

Oregon Case Update



Servicemember's Wrongful-Death Claim Tolloed While on Active Duty

From the desk of Josh Hayward: Federal law tolls the statute of limitations for military members while they are on active duty. But does this law extend to members of the military who bring a claim as a personal representative instead of bringing their own claim? Read on to find out.

Claims Pointer: In this case arising out of a death caused by an exploding tire, the Oregon Court of Appeals held that the statute of limitations on a wrongful-death claim was tolled when the servicemember, acting as personal representative, sued within three years of being discharged from active duty but beyond three years since the date of injury. This case defines the scope of the protection servicemembers receive under the federal tolling statute.

[Wilcox v. Les Schwab Tire Centers of Oregon, Inc., 293 Or App 452 \(August 22, 2018\).](#)

In March 2010, Plaintiff Scott Wilcox ("Plaintiff") and his wife were active duty servicemembers in the United States Air Force. While on leave, the two were traveling in Plaintiff's vehicle and noticed that the vehicle was shaking. After stopping, the couple was advised to replace a tire which had originally been purchased from Les Schwab Tire Centers of America, Inc. ("Les Schwab"). After replacing the problem tire, Plaintiff's wife placed the tire on her lap while they drove in search of a mechanic. The tire exploded in Plaintiff's wife's lap, causing serious injuries which eventually led to her death in April of 2010. Plaintiff was discharged from active duty in September 2011.

In September 2014, Plaintiff, acting as personal representative, brought a wrongful-death lawsuit against Les Schwab claiming products liability and negligence. In Oregon, the statute of limitations on wrongful-death claims is three years. See ORS 30.020(1), ORS 30.905(4). Because more than three years had elapsed since his wife's death in 2010, Les Schwab filed a motion with the court to dismiss the wrongful-death claim as untimely.

Plaintiff argued that, under the Servicemembers Civil Relief Act ("SCRA"), the statute of limitations on the wrongful-death claim was tolled while he was on active duty. Generally, the SCRA mandates that "[t]he period of a servicemember's military service may not be included in computing any period limited by law..." 50 USC § 3936. The trial court disagreed with Plaintiff and held that the statute of limitations had run on Plaintiff's wrongful-death claim. The trial court reasoned that the SCRA does not toll the statute of limitations for suits brought by an individual acting as a personal representative. Plaintiff appealed.

On appeal, Les Schwab took the position that the SCRA should not be construed so broadly as to apply to claims brought by personal representatives. Les Schwab asked the court to follow the precedent of other jurisdictions, including Colorado, which "reject[ed] a construction of the SCRA that would toll statutes of limitation in actions brought by servicemembers acting as personal representatives of estates." According to Les Schwab, the SCRA was limited to tolling the statute of limitations for claims brought in a personal capacity.



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The Oregon Court of Appeals looked to the language of the SCRA to determine whether the statute of limitations on Plaintiff's wrongful-death claim should have been tolled until he was discharged. It noted that the text of the statute is expansive and "excludes military service time from a statute-of-limitation calculation for the 'bringing of any action or proceeding in a court' by a servicemember." The court also took note of the fact that the language "does not distinguish between actions brought by a servicemember in a personal capacity and those brought in a representative capacity." Accordingly, the court preliminarily concluded that "the SCRA does apply to an action brought by a servicemember in a representative capacity."

Les Schwab also argued that the SCRA's tolling provision does not apply to wrongful-death claims because the "rights asserted by plaintiff are derivative of the decedent's rights, making the decedent, and not plaintiff, the person whose claims are subject to tolling under the SCRA." The court was not convinced. It noted that even though Plaintiff's rights were derivative in his wrongful-death claim, the claim was brought for the benefit of Plaintiff. Accordingly, the court held that "because the SCRA tolled the Oregon statute of limitation for plaintiff's wrongful-death action for the period that plaintiff was serving in the Air Force, the trial court erred by dismissing plaintiff's action as untimely."

In an interesting note, the court identified a potential loophole created by its ruling:

"We acknowledge that our construction of the SCRA might encourage some people to attempt to circumvent statutes of limitation under circumstances that would not serve the policies that Congress enacted the SCRA to serve, for example, by appointing as personal representative for a decedent's estate a servicemember who has no connection to the decedent to pursue claims that do not affect the servicemember's rights. To the extent that the SCRA is subject to manipulation in that way, which is a question that we need not resolve, it is Congress that must address the problem, not us. See e.g., *National Ass'n of Mfrs. v. Department of Defense*, __ US __, 138 S Ct 617, 629, 199 L ED 2d 501 (2018) ('[O]ur constitutional structure does not permit this Court to rewrite the statute that Congress has enacted.' (Brackets in original).)"

Wilcox, 293 Or App at 457-58. This could be significant because ORS 113.085, the Oregon statute identifying the preference for the appointment of a personal representative, lists the surviving spouse or the "nominee of the surviving spouse of the decedent" as taking precedence over all other candidates for personal representative other than a representative named in a will. Such a mechanism, combined with the court's ruling in this case, provides a potential loophole to avoid the consequences of missing a statute of limitations by appointing a servicemember as the personal representative of an estate.

View full opinion at <https://cdm17027.contentdm.oclc.org/digital/pdf.js/web/viewer.html?file=/digital/api/collection/p17027coll5/id/15642/download#page=1&zoom=auto>



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