

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Appellants,

vs.

RIVER'S BEND HEALTHCARE, et al.,

Appellees.

CASE NO. 2009-1484

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

**MERIT BRIEF OF APPELLEES, RIVER'S BEND HEALTHCARE, and  
RIVER'S BEND HEALTHCARE, LLC.**

TIMOTHY A. SPIRKO (0070589)  
(Counsel of Record)  
One Cleveland Center- 17<sup>th</sup> Floor  
1375 E. 9<sup>th</sup> Street  
Cleveland, Ohio 44114-1724  
Tel: (216) 621-5300  
Fax: (216) 621-5440  
[tspirko@bdblaw.com](mailto:tspirko@bdblaw.com)

*Attorney for Appellees River's Bend Healthcare  
and River's Bend Healthcare, LLC*

PETER D. TRASKA (0079036)  
PHILLIP A. KURI (0061910)  
6105 Parkland Boulevard  
Maple Heights, Ohio 44124  
Tel. (440) 442-6677  
Fax. (440) 442-7944  
[pkuri@elkandelk.com](mailto:pkuri@elkandelk.com)

*Attorneys for Appellants  
Marian C. Whitley and Patricia Mazzella,  
Individually and as Co-Administrators of the  
Estate of Ethel V. Christian*

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## STATEMENT OF FACTS

### I. *The original complaint*

The plaintiffs in this case are co-administrators of the estate of Ethel Christian, a former resident of the nursing home operated by defendant, River's Bend Healthcare ("River's Bend"). As alleged in the complaint, Ethel Christian was a resident at the home from February 11, 2001 through April 25, 2004. (Supp. 0003, ¶5.)<sup>1</sup>

Ethel Christian died on February 7, 2005, at the age of 85. (Appellee's Supplement, p.18) On March 9, 2005, Marian C. Whitley and Patricia Mazzella were appointed co-administrators of the Estate of Ethel Christian.

On April 15, 2005, more than one month after the co-administrators were appointed and more than two months after Ethel Christian died, a complaint was filed in Lawrence County Court of Common Pleas against River's Bend and "John Does 1 through 10, Inclusive, Defendants Whose Names are Unknown to the Plaintiffs at This Time." The plaintiff, however, was not the administrator of the estate who had already been appointed. The named plaintiff was "Ethel V. Christian, by and through her Conservator and Guardian, Marcella E. Christian." Thus, even though there were co-administrators appointed to present the claim on behalf of the Estate of Ethel V. Christian, the complaint was filed in the name of the decedent by and through her Guardian and Conservator.

At paragraph 1, the complaint alleged:

Marcella E. Christian is the duly appointed Guardian and Conservator of Ethel V. Christian, **living**, having been duly appointed by the Circuit Court of Cabell County, West Virginia in Case No. 03-G-38, on the 19<sup>th</sup> day of May, 2003. (Emphasis added.) (Supp. 0002)

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<sup>1</sup> Unless otherwise indicated, supplement references are to the Appellants' supplement.

At the time the complaint was filed, Marcella E. Christian was no longer the Guardian and Conservator of Ethel Christian, that appointment having ended by operation of law on the date of Ethel Christian's death. See W.Va. Code § 44A-4-1(a).

River's Bend answered the April 15, 2005 complaint. (Supp. 0017.) Although the complaint alleged that Ethel Christian was living and did not put River's Bend on notice that she had died, River's Bend included the following affirmative defenses in its answer: "11. Plaintiff is not the real party-in-interest for all or part of this action"; and "12. This Court lacks jurisdiction over this matter." (Supp. 0020.)

There is no evidence in the record explaining why the complaint was filed in the name of "Ethel V. Christian," or why it alleged that she was living. Appellant's merit brief remarks on those and other matters without reference to any evidence from the record ("Marcella, who was Ethel's adult child, is also now deceased, having passed away in April 2007," brief, p.1; "Marcella Christian did not inform Counsel of her mother's passing until May 31, 2006," brief, p.1; "In this case, Marcella Christian simply did not appreciate the legal significance of Ethel Christian's passing." brief, p.5.); "Similarly, in the case at bar, Marcella Christian's mistaken belief that she could act on her mother's behalf was corrected by the court order substituting the administrators of her mother's estate as the correct nominal party." (brief, p.8.) "Likewise, Marcella Christian's failure to understand the legal import of her mother's death on her status as Guardian caused counsel herein to file the action under a similar misnomer." (brief, p.8.)

Those assertions are all supposition; the record is silent as to what caused the filing of a "personal injury" lawsuit on behalf of an octogenarian who had died months before and what Marcella Christian may have known or understood.

II. *Plaintiff's motion to substitute and suggestion of death*

On June 8, 2005, the co-administrators, Marian Whitley and Patricia Mazzella, moved to substitute the Estate of Ethel Christian as plaintiff. (Supp. 0023.) There was no memorandum accompanying that motion to explain the reason for the substitution. On that day, "counsel for plaintiff" also filed a "suggestion of death, pursuant to Civ. R. 25(E)." (Supp. 0025.) Under Rule 25(E), the attorney of record for a party who has died has a duty to suggest such fact upon the record. Implicit in the rule is the understanding that the party was living when the complaint was filed and died thereafter.

The two filings of June 8, 2005 were carefully worded. Neither the motion to substitute nor the suggestion of death explained that Ethel Christian had already died when the complaint was filed. The court would have understood that fact only by comparing the stated date of death with the date the complaint was filed.

On the same day that the motion to substitute and the suggestion of death were filed, June 8, 2005, the trial court issued an order that "The Estate of Ethel V. Christian is granted leave to substitute itself for Ethel V. Christian, deceased, to become a Plaintiff in the above captioned action." (Supp. 00027) On March 6, 2006, "plaintiffs" filed a notice of dismissal under Civ. R. 41(A)(1)(a). (Supp. 0028.)

III. *The second complaint*

On February 27, 2007, a complaint was filed in Lawrence County, Ohio by "Marian C. Whitley and Patricia A. Mazzella, Individually and as Co-Administrators for the Estate of Ethel V. Christian" ("The Estate") against River's Bend and against "John Does 1 through 10 Whose Names are Unknown to the Plaintiffs at This Time." (Supp. 0030) This second complaint removed the reference to Ethel Christian as someone "living." It also represented the date of the

co-administrators' appointment as "the 11<sup>th</sup> day of May, 2006." (Supp. 31.) In fact, the co-administrators were appointed over a year earlier, on March 9, 2005, as referenced on the "letters of administration," which was attached to the complaint. (Supp. 0037)

Unlike the 2005 complaint, the 2007 complaint included two affidavits of merit which alleged that River's Bend had breached the standard of care and that Ethel Christian suffered harm "as a consequence of a fall which occurred on April 25, 2004." It alleged actual malice and sought millions in punitive damages.

River's Bend answered the complaint (Supp. 0040) and, on July 5, 2007, moved for summary judgment on the ground that the action was untimely. (Supp. 0047.) The Estate opposed the motion, raising the single argument that when plaintiff substituted the co-administrators of the estate in the first complaint, that substitution related back to the date of the original filing, so that the action was timely. (Supp. 0058) The Estate did not argue that the filing of the original complaint was proper under the Resident's Rights Statute, R.C. 3721.17.

The court granted summary judgment to River's Bend. In its opinion, the court first noted that it "would question whether a guardian or a conservator would retain the authority to file this type of an action after the death of the Ward." It then reasoned that the action was time barred because plaintiff had not moved to substitute the co-administrators for the plaintiff until June of 2005, which was more than a year after the cause of action accrued.

Before the trial court entered a final dismissal of the action, the Estate appealed the judgment to the Lawrence County Court of Appeals, Fourth Appellate District. In that appeal, plaintiff argued for the first time that the initial complaint that was filed by "Ethel V. Christian, and through her Conservator and Guardian, Marcella E. Christian" was proper because R.C.

3721.17 permitted the adult child of a resident to file a complaint alleging violations of the Resident's Rights Act.

The Appellate Court dismissed the appeal for lack of a final appealable order and remanded the case for the entry of a final order. On remand, the Estate moved for reconsideration of the non-final order and argued that Marcella Christian did not notify counsel of the death of Ethel Christina until May 31, 2005, and that Marcella Christian did not understand that her guardianship terminated on the death of the ward, and that the first lawsuit was properly filed under R.C. 3721.17. (Supp. 0065.) The Estate's factual assertions in that motion, however, were unsupported by any affidavit.

On August 21, 2008, the trial court denied the Estate's motion for reconsideration and entered final judgment dismissing the action. (Appellee's Supp. 0024.)

The Estate then filed another appeal to the Lawrence County Court of Appeals. On June 30, 2009, the court affirmed the summary judgment, holding that the complaint that was filed on April 15, 2005 was a nullity, stating:

What is at issue in this case, however, is the legal authority to commence a lawsuit in the first instance....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....Thus, we affirm the trial court's decision that the action commenced by the guardian, after the ward's death, was a nullity.

*Whitley v. River's Bend*, Lawrence App. No. 08CA30, 2009-Ohio-3366, at ¶15.

The Estate timely appealed the appellate court's judgment, upon which the matter is now before this Court.

## ARGUMENT

**Proposition of Law No. 1: An action can be commenced only by a natural or legal person.**

A. *The named plaintiff in the first case was not a person.*

The named plaintiff in the complaint filed in April of 2005 was a decedent, “Ethel V. Christian, by and through her Conservator and Guardian, Marcella Christian.” Ethel V. Christian was not a legal entity and there was no conservator and guardian for her at the time the complaint was filed. Under W.Va. Code § 44A-4-1(a), the guardianship and conservatorship ended on the death of Ethel Christian.

Civ. R. 8 provides that complaints are filed by “parties.” Black’s Law Dictionary defines a “party” as follows:

A person concerned or having or taking part in any affair, matter, transaction or proceeding, considered individually. A “party” to an action is a person whose name is designated on record as plaintiff or defendant. [citation omitted] A “party” to an action is a person whose name is designated on record as plaintiff or defendant. [citation omitted]  
Black’s Law Dictionary (1979) 5<sup>th</sup> Ed. 1010.

Of course, a decedent is not concerned in any affair or proceeding so as to qualify as a party under the above definition. Further, courts have held that a deceased is not a person, which is defined in Black’s Law Dictionary as follows:

In general usage, a human being (i.e., natural person), though by statute term may include a firm, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.  
Black’s Law Dictionary (1979) 5<sup>th</sup> Ed. 1028

The understanding that the deceased do not qualify as persons is long settled in Ohio and throughout the United States. See, e.g. *Williams v. Marion Rapid Transit, Inc.* (1949), 152 Ohio St. 114 (holding that an injury done to an unborn viable child are actionable injuries to a “person” under Section 16, Article I, of the Ohio Constitution); *Brooks v. Boston & N. St. Ry.*

*Co.* (Mass. 1912), 97 N.E. 760 (“It is axiomatic that a corpse is not a person. That which constitutes a person is separated from the body by death and that which remains is ‘dust and ashes.’”); *Morton v. Western Union Tel. Co.* (N.C. 1902), 41 N.E. 484, 485 (“In law the word ‘person’ does not simply mean the physical body, for, if it did, it would apply equally to a corpse. It means a living person, composed of body and soul.”); *State v. Frear* (Wisc. 1910), 128 N.W. 1068, 1072 (“A person is a living human being. A dead man is not a person. When statutes refer to a person who has died they use the term ‘deceased person.’”); *Sawyer v. Mackie* (Mass. 1889), 21 N.E. 307 (“The natural and obvious meaning of the word ‘person’ is a living human being. A dead man cannot be the owner of property.”); *Madden v. Board of Election Com’rs.* (Mass. 1925), 146 N.E. 280, 281 (“...the word persons in the statute meaning living human beings.”)

In *Guyton v. Phillips* (C.A. 9, 1979), 606 F.2d 248, 250, the court held that a deceased “is not a ‘person’ for the purposes of 42 U.S.C. 1983 and 1985, nor for the constitutional rights which the Civil Rights Act serves to protect.” The cited authority for its holding:

Generally, the term “person” as used in a legal context, defines a living human being and excludes a corpse or a human being who has died. 70 C.J.S. Person (1951); 32 Words and Phrases, Person pp. 287, 309 (1965); *Telefilm v. Superior Court* (Cal. App. 1948), 194 P.2d 542, 547 [reversed on other grounds, *Telefilm v. Superior Court* (Cal. 1949), 33 Cal.2d 289]; *Lawson v. State*, 68 Ga. App. 830, 24 S.E.2d 326, 328 (1943); *Brooks v. Boston and N. St. Ry. Co.*, 211 Mass. 277, 97 N.E. 760 (1912); *Morton v. Western Union Tel. Co.*, 130 N.C. 299, 41 S.E. 484, 485 (1902).

See, also, *Means v. Chicago*, 153 F.Supp. 455 (“The civil rights of the deceased cannot be violated because subsequent to his death he is not a ‘person’ within the meaning of the statute.”); *Hudak v. E’Elia*, 120 A.D.2d 667, 668 (“The courts have consistently held that an action under 42 U.S.C. § 1983 may not be maintained to redress violations of a deceased civil rights which occurred after his death, on the ground that the statutory language ‘other person’

contemplates only a living person.”); *Silkwood v. Kerr McGhee Corp.* (C.A. 10, 1980), 637 F.2d 743 (“We agree with the Ninth Circuit that the civil rights of a person cannot be violated once the person has died.”).

Likewise, courts have held that a decedent does not qualify as a person for purposes of filing for bankruptcy protection. See, e.g., *In re Goerg* (C.A. 11, 1988), 844 F.2d 1562, 1564 (“The estate of a deceased person is not eligible to be a debtor under Title 11.”) One early decision explained that in the case of an insolvent debtor, “death has already discharged [the decedent] of all personal liability.” *Adams v. Terrell* (W.D. Tex. 1880), 4 Fed. 706, 801

Ethel Christian was not a person or party for purposes of commencing an action. Amicus for the Estate concedes as much. It writes, correctly, that when a complaint names a decedent as the plaintiff, the complaint has not even named a plaintiff: “First, in *Levering*, there was **literally no plaintiff**. The named plaintiff (the victim) was deceased when the attorney filed the complaint.” Brief, p.10, emphasis added; and “First, in *Simms* (as in *Levering*) there was **literally no plaintiff**. The named plaintiff (the victim) was deceased when the attorney filed the complaint.” Brief, p.13. emphasis added.)

Neither could Ethel Christian’s “guardian” or “conservator” file the complaint because she had no guardian or conservator after she died. Amicus argues that the complaint was filed in the name of a natural person—“Conservator and Guardian [of Ethel V. Christian], Marcella Christian.” Marcella Christian was named only because of her claimed status as Conservator and Guardian, and she was not a plaintiff in her own right. The guardianship ended by operation of law with the death of Ethel Christian. Neither Ethel Christian nor her guardian existed when the complaint was filed.

B. *The situation of a deceased plaintiff is materially different from a deceased defendant.*

The Estate disputes the appellate court's holding that a complaint filed by a deceased plaintiff is a nullity, arguing it is inconsistent with this Court's reasoning in a 1983 decision as applied to complaints filed against deceased defendants. As explained below, there are reasons for treating the circumstances differently.

First, the Ohio Constitution provides a right to sue on behalf of persons. Section 16, Article 1, says "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law...." As explained earlier, "persons" do not include decedents. A lawsuit brought in the name of a deceased person does not fit the framework established under the Constitution for commencing an action.

Second, the rule in Ohio that suits filed against decedents may be effective for purposes of commencing an action addresses particular concerns that do not arise in the context of suits filed in the name of deceased plaintiffs. In *Baker v. McKnight* (1983), 4 Ohio St.3d 125, the court considered whether a plaintiffs' action was brought within the statute of limitations when it was filed against a defendant who died before the complaint was filed. The court held that the filing was effective for that purpose, and cited with approval this language from an Illinois appellate decision:

Essentially the plaintiff has sued an entity, Hanson Castor, by the wrong name. Though Castor is dead, his legal existence is not extinguished, but shifted to the special administrator of his estate in existence at the date of the original complaint. The special administrator stands in the shoes of the decedent in defending against liability for his alleged torts. *Eberbach v. McNabney* (Ind. App. 1980), 413 N.E.2d 958.

The last statement from the above quote is correct—the estate of a decedent does "stand in the shoes" of the decedent in defending liability for his torts, since R.C. 2117.06 specifically shifts the tort liability of a decedent to the decedent's estate. But the Indiana appellate court

overstated the point in writing that the “legal existence” of a living person survives and is transferred to the estate after she dies—the conclusion argued by the Estate here in urging this Court to deem the naming of the deceased plaintiff as a “misnomer” for the estate. To the extent that a decedent’s legal liability is transferred to his estate, the decedent and the estate share a common feature. But that is not to say that, in all respects, the estate assumes the decedent’s “legal existence.” If that were so, an estate could exercise the decedent’s rights and change a will. While the assets of the estate can be reached by a creditor of the decedent, that arrangement does not transfer to an administrator the legal existence of the person who died.

The Court, in *Baker*, did not hold that the estate and the decedent were the same legal entity, but found only that plaintiffs’ naming of the decedent in the complaint was a misnomer for the estate because the estate’s obligation to answer for the decedent’s torts was established by law. The Court noted the “practical realities of modern personal injury practice,” i.e., that it would be an “unnecessarily severe rule” to punish an innocent plaintiff who filed a complaint without knowing the defendant had already died. The Court’s holding, in *Baker*, protected plaintiffs against the harshness of a trapdoor rule that could bar suits notwithstanding the vigilance of the plaintiff.

No such concern arises in the context of a claim brought in the name of a deceased plaintiff. While a plaintiff may not know whether the defendant is still living at the time a lawsuit is commenced, his counsel can easily confirm the plaintiff’s existence. The circumstances here are an especially weak basis for arguing a change in Ohio law. Here, counsel agreed to represent an 85 year-old plaintiff who was in poor health and then, for unexplained reasons, filed a complaint several months later without confirming whether the client was still living. The Ohio

law rule that an action can be commenced only by a natural or legal person is not (in the language of the *Baker* decision) “unnecessarily severe” as applied to this plaintiff.

B. *The case law on which appellants rely is distinguishable.*

In their brief, the Estate tries to fit this case into the analysis this Court has applied in recognizing as valid wrongful death claims brought by beneficiaries who were not appointed as administrators at the time the action was filed. They cite to the decisions in *Douglas v. Daniel Bros. Coal Co.* (1939), 135 Ohio St. 641; *Burwell v. Maynard* (1970), 21 Ohio St.2d 108; and *Ramsey v. Neiman* (1994), 69 Ohio St.3d 508. In each of those cases, a wrongful death beneficiary filed a wrongful death action before being appointed by the probate court as the decedent’s personal representative: In *Douglas*, a widow filed a wrongful death suit, mistakenly believing she had been appointed; in *Burwell*, the next-friend of the decedent’s minor child brought the action without being appointed personal representative; and in *Ramsey*, the decedent’s father filed a wrongful death action, claiming he had authority to sue for the wrongful death of his daughter, even though he was not appointed representative.

Each of the plaintiffs in those cases was a legal entity—a natural person—who had not been appointed administrator of the estate. The single issue that the Court considered in each of those cases was whether a beneficiary, prior to the appointment of a personal representative, could sue for wrongful death under the wrongful death statute. And in each case, the Court held there was no requirement that the administrator be appointed before the suit was filed. Once the administrator was appointed, the administrator could be substituted for the beneficiary-plaintiff.

The situation here is different. First, the co-administrators were already appointed when the first complaint was filed. Second, the complaint was not filed in the name of a legal entity. Ethel Christian was no longer living and there was no “Guardian and Conservator.” The Estate of

Ethel Christian had lawfully appointed representatives who were authorized to pursue claims on behalf of the decedent. But, either by design or through neglect, they did not do so.

C. *The appellate court cited sound authority supporting its decision.*

The court below cited three appellate decisions as authority for its ruling that a complaint filed in the name of a deceased person is a nullity: *Levering v. Riverside Methodist Hosp.* (1981), 2 Ohio App.3d 147; *Simms v. Alliance Comm. Hosp.*, Stark App. No. 2007-CA-00225, 2008-Ohio-847; and *Estate of Newland v. St. Rita's Medical Center*, Allen App. No. 1-07-53, 2008-Ohio-1342. In each of those cases, the court held that a complaint filed in the name of a plaintiff who was already deceased was a nullity.

The Estate argues that those decisions are unpersuasive authority because they referenced this Court's decision in *Barnhart v. Schultz* (1978), 53 Ohio St.2d 59, which was overruled in *Baker v. McKnight* (1983), 4 Ohio St.3d 125. In *Barnhart*, the Court considered a claim where the plaintiff filed a personal injury complaint against defendant shortly before the two-year statute of limitations expired, not knowing that the defendant had already died. Plaintiff moved to amend the complaint to name the administrator of the decedent's estate after the statute of limitations passed, and ultimately obtained service of process on the administrator nearly three years after the cause of action accrued. In considering whether plaintiff had commenced an action in filing the initial complaint against a decedent, this Court began its analysis by noting the principle that "[b]ecause a party must actually or legally exist, 'one deceased cannot be a party to an action.'" *Barnhart v. Schultz*, 53 Ohio St.2d at 61, quoting *Brickley v. Neuling* (Wis. 1950), 41 N.W. 2d 284, 285. The Court rejected the argument that the filing against a deceased defendant was effective to commence the action, reasoning that such a rule would serve to unduly and arbitrarily extend the statute of limitations. The Court noted, further, that the plaintiff

could protect himself against the dangers attending a suit against a deceased defendant by filing the complaint “sufficiently in advance of the statutory deadline.” *Barnhart*, 53 Ohio St.2d at 62.

The decision in *Barnhart* dealt narrowly and specifically with the issue of whether a suit filed against a deceased defendant was effective to commence an action so that a later amended complaint naming the administrator might relate back to that filing for purposes of the statute of limitations. The Court recognized the core principle that parties “must actually or legally exist,” and then analyzed the fairness of that rule in the context of actions brought against deceased defendants. It decided that public policy reasons favored the rule in that context and that it worked no unfairness to the plaintiff.

In *Baker v. McKnight*, 4 Ohio St.3d 125, the Court revisited that question and came to a different conclusion. The Court noted that lower courts were struggling with the *Barnhart* rule, and seeking ways to avoid its application. *Baker*, 4 Ohio St.3d at 126, fn.1, citing *Mitchell v. Price* (Dec. 24, 1979), Muskingum App. No. CA-79-20, 1979 WL 209758 (where the court wrote that, unlike the situation in *Barnhart*, “here our plaintiff is alleging that he justifiably relied on statements made by the attorney for the defendant’s insurance company that he would file an answer on behalf of the insured defendant,” and that “[a]bsent estoppel, it appears that the case of *Barnhart*...would be adversely dispositive of the claim...”); and *Gentile v. Carr* (Jefferson App. 1981), 4 Ohio App.3d 55 (distinguishing *Barnhart* on the ground that, in *Gentile*, “there was an existent party at the time of filing the complaint.” upon whom the complaint could have been served, whereas there was no such person available in *Barnhart*.)

In light of the difficulties that lower courts were having in applying the rule in *Barnhart*, the Court, in *Baker*, concluded that the rule in *Barnhart* worked an unfairness on plaintiffs. In changing the rule, it did not disturb the core principle underlying the *Barnhart* decision,

however, i.e., that a party must actually or legally exist. Instead, it followed a rationale that would preserve that principle but accomplish the desired objective of fairness in light of “the practical realities of modern practice.” It concluded that a lawsuit naming a deceased defendant should be deemed a “misnomer” for the decedent’s estate.

The Court, in *Baker*, left in place the principle that a party must actually or legally exist. In *Simms*, *Levering*, and *Estate of Newland*, three different courts of appeal applied that rule to claims brought by deceased plaintiffs without difficulty. There is no indication that the courts saw an unfairness in applying the rule that a plaintiff must be a natural or legal entity. This history is in contrast to the trouble among lower courts which led this Court, in *Baker*, to reconsider the rule in *Barnhart*.

Neither the Estate’s Merit brief nor the Amicus brief offer any argument about the unfairness of the rule requiring the plaintiff to be an actual or legal entity. The facts of this case, where plaintiff’s counsel for unexplained reasons filed the complaint in the name of someone who had died months earlier and after administrators for the decedent’s estate had been appointed, certainly do not support such a finding of unfairness.

D. *Federal courts and courts in other jurisdictions hold that when a complaint is filed in the name of a deceased plaintiff, the substitution of the decedent’s administrator does not relate back.*

Like Ohio’s civil rule, Fed. R. Civ. P. 25 says that if a party dies and the claim is not extinguished, the court may order a substitution of the proper party. The rule, however, presumes that the person who died was at some point a living party to the action. One treatise has noted this presumption:

The rule presupposes that substitution is for someone who was a party to a pending action. **Substitution is not possible if one who was named as a party in fact died before commencement of the action.**

7C Wright & Miller, Federal Practice & Procedure (2007), 651, §1951 (Emphasis added.)

For example, in *Banakus v. United Aircraft Corp.*, (D.C. S.D. N.Y. 1968), 290 F.Supp. 259, a diversity suit for personal injuries was filed on behalf of a person who, unbeknownst to his counsel, died on the day the complaint was filed. After the statute of limitations had passed, counsel for plaintiff moved to substitute the decedent's estate as plaintiff. The Court denied the motion, stating:

Since Holochuck was dead when the action for personal injuries was commenced, that action must be treated as a nullity and it cannot be given life by substituting parties and amending the complaint. An action cannot be brought by a deceased. *Banakus*, 290 F.Supp. at 260.

See, also, *Hanberry v. United States* (1974), 204 Ct. Cl. 811; *Passos v. Eastern S.S. Co.* (D. Del. 1949), 9 F.R.D. 279, 281 ("The defendant has shown that the plaintiff had no legal existence at the time this action was brought but had died over 15 months before the institution of the suit."); *Adelsberger v. United States*. (Fed. Cl. 2003), 58 Fed. Cl. 616, 618, 2003 U.S. Claims LEXIS 355 ("Mr. Stiles died before the complaint was filed. A person who dies prior to filing suit is not a legal entity."); *Banks v. Employers' Liab. Assurance Corp.* W.D. Mo. 1944), 4 F.R.D. 179, 180 (holding that the substitution of the deceased plaintiff by his estate was improper since the substitution happened after the filing of the "void suit.")

Likewise, other state courts follow the rule that a complaint must be commenced in the name of a natural or legal entity. As stated by one authority, "It has been held that where an action is brought in the name of a plaintiff who is dead..., the complaint may not be amended by substituting a plaintiff having capacity to sue." 59 Am. Jur.2d , Parties, 679 § 219.

In *Matthews v. Cleveland* (Ga. App. 1981), 284 S.E.2d 634, for example, an individual, Jessie Cleveland, signed an affidavit of garnishment based on a judgment he had obtained, and his attorney filed the affidavit but did so after Cleveland died. The defendant moved to dismiss

the complaint and plaintiff's counsel moved to substitute Cleveland's estate as plaintiff. The trial court granted the motion to substitute, and the defendant appealed. The appellate court reversed the judgment, holding that the substitution was ineffective because the initial complaint—filed in the name of a decedent—was a nullity. The court wrote:

It is clear that Code Ann. § 81A-117(A) contemplates that an 'action' must already have been commenced prior to substituting as the plaintiff therein the real party in interest. ... If, in this state, all civil 'actions' must have a 'proper' party plaintiff and a deceased person cannot be a party to an action, it must follow that a complaint filed in the name of a deceased person cannot commence an action. In other words, a suit commenced in the name of a deceased person is not brought in the name of a 'natural person,' a deceased person having no capacity to be a proper litigant in the courts of this state. If 'no legal party plaintiff was named in the pleadings and shown to exist, ... the suit is a mere nullity.

*Matthews v. Cleveland*, 284 S.E.2d 635, 636.

In the recent case of *McCormick v. Illinois Central Rd. Co.* (Tenn. App. 2009), Case No. W2008-00902-COA-R9-CV, 2009 Ten. App. LEXIS 357, a lawsuit was filed on behalf of one-time employee of a railroad, alleging that the worker's lung disease was caused by exposure to asbestos. At the time the lawsuit was filed, however, the worker had already died. The trial court granted plaintiff leave to substitute the decedent's estate, and the railroad appealed. The Tennessee appellate court reversed the order and dismissed the case, holding that the action filed in the name of the decedent was a nullity. The court wrote:

We are persuaded by the numerous decisions from other jurisdictions cited by Railroad, that because Mr. McCormick was deceased when the complaint was filed on his behalf, the suit was a nullity, and thus not amenable to substitution.

The rule that a complaint must be filed by a natural or legal entity is followed throughout the country. The proposition of law offered by the Estate would change Ohio law and place it out of step with the rule followed nationally.

E. *The rule that only a natural or legal entity may file a complaint is sensible.*

As noted by the court below, there are good reasons for requiring that complaints be filed only by natural or legal entities. The court explained that a rule allowing complaints filed in the name of deceased persons would have far reaching consequences that would undermine the stability of the law. In a footnote on page three, the court asked, “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.?”

Those are sensible questions to consider in deciding whether to change the law in the way proposed by the Estate. One court, in fact, addressed one of the scenarios suggested by the appellate court. In *Automated Information Processing, Inc. v. the Genesys Solutions Group* (E.D.N.Y. 1995), 164 F.R.D. 1, the plaintiff, suing for copyright infringement and breach of contract, was named as a corporation—Automated Information Processing, Inc. During discovery, however, defendant learned that the business was never incorporated. When the defendant moved to dismiss the complaint, the principal of the business sought to incorporate a new entity and, by way of assigning his rights to that business, to then amend the complaint to substitute that new business for the original named plaintiff.

The court refused to allow the amendment. It noted that “[n]othing about the situation here suggests that justice requires the relief the ‘new’ plaintiffs seek. The information concerning A.I.P., Inc.’s non-existence was certainly within Mr. Stadler’s responsibility and ability to ascertain.” The court noted, further, that the complaint alleged that the business was incorporated under the laws of the State of New Jersey, and noted that “it is of course a party’s obligations to conduct reasonable inquiry concerning the truth of the allegations made in its pleadings.” In light

of those facts, the court concluded that “justice would not be served if the plaintiffs were rewarded for their failures, oversights and misrepresentations by permitting an amendment of their pleadings where it is otherwise unwarranted by the rules.”

The original complaint in this case, too, alleged facts that were within the ability of counsel to ascertain. For one, it alleged that Ethel Christian was “living.” (Complaint, para. 1. Supp. 0002.) As the court observed in *Automated*, a rule excusing the plaintiff’s counsel from such a “failure, oversight, and misrepresentation” would not serve the interests of justice.

F. *River’s End did not waive a challenge to the capacity of a decedent to commence an action.*

The Estate argues that River’s End waived the right to “challenge capacity” of the deceased plaintiff to file the original action. River’s End asserted in its answer that the complaint was not brought by the real parties in interest and that the court lacked jurisdiction over the matter. (Supp. 0044) River’s End preserved the defense that the original complaint was a nullity.

Moreover, the lack of a plaintiff meant that the complaint did not state a justiciable claim. Courts have jurisdiction over only justiciable claims. *Morrison v. Steiner* (1972), 32 Ohio St.3d 86. The trial court, therefore, had no subject matter jurisdiction to decide a complaint that was filed by a non-entity. The defense of lack of subject matter jurisdiction is never waived. *State v. Wozniak* (1961), 172 Ohio St. 517.

G. *Conclusion*

The Estate offered no evidence to explain why the complaint was filed months after the death of Ethel Christian but named her as the plaintiff and affirmatively represented she was living. The motion to amend and suggestion of death did not set out any of those circumstances and, in fact, invited the misimpression that the named plaintiff died after the complaint was filed.

The prompt disposition of the motion to substitute (the order being issued on the same day that the motion was filed) is consistent with the court having had that misunderstanding.

The Estate now seeks to use the order on the substitution as somehow settling the issue of its propriety. The apparent reason for pressing that argument is that the Estate sees in it some opportunity to bypass scrutiny of the question on which it sought and obtained jurisdictional review, namely, whether a complaint that names a plaintiff who is already deceased is effective to support the later substitution of the decedent's estate.

The answer to the question posed by the Estate in this appeal is what it has always been under Ohio law: no. A complaint must be filed by a natural or legal entity. This complaint was filed in the name of someone who had died, and the court below properly found it was a nullity. The Estate has given the Court no basis on which to disturb that judgment.

**Proposition of Law No. 2: The adult child of a nursing home resident who has died cannot sue under the Resident's Rights Act without showing that the resident or her duly appointed representative is unable to bring suit.**

The Estate argues that the court below erred in holding that the original complaint brought in the name of "Ethel V. Christian, by and through her Conservator and Guardian, Marcella E. Christian" was authorized under R.C. 3721.13 because Marcella E. Christian, as an adult daughter of the resident, could sue as a "sponsor."

The initial point to be made in analyzing this argument is its premise that the initial complaint was filed by Marcella Christian. The complaint was filed in the name of Ethel Christian by her conservator and guardian, Marcella Christian. This was not a complaint filed by Marcella Christian alleging violations of the Resident's Rights Act, but was filed by the purported Conservator and Guardian of a deceased resident—someone who did not exist because the guardianship terminated by operation of law upon the death of Ethel Christian.

The Resident's Rights Act, R.C. 3721.10 to R.C. 3721.17, specifically establishes a cause of action against any home committing a violation of the Act. Under R.C., 3721.17(I), the resident may commence that civil action or the resident's legal guardian "or other legally authorized representative on behalf of the resident or the resident's estate." The statute then lists in order of priority others who may bring that action if the resident or her representative "is unable to commence an action," and the list includes "the resident's parent or adult child."

The appellate court below concluded that Marcella E. Christian did not qualify as a person entitled to bring an action for violation of the Resident's Rights Act because the Estate had not presented evidence that a "legally authorized representative" was unable to bring the action "on behalf of the resident's estate." The necessary condition for Marcella Christian to bring suit for violation of the Resident's Rights Act, therefore, was not satisfied.

In its merit brief, the Estate argues two points in challenging the appellate court's judgment. First, it argues that there was a separate statute authorizing persons to sue for violations of the Residents Rights Act, namely R.C. 3721.13(B). That statute says:

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 3721.17 of the Revised Code.

A "sponsor" is defined at R.C. 3721.10(D) to mean "an adult relative, friend, or guardian of a resident who has an interest or responsibility in the resident's welfare." The Estate reasons, therefore, that anyone can file a lawsuit on behalf of a resident for violations of the Resident's Rights Act, and that the specific statute authorizing such suits is needless surplussage.

The Court, however, must presume that the specific statute, R.C. 3721.17(I), was enacted for a genuine purpose to effect a real result. As the Court held in *State, ex rel. Crawford v.*

*McGregor* (1887), 44 Ohio St. 628, 631,<sup>2</sup> “The courts presume an intention in the legislature to be consistent in the making of laws; and also to have a purpose in each enactment and all its provisions.” If the legislature intended to give sponsors the right to sue nursing homes for alleged violations of the Resident’s Rights Act, it would not have specifically provided for that right to a carefully considered list of individuals in another statute.

The two statutory provisions must be read in a manner that gives effect to each. In *Perkins v. Bright* (1923), 109 Ohio St. 14, 17, the Court noted a rule of construction “that full force and effect must be given to each and every part of the statute, if it can be done, and the entire statute construed so that its respective parts are consistent, and in the light of the further rule that special statutes must receive construction over general statutes if any irreconcilable conflict appears.”

The two statutes must be read in a way that gives effect to each. That can be achieved if R.C. 3721.17(I) is read to cover the subject of who can bring suit on behalf of a resident for violations of the Resident’s Rights Act, and R.C. 3721.13 is read to determine who can act prospectively to protect the rights of residents under the Resident’s Rights Act **before** they are violated. Moreover, under the rule of construction noted above from the *Perkins* case, the specific statute covering the names of those persons who can sue for violations of the Resident’s Rights Act would control over the general language in R.C. 3721.13 concerning the rights of sponsors to “act on a resident’s behalf.”

The second argument offered by the Estate as to why Marcella Christian qualified to file the complaint is that the condition stated in R.C. 3721.17 under which persons other than the resident or her legal representative may sue for violations of the Resident’s Rights Act had

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<sup>2</sup> Overruled on other grounds by *Haff v. Pask* (1933), 126 Ohio St. 633, 641.

occurred. The Estate writes that the statute describes the condition as applying when “the resident or the resident’s legal guardian or other legally authorized representative is unable to commence an action....” The Estate argues that because the legislature provided that the alternative listing of persons could sue on behalf of the resident if the resident or her representative was unable to do so, the statutory authorization applied in the case of either disability. It reasons that because Ethel Christian—the resident—had died, that circumstance was all that was necessary to authorize the filing by the listed persons, whether or not the administrators of her estate were able to do so.

That argument presumes that the legislature did not intend to give any preference to the legally authorized representative—someone charged under law with the responsibility of protecting the interests of the resident—to commence a lawsuit. The Estate offers no explanation why the legislature would have intended such a result. Plainly, it did not. The statute must be read to give effect to the stated legislative deference to the resident and her legally authorized representative before others may file a complaint for a violation of the Resident’s Rights Act.

One court has interpreted the statute to apply in that way. In *Treadway v. Free Pentecostal Pater Avenue Church of God, Inc.*, Butler App. No. CA2007-05-139, 2008-Ohio-1663, the grandchildren of a nursing home resident sued a nursing home, alleging violations of the Resident’s Rights Act. The suit was filed after the death of the resident. The trial court dismissed the complaint, reasoning that the plaintiffs failed to present evidence that the legally authorized representative of the resident’s estate was unable to bring the suit. The appellate court affirmed the judgment, stating:

Appellants have no right to assert a claim...because they are not the legally authorized representative of [the resident’s] 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 the statute. *Treadway*, 2008-Ohio-1663, at ¶18.

If it was necessary only that the resident be unable to commence an action, as the Estate argues here, then the condition would have been satisfied for the grandchildren to sue in *Treadway*. The appellate court's holding contradicts the argument offered by the Estate.

In summary, the Estate has made no argument or showing that the co-administrators of the Estate of Ethel Christian were unable to commence an action on her behalf for alleged violations of the Resident's Rights Act. The court below found correctly that Marcella Christian—even if she had filed this complaint in her individual name and not as conservator and guardian of Ethel Christian—did not qualify to commence this action.

### CONCLUSION

This case represents the third Ohio appellate decision in the past two years to consider the effect of a complaint filed in the name of a decedent. In each case, the courts followed the Ohio law rule that such a complaint is a nullity. Another appellate decision, issued nineteen years ago, reached the same conclusion.

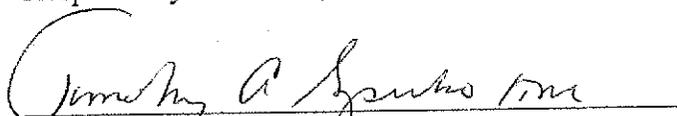
The Estate urges the Court to change the law to give effect to such filings and hold that an amended complaint naming the representative of a decedent's estate should relate back to the date of the original filing to bring the action within the statute of limitations. The failure to commence this action in the name of the proper plaintiff is unexplained. If the court accepts the proposition of law argued by the Estate, the ruling will signal a softening of the Court's expectation that counsel filing pleadings make a reasonable inquiry to determine whether factual averments in a pleading are true. There has been no showing that the proposed change in Ohio law is needed to address an unfairness in the procedure for filing lawsuits.

Further, the proposed change of law would invite court filings in the name of other plaintiffs who are not legal entities. The Court should affirm the rule that plaintiffs filing civil lawsuits must be either natural or legal entities.

The Estate's argument that a "sponsor" can file a lawsuit on behalf of a resident for violation of the Resident's Rights Act is unsupported by case law and inconsistent with the statutory law established for the filing of such actions. The Estate has presented no basis on which the Court should disturb the decision below which held that the Resident's Rights Act does not allow complaints filed anyone other than the resident or the resident's legal representative absent a showing that that the resident or the representative are unable to commence the action.

The Court should affirm the decision below.

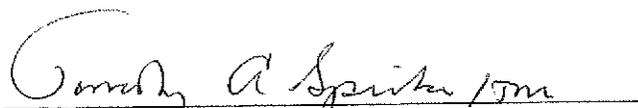
Respectfully submitted,



Timothy A. Spirko (0070589)  
Buckingham, Doolittle & Burroughs, LLP  
1375 E. Ninth Street, 17<sup>th</sup> Floor  
Cleveland, Ohio 44114  
(216) 621-5300  
Fax: (216) 621-5440  
*Counsel for Appellees River's Bend Health Care  
and River's Bend Health Care, LLC*

**CERTIFICATE OF SERVICE**

A copy of the foregoing *Merit Brief of Appellees, River's Bend Healthcare and River's Bend Healthcare, LLC* was sent by regular U.S. Mail to **Peter D. Traska** and **Phillip A. Kuri**, at Elk & Elk Co., Ltd., 6105 Parkland Blvd., Mayfield Heights, OH 44124 this 29<sup>th</sup> day of March, 2010.



Timothy A. Spirko (0070589)

*Counsel for Appellees River's Bend Health Care  
and River's Bend Health Care, LLC*

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\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH FEBRUARY 22, 2010 \*\*\*

CONSTITUTION OF THE STATE OF OHIO  
ARTICLE I. BILL OF RIGHTS

**Go to the Ohio Code Archive Directory**

*Oh. Const. Art. I, § 16 (2010)*

§ 16. Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

*[Suits against the state.]* Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

**HISTORY:**

(As amended September 3, 1912.)

LEXSTAT OHIO REV CODE 3721.13

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TITLE 37. HEALTH -- SAFETY -- MORALS  
CHAPTER 3721. NURSING HOMES; RESIDENTIAL CARE FACILITIES  
RESIDENTS' RIGHTS

Go to the Ohio Code Archive Directory

*ORC Ann. 3721.13 (2010)*

§ 3721.13. Residents' rights; sponsor may protect rights

(A) The rights of residents of a home shall include, but are not limited to, the following:

(1) The right to a safe and clean living environment pursuant to the medicare and medicaid programs and applicable state laws and regulations prescribed by the public health council;

(2) The right to be free from physical, verbal, mental, and emotional abuse and to be treated at all times with courtesy, respect, and full recognition of dignity and individuality;

(3) Upon admission and thereafter, the right to adequate and appropriate medical treatment and nursing care and to other ancillary services that comprise necessary and appropriate care consistent with the program for which the resident contracted. This care shall be provided without regard to considerations such as race, color, religion, national origin, age, or source of payment for care.

(4) The right to have all reasonable requests and inquiries responded to promptly;

(5) The right to have clothes and bed sheets changed as the need arises, to ensure the resident's comfort or sanitation;

(6) The right to obtain from the home, upon request, the name and any specialty of any physician or other person responsible for the resident's care or for the coordination of care;

(7) The right, upon request, to be assigned, within the capacity of the home to make the assignment, to the staff physician of the resident's choice, and the right, in accordance with the rules and written policies and procedures of the home, to select as the attending physician a physician who is not on the staff of the home. If the cost of a physician's services is to be met under a federally supported program, the physician shall meet the federal laws and regulations governing such services.

(8) The right to participate in decisions that affect the resident's life, including the right to communicate with the physician and employees of the home in planning the resident's treatment or care and to obtain from the attending physician complete and current information concerning medical condition, prognosis, and treatment plan, in terms the resident can reasonably be expected to understand; the right of access to all information in the resident's medical record; and the right to give or withhold informed consent for treatment after the consequences of that choice have been carefully explained. When the attending physician finds that it is not medically advisable to give the information to the resident, the information shall be made available to the resident's sponsor on the resident's behalf, if the sponsor has a legal

interest or is authorized by the resident to receive the information. The home is not liable for a violation of this division if the violation is found to be the result of an act or omission on the part of a physician selected by the resident who is not otherwise affiliated with the home.

(9) The right to withhold payment for physician visitation if the physician did not visit the resident;

(10) The right to confidential treatment of personal and medical records, and the right to approve or refuse the release of these records to any individual outside the home, except in case of transfer to another home, hospital, or health care system, as required by law or rule, or as required by a third-party payment contract;

(11) The right to privacy during medical examination or treatment and in the care of personal or bodily needs;

(12) The right to refuse, without jeopardizing access to appropriate medical care, to serve as a medical research subject;

(13) The right to be free from physical or chemical restraints or prolonged isolation except to the minimum extent necessary to protect the resident from injury to self, others, or to property and except as authorized in writing by the attending physician for a specified and limited period of time and documented in the resident's medical record. Prior to authorizing the use of a physical or chemical restraint on any resident, the attending physician shall make a personal examination of the resident and an individualized determination of the need to use the restraint on that resident.

Physical or chemical restraints or isolation may be used in an emergency situation without authorization of the attending physician only to protect the resident from injury to self or others. Use of the physical or chemical restraints or isolation shall not be continued for more than twelve hours after the onset of the emergency without personal examination and authorization by the attending physician. The attending physician or a staff physician may authorize continued use of physical or chemical restraints for a period not to exceed thirty days, and at the end of this period and any subsequent period may extend the authorization for an additional period of not more than thirty days. The use of physical or chemical restraints shall not be continued without a personal examination of the resident and the written authorization of the attending physician stating the reasons for continuing the restraint.

If physical or chemical restraints are used under this division, the home shall ensure that the restrained resident receives a proper diet. In no event shall physical or chemical restraints or isolation be used for punishment, incentive, or convenience.

(14) The right to the pharmacist of the resident's choice and the right to receive pharmaceutical supplies and services at reasonable prices not exceeding applicable and normally accepted prices for comparably packaged pharmaceutical supplies and services within the community;

(15) The right to exercise all civil rights, unless the resident has been adjudicated incompetent pursuant to Chapter 2111. of the Revised Code and has not been restored to legal capacity, as well as the right to the cooperation of the home's administrator in making arrangements for the exercise of the right to vote;

(16) The right of access to opportunities that enable the resident, at the resident's own expense or at the expense of a third-party payer, to achieve the resident's fullest potential, including educational, vocational, social, recreational, and habilitation programs;

(17) The right to consume a reasonable amount of alcoholic beverages at the resident's own expense, unless not medically advisable as documented in the resident's medical record by the attending physician or unless contradictory to written admission policies;

(18) The right to use tobacco at the resident's own expense under the home's safety rules and under applicable laws and rules of the state, unless not medically advisable as documented in the resident's medical record by the attending physician or unless contradictory to written admission policies;

(19) The right to retire and rise in accordance with the resident's reasonable requests, if the resident does not disturb others or the posted meal schedules and upon the home's request remains in a supervised area, unless not medically advisable as documented by the attending physician;

(20) The right to observe religious obligations and participate in religious activities; the right to maintain individual and cultural identity; and the right to meet with and participate in activities of social and community groups at the resident's or the group's initiative;

(21) The right upon reasonable request to private and unrestricted communications with the resident's family, social worker, and any other person, unless not medically advisable as documented in the resident's medical record by the attending physician, except that communications with public officials or with the resident's attorney or physician shall not be restricted. Private and unrestricted communications shall include, but are not limited to, the right to:

- (a) Receive, send, and mail sealed, unopened correspondence;
- (b) Reasonable access to a telephone for private communications;
- (c) Private visits at any reasonable hour.

(22) The right to assured privacy for visits by the spouse, or if both are residents of the same home, the right to share a room within the capacity of the home, unless not medically advisable as documented in the resident's medical record by the attending physician;

(23) The right upon reasonable request to have room doors closed and to have them not opened without knocking, except in the case of an emergency or unless not medically advisable as documented in the resident's medical record by the attending physician;

(24) The right to retain and use personal clothing and a reasonable amount of possessions, in a reasonably secure manner, unless to do so would infringe on the rights of other residents or would not be medically advisable as documented in the resident's medical record by the attending physician;

(25) The right to be fully informed, prior to or at the time of admission and during the resident's stay, in writing, of the basic rate charged by the home, of services available in the home, and of any additional charges related to such services, including charges for services not covered under the medicare or medicaid program. The basic rate shall not be changed unless thirty days notice is given to the resident or, if the resident is unable to understand this information, to the resident's sponsor.

(26) The right of the resident and person paying for the care to examine and receive a bill at least monthly for the resident's care from the home that itemizes charges not included in the basic rates;

(27) (a) The right to be free from financial exploitation;

(b) The right to manage the resident's own personal financial affairs, or, if the resident has delegated this responsibility in writing to the home, to receive upon written request at least a quarterly accounting statement of financial transactions made on the resident's behalf. The statement shall include:

(i) A complete record of all funds, personal property, or possessions of a resident from any source whatsoever, that have been deposited for safekeeping with the home for use by the resident or the resident's sponsor;

(ii) A listing of all deposits and withdrawals transacted, which shall be substantiated by receipts which shall be available for inspection and copying by the resident or sponsor.

(28) The right of the resident to be allowed unrestricted access to the resident's property on deposit at reasonable hours, unless requests for access to property on deposit are so persistent, continuous, and unreasonable that they constitute a nuisance;

(29) The right to receive reasonable notice before the resident's room or roommate is changed, including an explanation of the reason for either change.

(30) The right not to be transferred or discharged from the home unless the transfer is necessary because of one of the following:

(a) The welfare and needs of the resident cannot be met in the home.

(b) The resident's health has improved sufficiently so that the resident no longer needs the services provided by the home.

(c) The safety of individuals in the home is endangered.

(d) The health of individuals in the home would otherwise be endangered.

(e) The resident has failed, after reasonable and appropriate notice, to pay or to have the medicare or medicaid program pay on the resident's behalf, for the care provided by the home. A resident shall not be considered to have

failed to have the resident's care paid for if the resident has applied for medicaid, unless both of the following are the case:

(i) The resident's application, or a substantially similar previous application, has been denied by the county department of job and family services.

(ii) If the resident appealed the denial pursuant to division (C) of *section 5101.35 of the Revised Code*, the director of job and family services has upheld the denial.

(f) The home's license has been revoked, the home is being closed pursuant to *section 3721.08, sections 5111.35 to 5111.62, or section 5155.31 of the Revised Code*, or the home otherwise ceases to operate.

(g) The resident is a recipient of medicaid, and the home's participation in the medicaid program is involuntarily terminated or denied.

(h) The resident is a beneficiary under the medicare program, and the home's participation in the medicare program is involuntarily terminated or denied.

(31) The right to voice grievances and recommend changes in policies and services to the home's staff, to employees of the department of health, or to other persons not associated with the operation of the home, of the resident's choice, free from restraint, interference, coercion, discrimination, or reprisal. This right includes access to a residents' rights advocate, and the right to be a member of, to be active in, and to associate with persons who are active in organizations of relatives and friends of nursing home residents and other organizations engaged in assisting residents.

(32) The right to have any significant change in the resident's health status reported to the resident's sponsor. As soon as such a change is known to the home's staff, the home shall make a reasonable effort to notify the sponsor within twelve hours.

(B) 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 3721.17 of the Revised Code*.

(C) Any attempted waiver of the rights listed in division (A) of this section is void.

**HISTORY:**

137 v H 600 (Eff 4-9-79); 143 v H 822 (Eff 12-13-90); 149 v H 94. Eff 9-5-2001.

LEXSTAT ORC ANN. 3721.17

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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND  
FILED WITH THE SECRETARY OF STATE THROUGH FEBRUARY 26, 2010 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH FEBRUARY 22, 2010 \*\*\*

TITLE 37. HEALTH -- SAFETY -- MORALS  
CHAPTER 3721. NURSING HOMES; RESIDENTIAL CARE FACILITIES  
RESIDENTS' RIGHTS

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*ORC Ann. 3721.17 (2010)*

§ 3721.17. Resident may file grievance; procedure upon complaint to department of health; retaliation prohibited; cause of action for violation

(A) Any resident who believes that the resident's rights under *sections 3721.10 to 3721.17 of the Revised Code* have been violated may file a grievance under procedures adopted pursuant to division (A)(2) of *section 3721.12 of the Revised Code*.

When the grievance committee determines a violation of *sections 3721.10 to 3721.17 of the Revised Code* has occurred, it shall notify the administrator of the home. If the violation cannot be corrected within ten days, or if ten days have elapsed without correction of the violation, the grievance committee shall refer the matter to the department of health.

(B) Any person who believes that a resident's rights under *sections 3721.10 to 3721.17 of the Revised Code* have been violated may report or cause reports to be made of the information directly to the department of health. No person who files a report is liable for civil damages resulting from the report.

(C) (1) Within thirty days of receiving a complaint under this section, the department of health shall investigate any complaint referred to it by a home's grievance committee and any complaint from any source that alleges that the home provided substantially less than adequate care or treatment, or substantially unsafe conditions, or, within seven days of receiving a complaint, refer it to the attorney general, if the attorney general agrees to investigate within thirty days.

(2) Within thirty days of receiving a complaint under this section, the department of health may investigate any alleged violation of *sections 3721.10 to 3721.17 of the Revised Code*, or of rules, policies, or procedures adopted pursuant to those sections, not covered by division (C)(1) of this section, or it may, within seven days of receiving a complaint, refer the complaint to the grievance committee at the home where the alleged violation occurred, or to the attorney general if the attorney general agrees to investigate within thirty days.

(D) If, after an investigation, the department of health finds probable cause to believe that a violation of *sections 3721.10 to 3721.17 of the Revised Code*, or of rules, policies, or procedures adopted pursuant to those sections, has occurred at a home that is certified under the medicare or medicaid program, it shall cite one or more findings or deficiencies under *sections 5111.35 to 5111.62 of the Revised Code*. If the home is not so certified, the department shall hold an adjudicative hearing within thirty days under Chapter 119. of the Revised Code.

(E) Upon a finding at an adjudicative hearing under division (D) of this section that a violation of *sections 3721.10 to 3721.17 of the Revised Code*, or of rules, policies, or procedures adopted pursuant thereto, has occurred, the depart-

ment of health shall make an order for compliance, set a reasonable time for compliance, and assess a fine pursuant to division (F) of this section. The fine shall be paid to the general revenue fund only if compliance with the order is not shown to have been made within the reasonable time set in the order. The department of health may issue an order prohibiting the continuation of any violation of *sections 3721.10 to 3721.17 of the Revised Code*.

Findings at the hearings conducted under this section may be appealed pursuant to Chapter 119. of the Revised Code, except that an appeal may be made to the court of common pleas of the county in which the home is located.

The department of health shall initiate proceedings in court to collect any fine assessed under this section that is unpaid thirty days after the violator's final appeal is exhausted.

(F) Any home found, pursuant to an adjudication hearing under division (D) of this section, to have violated *sections 3721.10 to 3721.17 of the Revised Code*, or rules, policies, or procedures adopted pursuant to those sections may be fined not less than one hundred nor more than five hundred dollars for a first offense. For each subsequent offense, the home may be fined not less than two hundred nor more than one thousand dollars.

A violation of *sections 3721.10 to 3721.17 of the Revised Code* is a separate offense for each day of the violation and for each resident who claims the violation.

(G) No home or employee of a home shall retaliate against any person who:

(1) Exercises any right set forth in *sections 3721.10 to 3721.17 of the Revised Code*, including, but not limited to, filing a complaint with the home's grievance committee or reporting an alleged violation to the department of health;

(2) Appears as a witness in any hearing conducted under this section or *section 3721.162 [3721.16.2] of the Revised Code*;

(3) Files a civil action alleging a violation of *sections 3721.10 to 3721.17 of the Revised Code*, or notifies a county prosecuting attorney or the attorney general of a possible violation of *sections 3721.10 to 3721.17 of the Revised Code*.

If, under the procedures outlined in this section, a home or its employee is found to have retaliated, the violator may be fined up to one thousand dollars.

(H) When legal action is indicated, any evidence of criminal activity found in an investigation under division (C) of this section shall be given to the prosecuting attorney in the county in which the home is located for investigation.

(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.

(c) Notwithstanding any law as to priority of persons entitled to commence an action, if more than one eligible person within the same level of priority seeks to commence an action on behalf of a resident or the resident's estate, the court shall determine, in the best interest of the resident or the resident's estate, the individual to commence the action. A court's determination under this division as to the person to commence an action on behalf of a resident or the resident's estate shall bar another person from commencing the action on behalf of the resident or the resident's estate.

(d) The result of an action commenced pursuant to division (I)(1)(a) of this section by a person authorized under division (I)(1)(b) of this section shall bind the resident or the resident's estate that is the subject of the action.

(e) A cause of action under division (I)(1)(a) of this section shall accrue, and the statute of limitations applicable to that cause of action shall begin to run, based upon the violation of a resident's rights under *sections 3721.10 to 3721.17 of the Revised Code*, regardless of the party commencing the action on behalf of the resident or the resident's estate as authorized under divisions (I)(1)(b) and (c) of this section.

(2) (a) The plaintiff in an action filed under division (I)(1) of this section may obtain injunctive relief against the violation of the resident's rights. The plaintiff also may recover compensatory damages based upon a showing, by a preponderance of the evidence, that the violation of the resident's rights resulted from a negligent act or omission of the person or home and that the violation was the proximate cause of the resident's injury, death, or loss to person or property.

(b) If compensatory damages are awarded for a violation of the resident's rights, *section 2315.21 of the Revised Code* shall apply to an award of punitive or exemplary damages for the violation.

(c) The court, in a case in which only injunctive relief is granted, may award to the prevailing party reasonable attorney's fees limited to the work reasonably performed.

(3) Division (I)(2)(b) of this section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action in which this section is relevant, whether the action is pending in court or commenced on or after July 9, 1998.

(4) Within thirty days after the filing of a complaint in an action for damages brought against a home under division (I)(1)(a) of this section by or on behalf of a resident or former resident of the home, the plaintiff or plaintiff's counsel shall send written notice of the filing of the complaint to the department of job and family services if the department has a right of recovery under *section 5101.58 of the Revised Code* against the liability of the home for the cost of medical services and care arising out of injury, disease, or disability of the resident or former resident.

#### **HISTORY:**

137 v H 600 (Eff 4-9-79); 140 v H 660 (Eff 7-26-84); 143 v H 822 (Eff 12-13-90); 147 v H 354 (Eff 7-9-98); 149 v H 94 (Eff 9-5-2001); 149 v H 412. Eff 11-7-2002.

LEXSTAT W VA CODE § 44A-4-1

Michie's West Virginia Code Annotated  
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\*\*\* Text Current Through 2009 Regular and First Through Fourth \*\*\*  
Extraordinary Sessions  
Annotations Current Through June 25, 2009

Chapter 44A. West Virginia Guardianship and Conservatorship Act.  
Article 4. Termination, Revocation and Modification of Appointments.

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*W. Va. Code § 44A-4-1 (2009)*

**§ 44A-4-1. Termination of appointment of guardian or conservator.**

(a) The appointment of a guardian or conservator shall terminate upon the death, resignation or removal of the guardian or conservator.

(b) The appointment further terminates upon the death of the protected person. The guardian or conservator shall file the certified death certificate of the protected person with the circuit clerk with a final report or accounting.

(c) A guardianship or conservatorship shall terminate whenever jurisdiction is transferred to another state or if ordered by the court following a hearing on the petition of any interested person.

(d) In the case of a missing person, a conservatorship shall terminate when the missing person is located or when the person's death is established by the production of a certified death certificate, or the person is presumed dead pursuant to the provisions of article nine [§§ 44-9-1 et seq.], chapter forty-four of this code.

(e) The court or the mental hygiene commissioner shall prepare a termination order dismissing the guardianship or conservatorship case and discharging any bond posted by the guardian or conservator.

(f) A termination of an appointment does not affect the liability of a guardian or conservator for prior acts or the responsibility of a conservator to account for the estate of the protected person.

**HISTORY:** 1994, c. 64; 2009, c. 107.