

STATE OF VERMONT
WINDSOR COUNTY, SS

John Madden
Plaintiff

v.

Jay Ketcham; James Harris;
Kyle Gendron-Gigure; Randall
Trask; Pam Trask and Michael Trask
Defendants

SUPERIOR COURT
Docket No. 468-7-08 Wrcv

DECISION ON MOTION TO DISMISS

Plaintiff has filed an action for wrongful death as a result of the death of his son, Colby Madden, on July 1, 2006. While various legal theories are asserted (e.g. negligence and strict liability), the claims all seek damages for the death of Colby Madden.

Plaintiff's son was killed as a result of the explosion of a cannon which was allegedly discharged by one of the defendants. The defendants include persons allegedly responsible for buying the materials to make the cannon, for constructing the cannon, for firing the cannon and for allowing the cannon to be used on the property on the day in question. The three Trask defendants have all died since this incident and substitution of parties has been made concerning them.

The Plaintiff's complaint alleges that the Plaintiff is the biological father of the decedent, Colby Madden. The plaintiff's complaint is not styled as being brought in John Madden's capacity as administrator or representative of his son's estate. On the contrary, the complaint merely recites that John Madden is Colby Madden's biological father. Other than that, there is no suggestion why John Madden has any claim resulting from his son's death.

Defendants Randall and Pam Trask have filed a motion to dismiss pursuant to V.R.C.P. 12(b)(1) alleging lack of standing and V.R.C.P. 12(b)(6) alleging failure to state a claim upon which relief can be granted. No other defendants have filed motions to dismiss at this time, although similar defenses have been raised in answers which have been filed.

The purpose of a motion to dismiss is to test the law of the case, not the facts supporting the claim. *Powers v. Office of Child Support*, 173 Vt. 390 (2002); *Levinsky*, 2008 VT 101.

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Diamond, 140 Vt. 595 (1982) overruled on other grounds in *Muzzy v. State*, 155 Vt. 279 (1990). In considering a motion to dismiss, either for lack of standing or for failure to state a claim, the court must consider all well-pleaded allegations of the complaint to be true. *Town of Bridgewater v. Department of Taxes*, 173 Vt. 509 (2001); *Jones v. Keough*, 137 Vt. 562 (1979).

Applying that standard here, the Plaintiff's complaint is one alleging wrongful death. Vermont's wrongful death statute, 14 V.S.A. §1492 provides that actions for wrongful death "shall be brought in the name of the personal representative of such deceased person . . ." 14 V.S.A. §1492(a). There is no common-law cause of action for wrongful death; the wrongful death statute provides the sole remedy. *Quesnel v. Town of Middlebury*, 167 Vt. 252 (1997).

An action for wrongful death must be brought by the decedent's representative, not by the beneficiary of the estate. *Leo v. Hillman*, 164 Vt. 94 (1995). Even a foreign appointment of an administrator is insufficient; there must be an appointment of an administrator in Vermont to maintain an action for wrongful death. *Dutil v. Mayette*, 395 F. Supp. 922 (D. Vt., affirmed 517 F.2d 936 (2d. Cir. 1975); *Weinstein v. Medical Center Hospital*, 358 F. Supp. 297 (D. Vt. 1972). Where a wrongful death claim involves a minor (as may be the case here), the claim belongs to the estate, it is not a claim which can be brought or settled by a parent. *Estate of Tilton v. Lamoille Superior Court*, 148 Vt. 213 (1987).

No person other than the representative of the deceased estate has the authority to bring a wrongful death claim. *Leo v. Hillman*, 164 Vt. 94 (1996). As John Madden is not asserted to be the representative of Colby Madden's estate, he is not authorized to bring this action and lacks standing to do so. To have a case or controversy subject to the jurisdiction of the court the plaintiff must have standing. *Brod v. Agency of Natural resources*, 182 Vt. 234 (2007). In the absence of standing, any opinion by the court would be advisory only, which Vermont courts are without authority to issue. *Parker v. Town of Milton*, 169 Vt. 74 (1998).

Further, because there is no common law right of action for wrongful death and because the action has not been brought by the representative of the decedent as Vermont law requires, Plaintiff's complaint fails to state a cause of action upon which relief can be granted. *Leo v. Hillman*, 164 Vt. 94 (1996); *Quesnel v. Town of Middlebury*, 167 Vt. 252 (1997); 14 V.S.A. §1492(a). This provides an alternate and equally compelling reason why Plaintiff's complaint must be dismissed.

Taking the allegations of the Plaintiff's complaint as true, the complaint has not been brought by the decedent's personal representative, but rather by decedent's father. While the decedent's father may be a beneficiary of the estate, he is not the alter ego of the estate's representative. *Leo v. Hillman*, 164 Vt. 94 (1995). Accordingly, Plaintiff lacks standing to pursue this claim and his complaint fails to state a claim upon which relief can be granted.

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For the reasons stated herein, the Motion to Dismiss is **GRANTED**. This action is **DISMISSED** as to all claims against all parties.

Dated at Woodstock this 30th day of September, 2008.



Harold E. Eaton, Jr.
Superior Court Judge

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