

ORIGINAL

No. 2009-1484

IN THE SUPREME COURT OF OHIO

**ON APPEAL FROM THE FOURTH APPELLATE DISTRICT COURT OF APPEALS
COURT OF APPEALS CASE NO. 08CA00030**

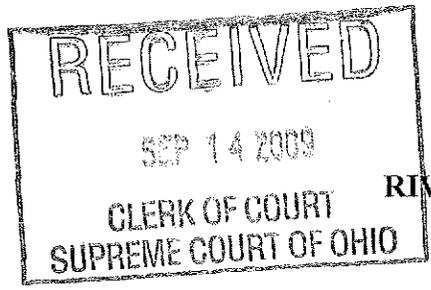
**MARIAN C. WHITLEY, and PATRICIA MAZZELLA,
Individually and as the Co-Administrators of the Estate of
Ethel V. Christian**

Appellants,

vs.

RIVER'S BEND HEALTH CARE, et al.,

Appellees.



MEMORANDUM OF APPELLEES

**RIVER'S BEND HEALTH CARE AND RIVER'S BEND HEALTH CARE, LLC
OPPOSING JURISDICTION**

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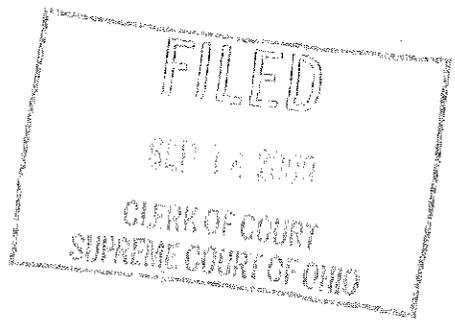


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**EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC
OR GREAT GENERAL INTEREST**

This case does not involve a matter of public or great general interest. This appeal is merely Appellants' (the Estate) dissatisfaction with the Trial and Appellate Court's decisions regarding a failure to timely and properly commence the within matter.

As it relates to Proposition of Law Number I, the Estate argues that this situation will likely recur because of the frail status of nursing homes residents. However, it is not the frail status of Ethel Christian that caused her daughter Marcella Christian to improperly file a lawsuit for a deceased person, or that caused the estate representatives who had been appointed prior to the termination of the statute of limitations to not file suit timely. The Estate bears responsibility for not filing this suit timely; to allow them to ignore a procedural requirement would be to permit them to ignore their fiduciary responsibility to act on behalf of the estate. This is exactly the situation that the law is in place to prevent and that the lower courts' rulings re-emphasized.

Further, a decision by this Court will not eliminate "procedural technicalities" that "negate the protections of the nursing home bill of rights". These rights remain in effect regardless of the lower courts' decisions. The only impact of the decisions is to reinforce the notion that procedural requirements are in place for the filing of all legal actions and litigants are required to follow those procedures, especially in the complete absence of any evidence providing justification for an exception to the rules.

As it relates to Proposition of Law Number II, the Appellate Court's interpretation of the statute that designates a specific class of individuals who may pursue a civil action (authorized pursuant to the same statute) correctly applied the law to the facts of this case. The court explained the decision not to follow a prior case that was decided under a former version of the

statute. There is no public or great general interest requiring this Court to indulge the Estate in their attempt to revive a case that has been superseded by statute.

The lower court's interpretation of the plain language of O.R.C. §3721.17(I)(1)(b) was correct and does not require this court to re-analyze that decision. The statute was specifically amended in 2002 and as such overruled the precedent upon which the Estate relied in arguing that the suit was properly filed. The amended language of the statute is clear and does not require interpretation by this Court simply because the Estate has attempted to apply old law to try to save an action that was not properly commenced.

As to Proposition of Law Number III, the matter is not proper for review since this Court ought not to rule on matters that were not decided by the lower courts. Despite this, there is no justification for arguing that the Court's apparent decision not to agree with the Estate's waiver argument is of public or great general interest. First, River's Bend preserved the defense of the statute of limitations by asserting it as an affirmative defense in answering the complaint filed in each action and the savings statute's plain language requires that the prior action be properly commenced. Thus, in every instance where the saving's statute is applied, the prior action must be analyzed for proper commencement, which is exactly what occurred in this matter.

STATEMENT OF THE CASE AND FACTS

This action was filed on or about February 27, 2007, naming as plaintiffs, Marian C. Whitley and Patricia A. Mazzella, Individually and as Co-Administrators of the Estate of Ethel V. Christian. The allegations of the Complaint are based upon the care and treatment provided to Ethel Christian from February 11, 2004 through April 25, 2004, while she was a resident at River's Bend Health Care.

On February 7, 2005, Ethel Christian died. A little over one month later, on or about March 9, 2005, Marian C. Whitley and Patricia A. Mazella, were appointed as co-administrators of the estate of Ethel Christian by the Cabell County, WV, Probate Court.

Inexplicably, two months later on April 15, 2005, Marcella Christian, not the co-administrators, filed a lawsuit identifying the plaintiff as "Ethel V. Christian, by and through her conservator and guardian, Marcella E. Christian". In answering the Complaint, River's Bend asserted the affirmative defense of statute of limitations.

On June 8, 2005, the Estate, for the first time, took steps to pursue a cause of action by seeking to be substituted as plaintiff. On March 6, 2006, case number 05PI309 was dismissed.

On February 27, 2007, the instant suit was initiated as a re-filing. In answering the Complaint, River's Bend once again asserted the statute of limitations as an affirmative defense. Thereafter, River's Bend sought dismissal by way of summary judgment based upon the facts in evidence and the law. Essentially, River's Bend argued that since the complaint was filed three years after the date of last treatment and the prior action was not properly commenced, the claims were barred by the statute of limitations.

The evidence demonstrated that at the time 05PI309 was filed, the named plaintiff, Ethel Christian, was deceased, Marcella Christian had no legal authority to institute an action and the

co-administrators did not attempt to commence an action until June 8, 2005, after the statute of limitations had expired.

The Estate opposed the motion arguing only that the substitution under Civ.R. 25 related back to the original filing and thus the re-filing was “saved” under O.R.C. §2305.19. In opposing the motion, the Estate did not present any evidence. Specifically, no evidence was presented to demonstrate that there was a mistake by Marcella Christian or the Estate at the time of the original filing. Further, the Estate did not argue that Marcella Christian had the authority to file the initial lawsuit pursuant to O.R.C. §3721.17(I)(1)(b)(ii), nor did they present any evidence tending to show that the Estate was unable to file suit prior to the expiration of the statute of limitations.

The trial Court granted River’s Bend’s motion finding that there was no genuine issue of material fact and the Estate did not attempt to file suit until after the statute of limitations had expired.

Prior to the court entering a final dismissal of the action, the Estate filed a Notice of Appeal. For the first time, the Estate argued that O.R.C. §3721.17(I)(1)(b)(ii) permitted the filing of the original Complaint by the decedent’s daughter, Marcella Christian. The Appellate Court dismissed the appeal for lack of a final appealable order and remanded the case for entry of a final order.

Upon remand, the Estate filed a motion for reconsideration arguing that Marcella Christian did not notify counsel of the death of her mother until May 31, 2005 and that Marcella Christian did not understand that her guardianship terminated upon the death of the decedent; and that the first lawsuit was properly filed pursuant to O.R.C. §3721.17(I)(1)(b)(ii). This motion

was submitted without any supporting evidence, although the Estate did request leave to submit evidence by way of an affidavit.

River's Bend subsequently requested that the Estate submit the affidavit. After a month had passed and no affidavit or any other evidence of the type contemplated by Civil Rule 56(C) had been submitted, River's Bend filed an opposition.

Despite having a second opportunity to present evidence in order to oppose River's Bend motion for summary judgment and to support their argument that Marcella Christian was permitted to file this suit, no new evidence was ever submitted by the Estate.

While the Estate identifies numerous "facts" in their Memorandum, no evidence was ever submitted to demonstrate that Marcella Christian did not inform counsel of Ethel's passing until after suit was filed; that this notification did not occur until May 31, 2005; that counsel substituted the estate within ten days; or that there was any mistaken belief by Marcella Christian, Marian C. Whitley or Patricia Mazella that suit could be filed in the manner it was initially filed.

The Trial Court rejected the Estate's new arguments, and dismissed the action.

ARGUMENT WITH RESPECT TO PROPOSITIONS OF LAW

Proposition of Law No. I: The Substitution of a Deceased Plaintiff's Estate Relates Back to the Filing of the Complaint.

One manner in which a plaintiff can file a cause of action beyond the statute of limitations is by proper utilization of the savings statute. Ohio Revised Code §2305.19 reads in pertinent part as follows:

(A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff...may commence a new action within one year after the date of the reversal of the judgment or the The Estate' failure otherwise than upon the merits or within the applicable statute of limitations, whichever occurs later.

The prior action must be properly commenced or a proper attempt at commencement must have been made. This did not occur in the instant matter.

Ethel Christian was deceased at the time the initial action was filed in her name, by and through her conservator and guardian, Marcella E. Christian. Under Ohio law, a dead person is not a legal entity and for that reason a decedent cannot be a party to an action. *Baker v. McKnight* (1983), 4 Ohio St.3d 125; *Wells v. Michael*, 10th Dist. No. 05AP-1353, 2006-Ohio-5871; *Korn v. Mackey*, 2nd Dist. No. 20727, 2005-Ohio-2768. Consequently, a suit brought by a dead person is a nullity.

In a case almost identical to the prior filing of this matter, the Franklin County Court of Appeals upheld summary judgment in a medical negligence claim when plaintiff filed a complaint which named the patient as the plaintiff, although, unknown to plaintiff's counsel, the patient had died. *Levering v. Riverside Methodist Hosp.* (1981), 2 Ohio App.3d 157. The Court upheld summary judgment noting that a suit brought against a dead person is a nullity. *Id.* The court stated that the complaint was a nullity because there was no party-plaintiff, the named plaintiff having been deceased prior to the filing of the complaint. *Id.* at 159. See also, *Simms v.*

Alliance Comm. Hosp., Stark App. No. 2007-CA-00225, 2008-Ohio-847; *Estate of Newland v. St. Rita's Medical Ctr.*, Allen App. No. 1-07-53, 2008-Ohio-1342.

Just as in *Levering*, *Simms* and *Newland*, Lawrence County Case No. 05PI309, was a nullity since Ethel Christian was deceased at the time it was filed. As such, the substitution of the estate did not relate back to the date of the original filing.

Civil Rule 25, providing for substitution of parties and creating the suggestion of death procedure, applies only upon the death of a "party"; the rule does not apply so as to permit substitution for a named plaintiff who is not a "party" because of her death prior to inception of the lawsuit. *Levering*, supra at 159.

The Estate has relied on three cases to support their position that substitution of the estate relates back to the date of the original filing. However, each of these cases is distinguishable from the instant action.

First, the Estate cites to *Douglas v. Daniels Bros. Coal Co.* (1939), 135 Ohio St. 641. Unlike this case, *Douglas* involved an action where the same plaintiff filed an amended complaint substituting herself as the newly appointed estate representative and had been appointed as the estate representative after the case was filed. In this matter, the substituted estate representatives were different persons than the original plaintiff. More significantly, these estate representatives were appointed before this case was ever filed. Also, in *Douglas*, the plaintiff presented evidence that there was a mistaken belief that she had been appointed as the administrator prior to the filing of the lawsuit. In this case, no such evidence was ever submitted by the Estate in opposition to the Motion for Summary Judgment or in support of the Motion for Reconsideration. On the contrary, the evidence shows that the lawsuit was filed by an individual

who was deceased and not an individual who mistakenly believed that she was the correct representative for that deceased person's estate.

Thus, not only is *Douglas* not on all fours, but it is significantly distinguishable from the instant matter. This case is more analogous to *Levering*, supra. In *Levering*, a deceased party was named as the plaintiff in the complaint. The court ultimately held that relation back of the amended pleading was not permitted since the plaintiff was deceased at the time of filing and the original complaint was a nullity.

Second, the Estate cites to *Kyes v. Pennsylvania R. Co.* (1952), 158 Ohio St. 362. *Kyes* is distinguishable since at the time that the original complaint was filed, it was commenced by an ancillary administrator with authority to file the suit. After the Complaint was filed, another administrator was appointed and the Court allowed substitution and relation back. In this action, the original suit was not filed by a person who had authority to file it and the co-administrators were appointed before suit was filed. Thus, the substitution in this case does not relate back under the holding in *Kyes*.

Lastly, the Estate relies upon *Shealy v. Campbell* (1985), 20 Ohio St.3d 23. This case is wholly inapplicable to the instant action. *Shealy* dealt with a substitution of the real party in interest under Civ. R. 17 in a case where there had been an assignment of rights. No such procedure occurred in this case.

In examining the cases cited by the Estate, it is clear that the law does not support a relation back. This case was originally filed in the name of a deceased party and the substitution was of estate representatives who had been appointed before the case was ever filed. The Estate presented no evidence to establish any sort of mistaken belief that might permit a relation back.

The fact is that the estate representatives who had authority to file suit failed to do so within the statute of limitations and the Estate is looking to this Court to act as another level of review, not to decide an issue that affects public or great general interest.

Proposition of Law No. II: The Ohio Nursing Home Bill of Rights Allows the Adult Child of a Nursing Home Resident to Represent Said Resident in Court.

The Estate argues that O.R.C. §3721.17(I)(1)(b)(ii) gives a family member, as a “sponsor”, the authority to file an action on behalf of a relative who was in a nursing home. In accordance with a plain reading of the statute, the lower Courts rejected this argument. The applicable version of O.R.C. §3721.17 reads in pertinent part as follows:

(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:

(ii) The resident's parent or adult child;

The statute requires a showing that the resident's legal guardian or other legally authorized representative is unable to commence an action. In a case almost identical to the within matter, the Twelfth District Court of Appeals made this clear. See, *Treadway v. Free Pentecostal Pater Ave. Church of God, Inc.*, 12th Dist. No. CA2007-05-139, 2008-Ohio-1663. The *Treadway* court stated that “[a]ppellants do not have standing to bring a claim under O.R.C. §3721.17(I)(1)(b) ...because they are not the legally authorized representative of [the] estate and there is no evidence that the legally authorized representative of her estate is ‘unable to commence an action’ on behalf of the estate, as is required by statute”. *Id.* at ¶18. Thus, the

court, in quoting the language of the statute, made it clear that there must be a showing of inability to file suit.

The Estate presented no evidence to satisfy this requirement. On the contrary, the Estate blames their now deceased sister for not notifying counsel. The fact remains: the Estate had the ability to commence suit and did not.

The Estate urges that the Court's decision in *Shelton v. LTC Mgmt. Servs.*, 4th Dist. App. No. 03CA10, 2004-Ohio-507, permitted Marcella Christian to file the original action in this claim. However, there is an obvious defect in this argument.

The opinion in *Shelton* was based upon the 1998 version of the statute, which allowed a "sponsor" to bring an action for personal injury. The current version of O.R.C. §3721.17, amended by H.B. 412 in 2002, eliminated the ability of the "sponsor" to bring an action for damages for a violation of the nursing home resident's rights and delineated a specific group of individuals who could bring suit and required that these individuals could bring suit only when the resident or legal representative was unable to commence the action.

The new statute made it clear that only the resident or his or her legal representative may institute the action, unless these two classes of people were unable to commence the suit. See, *Treadway*, supra. The Estate has made no showing that the estate representatives were unable to bring this claim.

There is no reason for this Court to review an issue that has been clearly stated by the Legislature simply because the Estate is attempting to circumvent its failure to commence this action timely.

Proposition of Law No. III: 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.

The Estate now asks this Court to accept an issue that neither lower court addressed. In *Mills-Jennings, Inc. v. Dept. of Liquor Control* (1982), 70 Ohio St.2d 95, the Court considered whether it could decide issues that were raised before the trial court but not decided. The Court held it could not decide the issues raised by the plaintiff/appellant because the lower courts had not addressed them. The Court wrote:

These issues were not ruled upon by the trial court, nor were they raised or directly ruled upon by the Court of Appeals. It is elementary that questions not raised or passed upon by the lower courts will not be ruled upon by the Supreme Court. [Citing *In re Adoption of McDermitt* (1980), 63 Ohio St.2d 301, 307.]

Neither the trial court nor the Court of Appeals addressed the Estate's waiver argument. There is, therefore, no decision on that issue for this Court to review.

Additionally, the Savings Statute relied upon by the Estate requires an examination of the prior suit. See, Ohio Revised Code §2305.19 (“[i]n any action that is commenced or attempted to be commenced, ... if the plaintiff fails otherwise than upon the merits, the plaintiff...may commence a new action within one year”). Thus, in order to avail itself of the savings statute, the prior suit must be examined to see if it was properly commenced. If this were not the case, the savings statute would only state that the prior case must have been filed and dismissed.

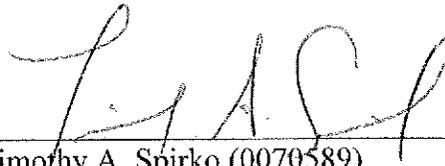
Further, River's Bend specifically raised the affirmative defense of the statute of limitations in answering each complaint filed in this matter. Thus, there was no waiver and the Court need not consider this issue.

CONCLUSION

None of the propositions of law presented by the Estate need be addressed by this Court. The issues are not matters that will affect a large class of people. Thus, they are not matters of public or great general interest. The decisions will not deny anyone their rights. They merely emphasize that in pursuing these rights, there are procedural guidelines that must be followed to protect the rights of others involved.

Therefore, River's Bend requests that this Court deny jurisdiction to hear these matters that do not implicate public or great general interest, but instead are matters that are questions of interest primarily to the Estate who failed to timely file suit.

Respectfully submitted,

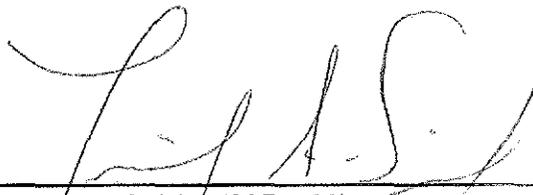


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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Memorandum of Appellees River's Bend Health Care and River's Bend Health Care, LLC Opposing Jurisdiction was served, by regular U.S. Mail, this 11th day of September, 2009 to the following:

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