

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARIAN C. WHITLEY, and PATRICIA)
MAZZELLA, Individually and as)
Co-Administrators for the Estate of)
Ethel V. Christian,)

Appellants,)

v.)

RIVER'S BEND HEALTHCARE, et al.,)

Appellees.)

On Appeal from the
Lawrence County Court
of Appeals, Fourth
Appellate District

09-1484

Court of Appeals
Case No. 08CA00030

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS MARIAN C. WHITLEY, and PATRICIA MAZZELLA,
INDIVIDUALLY AND AS CO-ADMINISTRATORS FOR THE
ESTATE OF ETHEL V. CHRISTIAN
Re: Journal Entry of June 30, 2009

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
AND GREAT GENERAL INTEREST**

Rather than hearing the Plaintiffs' claims on their merits, the lower courts have allowed a minor, hypertechnical, and actually corrected procedural issue to decide this case. Moreover, they have done so even in the complete absence of any prejudice to the Appellees, and even while the Appellee took no action to preserve its rights. The fact is that Ethel Christian's daughter and guardian did not inform Counsel of Ethel's passing until suit was already filed. Once advised, Counsel substituted Mrs. Christian's estate within ten days. Appellees made no objection for an additional nine months, and did not raise any issue until the case had been voluntarily dismissed and re-filed.

This issue will certainly recur because nursing home residents are, without exception, of advanced years, or have serious health complications. This is a class of litigants that is at much higher risk of death than most plaintiffs, generally. The number of nursing home residents in Ohio is large, and growing. Procedural technicalities that negate the protections of the Nursing Home Bill of Rights should be a top priority of this Court, given the vulnerability of nursing home residents.

The lower courts have ignored their own precedents concerning Ohio's Nursing Home Bill of Rights. They have ignored a binding precedent of this Court that holds that the substitution of a plaintiff's estate relates back to the filing of the complaint. And they have ignored the plain language of R.C. 3721.17(I)(1)(b). As shown in the Fourth District's opinion, the primary Supreme Court authority for the majority's opinion has been long since discarded. This Court should accept review for the benefit of all residents of nursing homes.

STATEMENT OF THE CASE AND FACTS

This case arises out of a nursing home stay by Ethel V. Christian, who is now deceased, at the facility run by Appellees, River's Bend Health Care & River's Bend Health Care, LLC (collectively, hereinafter, "RBHC"), in South Point, Ohio. Mrs. Christian was admitted to RBHC in February of 2004, and she remained at the Appellee's facility until April 25, 2004. This case concerns several instances of neglect occurring during her stay. These facts are not in dispute.

Ethel died on February 7, 2005. This action was timely filed on April 15, 2005, albeit by and through Ethel's Conservator and Guardian, Marcella Christian. (Case No. 05PI309.) Marcella did not inform Counsel of her mother's passing until May 31, 2005. Marcella, who was also Ethel's adult child, is also now deceased. Marcella was her mother's guardian during Ethel's lifetime, but did not act as Administrator of her Estate upon her passing. Marcella's two sisters, Marian C. Whitley and Patricia Mazella, were jointly appointed as Administrators. On June 8, 2005, Appellant filed a Notice of Suggestion of Death, and moved to substitute the co-Administrators of Ethel's estate. The trial court granted that motion on the same day. (*See Entry*, Vol. 343, p. 175, Exhibit A.) *Nine months later*, the '05 case was then dismissed without prejudice pursuant to Civ.R. 41(A) on March 6, 2006. This case was timely re-filed on February 27, 2007 pursuant to Ohio's savings statute, R.C. 2305.19.

On July 5, 2007, RBHC filed a Motion for summary judgment, asserting one ground for dismissal. Appellees argued that this case is untimely because the *prior* action was not commenced properly, and that therefore the savings statute could not be used. The purported defect with the first action was the fact that the Estate of Ethel Christian was not formally made a

party until June 8, about two months subsequent to the filing of the Complaint. Thus, Appellees argued, the first Complaint was a nullity, and the only action commenced was the one filed on February 27, 2007.

It must be noted that this Motion to Substitute in the first action was not occasioned by any Motion or objection raised by the Appellees. Appellants, through discussions with Counsel, identified an error in the pleadings, and promptly moved to correct it. At no time during the pendency of the first case, No. 05PI309, did the Appellees object to the substitution of the Estate of Ethel Christian for Mrs. Christian, as she was mistakenly named in her individual capacity. Appellees have pointed out that the Motion to Substitute was granted the same day it was filed. But this does not change the fact that the first case remained pending for an additional *nine months*. Appellees could have made a dispositive motion based on the same grounds at any time while that action was pending, but opted not to.

In the re-filed case, Appellants opposed the Motion, arguing that the substitution of the “Estate of Ethel V. Christian” for the person of Ethel Christian, made by the trial court on June 8, 2005, relates back to the time of the first-filed complaint. The trial court adopted the Appellees’ position, and granted Appellee’s Motion for Summary Judgment, by the Entry of August 3, 2007. A prior appeal, case number 07CA25, was dismissed for want of a final, appealable order.

Upon remand the Appellants sought reconsideration of the entry of August 3, 2007. Appellants made the argument that the Appellees claim was waived during the first appeal. Specifically, Appellants argued that the Nursing Home Bill of Rights allowed Marcella standing to bring the case for her deceased mother, as Ethel Christian’s daughter, regardless of her powers as guardian having terminated. Marcella herself died in April of 2007. The trial court rejected

this argument, and formally dismissed the case.

On June 30, 2009, the Fourth District Court of Appeals issued the Decision and Entry now appealed, and attached hereto as Exhibit A. The opinion indicates an unusually vigorous debate between the two judges of the majority, and the dissenting judge, concerning the effect of the substitution of Mrs. Christian's estate for her person. Following the argument presented by the Appellant, the dissent would have held that just as an estate may be substituted for a deceased defendant, there is no reason for treating a deceased plaintiff differently. (Page 14.) In footnote 1, the majority engaged in a "slippery slope" analysis, raising the concern that the dissents reasoning would allow a corporation to bring suit prior to being incorporated. Obviously, no such facts are presented by this case. The dissent recognizes that for the limited circumstances actually at issue, there is no difference between allowing an estate to be substituted for a plaintiff who was deceased at the time of filing, and doing the same for a deceased defendant.

This case is about a grieving and ill daughter of a nursing home resident who did not realize the legal significance of her mother's death. The Civil Rules do not mandate the destruction of statutorily created claims when the *defendant* is deceased when the case is filed. There is no reason to deny plaintiffs the same treatment. Moreover, if there had been any actual prejudice to the Appellee in this case, Appellee would certainly have raised the argument in the nine months after the substitution occurred, and prior to the voluntary dismissal of the case.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

The Substitution of a Deceased Plaintiff's Estate Relates Back to the Filing of the Complaint.

The court of appeals completely ignored controlling precedent of this Court. Douglas v. Daniels Bros. Coal Co. (1939), 135 Ohio St. 641. Douglas is indistinguishable, and has never been overruled by this Court. While subsequent decisions of this Court discuss related issues, there is no plausible explanation for the lower court's refusal to deal with a valid precedent, on exactly the same issue. The Fourth District's silence as to Douglas is deafening. Moreover, as aptly detailed by the dissent, the cases relied on by the majority rest on the now overruled Barnhart v. Schultz (1978), 53 Ohio St.2d 59. In sum, the Appellants' position rests on long standing and consistent precedent. The Appellee's position rests on cases that in turn rest on a now overruled case. The lower court failed to conduct a full review by avoiding Douglas.

There is no question that the Entry of June 8, 2005 substitutes the correct party, the "Estate of Ethel V. Christian," for "Ethel V. Christian." The Entry states that leave is granted for the substitution. Even in the Entry granting summary judgment, the trial court made it clear that the substitution was completed:

This Court did not substitute the Administrator for the Guardian/Conservator until June 8, 2005.

(Entry of August 3, 2007, second page.) No further action was required on the part of the Plaintiff below because the trial court's approval of the Motion to substitute made that substitution complete.

Ohio Civ. R. 25 states, in relevant part:

In case of any transfer of interest, the action may be continued by or

against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Ohio Civ. R. 25(C). Under the plain language of the rule, there is no requirement that any party amend the pleadings to affect the substitution or joinder. Rather, the Court can join the other interested party by its own action, as in this case.

Case law is clear that the Court may act on its own under Civil Rule 25 to join a real party in interest. Holiday Props. Acquisition Corp. v. Lowrie (Summit Ct. App., 2003), 2003 Ohio 1136, at P. 14; Hawkins v. Anchors (Portage Ct. App., 2004), 2004 Ohio 3341, P41 (trial court added real party in interest).

In this case, Ethel Christian's surviving family members simply did not appreciate the legal significance of Mrs. Christian's passing. Once Mrs. Christian's family members made her passing known to Counsel, Appellants moved to substitute the Estate of Ethel V. Christian for Ethel, personally. It is clear that a Court can make this substitution by its own action, or upon a Motion made by the party who should be substituted, as in this case. Even while granting summary judgment, the trial court in this case acknowledged that the Estate was made a party in June of 2005. Thus, the substitution of the Estate is established, and the only question is whether this substitution relates back to the filing of the Complaint in the '05 case, on April 15, 2005.

The Appellee's Motion should have been denied because this Court has recognized that the appointment as the administrator of an estate can relate back to an earlier filed complaint:

1. Where a widow institutes an action, as administratrix, for damages for the wrongful death of her husband, under the mistaken belief that she had been duly appointed and had qualified as such, thereafter discovers her error and amends her petition so as to show that she was appointed administratrix after the expiration of the statute of limitation applicable to such action, **the amended petition will relate back to the date of the filing of the petition**, and the action will be deemed commenced within

the time limited by statute. [Emphasis added.]

Douglas v. Daniels Bros. Coal Co. (1939), 135 Ohio St. 641.

This case is on all fours with Douglas because in that case, the original plaintiff initiated a lawsuit under the belief that she had the authority to act on behalf of the decedent. The situation is indistinguishable in this case. Appellant moved this court to substitute the Co-Administrators, and that Motion was granted on June 8, 2005.

In Douglas, this Court held that the substitution of an administrator for a party who mistakenly believed herself already to have authority to act for the estate would relate back to the time the complaint was filed:

It is well settled in Ohio that if an amended petition does not set up a new cause of action it will not be barred by the statute fixing a period of limitation for the institution of suit, but will relate back to the date of the filing of the original petition. [cites omitted]

In the instant case, the original petition alleges that plaintiff is the duly appointed and qualified administratrix of the estate of her husband, Verne Douglas, deceased. The amended petition alleges that at the time of the filing of the original petition plaintiff erroneously believed herself appointed but was in fact not appointed and qualified as such administratrix; that since the filing of her original petition, the error was discovered and she has been appointed and qualified as such administratrix. The amended petition further states that she adopts and ratifies her act in commencing the suit. In all other respects, the petition and amended petition are identical insofar as they relate to the claims made against defendants. The amended petition in no manner changes the cause of action as originally stated, and does not set up a new cause of action.

Douglas, 135 Ohio St. at 645.

The Douglas Court explained that the subsequent naming of an administrator is merely a substitution of the correct nominal party for the incorrectly named one. The underlying cause is unaffected. Therefore, the only sensible outcome is for the naming of the administrator to relate

back to the time the complaint was filed:

The mere substitution of parties plaintiff, without substantial or material changes from the claims of the original petition, does not of itself constitute setting forth a new cause of action in the amended petition. As was said in the opinion in the case of Van Camp v. McCulley, Trustee, supra: "The mere change of the name of the plaintiff in the title would not of course change the cause of action."

In the instant case the cause of action set up in the petition is in no way affected by the corrections contained in the amendment. The amendment corrects the allegations of the petition with respect to plaintiff's capacity to sue and relates to the right of action as contradistinguished from the cause of action. A right of action is remedial, while a cause of action is substantive, and an amendment of the former does not affect the substance of the latter. See 1 Bouvier's Law Dictionary (Rawles Rev.), 295; Pomeroy's Code Remedies (5 Ed.), 526 et seq., Section 346 et seq.; 1 Cyc., 642. An amendment which does not substantially change the cause of action may be made even after the statute of limitations has run.

The requirement of the wrongful death statute that the prosecution of the action be in the name of the personal representative is no part of the cause of action itself, but relates merely to the right of action or remedy. That requirement was obviously intended for the benefit and protection of the surviving spouse, children and next of kin of a decedent, the real parties in interest. The personal representative is only a nominal party. Wolf, Admr., v. Lake Erie & W. Ry. Co., 55 Ohio St., 517, 45 N. E., 708, 36 L. R. A., 812. Nor does the statute require that the personal representative shall bring the action (Wolf, Admr., v. Lake Erie & W. Ry. Co., supra), but merely provides that the action, if brought, shall be brought in the name of the [*648] personal representative. The only concern defendants have is that the action be brought in the name of the party authorized so that they may not again be haled into court to answer for the same wrong.

Douglas, 135 Ohio St. at 647-648. In this case, as in Douglas, the Complaint in this case was filed by the decedent's *guardian*, who believed that she retained authority to act for the Plaintiff after her death. Within ten days of learning of Mrs. Christian's passing, the Appellants suggested her death on the record and moved for leave to substitute her estate. These are the same circumstances as in Douglas, and in that case the Supreme Court found that the substitution

relates back to the filing of the complaint.

In a similar case, this Court held that the substitution of a proper personal representative for one who could not properly act for wrongful death beneficiaries related back to the filing of the complaint. Kyes v. Pennsylvania R. Co. (1952), 158 Ohio St. 362. In Kyes, wrongful death claims were first pled by a personal representative who was later found to lack capacity. The defendant in that case challenged the substitution of a proper representative. But, citing Douglas, this Court held that so long as the cause of action is not changed, the substitution of a proper representative relates back to the filing of the claim. The Court based this conclusion on the fact that the wrongful death statute is “remedial in its nature, and should be construed liberally.” Id. at syllabus 2. This Court found that the statutory requirement that the wrongful death claims be pursued in the name of the “personal representative” was a statutory requirement that did not affect the merits or substance of the underlying claim. As in Douglas, therefore, this Court found that a substitution of a proper personal representative would relate back to the filing of the complaint, so long as the underlying claims were the same. Id. at syllabus 5.

The substitution of the co-Administrators in the original case relates back to the time of the original filing on April 15, 2005. *Appellees made no objection while the ‘05 case remained pending.* That case was then dismissed voluntarily, then timely re-filed pursuant to Ohio’s savings statute, R.C. 2305.19, with the co-Administrators of Ethel’s estate named as Plaintiffs. Any defect that may have existed in the original action was cured promptly, and the cure relates back to the filing of the Complaint. The re-filed action was thus properly and timely filed.

In a closely analogous situation, this Court considered a contribution action brought by a civil tortfeasor whose liability insurance carrier had actually satisfied the entire judgment against

the tortfeasor. Shealy v. Campbell (1985), 20 Ohio St. 3d 23, 24-25. When contribution was sought against an alleged co-tortfeasor, that party moved for dismissal on the basis that the liability insurance carrier was the “real party in interest,” and that the contribution claim could only be pursued by the liability carrier.

This Court held that, indeed, the insurer was the only party who could pursue contribution rights. However, rather than find that the remedy was dismissal, the Court agreed with the Court of Appeals that remand for substitution was the proper course:

Accordingly, this court concurs with the judgment of the court of appeals that, in accordance with the language in Civ. R. 17(A), “* * * [n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. * * *” Accordingly, this cause is remanded to the trial court for further proceedings and to permit the prompt substitution of Celina Mutual Casualty Company as the real party in interest in this cause of action.

Shealy, 20 Ohio St. 3d at 26. In Shealy, the Motion to Dismiss was not filed until about a year and a half after the contribution claim was commenced. Id. at 23. With the appellate process, the final disposition remanding to allow for substitution did not occur until three and one half years after the complaint was filed. Id. Still, the Court found that the proper action was the substitution of the liability carrier for the incorrectly named party, on whose behalf the carrier had paid damages.

One thread runs through Douglas, Kyes, and Shealy. When the correct nominal party can be substituted for an incorrectly named one, and the substance of the underlying cause is not affected, the law prefers substitution to dismissal. Moreover, under Douglas, and under the facts of this case, the substitution of the actual administrator of an estate an incorrectly pled estate

representative *relates back* filing of the Complaint.

This case was originally filed on April 15, 2005. The Complaint incorrectly identified Marcella Christian as the person acting for Ethel Christian, in Marcella's capacity as Guardian or Conservator. The Appellants moved timely to substitute the parties who could act. The trial court agreed, and the Appellees made no objection for an additional nine months prior to the Appellants' voluntary dismissal of the case. If the first case was a "nullity," the time to raise that issue was while the first case was pending. Having failed to do so, Appellees should not be permitted to contest issues presented by the 2005 case in the 2007 case. Even if they are, it is clear that the Court's action of substitution of Marian Whitley and Patricia Mazzella relates back to the time the first complaint was filed.

Proposition of Law No. 2:

The Ohio Nursing Home Bill of Rights Allows the Adult Child of a Nursing Home Resident To Represent Said Resident in Court.

Marcella Christian timely brought the initial action on behalf of her then-deceased mother, Ethel Christian. The Nursing Home Bill of Rights explicitly allows for an action to be brought by the adult child of a nursing home resident whose rights are violated:

(I) (1) (a) Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation.

(b) An action under division (I)(1)(a) of this section may be commenced by the resident or by the resident's legal guardian or other legally authorized representative on behalf of the resident or the resident's estate. **If the resident or the resident's legal guardian or other legally authorized representative is unable to commence an action under that division on behalf of the resident, the following persons in the following order of priority have the right to and may commence an action under that division on behalf of the resident or the resident's estate:**

- (i) The resident's spouse;
- (ii) The resident's parent or adult child;**
- (iii) The resident's guardian if the resident is a minor child;
- (iv) The resident's brother or sister;
- (v) The resident's niece, nephew, aunt, or uncle.

R.C. 3721.17(I)(1), emphasis added.

Appellee's position is that Marcella was unable to act for her deceased mother in court because she was not the appointed the administrator of her mother's estate. The Nursing Home Bill of Rights, however, allows the adult child to commence the action. R.C. 3721.17(I)(1)(b)(ii). Appellee will not dispute that Marcella Christian brought the first action under the Nursing Home Bill of Rights, timely. Nor is there any dispute that Marcella is the daughter of Ethel Christian, deceased. Marcella herself died in April of 2007.

The Fourth District had previously found that a "sponsor," within the meaning of the Nursing Home Bill of Rights, has standing to bring an action as provided by the statute:

Edgewood questions whether Shelton has standing to bring this action. We answer this legal question using a de novo standard of review.

[*P6] A non-resident of a nursing home does not have standing to sue in his or her individual capacity for a violation of R.C. Chapter 3721.10 - .17, which is known as the nursing home patients' bill of rights, because it only provides protection for a resident of a nursing home. Belinky v. Drake Center, Inc. (1996), 117 Ohio App. 3d 497, 503, 690 N.E.2d 1302. However, "[a] sponsor may act on a resident's behalf to assure that the home does not deny the residents' rights under sections 3721.10 to R.C. 3721.17 of the Revised Code." R.C. 3721.13(B). "'Sponsor' means an adult relative, friend, or guardian of a resident who has an interest or responsibility in the resident's welfare." 3721.10(D). [Emphasis added.]

Shelton v. LTC Mgmt. Servs. (Highland Ct. App. 2004), 2004 Ohio 507, P 5-6. The First

District Court of Appeals has agreed. Belinky v. Drake Ctr. (Hamilton Ct. App. 1996), 117 Ohio App. 3d 497, 503-504.

In Shelton, the same court of appeals had gone on to admonish that a misnomer in the caption of a complaint is not fatal, where it is clear from the body of the complaint that the person bringing the action only represents the aggrieved resident:

[*P7] Here, the caption of the case shows that Shelton brought this action in her individual capacity, instead of her capacity as a sponsor of her mother. However, absent a showing of prejudice, a defective caption does not deprive a court of its power to look beyond the caption to the body of the complaint to determine the legal capacity of a party. See, e.g., Porter v. Fenner (1966), 5 Ohio St.2d 233, 215 N.E.2d 389; Gibbs v. Lemley (1972), 33 Ohio App. 2d 220, 293 N.E.2d 324; Scadden v. Willhite (Mar. 26, 2002), Franklin App. No. 01AP-800, 2002 Ohio 1352; Newark Orthopedics, Inc. v. Brock (Oct. 5, 1995), Franklin App. No. 95APE03-246, 1995 Ohio App. Lexis 4423. The body of Shelton's complaint indicates that she is the daughter of Etta Mae Beatty and that she does not claim any injury to herself. She alleges in her complaint that Edgewood violated her mother's rights. Moreover, Edgewood does not allege that it is prejudiced by the defective caption. Hence, we find that Shelton has standing because she qualifies to bring this action in her capacity as a sponsor for her mother.

Shelton, 2004 Ohio 507, P7.

Inexplicably, and again without discussing even its own precedent by name, the Court of Appeals adopted the Appellee's argument that new language inserted into R.C. 3721.17(I)(1)(b) essentially overrules Shelton. Appellees argued that because the statute now requires a "showing" that the nursing home resident *and* the resident's legally appointed representative are unable to act for the resident.

There are two reasons why this position is incorrect. First, Shelton relied on a different portion of the statute, R.C. 3721.13(B), a portion that remains unchanged since the time Shelton was decided:

However, "[a] sponsor may act on a resident's behalf to assure that the home does not deny the residents' rights under sections 3721.10 to R.C. 3721.17 of the Revised Code." R.C. 3721.13(B). "'Sponsor' means an adult relative, friend, or guardian of a resident who has an interest or responsibility in the resident's welfare." 3721.10(D).

Shelton v. LTC Mgmt. Servs. (Highland Ct. App. 2004), 2004 Ohio 507, P6. Again, while language may have been added to R.C. 3721.17(I), the clause the Fourth District relied upon in Shelton—R.C. 3721.13(B)—is exactly the same today as when that court decided Shelton.

Secondly, Appellees are incorrect to assert that both the resident *and* the resident's legal representative must be shown, under R.C. 3721.17(I)(1)(b), to be unable to act in the resident's interest. The statute says, "If the resident *or* the resident's legal guardian or other legally authorized representative is unable to commence an action," then a sponsor may act. The statute uses the word "or," not the word "and." Therefore, the showing that the statute applies is made upon filing the suggestion of death of the resident. Had the General Assembly intended to require showings that both the resident *and* her legal representative were unable to act on her behalf, then that is how the statute would have been written. But "or" is not equivalent to "and," and the Fourth District's "ready" conclusion to the contrary is inconsistent with the plain language of R.C. 3721.17(I)(1)(b). The court decided this issue based on what it would like the statute to say, rather than what the statute actually does say.

The Nursing Home Bill of Rights creates unique remedies, and a unique avenue by which they may be pursued when the resident cannot act for herself. A specific Code provision allowed Marcella to act for her mother in Case No. 05PI309. There is no dispute this case was filed timely, voluntarily dismissed, then re-filed as the instant case. Ohio law explicitly allowed Marcella Christian to act for Ethel Christian in the prior case, and this case was timely re-filed.

Proposition of Law No. 3:

A Party Substitution to Which no Objection is Made Prior to a Voluntary Dismissal May not be Disputed for the First Time Upon the Re-filing of the Suit.

Finally, the court of appeals' decision overlooked the fact that the Appellee could have sought dismissal for nine months prior to the Appellants' voluntary dismissal of the '05 case. There is no denying that the Appellee slept on the argument. During that time, the Appellants were required to expend resources, including filing fees for maintaining the Estate and re-filing the action. In all fairness, Appellee's failure to bring the argument to the trial court's attention while the '05 case was pending should estop the Appellee from being allowed to make the same argument after the case was re-filed. This Court should accept review on this additional issue to re-affirm the rule that parties bear the responsibility of timely raising objections in the trial court.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellants request that this Court grant jurisdiction over this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,



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APPENDIX

Appx. Page:

Decision and Judgment Entry of the Lawrence County Court of Appeals June 30, 2009 Exh.A

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

2009 JUN 30 PM 2:21

MARIAN C. WHITLEY AND
PATRICIA A. MAZZELLA,
INDIVIDUALLY AND AS CO-
ADMINISTRATORS FOR THE
ESTATE OF ETHEL V. CHRISTIAN,

MIKE PATTERSON
CLERK OF COURTS
LAWRENCE COUNTY

Plaintiffs-Appellants,

Case No. 08CA30

vs.

RIVER'S BEND HEALTH CARE,
et al.,

DECISION AND JUDGMENT ENTRY

Defendants-Appellees.

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CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Lawrence County Common Pleas Court
summary judgment in favor of River's Bend Health Care (River's
Bend), defendant below and appellee herein, on claims brought
against it by Marian C. Whitley and Patricia A. Mazzella
individually and as co-administrators of the Estate of Ethel V.
Christian, plaintiffs below and appellants herein. We affirm the

trial court's judgment.¹

'The dissent asserts that we should extend the holding in Baker v. McKnight (1983), 4 Ohio St.3d 125, 447 N.E.2d 104, to the case sub judice and, in doing so, argues that we have (1) based our reasoning on two cases that are no longer good law, and (2) misinterpreted the pertinent issue in this case as one in agency rather than procedure. We disagree with each point.

First, although the dissent does not discuss Simms v. Alliance Community Hosp., Stark App. No. 2007-CA-00225, 2008-Ohio-847 and Estate of Newland v. St. Rita's Medical Ctr., Allen App. No. 1-07-53, 2008-Ohio-1342, it does argue that those cases are based on another case, that was based on still another case, that has been overruled. We are aware that Simms and Estate of Newland cite to Levering v. Riverside Hospital (1981), 2 Ohio App.3d 157, 441 N.E.2d 290, and that Levering cites Barnhart v. Schultz (1978), 53 Ohio St.2d 59, 372 N.E.2d 589, which, of course, was overruled in Baker v. McKnight (1983), 4 Ohio St.3d 125, 447 N.E.2d 104, at the syllabus. However, merely because Barnhart was overruled does not necessarily mean that Levering is bad law, nor does it mean that Simms and Estate of Newland are bad law for relying on Levering. We point out that the Fifth District in Simms, 2008-Ohio-847, at ¶¶20-22, expressly considered the effect of Barnhart being overruled on Levering, but concluded that the reasoning in Levering is still sound. Although Estate of Newland does not discuss the foundational underpinnings of Levering, we certainly believe that the Third District was aware that Levering is based on Barnhart and that Baker overruled Barnhart. We also agree with these two courts that the principles remain sound and the dissent cites no authority to support its position that Baker should be extended to situations in which we have a non-existent plaintiff.

This brings us to the dissent's other argument. Although the dissent finds no reason why the principles in Baker should not apply for a deceased plaintiff, we believe that one good reason is that the plaintiff here simply did not exist. In other words, in Baker an existing plaintiff could commence an action even if he named wrong defendant. That is not the case here. Here, the ward died and the guardianship ceased to exist. We recognize that a complaint was filed within the statute of limitations, but we do not equate the "filing a complaint" with "commencing an action" as the dissent appears to do. Here, no existing plaintiff filed the first case and we cannot get around that fact.

Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"BECAUSE THE SUBSTITUTION OF AN ESTATE FOR A DECEASED PARTY PLAINTIFF RELATES BACK TO THE FILING OF THE COMPLAINT, THE TRIAL COURT ERRED BY FINDING THAT THE ORIGINAL COMPLAINT WAS NOT FILED BY AN ENTITY WITH AUTHORITY TO ACT FOR APPELLANT'S [sic] DECEDENT."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT WAS INCORRECT TO FIND THE ORIGINAL ACTION IMPROPERLY COMMENCED BECAUSE THE NURSING HOME BILL OF RIGHTS AT R.C. 3721.17(I)(1)(b)(ii) PERMITS THE ADULT CHILD OF AN AGGRIEVED NURSING HOME RESIDENT TO BRING SUIT."

On May 19, 2003, the Circuit Court of Cabell County, West Virginia, appointed Marcella Christian to act as guardian for her mother, Ethel V. Christian. Marcella placed her mother in the River Bend's nursing facility between February 11, 2004 and April

To reach its conclusion, the dissent must find that a guardianship extends beyond the death of the ward. This contradicts well-settled law that a guardianship terminates at death. Simpson v. Holmes (1922), 106 Ohio St. 437, 140 N.E. 395, at paragraph one of the syllabus; Sommers v. Boyd (1891), 48 Ohio St. 648, 29 N.E. 497, at paragraph one of the syllabus. It is not entirely clear if the dissent desires to stray from rulings that the Supreme Court has issued, but we point out that (1) we are bound by Ohio Supreme Court syllabi and only the Supreme Court should make exceptions to them, and (2) the principles expressed in Simpson and Sommers are sound to begin with. If we held that a guardian may commence an action for a ward after the death of the ward, where do we go from there? Can a corporation that has yet to be incorporated also bring a lawsuit? Can a partner to a dissolved partnership bring a lawsuit on behalf of the non-existent partnership and thereby determine the rights of fellow partners? Without further guidance from the Ohio Supreme Court, we are reluctant to cross that divide.

25, 2004, during which time her mother allegedly fell and sustained injuries. Ethel died on February 7, 2005.

On April 15, 2005, Marcella commenced an action on behalf of her ward (Case No. 05PI309) and alleged that River's Bend and ten unnamed employees provided negligent care for the decedent and inflicted pain, suffering and loss of enjoyment of life. The complaint requested compensatory and punitive damages. A June 8, 2005 entry substituted the Estate of Ethel V. Christian as plaintiff to replace the decedent and guardian. On March 6, 2006, the case was voluntarily dismissed.

Appellants commenced the instant action on February 27, 2007 as a re-filing of Case No. 05PI309. Appellees denied liability and asserted a variety of defenses. On July 5, 2007, River's Bend requested summary judgment and argued that appellants filed the case after the R.C. 2305.113 one year statute of limitations had expired.² River's Bend asserted that the prior case (Case No. 05PI309) was filed after the decedent's death, thus after the time that the guardian lost her legal standing or authority to prosecute an action on the decedent's behalf. Appellants countered that a substitution of the co-administrators of the Estate occurred in place of the guardian and that the re-filing of the case fell within the allowable time frame of Ohio's

² R.C. 2305.113(A) states that a medical claim shall be commenced within one year after the cause of action accrues.

"savings statute."³

The trial court agreed that the statute of limitations had expired, but did so because the decedent's "last date of treatment" was April 25, 2004 and the estate was not substituted as a party until June 8, 2005 - over one year later. River's Bend motion for summary judgment was thus granted. Appellants appealed to this Court, but we dismissed the appeal for lack of jurisdiction because the summary judgment neither terminated a claim nor dismissed a party defendant. See Whitley v. River's Bend Health Care, Lawrence App. No. 07CA25, 2008-Ohio-3098.

On August 21, 2008, the trial court issued a second entry and terminated the entire action. This time, with regard to River's Bend, the court reasoned an action brought by a guardian after the ward's death is a "nullity" and, thus, the case sub judice was outside the statute of limitations and not preserved under the "savings statute." With regard to the individual executors, in a motion for reconsideration they raised the issue that the "Nursing Home Patient Bill of Rights" gives the adult children of a nursing home resident an independent right to file suit. Because the guardian was the adult daughter of her ward, appellants reasoned, she had a right to commence an action on her

³ R.C. 2305.19(A) allows a medical claim to be re-filed outside a limitations period, so long as the original claim was brought within the limitations period and the claim is resolved "otherwise than upon the merits" (e.g. a Civ.R. 41 voluntary dismissal).

own without regard to any limitations period. The trial court rejected that argument, however, and ruled that it was first necessary to show that the estate's legal representatives could not bring an action and that no such showing was made. Summary judgment against appellants was thus entered on all claims. This appeal followed.

I

Before we address the merits of the assignments of error, we first outline our standard of review. This case comes to us by way of summary judgment. Appellate courts review summary judgments de novo. Broadnax v. Greene Credit Service (1997), 118 Ohio App.3d 881, 887, 694 N.E.2d 167; Coventry Twp. v. Ecker (1995), 101 Ohio App.3d 38, 41, 654 N.E.2d 1327. In other words, appellate courts afford no deference to trial court decisions, Hicks v. Leffler (1997), 119 Ohio App.3d 424, 427, 695 N.E.2d 777; Dillon v. Med. Ctr. Hosp. (1993), 98 Ohio App.3d 510, 514-515, 648 N.E.2d 1375. Instead, appellate courts conduct an independent review to determine if summary judgment is appropriate. Woods v. Dutta (1997), 119 Ohio App.3d 228, 233-234, 695 N.E.2d 18; Phillips v. Rayburn (1996), 113 Ohio App.3d 374, 377, 680 N.E.2d 1279.

Summary judgment under Civ. R. 56(C) is appropriate when a movant shows that (1) no genuine issues of material fact exist, (2) he is entitled to judgment as a matter of law and (3) after

the evidence is construed most strongly in favor of the non-movant, reasonable minds can come to one conclusion and that conclusion is adverse to the non-moving party. Zivich v. Mentor Soccer Club, Inc. (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201. The moving party bears the initial burden to show no genuine issue of material facts exist and that he is entitled to judgment as a matter of law. Vahila v. Hall (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164; Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. If that burden is met, the onus shifts to the non-moving party to provide rebuttal evidentiary materials. See Trout v. Parker (1991), 72 Ohio App.3d 720, 723, 595 N.E.2d 1015; Campco Distributors, Inc. v. Fries (1987), 42 Ohio App.3d 200, 201, 537 N.E.2d 661.

In the case sub judice, there is no factual dispute between the parties. Rather, at issue is the application of the law to those facts. We review a trial court's application of the law de novo as well. See e.g. Lovett v. Carlisle, 179 Ohio App.3d 182, 901 N.E.2d 255, 2008-Ohio-5852, at ¶16. With these principles in mind, we turn to the merits of the assignments of error.

II

In their first assignment of error, appellants assert that the trial court erred in ruling that the June 8, 2005 substitution of the decedent's estate as the party in interest (Case No. 05PI309) in place of the guardian related back to the

filing of the complaint. We disagree.

To fully understand the procedural issue involved, we begin our analysis with Barnhart v. Schultz (1978), 53 Ohio St.2d 59, 372 N.E.2d 589, wherein the Ohio Supreme Court affirmed a summary judgment for the administrator of an estate substituted into a lawsuit in place of his decedent. The Ohio Supreme Court noted that the decedent died before the complaint against her was filed and that parties to a lawsuit must "actually or legally" exist in order to have the capacity to be sued. In ruling that the action was, in essence, a nullity, the Court held that the substitution of the administrator for the decedent did not preserve the action for purposes of the limitations period as "there [was] nothing to amend." Id. at 61-62.

The Ohio Supreme Court subsequently overruled Barnhart in Baker v. McKnight (1983), 4 Ohio St.3d 125, 447 N.E.2d 104, at the syllabus. Reasoning that the naming of a decedent, rather than a decedent's estate, was but a technical "misnomer" in pleading, the Court wrote:

"Accordingly, we hold that where the requirements of Civ.R. 15(C) for relation back are met, an otherwise timely complaint in negligence which designates as a sole defendant one who died after the cause of action accrued but before the complaint was filed has met the requirements of the applicable statute of limitations and commenced an action pursuant to Civ.R. 3(A), and the complaint may be amended to substitute an administrator of the deceased defendant's estate for the original defendant after the limitations period has expired, when service on the administrator is obtained within the one-year, post-filing period provided for in

Civ.R. 3(A)." (Emphasis added.)

Although Baker involved a deceased defendant, appellants argue that no reason exists to distinguish between a deceased defendant and a deceased plaintiff as in this case. We disagree. The Ohio Supreme Court's reasoning in Baker was premised on pleading technicalities as to the proper naming of a defendant. What is at issue in this case, however, is the legal authority to commence a lawsuit in the first instance.

It is well-settled that the death of a ward terminates all powers of the guardian. Simpson v. Holmes (1922), 106 Ohio St. 437, 140 N.E. 395, at paragraph one of the syllabus; Sommers v. Boyd (1891), 48 Ohio St. 648, 29 N.E. 497, at paragraph one of the syllabus. Ethel Christian's death ended the guardianship and, along with it, any authority on the part of Marcella Christian to commence an action on behalf of her ward. This is no pleading technicality but, rather, a question of legal authority on the part of one person to act for another. For example, no one would seriously contend that a fiduciary, with knowledge of her ward's death, could bind the ward to a contract. We believe the same principle applies here.⁴

Our colleagues in the Fifth District have also distinguished

⁴ Ethel Christian died more than two months before Case No. 05PI309 was filed. In their brief, appellants admit that the "surviving family members simply did not appreciate the legal significance of Mrs. Christian's passing" and, thus, did not notify counsel for several months.

Baker and held that it does not apply to deceased plaintiffs. See Simms v. Alliance Community Hosp., Stark App. No. 2007-CA-00225, 2008-Ohio-847, at ¶22. The Third District Court of Appeals, although not expressly limiting the scope of the Baker case, also recently opined that a lawsuit filed on behalf of a deceased plaintiff is a "nullity." See e.g. Estate of Newland v. St. Rita's Med. Ctr., Allen App. No. 1-07-53, 2008-Ohio-1342, at ¶22.

For these reasons, we likewise decline to extend Baker to deceased plaintiffs. Thus, we affirm the trial court's decision that the action commenced by the guardian, after her ward's death, is a nullity.

Accordingly, appellant's first assignment of error is hereby overruled.

II

Appellants assert in their second assignment of error that the trial court also erred by determining that they could not maintain the suit individually pursuant to the "Nursing Home Patient Bill of Rights." We, however, readily conclude that the trial court reached the correct decision on this issue.

Any nursing home resident whose rights under the "Nursing Home Patient Bill of Rights" are violated has a cause of action against the home or any person responsible for that violation. R.C. 3721.17(I)(1)(a). That cause of action may be commenced by

the resident, the resident's guardian or a legally authorized representative of the resident's estate. Id. at (I)(1)(b). If these parties are "unable to commence an action . . . on behalf of the resident," the statute provides a list of people (in descending priority) who are empowered to commence the action on the resident's behalf. Id. (Emphasis added.) The first person is the resident's spouse. The second is the resident's adult child. Id. at (I)(1)(b)(ii).

Here, is no question that Ethel Christian was unable to commence the action herself, or that Marcella Christian was the adult daughter of Ethel Christian. As the trial court aptly noted, however, we find nothing in the record to show that appellants (the estate's duly appointed and legally authorized representatives) were unable to bring the action themselves.

In Treadway v. Free Pentecostal Pater Ave. Church of God, Inc., Butler App. No. CA2007-05-139, 2008-Ohio-1663 at ¶18, the Twelfth District Court of Appeals applied the statute and affirmed the dismissal of a nursing home residents grandchildren for lack of standing, in part because they were not the legal representatives of the estate and nothing appeared in the record to show that the estate representatives were unable to act. In view of the plain language of the statute, and its application in Treadway, we conclude that the trial court properly rejected appellants' claim because no showing was made that the estate

representatives were unable to commence the action rather than Marcella Christian.

Appellants counter by citing cases that involve the ability of a "sponsor" to bring an action on behalf of a nursing home resident. A "sponsor" is defined by R.C. 2721.10(D) as an adult relative of the resident. Thus, appellants conclude, Marcella Christian's suit was proper.

The flaw in appellants' argument, however, is that the cited cases involve language in R.C. 3721.17 that has since been repealed. Prior to 2002, R.C. 3721.17(I)(1) allowed an action to be filed by the resident or her "sponsor." The "sponsor" provision was removed by H.B. No. 412, 2002 Ohio Laws 185 and, in its place, were inserted the categories of people (i.e. a guardian, authorized representative of the estate and a list of people who have authority if neither are able to act).

We therefore agree with the trial court's disposition of appellants' claims under the "Nursing Home Patient Bill of Rights." Accordingly, we hereby overrule appellant's second assignment of error.

Having considered all of the appellant's errors assigned and argued, and finding merit in none, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Kline, P.J., dissenting.

I respectfully dissent for the following reasons.

The relevant statute of limitations bars actions if a plaintiff has not commenced them within one year of the accrual of the action. See R.C. 2305.113; R.C. 2305.03. The word "commencement" is a defined term for the purposes of the statute of limitations. "An action is commenced * * * by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within one year." R.C. 2305.17. If the service is obtained within the required year, then the date of commencement is the date of filing. See *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, 550 (considering Civ.R. 3(A), which imposes similar requirements for the commencement of an action, and concluding that "it is not necessary to obtain service upon a defendant within the limitations period").

Here, it is uncontested that a complaint was filed, on behalf of the plaintiff, within the statute of limitations and service was obtained within a year. The requirements for commencement under R.C. 2305.17 are met, and there is no justification for a dismissal for failure to comply with the statute of limitations. The only plausible objection, based on the statute's text, is that the plaintiff did not "[file] a

petition in the office of the clerk in the proper court" within the meaning of the statute because the wrong representative party filed it. That is, the petition was not filed within the meaning of the statute because the guardian who brought the suit on behalf of the plaintiff was no longer empowered to act. However, the Supreme Court of Ohio has held that where a plaintiff files a suit against a deceased defendant, and the complaint fails to name the estate as the opposing party, an amendment to the complaint that fixes this error relates back to the initial filing, and the complaint serves to commence the action. *Baker v. McKnight* (1983), 4 Ohio St.3d 125, syllabus. And if under *Baker* a plaintiff has commenced an action where the service on the defendant is arguably defective, then I see no reason why the plaintiff has not commenced an action here. This is particularly true because the statute of limitations serves to safeguard the interests of defendants. Here, service was properly obtained; the only defect is in regard to the representative party that brought the action on behalf of the plaintiff. Under these circumstances, a plaintiff should be permitted to amend the complaint to remedy a defect in the representative party. See *Douglas v. Daniels Bros. Coal Co.* (1939), 135 Ohio St. 641, 647 (finding a change in a nominal party relates back, and may be made even after the statute of limitations has run).

The majority analogizes the issue of this case to the question of whether "a fiduciary, with knowledge of her ward's death, could bind the ward to a contract." I agree that in order for any representative to bind a principal to contract, the formation of the contract must comply with the established requirements of the law of agency. However, unlike the contract issue, here the question is not whether the case, as originally filed, could have prevailed, but whether, as filed, the original suit served to "commence" an action within the meaning of the statute.

The majority cites two court of appeals cases, and both of these cases rely upon *Levering v. Riverside Methodist Hosp.* (1981), 2 Ohio App.3d 157, a tenth district case. In that case, the plaintiff, while living, retained a lawyer to file an action against the defendant, but the plaintiff died before the lawyer filed the complaint. *Id.* at 158. In *Levering*, the tenth district court of appeals followed *Barnhart v. Schultz* (1978), 53 Ohio St.2d 59, which was later expressly overruled in *Baker*, *supra*. And the *Levering* court held: "A complaint for personal injury requires a plaintiff and a defendant. There was only a defendant; hence, the complaint was a nullity and not a pleading. Civ.R. 15, which pertains to amendments of pleadings, does not apply." *Levering* at 159.

This language that construes the initial complaint as a nullity has its basis in the now overruled *Barnhart v. Schultz*. See *Barnhart* at 61. Under *Levering*, a complaint requires both a plaintiff and a defendant. But under *Baker*, the Supreme Court of Ohio held that a complaint serves to commence an action even where the complaint names, as living, a now deceased defendant. Therefore, I see no reason to believe that a suit initiated by an erroneous representative plaintiff cannot serve to commence an action under *Baker*.

Accordingly, for the foregoing reasons, I respectfully dissent.

LAWRENCE, 08CA30

JUDGMENT ENTRY

2009 JUN 30 PM 2:21

It is ordered that the judgment be affirmed and that appellee recover of appellants costs herein taxed.

MIKE PATTERSON
CLERK OF COURTS
LAWRENCE COUNTY

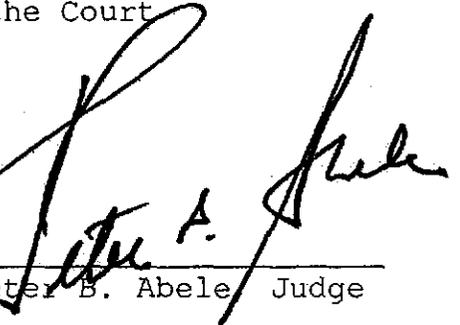
The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J.: Dissents with Dissenting Opinion
McFarland, J.: Concurs in Judgment & Opinion

For the Court


BY: Peter B. Abele Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.