

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
April 4, 2023 Session

<b>FILED</b> 08/29/2023 Clerk of the Appellate Courts
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**BRADLEY SANDERS, INDIVIDUALLY AND AS SURVIVING SPOUSE OF  
DECEDENT, KELLY DUGGAN v. NOAH HIGGINS ET AL.**

**Appeal from the Circuit Court for Williamson County  
No. 2020-421 James G. Martin, III, Judge**

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**No. M2022-00892-COA-R3-CV**

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This appeal involves the disbursement of settlement proceeds proffered by an insurance company in resolution of a claim against it. The plaintiff is the surviving spouse of the decedent, who was killed when she was struck by a vehicle while riding her bicycle. The plaintiff filed a wrongful death action against the vehicle’s driver and the driver’s parents, all of whom were subsequently dismissed from the lawsuit following a settlement unrelated to this appeal. Within the same action, the plaintiff asserted a claim against his and the decedent’s insurer for negligent misrepresentation and negligent failure to procure insurance. The insurer had previously paid a pre-suit settlement to the plaintiff related to uninsured/underinsured motorist coverage. In the complaint, the plaintiff alleged that the insurer had misrepresented additional coverage under an “umbrella policy,” leading the plaintiff and decedent to believe they were covered while failing to actually reinstate the umbrella policy when it had been temporarily cancelled months before the decedent’s death. The plaintiff and the insurer eventually reached a confidential settlement. To facilitate the release of claims by both the plaintiff and the decedent’s estate and upon the estate’s motion, the trial court entered an agreed order allowing the estate to intervene. The plaintiff then filed a motion to disburse the settlement proceeds to him, and the estate filed an intervening complaint and opposition to the plaintiff’s motion, asserting that the estate was entitled to one hundred percent of the settlement proceeds related to the umbrella policy claim. Following a hearing, the trial court entered an order granting the plaintiff’s motion to disburse the settlement proceeds to him upon finding that the cause of action against the insurer had not vested in the decedent prior to her death. The court subsequently denied the estate’s motion to alter or amend the judgment. The estate has appealed. Determining that the cause of action against the insurer was based in tort, rather than wrongful death, and accrued to the decedent at the time of her fatal injuries, we conclude that the right to the resulting settlement proceeds belongs to the decedent’s estate. We therefore reverse the trial court’s judgment and remand for entry of an order granting disbursement of the settlement funds to the estate.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Reversed; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which ANDY D. BENNETT and JEFFREY USMAN, JJ., joined.

Laura B. Baker, Brentwood, Tennessee, for the appellants, Charley Duggan and Sarah Duggan, as Co-Trustees of the Maggie Duggan Trust and the Julia Jane Duggan Trust, and Samantha Douglas.

Rebecca C. Blair, Brentwood, Tennessee, as Administrator *Ad Litem* for the appellant, the Estate of Kelly Rebecca Duggan.

C.J. Gideon, Jr.; Steven A. Riley; and Jared A. Hagler, Nashville, Tennessee, for the appellee, Bradley Sanders.

**OPINION**

**I. Factual and Procedural Background**

The parties have stipulated to the facts underlying this action. The settlement proceeds at issue arose from an accident that tragically killed Kelly Rebecca Duggan (“Decedent”) on March 25, 2020, while she was bicycling on a bike path in Brentwood, Tennessee. Noah Higgins lost control of his vehicle while traveling at a high rate of speed in a residential area, left the roadway, and struck Decedent with his vehicle. On September 14, 2020, the plaintiff, Bradley Sanders, who is Decedent’s surviving spouse, filed a complaint, pursuant to Tennessee wrongful death statutes, in the Williamson County Circuit Court (“trial court”) against Noah Higgins and his parents, Jill Higgins and Kevin Higgins (collectively, “the Higgins Defendants”), under the family purpose doctrine.

Having discovered that Noah Higgins was underinsured, Mr. Sanders initially filed a claim with his insurance carriers, USAA Insurance Agency, Inc., and Garrison Property and Casualty Insurance Company (collectively, “the USAA Defendants”), prior to filing his complaint.<sup>1</sup> In response to his claim, the USAA Defendants agreed to pay Mr. Sanders \$275,000, representing the \$300,000 policy limit of Decedent’s and his primary policy’s uninsured/underinsured motorist coverage minus the \$25,000 policy limit of

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<sup>1</sup> Mr. Sanders explains in his responsive brief on appeal that USAA Insurance Agency, Inc., procured coverage on his behalf from Garrison Property and Casualty Insurance Company and that both are subsidiaries of United Services Automobile Association (USAA).

Noah Higgins's policy. However, according to the complaint, Mr. Sanders and Decedent had believed that they were also covered by the USAA Defendants under an "umbrella policy" ("the Umbrella Policy") procured prior to the fatal accident. The Umbrella Policy would have provided an additional two million dollars in coverage. Unknown to Mr. Sanders and Decedent and in contrast to alleged previous assurances by the USAA Defendants, the Umbrella Policy had been cancelled prior to Decedent's death and had not been reinstated.

In addition to naming the Higgins Defendants in his complaint, Mr. Sanders named the USAA Defendants, asserting claims of negligent misrepresentation and negligence in "fail[ing] to procure the policy they promised to provide." Mr. Sanders also asserted that the USAA Defendants should be estopped from denying coverage under the Umbrella Policy. Upon the USAA Defendants' filing of a partial motion to dismiss and an announced agreement, the trial court entered a "Stipulation and Agreed Order" on December 14, 2020, approving a stipulation that Mr. Sanders was not asserting a bad faith refusal to pay claim against the USAA Defendants or seeking a statutory penalty for same. Following initial discovery and pretrial motions, the case involving the USAA Defendants was set for trial separately from the case against the Higgins Defendants. After multiple additional discovery and pretrial motions, Mr. Sanders and the USAA Defendants ultimately reached a settlement via a confidential agreement, the status of which was announced to the trial court and memorialized in an order entered on February 23, 2022.

Meanwhile, Decedent's last will and testament had been probated in the Probate Division of the Williamson County Chancery Court ("probate court"). The beneficiaries included Mr. Sanders (through a marital trust) and Decedent's three nieces: Samantha Douglas (inheriting outright), Maggie Duggan (inheriting through a trust), and Julia Jane Duggan (inheriting through a trust). Initially, Mr. Sanders and Dr. Roger Duggan, one of Decedent's brothers, served as co-executors of Decedent's Estate ("the Estate"). On January 25, 2022, the USAA Defendants moved to join the Estate in the instant proceedings to obtain a release of claims from both Mr. Sanders and the Estate.

Upon a "Motion to Bifurcate Executor Duties" filed by Dr. Duggan, the probate court entered an order on February 20, 2022, appointing attorney Rebecca C. Blair as administrator *ad litem* with the authority to represent the Estate in the instant action. The probate court subsequently entered a supplemental order clarifying that Ms. Blair would have the authority "to participate on behalf of the Estate in any determination of the nature of the proceeds from any settlement or judgment for the claims against the USAA Defendants whether by agreement or adjudication . . . ." The trial court entered an "Agreed Order of Intervention" on March 4, 2022, permitting the Estate and its

beneficiaries to intervene “for the limited purpose of allowing them to evaluate settlement of certain claims” against the USAA Defendants.

Mr. Sanders filed a motion to disburse funds on May 2, 2022, contending that he, as the surviving spouse, was entitled to the settlement funds proffered by the USAA Defendants under the Tennessee wrongful death statutory scheme. *See* Tenn. Code Ann. § 20-5-106(a). Mr. Sanders further argued that the survival statute relied upon by the Estate, Tennessee Code Annotated § 20-5-102, did not apply because the right of action did not accrue in Decedent before her death.

The Estate, represented by Ms. Blair, Samantha Douglas as an individual beneficiary, and Charley Duggan and Sarah Duggan as co-trustees of the Maggie Duggan Trust and Julia Jane Duggan Trust, filed an intervening complaint and opposition to the motion to disburse funds on May 12, 2022. Asserting that it was entitled to the settlement funds arising from the Umbrella Policy, the Estate argued that the claims against the USAA Defendants were based not under wrongful death statutes but in negligence, misrepresentation, and estoppel and that for this reason, the survival statute applied. The Estate thereby argued that the cause of action had already vested in Decedent at the time of her death. As such, the Estate asserted that the claims belonged to Decedent personally and that the proceeds of the lawsuit should be distributed to the Estate rather than to Mr. Sanders.

Following a hearing on the motion to disburse conducted on May 19, 2022, the trial court took the matter under advisement. On May 25, 2022, Mr. Sanders filed an answer to the intervening complaint, reasserting that the proceeds from the settlement were wrongful death proceeds and thus should be paid to him personally. Relying on the discovery rule, Mr. Sanders argued that Decedent could not have suffered the wrong brought about by the USAA Defendants because the injury was not discovered until after her death. On June 2, 2022, Mr. Sanders filed additional documents related to the motion to disburse funds, including Decedent’s last will and testament and the probate petition.

On June 3, 2022, the trial court entered a “Memorandum and Order,” granting Mr. Sanders’s motion to disburse funds. The trial court determined that (1) the settlement funds arose out of Decedent’s death but vested after her death; (2) neither Tennessee Code Annotated § 20-5-106(a) nor Tennessee Code Annotated § 20-5-102 applied to the action; (3) the settlement funds should be distributed to Mr. Sanders individually as compensatory damages, “encompass[ing] the amount of coverage Mr. Sanders would have received as a result of [Decedent’s] death had an umbrella policy been in place”; and (4) no distinction existed between the prior \$275,000 settlement amount tendered to Mr. Sanders under the uninsured/underinsured motorist policy and the subject settlement proceeds.

The trial court subsequently entered a “Final Judgment Against Noah Higgins” on June 7, 2022, approving an announced “compromise and settlement.” Noah Higgins and his parents were then dismissed from the case with prejudice in an agreed order on June 15, 2022. The trial court entered a subsequent agreed order on June 30, 2022, stating that Noah Higgins had satisfied the judgment against him.

On July 1, 2022, the Estate filed a notice of appeal with this Court. The Estate concomitantly filed a motion in the trial court to amend its intervening complaint “to clarify the allegations and facts.” On the same day, the Estate also filed in the trial court a motion to alter or amend the June 3, 2022 memorandum and order, positing that the order did not constitute a final adjudication on the merits and that the trial court had not considered all relevant factual disputes. The Estate specifically argued that because the motion to disburse and resultant order did not set forth a procedural rule upon which disbursement was based and because the order did not include a statement of finality pursuant to Tennessee Rule of Civil Procedure 54.02, the order could not constitute a final judgment. Referencing the trial court’s instruction given during the May 19, 2022 hearing that the parties should work together on a stipulation of facts, the Estate averred that the parties had not done so. The Estate also reasserted its arguments related to the merits of the case. The Estate had previously filed a motion to strike as nonresponsive some of Mr. Sanders’s responses in his answer to the original intervening complaint and to have answers that were not denials deemed admitted.

Mr. Sanders filed an omnibus response to the Estate’s motions on August 4, 2022, averring that no factual disputes existed either before or after entry of the trial court’s June 3 order. Mr. Sanders stated that he had invited the Estate to identify any facts the Estate believed to be missing from the appellate record. While acknowledging that the Estate’s motion to alter or amend the judgment remained under the trial court’s jurisdiction, pursuant to Tennessee Rule of Appellate Procedure 4(b), Mr. Sanders questioned the trial court’s subject matter jurisdiction over the Estate’s July 1 motions considering that the Estate had concomitantly filed a notice of appeal.

Following a hearing, the trial court entered an order on August 12, 2022, finding that it lacked subject matter jurisdiction to hear the Estate’s motion to alter or amend and motion to strike due to the filing of the notice of appeal. In turn, the trial court continued the hearing on the motion to alter or amend and directed the parties to file a stipulation of facts by August 16, 2022, and to file briefs arguing the motion to alter or amend. On August 18, 2022, the parties filed a stipulation of the relevant facts in the case, and shortly thereafter, the Estate and Mr. Sanders each respectively filed a brief on the motion to alter or amend. Upon the Estate’s motion filed with this Court to stay the appeal, this

Court entered an order on August 19, 2022, staying the appeal “pending entry of a final judgment.”

In an order entered on August 25, 2022, the trial court denied the Estate’s motion to alter or amend the judgment, finding that although the stipulated facts submitted by the parties were “extremely helpful to ensure that there are no disputed facts thereby enabling appropriate appellate review,” these facts did not provide a basis to alter or amend the June 3, 2022 memorandum and order because “all of the facts contained in the Stipulation were previously available in the record.” The Estate subsequently filed a timely amended notice of appeal on August 26, 2022, and this appeal proceeded.

## II. Issues Presented

The Estate has presented two overarching issues on appeal. Within its first issue, the Estate has set forth six sub-issues. Consolidating the sub-issues somewhat, we have restated the Estate’s issues as follows:

1. Whether the trial court erred by finding that the proceeds from the settlement with the USAA Defendants belong to Mr. Sanders and not to the Estate.
  - A. Whether the trial court erred in finding Tennessee Code Annotated § 20-5-102 inapplicable to the instant action based on the imposition of additional requirements for a decedent’s rights of action that are not found in the plain language of the statute.
  - B. Whether the trial court misapplied the Discovery Rule to determine that the causes of action against the USAA Defendants belonged to Mr. Sanders individually.
  - C. Whether the trial court erred by finding that Mr. Sanders had individual damages such that claims against the USAA Defendants belonged to him individually.
  - D. Whether the trial court erred by finding that the settlement proceeds belonged to Mr. Sanders because he had received the proceeds of the pre-suit settlement.
2. Whether the trial court abused its discretion by denying the Estate’s motion to alter or amend.

### III. Standard of Review

The parties have stipulated to the facts underlying this action and have presented this Court with questions of law and statutory interpretation. We review questions of law, including those of statutory interpretation, *de novo* with no presumption of correctness. See *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000) (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 924 (Tenn. 1998)); see also *In re Estate of Haskins*, 224 S.W.3d 675, 678 (Tenn. Ct. App. 2006). Our Supreme Court has summarized the principles involved in statutory construction:

When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998). Further, the language of a statute cannot be considered in a vacuum, but “should be construed, if practicable, so that its component parts are consistent and reasonable.” *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). Any interpretation of the statute that “would render one section of the act repugnant to another” should be avoided. *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 444 (1937). We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

*In re Estate of Tanner*, 295 S.W.3d 610, 613-14 (Tenn. 2009).

We review an order on a motion to alter or amend pursuant to an abuse of discretion standard. See *Townsend Scientific Trust v. Food Tech. Investors, L.P.*, No. W2005-00835-COA-R3-CV, 2006 WL 47433, at \*2 (Tenn. Ct. App. Jan. 11, 2006). The

abuse of discretion standard of review analyzes “(1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the lower court’s decision was within the range of acceptable alternative dispositions.” *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

#### IV. Distribution of Settlement Proceeds

The essential dispute before us is whether the settlement proceeds at issue arose from a wrongful death claim and are therefore payable to Mr. Sanders as Decedent’s surviving spouse or whether the proceeds stem from a tort claim over which Mr. Sanders’s right to control the action on Decedent’s behalf does not equate to a right to receive the proceeds from the action. The trial court determined that Decedent did not have a cause of action for the USAA Defendants’ failure to provide the Umbrella Policy upon finding that such a cause of action had not vested prior to her death. The Estate contends that the trial court erred because the cause of action against the USAA Defendants involved the USAA Defendants’ conduct prior to Decedent’s death in committing the alleged torts of negligent failure to procure insurance and negligent misrepresentation, with a resultant injury of non-coverage for Decedent’s fatal injuries. According to the Estate’s argument, Tennessee Code Annotated § 20-5-102 authorizes Mr. Sanders as the surviving spouse to control the cause of action against the USAA Defendants on behalf of Decedent, but the cause of action, and thus the settlement proceeds, belong to Decedent and ultimately to the Estate. In response, Mr. Sanders contends that the trial court was correct in determining that Decedent had no cause of action against the USAA Defendants and that the claim and resultant proceeds belonged to him. Upon careful review of the record and applicable authorities, we agree with the Estate.

Our Supreme Court has described Tennessee Code Annotated § 20-5-102 (2021) as a “survival statute,” as distinguished from a “purely wrongful death statute.” *Beard v. Branson*, 528 S.W.3d 487, 496 (Tenn. 2017). As this Court has explained:

At common law, when a party to an action died while the case was pending the action abated. Tenn. Code Ann. § 20-5-101 abrogates the common law rule by providing that causes of action do not abate by the death of either party; this statute is a “survival statute” that permits the decedent’s cause of action to survive the death, so that the decedent, through his or her estate, recovers damages that would have been recovered by the decedent had he or she lived to the resolution of the case. *See Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 597 (Tenn. 1999) (citing *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575 n.2, 94 S. Ct.



806, 39 L. Ed. 2d 9 (1974)). Because the survival statute abrogates the common law rule, the statutory method for preserving either an existing action or a vested cause of action not yet commenced must be strictly followed. *See Preston v. Golde*, 80 Tenn. 267, 12 Lea 267-275 (1883); *McDonald v. Nashville*, 114 Tenn. 540, 86 S.W. 317, 318 (1904).

Tennessee's wrongful death statutes, Tenn. Code Ann. §§ 20-5-106-113, are also survival statutes; they are distinguished, however, from the other survival statutes because, in addition to preserving whatever cause of action was vested in the decedent at the time of death, they also create a new cause of action that compensates survivors of the decedent for their losses. *See Jordan*, 984 S.W.2d at 598. Tennessee courts have long held that the wrongful death statutes, because of their "hybrid" nature, must be construed with reference to one another. *See Foster v. Jeffers*, 813 S.W.2d 449, 451 (Tenn. Ct. App. 1991). Courts have also held that in order for the wrongful death statutes to apply, the victim must have died as a result of his or her injuries. *See e.g., Willis v. Heath*, 21 Tenn. App. 179, 107 S.W.2d 228 (1937) (widow could not bring an action to recover for the negligent injury of her deceased husband where it appeared that such injuries were not a contributing cause of his death); *Daniel v. East Tenn. Coal Co.*, 105 Tenn. 470, 58 S.W. 859, 860 (1900); *Nashville v. Reese*, 138 Tenn. 471, 197 S.W. 492 (1917).

*Timmins v. Lindsey*, 310 S.W.3d 834, 840-41 (Tenn. Ct. App. 2009) (footnote omitted). "A vested right of action in tort is a cause of action which has accrued, thereby becoming presently enforceable." *Mills v. Wong*, 155 S.W.3d 916, 921 (Tenn. 2005).

Tennessee Code Annotated § 20-5-102 provides:

No civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived; nor shall any right of action arising hereafter based on the wrongful act or omission of another, except actions for wrongs affecting the character, be abated by the death of the party wronged; but the right of action shall pass in like manner as the right of action described in § 20-5-106.

In *Timmins*, this Court elucidated:

Tenn. Code Ann. § 20-5-102 directs the procedural steps to be followed when a party dies. The first phrase in § 20-5-102 addresses how

an existing action is to be preserved upon the death of a party—by revival. The manner in which a pending action is to be revived is then provided for at Tenn. Code Ann. §§ 20-5-103 (causes surviving death of tort-feasor), -104 (revival by or against heirs) and -105 (revival by or against successor in interest). The remainder of § 20-5-102, beginning after the first semicolon, provides the procedural steps to be taken when a person who has suffered some wrong dies before he or she was able to commence a cause of action. The statute provides that the right of action passes in the “same manner” as the right of action described in Tenn. Code Ann. § 20-5-106; in other words, the right of action goes to the same person as designated in the statute.

310 S.W.3d at 841 (footnote omitted). Tennessee Code Annotated § 20-5-106(a) (2021) provides in relevant part:

The right of action that a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by the person’s death but shall pass to the person’s surviving spouse . . . .

(Emphasis added.)

In its memorandum and order, the trial court found that “neither Tennessee’s survival statutes nor Tennessee’s purely wrongful death statutes are applicable in this case.” The court determined § 20-5-106, the wrongful death statute, to be inapplicable because, undisputedly, “the USAA Defendants did not cause [Decedent’s] death.” The court therefore concluded that Decedent did not have a wrongful death right of action against the USAA Defendants to pass to Mr. Sanders. We agree with the trial court’s determination that Mr. Sanders did not have a wrongful death cause of action against the USAA Defendants. *See Cotten v. Wilson*, 576 S.W.3d 626, 638 (Tenn. 2019) (“A plaintiff in a wrongful death negligence action must prove that the defendant’s conduct was both the cause-in-fact and the legal cause of the decedent’s death.”) (emphasis added).

The trial court also found that Tennessee Code Annotated § 20-5-102 was inapplicable to this action, stating first that because Decedent “did not maintain an existing action at the time of her death . . . the first phrase of Tennessee Code Annotated, Section 20-5-102 does not apply.” We agree with the trial court up to this point inasmuch as Decedent did not maintain an existing action against the USAA Defendants at the time of her death. However, we cannot agree with the trial court’s further

determination that “[t]he remainder of Tennessee Code Annotated, Section 20-5-102, beginning after the first semi-colon, does not apply in this case because [Decedent] did not have a cause of action that had vested prior to her death.” The trial court reasoned in pertinent part:

Mr. Sanders filed his Complaint against the USAA Defendants individually and as [Decedent’s] surviving spouse. Mr. Sanders’ claims against the USAA Defendants do arise out of [Decedent’s] death. The cause of action Mr. Sanders asserted against the USAA Defendants vested after [Decedent’s] death when Mr. Sanders became aware of the USAA Defendants alleged misrepresentation regarding his umbrella policy. The cause of action against the USAA Defendants belongs to Mr. Sanders in his individual capacity.

The damages Mr. Sanders sought in his action against the USAA Defendants were compensatory damages for the USAA Defendants’ refusal to pay under the uninsured/underinsured policy and the umbrella policy; compensatory damages for the USAA Defendants’ misrepresentations related to the umbrella policy; and punitive damages.

Compensatory damages serve to return a plaintiff to the position he or she would have occupied had the harm not occurred. Mr. Sanders’ damages encompassed the amount of coverage Mr. Sanders would have received as a result of [Decedent’s] death had an umbrella policy been in place.

(Internal citations and footnote omitted.) Because we conclude that Decedent did have a cause of action against the USAA Defendants that accrued, or vested, at the time of her death, namely for the torts of negligent failure to procure insurance and negligent misrepresentation, we also conclude that the trial court erred in determining the second prong of Tennessee Code Annotated § 20-5-102 to be inapplicable.

In his complaint, Mr. Sanders asserted tort claims related to the Umbrella Policy against the USAA Defendants of negligent misrepresentation and negligence in “fail[ing] to procure the policy they promised to provide.” Concerning the proof required to establish a claim of negligent misrepresentation, our Supreme Court has instructed in pertinent part:

In *Giggers v. Memphis Housing Authority*, this Court confirmed the elements essential to a recovery based on general negligence:

In order to establish a prima facie claim of negligence, basically defined as the failure to exercise reasonable care, a plaintiff must establish the following essential elements: “(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause.”

277 S.W.3d 359, 364 (Tenn. 2009) (quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995)).

Negligent misrepresentation, on the other hand, applies to a narrower class of claims. “[T]o succeed on a claim for negligent misrepresentation, a plaintiff must establish ‘that the defendant supplied information to the plaintiff; the information was false; the defendant did not exercise reasonable care in obtaining or communicating the information and the plaintiffs justifiably relied on the information.’” *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 311 (Tenn. 2008) (quoting *Williams v. Berube & Assocs.*, 26 S.W.3d 640, 645 (Tenn. Ct. App. 2000)). “Tennessee has adopted Section 552 of the *Restatement (Second) of Torts* ‘as the guiding principle in negligent misrepresentation actions against . . . professionals and business persons.’” *Robinson v. Omer*, 952 S.W.2d 423, 427 (Tenn. 1997) (quoting *Bethlehem Steel Corp. v. Ernst & Whinney*, 822 S.W.2d 592, 595 (Tenn. 1991)). The *Restatement (Second)* provides as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*Restatement (Second) of Torts* § 552(1) (1977).

*Morrison v. Allen*, 338 S.W.3d 417, 437 (Tenn. 2011). Specific to the tort of negligent failure to procure insurance, the *Morrison* Court adopted the following “criteria as essential to support a claim”:

- (1) an undertaking or agreement by the agent or broker to procure insurance;
- (2) the agent's or broker's failure to use reasonable diligence in attempting to place the insurance and failure to notify the client promptly of any such failure; and
- (3) that the agent's or broker's actions warranted the client's assumption that he or she was properly insured.

*Id.* at 426 (quoting 43 Am. Jur. 2d *Insurance* § 163). “[I]n a failure to procure claim, ‘the agent, rather than [the] insurance company, is independently liable.’” *Id.*

According to Mr. Sanders's complaint, both Decedent and he were led by USAA Defendants' representatives to believe that they were covered by the Umbrella Policy up to and including the time of Decedent's fatal injuries. However, Decedent was not covered by the Umbrella Policy when she was struck on her bicycle. The instant action against the USAA Defendants is for their alleged wrongdoing prior to Decedent's death in failing to procure the Umbrella Policy while representing to Decedent and Mr. Sanders that the policy had been procured (or, more specifically, reinstated). Because Decedent was not covered by the Umbrella Policy when she was killed, the injury created by the USAA Defendants' wrongdoing occurred at the time of the fatal incident. Mr. Sanders would have been a beneficiary of the insurance that should have covered Decedent, but the coverage would have belonged to Decedent, if it had been procured and in force, at the time of her death. We therefore determine that the injury of non-coverage under the Umbrella Policy was to Decedent, and the tort claims of negligent misrepresentation and negligent failure to procure insurance belonged to her.

Although Mr. Sanders acknowledges that the USAA Defendants did not cause Decedent's death, he maintains, in contrast to the trial court's finding, that the torts alleged against the USAA Defendants constituted a cause of action inseparable from the wrongful death action. He thereby bolsters his argument that, pursuant to Tennessee Code Annotated § 20-5-106(a), both control of the action and ownership of any recovery passed to him as the surviving spouse. *See Beard*, 528 S.W.3d at 502 (explaining that “the surviving spouse who files a wrongful death complaint is not acting as a legal representative of the decedent” and that “the proceeds of a wrongful death action go directly to the spouse and the other statutory beneficiaries,” rather than passing through the decedent's estate). We find this argument unpersuasive.

Examining the interplay of Tennessee Code Annotated §§ 20-5-102 and 20-5-106(a), we conclude that Decedent's right of action in tort against the USAA Defendants

passed to her surviving spouse, Mr. Sanders. However, because we determine the tort action to be separate from the wrongful death action, Mr. Sanders, while retaining the right of control, did not assume the right to the proceeds recovered from the tort action. Those proceeds belonged to Decedent and now ultimately belong to the Estate.

This Court's decision in *Timmins* is especially instructive. In *Timmins*, as here, the distribution of settlement proceeds was at issue with the appellate court considering whether the proceeds should be treated as recovery for a wrongful death action or as recovery for a personal injury tort action. See *Timmins*, 310 S.W.3d at 843. *Timmins* involved a declaratory judgment action regarding settlement proceeds stemming from a personal injury claim brought by four surviving children and a grandchild of the injured party, Lela Lindsey, who had been injured by a medication overdose administered while she was a nursing home patient. *Id.* at 837. Ms. Lindsey had died before the lawsuit was commenced. *Id.* A jury ultimately awarded damages for Ms. Lindsey's personal injuries but "found that those injuries were not the proximate cause of her death." *Id.* One of Ms. Lindsey's grandchildren filed the declaratory judgment action as a representative of himself and his siblings, who were the children of Ms. Lindsey's one deceased child, seeking a declaration of their rights to the settlement proceeds as against Ms. Lindsey's four surviving children. *Id.* The *Timmins* trial court, applying Tennessee Code Annotated § 20-5-111 of the wrongful death statutory scheme, found that the plaintiff was not entitled to any part of the settlement. *Id.* at 838.

On appeal, both parties in *Timmins* "ask[ed] this Court to apply statutes governing wrongful death actions to the present facts" and differed over interpretations of the phrase, "next of kin," in the statutes at issue. *Id.* at 840. The *Timmins* Court vacated the trial court's judgment upon determining that the wrongful death statutes did not apply, stating, "rather, the settlement proceeds from the decedent's personal injury action are part of the decedent's estate and pass either by will, if there is one, or by the laws of intestate succession." *Id.* As the *Timmins* Court concluded:

Here, the jury found liability and awarded damages for personal injuries rather than wrongful death. The damages awarded did not include damages that a party would be entitled to recover if it were proven that the decedent died from the injuries sustained. Consequently, the manner of distribution provided for in the wrongful death statutes, specifically Tenn. Code Ann. §§ 20-5-106 and -108, is inapplicable to this case. Since the recovery was only for the decedent's personal injuries, the proceeds of the settlement could not, as the plaintiff contends, be distributed as a recovery for wrongful death; instead, they are part of the decedent's estate.

*Id.* at 843.

The *Timmins* Court further explained that a “wrongful death action is separate and distinct from an action to recover for personal injuries where, through happenstance, the plaintiff dies; the wrongful death action has statutory provisions that are unique to it.” *Id.* at 842. A point of confusion then arises between the *Timmins* analysis and the instant action because, certainly, Decedent in this case did not die “through happenstance” unrelated to the injuries inflicted by Noah Higgins. *See id.* We reiterate that Mr. Sanders’s claim against the USAA Defendants was not for the injuries to Decedent that caused her death, as his claim against the Higgins Defendants was, but rather for the injury of Decedent’s non-coverage by the Umbrella Policy at the time of her death. The trial court properly found that the wrongful death statutes did not apply because the USAA Defendants did not cause Decedent’s death. However, the trial court erred when it attributed the injury of non-coverage to Mr. Sanders, the individual who would have been the Umbrella Party’s beneficiary had it been in place, rather than to the Estate of Decedent, the individual whose injuries and death were not covered by the policy.

On appeal, Mr. Sanders attempts to distinguish the *Timmins* decision from the instant action because in *Timmins*, the jury denied wrongful death damages upon finding that Ms. Lindsey’s personal injuries, for which the jury did find tort recovery appropriate, had not been the cause of her death. *See Timmins*, 310 S.W.3d at 843. Having determined the recovery from the USAA Defendants in this action to have been based in tort, we further determine this distinction to be one without a legal difference. Likewise, we find Mr. Sanders’s reliance on this Court’s decision in *Lawson v. Lawson*, No. 2009-00537-COA-R3-CV, 2010 WL 3853289 (Tenn. Ct. App. Sept. 28, 2010), to be unavailing. In *Lawson*, the plaintiff filed a “wrongful death tort action” seeking recovery for her husband’s death in an automobile accident. *Lawson*, 2010 WL 3853289, at \*1. Prior to being served with a copy of the complaint in the wrongful death tort action, the plaintiff’s uninsured motorist carrier voluntarily tendered the limits of its coverage into the decedent’s estate. *Id.* Following receipt of notice of the wrongful death tort action, the insurer filed a motion seeking dismissal, which the trial court granted. *Id.* On appeal, this Court reversed the dismissal, holding: “Any insurance proceeds payable for wrongful death voluntarily tendered should be paid into the wrongful death tort proceeding and not into the probate proceeding administering the estate.” *Id.* at \*2.

Mr. Sanders posits that because the payment in *Lawson* “retained its character as wrongful death proceeds even though it was paid by an insurer,” the settlement for the Umbrella Policy dispute should likewise be paid as wrongful death proceeds. However, we find it highly factually distinguishable that the action in *Lawson* was not against the insurer. Here, the action resulting in the settlement proceeds at issue was a tort action against the insurer, the USAA Defendants. These proceeds were therefore not for

Decedent's wrongful death but for the USAA Defendants' alleged wrongdoing in failing to procure the Umbrella Policy after representing that they had done so.

Although the trial court found Tennessee's purely wrongful death statutes to be inapplicable to the settlement proceeds at issue, the court nonetheless determined that Mr. Sanders was entitled to the proceeds as compensatory damages "encompass[ing] the amount of coverage Mr. Sanders would have received as a result of [Decedent's] death had an umbrella policy been in place." In so determining, the trial court found that the cause of action against the USAA Defendants could not have belonged to Decedent because it "vested after [Decedent's] death when Mr. Sanders became aware of the USAA Defendants alleged misrepresentation regarding his umbrella policy." In so finding, the court applied the "discovery rule," citing *Hunter v. Brown*, 955 S.W.2d 49, 51 (Tenn. 1997), to reason that because the claim had not accrued prior to Decedent's death, she had no vested cause of action. We disagree with the trial court's interpretation of the discovery rule in this regard. As our Supreme Court explained in *Hunter*:

A cause of action generally accrues when the tort is complete and injury to the plaintiff has occurred. See *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487, 489-90 (Tenn. 1975) (citing cases). In certain tort actions, however, the accrual of the cause of action is deferred until the injury is discovered or in the exercise of reasonable care and diligence, the injury should have been discovered. *Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc.*, 876 S.W.2d 818, 820 (Tenn. 1994) (declining to apply the discovery rule to slander claims).

Under the discovery rule, the cause of action accrues and the statute of limitations begins to run when the injury is discovered, or in the exercise of due care and diligence, the plaintiff discovers that he or she has a right of action. *Potts v. Celotex Corp.*, 796 S.W.2d 678, 680 (Tenn. 1990); *McCroskey*, 524 S.W.2d at 491. The discovery rule applies only "in cases where the plaintiff does not discover and reasonably could not be expected to discover that [she] had a right of action." *Potts*, 796 S.W.2d at 680. Further, the limitations period is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred and, as a reasonable person, was not put on inquiry. *Potts*, 796 S.W.2d at 680-81; *Hoffman v. Hospital Affiliates, Inc.*, 652 S.W.2d 341, 344 (Tenn.1983).

955 S.W.2d at 51.

In the case at bar, Decedent's cause of action against the USAA Defendants accrued, or vested, when the tort was complete and injury to Decedent had occurred,



which we determine to have been when Decedent was fatally injured without the Umbrella Policy coverage she had purportedly been led to believe she possessed. *See id.* Under the discovery rule, if the statute of limitations had been implicated for negligent failure to procure, it may have been tolled during the period when Mr. Sanders, as the individual with the right to control an action for Decedent, did not discover and reasonably could not have been expected to discover that Decedent had a right of action. *See id.* However, Decedent’s cause of action had nonetheless accrued. The Estate maintains that “[t]he discovery rule does not dictate whether a party as a right of action; it simply protects parties from the harshness of the statute of limitations when a party cannot reasonably be expected to have discovered their right of action right away.”<sup>2</sup> We agree.

As our Supreme Court has elucidated:

The concept of accrual relates to the date on which the applicable statute of limitations begins to run. *Columbian Mut. Life Ins. Co. v. Martin*, 175 Tenn. 517, 526, 136 S.W.2d 52, 56 (1940); *see also McSpadden v. Parkenson*, 10 Tenn. App. 11, 18 (1928); 22 Steven W. Feldman, *Tennessee Practice: Contract Law and Practice* § 12:80, at 601 (2006). The traditional accrual rule was that a cause of action accrues and the applicable statute of limitations begins to run “when the plaintiff has a cause of action and the right to sue.” *Armistead v. Clarksville-Montgomery Cnty. Sch. Sys.*, 222 Tenn. 486, 490, 437 S.W.2d 527, 528-29 (1969). The statute of limitations began to run even though “the person entitled to an action . . . [had] no knowledge of his right to sue, or the facts out of which this right arises.” 2 H.G. Wood, *A Treatise on the Limitation of Actions* § 276c(1), at 1411 (4th rev. ed. 1916) (“Wood”). Accordingly, under the traditional accrual rule, the cause of action accrued in personal injury cases “immediately upon the infliction or occurrence of [the] injury.” *Teeters v. Currey*, 518 S.W.2d [512,] 515-16 [(Tenn. 1974)]; *Bodne v. Austin*, 156 Tenn. [366,] 370-71, 2 S.W.2d [104,] 105 [(Tenn. 1928)].

*Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 457 (Tenn. 2012).

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<sup>2</sup> Stated as a sub-issue, the Estate contends that the trial court erred by “imposing additional requirements” for a decedent’s right of action that are not found in the plain language of Tennessee Code Annotated § 20-5-102. Specifically, the Estate asserts that the trial court erred by requiring Decedent’s right of action to have accrued prior to her death and with her knowledge. Although we agree with the Estate that these “requirements” are not present in the plain language of the statute, we decline to hold that in interpreting the statute, the trial court erred by attempting to add these requirements for all factual scenarios that might arise.

In support of his argument that no injury had accrued related to the failure to procure insurance until the USAA Defendants denied coverage upon his claim, Mr. Sanders relies in great part on several cases from other jurisdictions. We emphasize that “[c]ases from other jurisdictions, including federal cases, are always instructive, sometimes persuasive, but never controlling in our decisions.” *See Summers Hardware & Supply Co., Inc. v. Steele*, 794 S.W.2d 358, 362 (Tenn. Ct. App. 1990). Moreover, we find Mr. Sanders’s reliance on these authorities to be misplaced.

As the Estate notes in its reply brief, each of the out-of-state cases relied upon by Mr. Sanders, as relative to a negligent procurement claim, involved when the statute of limitations had begun to run, *i.e.*, whether the claim was time-barred by the statute of limitations. *See, e.g., Bush v. Ford Life Ins. Co.*, 682 So. 2d 46, 47 (Ala. 1996) (“In a case of negligent procurement, a cause of action accrues when a loss that would trigger liability under the policy occurs.”); *Hoffman v. Ins. Co. of N. Am.*, 245 S.E.2d 287, 287 (Ga. 1978) (“When the question is raised as to whether an action is barred by a statute of limitations, the true test to determine when the cause of action accrued is ‘to ascertain the time when the plaintiff could first have maintained his action to a successful result.’” (quoting *Mobley v. Murray Cnty.*, 173 S.E. 680, 682 (Ga. 1934))); *Int’l Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.*, 560 N.E.2d 122, 124 (Mass. App. Ct. 1990) (“So it is that a negligence action may be maintained against an insurance agent or broker who undertakes to procure an insurance policy and fails to do so, but not unless there has been some appreciable harm to the potential insured.”) (internal citations omitted); *Huff v. Harbaugh*, 435 A.2d 108, 114 (Md. Ct. Spec. App. 1981) (affirming the trial court’s finding that the plaintiff’s claim was not time barred because the statute of limitations had not begun to run for the defendant insurer’s failure to procure property insurance until the plaintiff had knowledge that the building’s destruction in a fire was not covered). Again, we determine that the injury had accrued at the time of Decedent’s death although the statute of limitations may have been tolled for purposes of the limitations period until her representative bringing the action, Mr. Sanders, had knowledge of or reasonably should have had knowledge of Decedent’s non-coverage under the Umbrella Policy.

Finally, the Estate challenges the trial court’s finding in its distribution order that there was no “distinction between the \$275,000 settlement amount tendered to Mr. Sanders as a result of [Decedent’s] death under his uninsured/underinsured motorist policy prior to filing suit, and the proceeds from the March 2022 Settlement.” The Estate also takes issue with the trial court’s statement that the Estate had “concede[d] that the \$275,000 settlement amount Mr. Sanders received from the USAA Defendants prior to filing suit belonged to him in his individual capacity.” Emphasizing the distinction between a beneficiary and individual ownership, the Estate points to the parties’ stipulation that “[t]here is no dispute that such [pre-suit] proceeds were recovered for the

benefit of Mr. Sanders as the sole beneficiary of the claims for [Decedent's] wrongful death.”

We emphasize that the pre-suit settlement distribution received by Mr. Sanders is not at issue in this case. We do, however, in contrast to the trial court's finding, determine that a key distinction existed between the pre-suit settlement and the settlement at issue here. The pre-suit settlement was paid according to Mr. Sanders's and Decedent's uninsured/underinsured motorist policy and was the result of actual coverage for Decedent's injuries and wrongful death. In contrast, the settlement proceeds at issue here resulted from the tort action against the USAA Defendants for non-coverage under the Umbrella Policy at the time of Decedent's fatal injuries.

For the reasons explained above, we conclude that the action resulting in the settlement proceeds at issue was based in tort rather than wrongful death and that it was Decedent's cause of action. Although Decedent's cause of action has been controlled by Mr. Sanders since Decedent's death, the action nonetheless belonged to Decedent and thus passed to her Estate pursuant to the interplay of Tennessee Code Annotated §§ 20-5-102 and 20-5-106(a). We therefore reverse the trial court's June 2022 order granting Mr. Sanders's motion to disburse the settlement proceeds related to the Umbrella Policy and remand for entry of an order disbursing the proceeds to the Estate.

#### V. Motion to Alter or Amend

The Estate also raises an issue concerning the trial court's denial of its Tennessee Rule of Civil Procedure 59.04 motion to alter or amend the June 2022 order granting Mr. Sanders's motion to disburse funds. The Estate argues that the set of stipulated facts submitted by the parties subsequent to entry of the order and the presentation of a settlement check made payable to Decedent constituted previously unavailable information affecting the factual accuracy of the order and that the trial court abused its discretion by denying the motion to alter or amend. *See In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005) (The [Rule 59.04] motion should be granted when the controlling law changes before the judgment becomes final; when previously unavailable evidence becomes available; or to correct a clear error of law or to prevent injustice.”).

In its order denying the motion, the trial court found that “all of the facts contained in the Stipulation were previously available in the record” and that the Estate had “presented no basis to alter or amend” the order. Having determined that the trial court's order granting Mr. Sanders's motion to disburse funds should be reversed, we further determine the Estate's issue regarding the denial of its motion to alter or amend to be pretermitted as moot.

## VI. Conclusion

For the foregoing reasons, we reverse the trial court's grant of Mr. Sanders's motion to disburse the settlement funds related to the claim against the USAA Defendants for negligent misrepresentation and negligent failure to procure the Umbrella Policy. This case is remanded to the trial court for entry of an order disbursing the settlement funds related to the Umbrella Policy to Decedent's Estate and for collection of costs below. Costs on appeal are taxed to the appellee, Bradley Sanders.

s/ Thomas R. Frierson, II  
THOMAS R. FRIERSON, II, JUDGE