Court of Appeal for Saskatchewan
Docket: CACV4202

Citation: *Zbitnew Estate v Park*, 2024 SKCA 4
Date: 2024-01-08

Between:

The Estate of Wallis Zbitnew, by her personal representatives Philip Johnson and Murray Johnson

Appellant
(Defendants/Applicants)

And

James Park and Susan Park

Respondents
(Plaintiffs/Respondents)

Before:	Schwann, Tholl and McCreary JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Mr. Justice Tholl
In concurrence:	The Honourable Madam Justice Schwann The Honourable Madam Justice McCreary
On appeal from:	QBG-RG-00300-2011 (Sask KB), Regina
Appeal heard:	October 4, 2023
Counsel:	Nicole Krupski for the Appellant Allen Berriault and Craig Savoie for the Respondents

Tholl J.A.

I. INTRODUCTION

[1] James Park and Susan Park made an offer to purchase a parcel of land, which was accepted by Wallis Zbitnew. The deal fell through and the Parks sued Ms. Zbitnew, seeking the return of their deposit. When Ms. Zbitnew did not defend, the Parks obtained a default judgment against her. Many years later, Ms. Zbitnew passed away, and her Estate applied to have the default judgment set aside so that it could defend the action. Relying on *The Survival of Actions Act*, SS 1990-91, c S-66.1 [*SAA*], the Chambers judge dismissed the Estate's application on the ground that the right to bring such an application did not survive Ms. Zbitnew's death.

[2] For the reasons that follow, I have decided that the Chambers judge erred in his determination and find that the Estate was entitled to have its application considered on its merits.

II. BACKGROUND

[3] Ms. Zbitnew owned a parcel of land that the Parks were interested in purchasing. In May of 2010, a contract of purchase and sale was formed between Ms. Zbitnew as vendor and the Parks as purchasers. Pursuant to their agreement, the Parks paid a deposit of $50,000. Before the transaction closed, an issue arose regarding a pipeline easement, and the deal fell apart. However, Ms. Zbitnew refused to refund the deposit. The Parks had a statement of claim issued on February 15, 2011 – naming Ms. Zbitnew and the realtor (who had acted for the buyer and the seller) as defendants – seeking the return of the deposit. After an extension of time for service was granted, the statement of claim was served on Ms. Zbitnew on September 16, 2011.

[4] A statement of defence was not filed by Ms. Zbitnew, and the claim against her was noted for default of defence on September 25, 2012. A default judgment against her, in the amount of $51,441.28, was granted on that same day [Judgment]. Ms. Zbitnew was served with the Judgment on December 7, 2012. Thereafter, she took no steps to have it set aside prior to her death, a decade later, on May 8, 2022.

[5] The action was dismissed as against the realtor on May 25, 2017, for want of prosecution.

[6] After Ms. Zbitnew passed away, her sons Murray Johnson and Philip Johnson were appointed executors of the Estate [Executors].

[7] On September 23, 2022, the Parks served the Executors with an application to renew the Judgment. The Executors claimed to have been unaware of the Judgment, and on December 21, 2022, they brought an application, pursuant to Rules 3-21(3) and 10-13 of *The Queen's Bench Rules*, to set it aside. Those rules read as follows:

> **Default of defence …**
>
> **3-21**(3) After default has been noted in accordance with subrule (2), the defendant shall not file a statement of defence without leave of the Court or the written consent of the plaintiff.
>
> **Setting aside default judgment**
>
> **10-13** Subject to rule 9-13, in the case of any judgment by default, whether by reason of non-delivery of defence or non-compliance with any of these rules or with any order of the Court, the Court may set aside or vary the judgment on those terms as to costs or otherwise that the Court considers fit.

[8] In the meantime, the Executors had consented to the Parks' application to renew the Judgment in the original amount, plus interest.

III. CHAMBERS DECISION

[9] The Chambers judge reviewed the basic facts, which were not controverted. He then examined the application solely from the perspective of whether the right to apply to set aside the Judgment survived Ms. Zbitnew's death as a result of the operation of the *SAA*. The parties agree that neither of them raised this issue nor had they briefed it as part of arguing the application in the Court of King's Bench. The Parks had not sought to have the application dismissed on this basis. The Chambers judge raised the issue on his own accord, briefly, during the argument of the application, and did not seek further submissions from the parties. I note, however, that the Estate does not rely on these circumstances as a specific ground of appeal, even though it may have been entitled to do so under the principle of *audi alteram partem*: *Kirk v Kirk*, 2017 SKCA 97 at paras 21–30, [2018] 1 WWR 123, and *Armbruster v Barrett*, 2020 SKCA 140 at paras 18–20, 49 RFL (8th) 1.

[10] The Chambers judge's analysis began with his statement that "[a]t common law, a personal action died with the person. This rule prevented a person who died from suing or being sued" (*Park v Zbitnew Estate* (1 May 2023) Regina, QBG-RG-00300-2011 (Sask KB) [*Chambers Decision*]). For this broad proposition, he relied on *Stacey Estate v Lukenchuk*, 2020 SKCA 55 at para 48, [2020] 8 WWR 668, leave to appeal to SCC refused, 2020 CanLII 97865 [*Stacey Estate*], *Lorencz v Talukdar*, 2020 SKCA 28 at para 86, 446 DLR (4th) 487 [*Lorencz*], *Dustyhorn Estate v Stickney*, 2004 SKQB 53 at paras 11 and 13, 245 Sask R 132, rev'd 2005 SKCA 31, 250 DLR (4th) 520 [*Dustyhorn*] (but not on this point), and Kenneth Cooper-Stephenson and Elizabeth Adjin-Tettey, *Personal Injury Damages in Canada*, 3d ed (Toronto: Thomson Reuters, 2018) at 1021–1027. The Chambers judge noted that this common law rule was replaced by the *SAA* and concluded that "any personal right that Ms. Zbitnew had to apply to set aside the default judgment against her ended with her death, unless that right survives by operation of the *SAA*" (*Chambers Decision* at para 13). He did not attempt to distinguish between an action seeking personal injury damages and one that sued on a debt or contractual obligation.

[11] The Chambers judge engaged in a statutory interpretation of the *SAA*, focussing on ss. 2, 3, 4 and 6:

> **Interpretation**
>
> **2** In this Act, "cause of action" means:
>
> (a) the right to bring a civil proceeding; or
>
> (b) a civil proceeding commenced before death;
>
> but does not include a prosecution for the contravention of an Act, regulation or bylaw.
>
> **Cause of action survives for benefit of estate**
>
> **3** A cause of action vested in a person who dies after the coming into force of this Act survives for the benefit of that person's estate.
>
> **Cause of action survives against estate**
>
> **4** A cause of action existing against a person who dies after the coming into force of this Act survives against that person's estate.
>
> …
>
> **Only pecuniary loss recoverable**
>
> **6**(1) Subject to subsection (3), if a cause of action survives pursuant to section 3, only those damages that resulted in actual pecuniary loss to the deceased or the deceased's estate are recoverable.

[12] The Chambers judge concluded that s. 3 of the *SAA* was the only possible basis upon which the Estate could ground an application to set aside the Judgment. He rejected that possibility because he concluded that such an application was not a cause of action vested in Ms. Zbitnew that survived her death. The heart of his analysis is captured by the following excerpts from the *Chambers Decision*:

> [19] The question to be decided is whether a right to apply to set aside the default judgment is a right to bring a "civil proceeding", and therefore a cause of action as defined in s. 2(a) which survives by operation of s. 3.
>
> [20] The term "civil proceeding" is not defined in the *SAA*. However, giving this phrase its ordinary meaning, and reading these words in the context of the *SAA*, I conclude a "civil proceeding" is a civil action – i.e. a claim to remedy an injury, or seek compensation for loss or damage that occurred as a result of an act or omission.
>
> [21] This conclusion is supported by s. 6(1) of the *SAA*, which provides that if a cause of action survives pursuant to s. 3, only those damages that resulted in actual pecuniary loss to the deceased or the deceased's estate are recoverable. A surviving cause of action is therefore properly understood in general terms as either:
>
> (a) a vested right to bring an action to recover damages (preserved by s. 3); or
>
> (b) an existing action against a person who has died (preserved by s. 4).
>
> [22] This understanding of the causes of action which are preserved by the *SAA* is consistently implicit in the case law. …
>
> [23] It should also be noted that the *SAA* preserves only an *existing* cause of action: *Lorencz* at para 87, citing *Dustyhorn Estate* at para 13. Here, although this action is a civil proceeding which was commenced before Ms. Zbitnew died, it was concluded long ago. The default judgment was issued on September 25, 2012. Subject to rights of appeal, it is trite that issuance of a judgment decides and ends a cause of action. When a judgment is obtained, the cause of action upon which the judgment is based is merged in the judgment: *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 75, [2007] 1 SCR 429.
>
> [24] Section 3 of the *SAA* therefore preserves only a cause of action (i.e. a right to bring a civil claim) which was vested in Ms. Zbitnew at the time of her death. It does not preserve a right for the executors of her Estate to bring a procedural application to set aside the judgment in this action.
>
> [25] This conclusion is consistent with authority for the proposition that the general rule respecting survival of actions does not apply where an initial application is made against a party only after that party has died. See: *Stalzer v Stalzer*, 2018 ABQB 191 at paras 17–22, 7 RFL (8th) 394, decided by the Alberta Court of Queen's Bench in the family law context under similar survival of actions legislation.
>
> [26] There are also public policy reasons favouring the interpretation that the *SAA* does not preserve a right for executors of an estate to bring a procedural application to set aside a judgment against a deceased in a concluded action. If this were possible, there would be no finality to litigation.

> [27] This concern is readily illustrated by the facts of this case. Here, the judgment was entered on September 25, 2012, and Ms. Zbitnew passed away in May 2022. Although the judgment existed for almost ten years while Ms. Zbitnew was alive, she did not apply to set aside the judgment during her lifetime.
>
> [28] If the executors are able to apply to set aside the default judgment, this would mean that any judgment against a deceased person could be subject to challenge after their death; even where the judgment is of long standing and the deceased person took no steps to challenge it. This could permit executors of estates to challenge judgments in an attempt to defeat judgment creditors and to increase the value of the estate residue available for distribution to beneficiaries.
>
> [29] This would not be consistent with the general principle that litigation, once decided, should be final. Finality of litigation has been recognized as an important, though not absolute, value: [references omitted].
>
> [30] Finally, interpreting the *SAA* to allow an executor to challenge a judgment against a deceased who did not challenge the judgment during his or her lifetime would also be unfair to judgment creditors, who could potentially be required to re-litigate long decided issues. This could also negatively impact the ability of third parties to rely on decided judgments.
>
> (Emphasis in original)

[13] Based on these determinations, the Chambers judge held that the Estate's "procedural right to bring an application to set aside the default judgment did not survive Ms. Zbitnew's death and does not accrue to the executors" (at para 31). On this basis, the Chambers judge dismissed the Executors' application without considering it on its merits under Rule 10-13.

IV. ISSUES

[14] The issues, as framed by the Estate, are as follows:

(a) Did the Chambers judge err in law by incorrectly interpreting the *SAA* as it applied in the context of the Estate's application; and

(b) Did the Chambers judge err in law in determining the Estate lacked standing to bring an application to set aside the Judgment?

[15] In the course of the appeal hearing, the panel raised the issue with the parties of whether the provisions of the *SAA* apply to a claim in contract. While the Estate had not explicitly referenced this specific issue in its notice of appeal, it had asserted that the Chambers judge erred in his interpretation of the *SAA*. Given that the interpretation and the fundamental applicability of the *SAA* was at stake, we heard brief oral submissions on this issue and granted the parties leave to file supplemental factums to address this aspect of the appeal.

V. ANALYSIS

A. Positions of the parties

[16] The Estate argues that the Chambers judge erred in law by requiring its application to constitute its own separate cause of action under s. 3 of the *SAA* in order to have survived the death of Ms. Zbitnew. It asserts that the relevant cause of action was the claim by the Parks, which survived pursuant to s. 4 of the *SAA* and was then subject to the same procedures under *The Queen's Bench Rules* as any other such claim.

[17] The Parks contend that the Chambers judge correctly interpreted and applied the provisions of the *SAA* when he dismissed the Estate's application.

B. The Law: The *SAA* and the common law carve out for contracts

[18] As a starting point, I find the Chambers judge erred by determining that the common law, prior to legislative intervention, extinguished *all* causes of action by or against a person upon death. While his categorical statement is true regarding claims for personal injury, it is not correct for claims grounded in debt or contract. The substance of the claim in the matter at hand was the Parks' allegation that Ms. Zbitnew had breached her obligations under the real estate commission residential contract of purchase and sale and that they were entitled to a refund of the deposit paid under the contract. There was no claim for personal injuries. It was strictly a claim in contract. At common law, such claims are unaffected by the death of a party. Let me explain.

[19] Historically, an action for damages did not survive the death of the victim or the wrongdoer. This general rule was often conveyed using the maxim *actio personalis moritur cum persona*: a personal right of action dies with the person concerned. However, common law exceptions were carved out to preserve certain causes of action, including those based in contract. These propositions are set out in *Payne v Brady* (1996), 140 DLR (4th) 88 (NLCA) at para 49, *Dustyhorn* at paras 10–11 (overturned on appeal but not on this point), *Grant v Winnipeg Regional Health Authority*, 2015 MBCA 44 at paras 49–51, 385 DLR (4th) 346, and *Lorenz* at para 86. This common law position was described by the Saskatchewan Law Reform Commission in its report, *Proposals for a Survival of Actions Act: Report to the Minister of Justice*, May of 1985 [*LRC Report*]: "Where the cause of action was money due or founded on a contractual obligation, or

where property or its value had been appropriated by a deceased wrongdoer and added to his estate, the action survived. … A better expression of the rule was that a personal action on a tort died on the death of the victim or the wrongdoer" (at 7).

[20] The exception for contractual claims can be traced back to the early 17th century. In *Pinchon's Case*, [1611] 77 ER 859, the Court of King's Bench held that liability survives the death of the parties for actions "founded upon on an obligation, contract, debt, covenant or any other duty to be performed" (at 864): see also P.H. Winfield, "Recent Legislation on the English Law of Tort" (1936) 14:8 Can B Rev 639 at 643. Subsequent cases confirmed that the maxim had no application to any alleged breach of contract, aside from a breach of a promise to marry: *Hambly v Trott*, [1775] 98 ER 1136 [*Hambly*]; *Raymond v Fitch* (1835), 150 ER 251; *Phillips v Homfray* (1883), 24 ChD 439 (CA); and H.G. Beale, ed, *Chitty on Contracts*, 31st ed (London: Sweet & Maxwell, 2012) at para 20-001 [*Chitty*]. For example, *Hambly* drew a bright line between the survival of actions in contract versus those in tort (at 1138):

> We therefore thought the matter well deserved consideration: we have carefully looked into all the cases upon the subject. To state and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them.
>
> First, as to actions which survive against an executor, or die with the person, on account of the cause of action. Secondly, as to actions which survive against an executor, or die with the person, on account of the form of action.
>
> As to the first; *where the cause of action* is money due, or a *contract to be performed*, gain or acquisition of the testator, by the work and labour, or property of another, or a promise of the testator express or implied; where these are the causes of action, *the action survives against the executor*. But *where the cause of action is a tort* or rises ex delicto … supposed to be by force and against the King's peace, *there the action dies*; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water course, escape against the sheriff, and many other cases of the like kind.
>
> (Emphasis added)

[21] As such, actions in contract survived the death of a party, but such an event was a complete bar to a claim in tort. This untenable situation was addressed in Saskatchewan legislation with the passage of *The Trustee Act*, RSS 1909, c 46 [*1909 Trustee Act*], which abolished the common law rule against the survival of tort claims: see also the *LRC Report* at 8. This statutory language had been carried forward, without change, from the *Ordinances of the North-west Territories*: i.e., *The Trustee Ordinance*, NWT Ord 1903 (2), c 11, ss 29–30. Sections 30 and 31 of the 1909 statute read as follows:

Actions by executors and administrators *for torts*

30. *The executors or administrators of any deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased except in cases of libel and slander* in the same manner and with the same rights and remedies as the deceased would if living have been entitled to do; and the damages when recovered shall form part of the personal estate of the deceased; but such action shall be brought within one year after his decease.

Actions against executors and administrators *for torts*

31. *In case any deceased person committed a wrong to another in respect of his person or of his real or personal property except in cases of libel and slander the person so wronged may maintain an action against the executors or administrators of the person who committed the wrong*; but such action shall be brought within one year after the decease.

(Emphasis added)

[22] Section 30 was reworded in 1920 by *The Trustee Act*, RSS 1920, c 75, s 45 [*1920 Trustee Act*], and the following language was consistently used in future iterations of that statute:

Actions by executors and administrators *for torts*

45.—(1) The executors or administrators of any deceased person may maintain an action for all torts or injuries to the person *not resulting in death*, except libel and slander, or to the real and personal estate of the deceased, in the same manner as the deceased might have done if living.

(2) *In every such action the judge or jury may give such damages as he or they think proportioned to the loss sustained by the estate of the deceased in consequence of wrong committed*.

(3) Every such action shall be brought within one year after the death of the deceased.

(Emphasis added)

Also see, for example, *The Trustee Act*, RSS 1930, c 92, s 51; *The Trustee Act*, RSS 1940, c 112, s 52; *The Trustee Act*, RSS 1953, c 123, s 52; *The Trustee Act*, RSS 1965, c 130, s 58; and, until 1990 (when that particular section was repealed by the enactment of the *SAA*), *The Trustee Act*, RSS 1978, c T-23, s 58 [*1978 Trustee Act*].

[23] However, nothing in this legislation addressed the common law principle that had long held that an action for breach of contract survived against an estate. It dealt strictly with claims in tort.

[24] Unfortunately, the wording in the various iterations of *The Trustee Act* created uncertainty regarding actions in tort. From the early 1900s until 1920, a tort claim survived against the wrongdoer "in all cases" not involving libel or slander (*LRC Report* at 9): this is reflected in s. 30 of the *1909 Trustee Act*, where it speaks to "all torts or injuries". This suggested that a claim survived only if the victim's death was not caused by the tortious act. Instead, a dependent in these circumstances could bring a claim under *The Fatal Accidents Act*, RSS 1920, c 62, s 3 [*1920 Fatal Accidents Act*], but it was unclear exactly what damages an executor, administrator, or dependent could receive under these different regimes. In cases where a victim died from their injuries, the survivors were limited to recovering pecuniary losses under the *1920 Fatal Accidents Act*: see the *LRC Report* at 10, s. 3 of the *1920 Fatal Accidents Act*, and s. 45(1) of the *1920 Trustee Act*. In cases where the victim died from other causes, their estate could recover pecuniary and non-pecuniary losses: "where the tortious conduct did not cause the death, the right of action survived for the benefit of the estate" (*LRC Report* at 10 and the wording in s. 45(2) of the *1920 Trustee Act*). However, if the beneficiaries of the estate were not the wife, husband, parent, child, brother, or sister of the deceased, the estate could recover nothing: s. 4 of the *1920 Fatal Accidents Act* provides a specific list of beneficiaries. This series of irregularities prompted the Law Reform Commission of Saskatchewan [Commission] to study this area of law.

[25] The Commission examined the language of the *1978 Trustee Act*, particularly s. 58. The Commission's recommendations in the *LRC Report* resulted in the enactment of the *SAA*, which repealed s. 58 of the *1978 Trustee Act* with the coming into force of the *SAA* on June 22, 1990. With its passage, the *SAA* provided that existing causes of action for or against a person survived their death: ss. 3–5 of the *SAA*. It was at this point that the phrase *an action for all torts or injuries to the person* from *The Trustee Act* was replaced by the phrase *cause of action* in the *SAA*. As such, a possible interpretation of the *SAA* was that it was intended to cover *all* causes of action, including those that had already survived under the common law. However, at no point in the *LRC Report* is there any mention of altering or restricting the common law principles regarding claims for breach of contract or, for that matter, rolling all causes of action into one basket.

[26] The *LRC Report* contains a single explicit reference to contractual claims, which is located under the Background section of the document (at 7):

> At common law there was a general rule that an action for damages did not survive the death of either the wrongdoer or the victim. This was often expressed by the Latin maxim *actio personalis moritur cum persona*: a personal right of action dies with the person. In fact, the use of the maxim tended to garble the law. *Where the cause of action was* money due or *founded on a contractual obligation*, or where property or its value had been appropriated by a deceased wrongdoer and added to his estate, *the action survived*. A series of English statutes further modified the rule: actions for injury to property survived. A better expression of the rule was that a personal action on a tort died on the death of the victim or the wrongdoer.
>
> (Footnotes omitted, emphasis added)

[27] In my opinion, this comment was purely contextual. Contractual claims were mentioned in passing only to define the relevant maxim's scope and explain its significance in tort law. The remainder of the *LRC Report* explored how Saskatchewan law treated the survival of tort claims, not contractual claims, up to 1985. The terms *an action* and *a cause of action* were used in the report in reference to tort claims brought under the *1978 Trustee Act* and *The Fatal Accidents Act*, RSS 1978, c F-11 [*1978 Fatal Accidents Act*]. Several references to *tortious conduct* and *tort law* were made throughout the document, as well. One example reads as follows (*LRC Report* at 12):

> A number of arguments have been marshalled in favour of recovery of non-pecuniary loss by the estate. The earliest was the argument that "it should not be cheaper to kill than to maim". This argument is not particularly forceful. *The primary purpose of tort law should not be to punish the wrongdoer, but to compensate the victim. The law of torts is generally unsuited for punishing wrongdoers*; a little negligence may result in a great deal of liability, while a great deal of negligence may result in only a little or no liability. Recovery depends on the injuries actually suffered by the victim.
>
> (Emphasis added)

There are no similar references to *money due*, *breach of contract*, or *contract law* in the *LRC Report*.

[28] From these passages, the Commission can be understood to have aimed its proposed amendments to the *SAA* at tort claims, not those brought in contract. The relevant legislative debates suggest that the Legislature shared this view. There is total silence regarding contractual claims in the discussion of the *SAA* recorded in the *Hansard*.

[29] The Commission's recommendations spurred the introduction of Bill 8, *An Act respecting the Survival of Certain Causes of Action*, which would become the *SAA* in June of 1990. The following discussion introduced the second reading of Bill 8 (Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 21st Leg, 4th Sess (11 June 1990) at 1940 (Mr. Lane)):

> Mr. Speaker, this proposed new legislation will bring a logical and consistent approach to the law relating to actions that are commenced or continued by or against an estate.
>
> Essentially *this reform to the law will clarify a confused and irrational area of the law in this province. Existing inconsistent approaches in* The Trustee Act *lead to arbitrary results depending whether or not an injured person with a cause of action relating to the injury substantially dies as a result of the injury or from another cause*.
>
> If a victim dies from other causes, the estate may recover both financial and non-financial losses suffered by the victim. However, if the injury itself causes death, the estate is not permitted to maintain the action at all.
>
> *The proposed legislation is based on recommendations of the Law Reform Commission of Saskatchewan*. It substantially follows the uniform survival of actions recommended by the uniform law conference of Canada and existing legislation in Alberta and the maritime provinces.
>
> This new legislation provides that an action will survive the death of the victim whether or not the death resulted from the injuries inflicted by the wrongdoer. In such an action the estate will have a claim for only the financial losses of the deceased, such as wage loss and cost of care. Damage for such matters as the pain and suffering of the deceased are considered to compensate only the person who suffered and thus cannot be recovered by the estate.
>
> Also, an estate will not have a claim for the lost future earnings of the deceased. As a result, these damages which consist of what the deceased might have earned during the course of his life, had he not been injured and not died, can only be claimed by family members under *The Fatal Accidents Act*.
>
> It is anticipated that this new legislation will be applicable to only a few cases in any year. However, for those cases, this reform of the law to establish certainty, consistency, and fairness in the approach to actions by or against estates should be viewed as a significant improvement.
>
> (Emphasis added)

[30] Bill 8 adopted the Commission's recommendations so as to clarify when certain actions survived the death of the victim or the wrongdoer (Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 21st Leg, 4th Sess (18 June 1990) at 2178 (Mr. Koskie)):

> And this Bill here has been essentially drawn up by the Law Reform Commission who have looked at some of their difficulties in respect to the survival of *certain* causes of actions. And they basically made four recommendations in the Bill that has been brought forward by the minister.
>
> *The Law Reform Commission indicated four basic principles*, as I said. First of all, that *an* action should survive the death of a victim, whether or not the death resulted from injuries inflicted by the wrongdoer; secondly, the estate should not have a claim for non-pecuniary loss of the deceased; and third, an estate should not have a claim for loss of future earnings of the deceased; and four, an action should survive the death of the wrongdoer but a claim for exemplary damages should not survive unless it's a purpose to strip the estate of profits of wrongdoing.

> Those are the four basic principles that were set forth by the Law Reform Commission. They have supported their recommendations by a considerable amount of research and case law in drawing up the Bill. *This Bill then reflects that which the Law Reform Commission have drawn and we are in support of the general thrust of the Bill*, Mr. Speaker.
>
> (Emphasis added)

[31] The legislation also clarified the types of damages that were available for these certain causes of action, as opposed to those under the *1978 Fatal Accidents Act*, as noted in the following discussion (Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 21st Leg, 4th Sess (19 June 1990) at 2265 (Mr. Koskie & Mr. Lane)):

> **Mr. Koskie:** — Mr. Minister in respect to this we had the proposals for *The Survival of Actions Act* which was prepared by the Law Reform Commission in respect to it and the report that was provided to the minister back in May of '85. And having reviewed the detailed analysis and also the case law support of the various positions that they have put forward, *I noticed that within the law reform proposal here that they essentially drafted the legislation which you have adopted and simply cleaned up into legislative form*. In reviewing what they have provided within the proposal to you, *we are in agreement with the general thrust of this Act*.
>
> There's just one question that I want to ask, and that is in respect to section 6(1). Perhaps you could give me a bit of an explanation as to … where it indicates that the cause of action survives pursuant to section 3, only those damages that resulted in actual pecuniary loss to the deceased or the deceased's estate are recoverable.
>
> I'd like just your explanation in respect to limiting the damages to pecuniary losses and excluding other damages.
>
> (2030)
>
> **Hon. Mr. Lane:** — This of course would be *the survival of an action of someone deceased, and so it would only be for the actual cost. It wouldn't include something, for example, non-pecuniary such as pain and suffering. Any such actions in that way that would attribute to the family and giving them a cause of action comes under The Fatal Accidents Act*.
>
> (Emphasis added)

[32] Thus, the intent behind the *SAA* was to ensure the survival of actions in *tort*, not to disrupt or qualify the long-standing common law principle that a claim for breach of contract survived both for and against an estate. In summary, tort claims were the focal point of the *LRC Report*. The Legislature adopted almost verbatim the wording of the legislation proposed by the Commission. Changes to the common law regarding contractual claims were not part of the exercise engaged in by the Commission nor were they enacted by the Legislature.

[33] The *SAA* has been considered by Saskatchewan courts in dozens of cases. The overwhelming majority of the jurisprudence concerns personal injury claims and fatal accidents. Only one reported Saskatchewan decision considered a breach of contract, specifically between a physician and a patient. However, that action was part of a broader personal injury claim: *Martin v Inglis*, 2002 SKQB 157 at paras 108–110, [2002] 9 WWR 500. A breach of contract was not found to have occurred in that matter, so no analysis of this issue was undertaken that would inform the *SAA*'s application to contractual claims.

[34] The *actio personalis moritur cum persona* principle and the common law exception for contractual claims have, however, been noted by this Court before and after the *SAA* came into force. One such example is *Gukert v Kuntz* (1970), 22 DLR (3d) 458 (Sask CA) at para 25, aff'd [1971] 4 WWR 637 (SCC) [*Gukert*], which referenced the treatment of contractual claims in 19th-century case law:

> [25] In the *Bradshaw* [(1875), LR 10 CP 189] case, the female plaintiff was the executrix of the testator who was injured while travelling as a passenger on the defendant's railway. He ultimately died from the injuries received. It was not disputed that he had incurred expenses for medical attendance, and that his estate had suffered loss by reason of his being unable to attend to business prior to his death. *It was held that she was entitled to recover these items on the basis of a breach of contract by the defendant, and that this right existed independently of any claim for personal injuries, which died with the person*. Grove J. said the two sorts of damage are separable; one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured and as such dies with the person.
>
> (Emphasis added)

[35] The appellant in *Gukert* argued that the 1920 revisions to the *1909 Trustee Act* restricted an executor's remedy for a personal injury claim. The Court rejected this argument and held that it was for the Legislature to clarify the damages that could be claimed for an action in tort: *Gukert* at paras 30 and 32. The common law exception for contractual claims was unchanged by this case.

[36] In *Stacey Estate*, which involved a tort claim against an allegedly negligent optometrist, Kalmakoff J.A. thoroughly reviewed the scheme and purpose of the *1978 Fatal Accidents Act* in paragraphs 46 to 60 of that decision. He also touched on the historical common law rule against the survival of an action in tort, stating as follows:

> [47] The origins of the [*1978 Fatal Accidents Act*] trace back to 1808, and a decision in a case called *Baker v Bolton* (1808), 170 ER 1033 at 1033. In *Baker v Bolton*, Lord Ellenborough held that "[i]n a civil Court, the death of a human being could not be complained of as an injury"; any injury a person suffered while alive could not be

> compensated by damages after that person's death. Essentially, the rule in *Baker v Bolton* stood for the common law proposition that no living person had a cause of action against another for a wrongful killing.
>
> [48] A related, but distinct, common law principle was *actio personalis moritur cum persona*, or "a personal cause of action dies with the person". This prevented a person who died from suing or being sued … . *This common law rule was eventually overridden through the enactment of the SAA.*
>
> (Emphasis added)

[37] The fact that the maxim was displaced by the *SAA* does not mean that the common law exceptions to the rule for contract claims were also subsumed under this legislation.

[38] As noted by the Parks, it seems that actions in contract are not advanced by parties under the *SAA*, and the courts have not referred to this statute where a remedy for or against an estate lies in contract: see, for example, *Gerhardt v Miller Estate*, 2018 SKCA 99 at para 30, 22 RFL (8th) 77, and *Kyrylchuk v Cox Estate*, 2019 SKQB 214 at paras 13–14, aff'd 2020 SKCA 62, 58 ETR (4th) 201. This Court's analysis in *Lorencz* further supports that the *SAA* has, thus far, exclusively been utilized in relation to actions grounded in tort:

> [86] While *Lord Campbell's Act* [an 1846 English statute from which *The Fatal Accidents Act* was born] displaced the common law rule that a living plaintiff (the survivor of the deceased) cannot sue for another's wrongful death, it did nothing to displace a second common law rule that a personal action dies with the person who holds it. As explained by Fraser C.J.A. in *Ferraiuolo Estate* [2004 ABCA 281], the "adoption of fatal accidents legislation did nothing to change the rule *actio personalis moritur cum personalis*" (at para 39). This was achieved by the adoption of survival of actions legislation; in this province, see *The Survival of Actions Act*, SS 1990-91, c S-66.1 [*Survival of Actions Act*]. Section 3 of the *Survival of Actions Act* provides for the survival of claims for the benefit of the deceased's estate: "A cause of action vested in a person who dies after the coming into force of this Act survives for the benefit of that person's estate". Section 4 provides for the continued liability of the estate *for the deceased's torts*: "A cause of action existing against a person who dies after the coming into force of this Act survives against that person's estate". Unlike the *Fatal Accidents Act* cause of action, these are clearly the deceased's own claims statutorily transferred to the estate upon death.
>
> …
>
> [88] The point of referring to the *Survival of Actions Act* is to underscore that the *Fatal Accidents Act* is not the only statute potentially applicable *in the event of a wrongful death* and to emphasize the *sui generis* nature of the claims that can be made under the latter statute.
>
> (Underline emphasis in original, italic emphasis added)

[39] Like in *Stacey Estate*, there was no suggestion in *Lorencz* that the *SAA* applied to all causes of action, including those based in contract. The parties have been unable to refer me to any reported decision that stands for the proposition that the *SAA* applies to contractual claims at all, nor have I been able to locate one.

[40] At most, in my view, the *SAA* restated the common law position that claims in contract survive death and brought all causes of action together under one umbrella. This proposition is tangentially supported by *Allen Estate v Co-operators Life Insurance Company*, 1999 BCCA 35 at paras 56–59, [1999] 8 WWR 328. Alternatively, and more likely, the *SAA* must be interpreted as not applying to claims in contract. Given that the purpose of the *SAA* is to alleviate against the harshness of the effect of the outcomes that arose based on the *actio personalis moritur cum persona* principle – which never applied to suits to enforce contractual obligations – the better view is that the *SAA* does not apply to a statement of claim that seeks a remedy arising out of a breach of contract. However, as it is not strictly necessary to decide the delineation of the applicability of the *SAA* to resolve this appeal, I will leave that issue for another day.

C. The Executors were not precluded by the *SAA* from bringing a Rule 10-13 application

[41] Even if I accept that it was appropriate for the Chambers judge to have assessed the Executors' application through the lens of the *SAA*, I conclude that he erred in its application to the facts of this case. Let me explain.

[42] Sections 3 and 4 of the *SAA* provide for the survival of claims in relation to a cause of action that is *vested* in a person who dies (s. 3) and a cause of action existing *against* a person who dies (s. 4). The term *cause of action* is defined by s. 2 of the *SAA* as (a) a right to bring a civil proceeding or (b) a civil proceeding commenced before death. Given that definition, the Chambers judge framed the issue as being whether a right to apply to set aside a default judgment is a "civil proceeding", and "therefore a cause of action as defined in s. 2(a) which survives by operation of s. 3" (*Chambers Decision* at para 19). However, the cause of action here is not the Estate's application, it is the Parks' claim for breach of contract. The Estate is not asserting its own new cause of action; it is taking a procedural step in the context of the Parks' action. Even if the *SAA* applied, it would be the Parks' claim that survived under s. 4 of the *SAA*, which the Estate is then

entitled to defend itself against. Like virtually any other conceivable application made by a defendant estate, its application to set aside the Judgment is not a new cause of action under s. 3 of the *SAA* and does not need to be. Defendants do not assert causes of action, they defend against them.

[43] Neither of the parties suggested that, as a matter of general principle, an executor is outright barred from taking any type of *procedural* step simply because it represents the estate of a deceased person. Some examples of possible applications are striking a pleading under Rule 7-9, applying for summary judgment under Rule 7-2, and amending pleadings. I see nothing in the rules that curtail or prevent an estate from making these or any of the other myriad of applications that could have a profound effect on the course or outcome of a specific piece of litigation. There is certainly no such qualification in the wording of Rule 10-13 itself. There is no logical reason why an application under Rule 10-13, to open up a default judgment, should be singularly carved out as being out of bounds as a unique exception on the basis that it must constitute its own cause of action or it is barred.

[44] I further note that an executor or administrator has the power to "contest any claim … relating to the trust or trust property" under s. 36(1)(o) of *The Trustee Act, 2009*, SS 2009, c T-23.01, which is currently in force. The Parks' claim is now against the property of the Estate, i.e., the trust property. Additionally, various provisions under *The Administration of Estates Act*, SS 1998, c A-4.1, refer to executors' duties regarding debts but do not limit their acts in defending contractual claims against an estate. No rule of court, statutory enactment, or jurisprudence has been referred to that would specifically prevent an estate from taking any steps that a live person could take to defend against a breach of contract claim in Saskatchewan. No authority was put forth that supports an assertion that the procedural rights of an estate are somehow less than the rights of an individual when defending against a claim in contract. The passage of the *SAA* did not bring about that result. The *SAA*, as seen in the *LRC Report*, and in the debates in the Legislature surrounding its passage, did not even contemplate having an effect on contractual claims, let alone consider restricting existing rights in relation to such claims.

[45] Lastly, the Parks also argue that a final judgment has been issued and the doctrine of merger applies. The fact that a judgment has been issued is not enough to distinguish the procedural application at stake in this matter. The doctrine of merger does not prevent a living person from bringing an application to set aside a default judgment, so it seems incongruous that an executor should be prevented from doing so. The availability of relief under Rule 10-13 means that a default judgment is not *final* in the same manner as a judgment issued after trial or by consent, because there is always the possibility that it might be set aside on the application of a defendant. My conclusion is reinforced by the fact that there is no right of appeal from noting in default and the entry of a default judgment: *National Bank of Canada v Royal Bank of Canada* (1999), 121 OAC 304 (Ont CA) at paras 4–5, and *10720143 Canada Corp. v 2698874 Ontario Inc*., 2023 ONCA 463 at paras 16–17. The only avenue open to a defendant is an application in the Court of King's Bench to set it aside; a decision on that point is then subject to an appeal. It would be discordant to find that a living person or an estate could appeal a judgment not obtained by default but only an estate would be precluded from any review or recourse in the case of a default judgment.

[46] In my view, there are no impediments, at common law or pursuant to statute, that would prevent an estate from availing itself of the procedural tools available to any other litigant under *The King's Bench Rules*, including an application to set aside a default judgment in a matter involving a claim in debt or contract. Applications by estates to set aside default judgments have been heard in numerous cases in this province and others: see, for example, *Kilbach v McCredie Estate* (1986), 49 Sask R 179 (CA); *Schill & Beninger Plumbing & Heating Ltd. v Gallagher Estate* (2001), 140 OAC 353 (Ont CA); *Duffus v White Estate*, 2005 SKQB 321, 18 ETR (3d) 32, aff'd 2006 SKCA 53, 279 Sask R 35; and *Babineau v Crossman Estate*, 2020 NBQB 63.

[47] It must be kept in mind that the principle established by the Chambers judge would extend not only to dated default judgments such as the one at hand, but also, for example, to one that was obtained one day before a defendant died where an executor immediately applied thereafter to have it set aside. The public policy concerns raised by the Chambers judge and argued by the Parks are better suited to an examination of the application on its merits, where circumstances such as the death of a party and the effect of the passage of time can be taken into account in the context of all the relevant factors under Rule 10-13: *Browne Building Services Ltd. v North Country Home Inc.*, 2010 SKQB 20 at paras 14–15, 349 Sask R 72 [*Browne Building*]. The floodgate argument

presented by the Parks – that permitting such applications would allow executors to challenge judgments years after they were granted in hopes of increasing the value of the estate – ignores the fact that (a) Rule 10-13 contains no time limit in which to bring the application, (b) there are no impediments to living persons bringing such applications decades later, and (c) the test summarized in *Browne Building* permits the Court of King's Bench to fully address such concerns.

[48] The Estate should have been permitted to bring its application to set aside the default judgment and to argue it on its merits. I say this without making any comment on whether such an application will ultimately be successful.

VI. CONCLUSION

[49] The appeal is allowed. The order dismissing the Executors' application is set aside, including the order of costs, and the matter is remitted to the Court of King's Bench for a determination of whether the Judgment should be set aside under Rule 10-13, and the Estate be given leave to enter a statement of defence. Given the unusual circumstances of this matter, combined with the manner in which the dispositive issue in this appeal arose, there shall be no order for costs on this appeal.

"Tholl J.A."

Tholl J.A.

I concur.

"Schwann J.A."

Schwann J.A.

I concur.

"McCreary J.A."

McCreary J.A.