit. There, letters of office had been issued, and a personal representative had been named, so *Relf* was required to name the personal representative in the lawsuit. And because

Relf did not learn of the defendant's death until after the limitations period had run, subsection (c) of section 13-209, rather than subsection (b)(1), governed.

¶ 45 *Relf* did *not* hold that a personal representative must be named even if no estate has been opened, and no personal representative named. Subsection (b)(2), which governs when no letters of office have been issued and no personal representative has been named, was surely included in the overall discussion of section 13-209 in *Relf* but played no role in its holding, other than the fact that *Relf* repeatedly made it clear that subsection (b)(2) was not applicable under the facts of that case.

¶ 46 Here, it is undisputed that no estate had been opened in Christopher's name. No letters of office had been issued. No personal representative had been named. Plaintiff was thus well within her rights to elect the option of moving the court presiding over this lawsuit to appoint a special representative under subsection (b)(2) of section 13-209. She took that very step. We find no defect in the naming of that special representative that would warrant dismissal of this case.

¶ 47 **CONCLUSION**

¶ 48 The judgment of the circuit court is reversed. The cause is remanded with directions to reinstate the lawsuit and for any further proceedings.

¶ 49 Reversed and remanded with directions.

No. 1-20-0828

Cite as: *Lichter v. Carroll*, 2022 IL App (1st) 200828

Decision Under Review: Appeal from the Circuit Court of Cook County, No. 18-L-696;
the Hon. John H. Ehrlich, Judge, presiding.

**Attorneys
for
Appellant:** Yao O. Dinizulu, of Dinizulu Law Group, Ltd., of Chicago, for
appellant.

**Attorneys
for
Appellee:** Bruce Farrel Dorn & Associates, of Chicago (Ellen J. O'Rourke
and Jean M. Bradley, of counsel), for appellee.

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

Jamie Lichter,)	
)	
Plaintiff,)	
)	
v.)	
)	No. 18 L 696
Kimberley Porter Carroll, as special)	
representative of the estate of)	
Donald Christopher,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

The Code of Civil Procedure requires that a personal representative serve as the placeholder for a defendant who died without the plaintiff's knowledge prior to filing suit. In this case, the plaintiff named instead a special representative, and the statute of limitations for naming a personal representative has expired. The plaintiff's error compels this court to grant the defendant's motion and dismiss the case with prejudice.

Facts

On February 27, 2016, a vehicle driven by Donald Christopher rear-ended another driven by Jamie Lichter. On ~~June 12, 2017, Christopher died. On January 19, 2018, Lichter,~~ unaware of Christopher's death, filed a single-count negligence suit against him. Lichter attempted service on Christopher in January and February 2018, to no avail. On April 3, 2018, Lichter filed a motion asking this court to appoint a special representative on Christopher's behalf. On April 30, 2018, this court granted the motion and issued an order stating: "Plaintiff granted leave to file amended complaint appointing special representative Kimberly Porter Carroll pursuant to 735 ILCS 5/2-1008(b)." Porter Carroll

is an employee of Lichter's attorney's law firm. On May 22, 2018, Lichter filed an amended complaint with Porter Carroll identified in the caption as "special representative." Lichter obtained service on Porter Carroll the next day.

On August 22, 2018, Lichter sent a copy of the complaint and a court order to State Farm Insurance, Christopher's insurer at the time of the collision. After the carrier failed to file an appearance, Lichter filed a motion for default. This court continued that motion on multiple occasions until January 4, 2019, when a State Farm attorney appeared on Christopher's behalf through Porter Carroll.

The case proceeded through written and oral discovery. The trial that had been scheduled for April 21, 2020 was continued indefinitely because of the court's closure. On March 3, 2020, Christopher, through Porter Carroll, filed a motion to dismiss the amended complaint with prejudice. The parties fully briefed the motion and attached various exhibits to their pleadings.

Analysis

Porter Carroll brings her motion to dismiss pursuant to Code of Civil Procedure section 2-619. *See* 735 ILCS 5/2-619. A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

Porter Carroll argues that two of the enumerated grounds for a section 2-619 motion authorize the dismissal of Lichter's complaint: (1) "the court does not have jurisdiction of the subject matter of the action," 735 ILCS 5/2-619(a)(1); and (2) "the action was not commenced within the time limited by law," 735 ILCS 5/2-619(a)(5). Porter Carroll's argument derives from the statute of limitations governing the filing of suits when one or more of the parties is deceased. *See* 735 ILCS 5/13-209. Lichter agrees that section 13-209 is the lynchpin to this case, but argues that a different subsection controls. The dueling subparagraphs state as follows:

(b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred:

(1) an action may be commenced against his or her personal representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death;

(2) if no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims.

(c) If a party commences an action against a deceased person whose death is unknown to the party before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, the action may be commenced against

the deceased person's personal representative if all of the following terms and conditions are met:

(1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.

(2) The party proceeds with reasonable diligence to serve process upon the personal representative.

(3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.

(4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action.

735 ILCS 5/13-209(b) & (c).

Porter Carroll's motion is grounded in subsection (c). She argues first that Lichter failed to name a personal representative to represent Christopher within the two-year statute of limitations provided in section 13-209(c)(4). According to Porter Carroll, absent a timely identified personal representative, Lichter's case is proceeding against a decedent who, under the common law, cannot be named in a lawsuit. *See Relf v. Shatayeva*, 2013 IL 114925, ¶ 22 (citing *Volkmar v. State Farm Mut. Auto. Ins. Co.*, 104 Ill. App. 3d 149, 151 (5th Dist. 1982)). A case in which a named party is deceased cannot invoke a circuit court's jurisdiction; consequently, any judgment entered in the case would be a nullity. *See Relf*, 2013 IL 114925, ¶ 22 (citing *Danforth v. Danforth*, 111 Ill. 236, 240 (1884); *Bricker v. Borah*, 127 Ill. App. 3d 722, 724 (5th Dist. 1984)).

Lichter argues that Porter Carroll is focusing on the wrong subsection. According to Lichter, subsection (b)(2) controls because no one obtained letters of office to open an estate for

Christopher after his death. Lichter argues that since Christopher had and has no estate, the statute requires the appointment not of a personal representative, but a special representative. That moniker is reflected in this court's May 22, 2018 order appointing Porter Carroll as special representative.

The answer to this dispute is found in two sources, the first of which is the rules of statutory construction. When faced with the job of interpreting competing statutes, courts invariably turn to the tools of statutory construction, the cardinal rule of which is to "ascertain and effectuate the legislature's intent. . . ." *McElwain v. Illinois Sec'y of State*, 2015 IL 117170, ¶ 12. The primary source from which to infer this intent is the statute's language. *See id.* "If the language of the statute is clear, the court should give effect to it and not look to extrinsic aids for construction." *Bogseth v. Emanuel*, 166 Ill. 2d 507, 513 (1995). That admonishment extends even to legislative history. *See O'Casek v. Children's Home & Aid Soc'y*, 229 Ill. 2d 421, 446 (2008) (if statute is unambiguous, resort to legislative history is inappropriate). It is also plain that a court may not, "depart from plain statutory language by reading into [a] statute exceptions, limitations, or conditions not expressed by the legislature." *McElwain*, 2015 IL 117170, ¶ 12.

The rules of statutory construction further provide that a statute is to be viewed as a whole, and that a court is to construe words and phrases in light of other relevant statutory provisions. *See Chicago Teachers Union v. Board of Ed.*, 2012 IL 112566, ¶ 15 (citing cases). Words, clauses, and sentences are to be given a reasonable meaning and not rendered superfluous. *See id.* (citing cases). In construing a statute, a court may consider, "the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Id.* A court should attempt to construe potentially conflicting provisions together, *in pari materia*, if it is reasonable to do so, *see id.*, keeping in mind that a court is to presume that the legislature did not intend to create absurd, inconvenient, or unjust results. *See Price v. Phillip Morris, Inc.*, 2015 IL 117687, ¶ 30.

The second source of assistance is the Supreme Court's decision in *Relf*. There, the plaintiff filed a personal injury action against a driver who died two months after the vehicle collision and 22 months before the filing of the complaint. 2013 IL 114925, ¶¶ 4-6. At the time of Relf's filing, the defendant-decedent's death notice had been published, his will admitted to probate, and letters of office issued to his son to serve as the estate's independent administrator. *Id.* These publications had been made one-and-a-half years before Relf filed her complaint. *Id.* at ¶¶ 1 & 6. Despite the defendant-decedent's son's status as the independent administrator of his father's estate, Relf later sought, and the court entered, an order appointing a secretary in Relf's attorney's office to serve as the defendant-decedent's "special administrator," a position not defined in any statute. *Id.* at ¶¶ 9-10.

Based on those facts, the *Relf* court addressed the parties' arguments, which are similar to those presented here. The court first explained the distinction between the two section 13-209 subsections:

Where the deceased party is the defendant, subsections (b) . . . or (c) . . . come into play.

Subsection (b) sets forth the basic procedures and time requirements that must be followed in situations where a person against whom an action may be filed dies before the limitations period runs out, the action survives the person's death, and it is not otherwise barred. If no petition has been filed for letters of office for the decedent's estate, the court may appoint a "special representative" for the deceased party for the purposes of defending the action. 735 ILCS 5/13-209(b)(2). Otherwise, *i.e.*, if a petition has been filed for letters of office for the decedent's estate, an action may be commenced against the "personal representative" appointed by the court. 735 ILCS 5/13-209(b)(1).

Id. at ¶¶ 25-26 (some citations omitted).

Relf also provides a useful explanation distinguishing a personal representative from a special representative. A personal representative includes, “executors, who are named in the defendant’s will, and administrators, who are appointed where the decedent is intestate or else left a will but has no executor.” 2013 IL 114925, ¶ 32. “[E]xecutors and administrators share a common trait. They are both officers of the court to whom letters of office are issued.” *Id.* at ¶ 33. In contrast, “[s]pecial representatives’ are referenced only with respect to situations where ‘no petition for letters of office for the decedent’s estate has been filed.’” *Id.* (citing 735 ILCS 5/13-209(a)(2) & (b)(2)). Given that distinction, Shatayeva’s appointment as “special administrator” was all the more confusing considering that such a designation is not authorized by any statute. *Id.* at ¶ 42. She also had not received letters of office and had no authority to distribute assets of the decedent’s estate. *Id.* at ¶ 44. “Accordingly, appointment of a ‘special administrator’ would not operate to trigger the provisions of section 13-209. . . .” *Id.*

Relf is, however, unsatisfying in at least one respect as to distinguishing between subsections (b) and (c). The court writes that: “The provisions of section 13-209(b) presuppose that the plaintiff is aware of the defendant’s death at the time he or she commences the action.” *Id.* at ¶ 27. Unfortunately, the court does not explain the basis of this statement or cite to any other decision in support. It may be that the *Relf* court made that presumption because subsection (c) explicitly applies if the plaintiff does not know of the defendant-decedent’s death, while subsection (b) is silent as to a plaintiff’s knowledge. *See id.* If true, the court’s presumption would appear to violate the rules of statutory construction by inferring language the legislature did not include. *See McElwain*, 2015 IL 117170, ¶ 12.

Despite *Relf*’s questionable reading of subsection (b), the opinion correctly concludes that subsection (c) is a savings clause.

Subsection (c) applies in those instances in which a lawsuit is filed without the plaintiff knowing of the defendant's death and learns of the death after the statute of limitations has expired. Under those circumstances, an action may be commenced against the defendant-decedent's personal representative if four terms and conditions are met, including: "In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action." 735 ILCS 13-209(c)(4).

Since *Relf* forecloses subsection (b)(2) to a plaintiff who does not know of a defendant's death, it is worth identifying two procedural alternatives that were available to Lichter, both of which derive from the Probate Act. That statute provides an order of preference for various persons to obtain letters of administration on an estate's behalf. See 755 ILCS 5/9-2 & 5/9-3. The statute unquestionably favors the appointment of a decedent's surviving spouse or other relatives, see 755 ILCS 5/9-3(a)-(g), but, importantly, also authorizes the appointment of a decedent's creditor as administrator, see 755 ILCS 5/9-3(j). Under that provision, Lichter could have filed a petition before the probate court to have Porter Carroll named as administrator. Such an appointment would likely have created, at least temporarily, a conflict of interest between the plaintiff and the personal representative and required a probate court's intervention.

A second option available to Lichter under the Probate Act was to have the public administrator appointed as the personal representative of Christopher's estate. See 755 ILCS 5/9-3(i). Each county in Illinois has a public administrator whose job it is to "protect and secure the estate from waste, loss or embezzlement until letters of office on the estate are issued to the person entitled . . . or when no relative or creditor is available." 755 ILCS 5/13-1, 13-3(a) & 13-4; *In re Richter's Estate*, 341 Ill. App. 334, 337 (1st Dist. 1950) ("The purpose of creating the office of public administrator was to give authority to someone to administer on intestate estates where no relative or creditor would administer.").

The public administrator would have been a proper placeholder, able to protect Christopher's estate and represent it in these proceedings.

While the procedures outlined above are not patently obvious, Lichter should have recognized them. After all, the Supreme Court handed down *Relf* in 2013, three years before Lichter's accident and five years before she filed suit. Based on *Relf*, Lichter should have known that she needed to appoint a personal representative, not a special representative. At the same time, State Farm is not an entirely innocent party in this controversy. It is not lost on this court that State Farm took the appellate court's adverse opinion in *Relf* to the Supreme Court and obtained a reversal. Armed with its knowledge of section 13-209, State Farm's attorney could have telephoned the plaintiff's attorney within the two-year window afforded by section 13-209(c)(4), cleared up the error, and gotten this case onto the proper procedural track. While that would have been the optimal resolution, the statute does not require such a professional courtesy.

In sum, the statute of limitations has long passed under section 13-209(c)(4) for Lichter to name a personal representative for Christopher's estate and file an amended complaint. To permit Lichter to correct her errors at this point would read *Relf* out of existence. That is a result this court cannot order.

Conclusion

For the reasons presented above, it is ordered that:

1. Porter Carroll's motion is granted; and
2. This case is dismissed with prejudice.

Judge John H. Ehrlich

JUN 04 2020

Circuit Court 2075


John H. Ehrlich, Circuit Court Judge



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September 28, 2022

In re: Jamie Lichter, Appellee, v. Kimberly Porter Carroll, etc., Appellant.
Appeal, Appellate Court, First District.
128468

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause. We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed with the Clerk's office.

With respect to oral argument, a case is made ready upon the filing of the appellant's reply brief or, if cross-relief is requested, upon the filing of the appellee's cross-reply brief. Any motion to reschedule oral argument shall be filed within five days after the case has been set for oral argument. Motions to reschedule oral argument are not favored and will be allowed only in compelling circumstances. The Supreme Court hears arguments beginning the second Monday in September, November, January, March, and May. Please see Supreme Court Rule 352 regarding oral argument.

Very truly yours,

A handwritten signature in black ink that reads "Cynthia A. Grant".

Clerk of the Supreme Court

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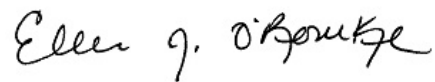
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CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) and 315. The length of this brief, excluding the pages and words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 19 (nineteen) pages.



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Attorney for Defendant/Appellant

Docket No. 128468

IN THE ILLINOIS SUPREME COURT

JAMIE LICHTER,

Plaintiff/Appellee,

v.

KIMBERLY PORTER CARROLL, as special
administrator of the Estate of DONALD
CHRISTOPHER,

Defendant/Appellant.

On Acceptance of Petition for Leave to
Appeal from the Illinois Appellate
Court, First Judicial District, Third
Division

Docket No 1-20-0828

There Heard on Appeal from Circuit
Court of Cook County, Illinois
County Department, Law Division

Circuit Court No. 2018 L 000696

The Honorable John H. Ehrlich,
Judge Presiding**NOTICE OF FILING AND CERTIFICATE/AFFIDAVIT OF SERVICE**

PLEASE TAKE NOTICE that on November 2, 2022, I certify that I have filed with the Clerk of the Illinois Supreme Court, Defendant-Appellant's Supplemental Brief pursuant to Rule 315 following Acceptance of Petition for Leave to Appeal and have on November 2, 2022 also served a copy of this Supplemental Brief and this certificate to Plaintiff counsel at the address noted below in the noted manner(s):

Dinizulu Law Group, Ltd.
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Chicago, IL 60601
dinizulu@dinizululawgroup.com

Court electronic filing manager

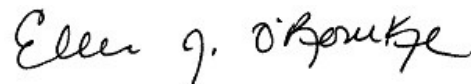
E-mail

U.S. mail at 120 N. LaSalle Street, Chicago, Illinois, at 5:00 p.m., with proper postage prepaid

Certified mail, return receipt requested, with proper postage prepaid, with a check for the fee and mileage enclosed

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

BRUCE FARREL DORN & ASSOCIATES



By: _____

Ellen J. O'Rourke
Attorney for Defendant-Appellant