

IN THE SUPREME COURT OF OHIO

ORIGINAL

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

Appellants,

v.

RIVER'S BEND HEALTHCARE, et al.,

Appellees.

Case No. 2009-1484

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

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

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APPELLANTS' REPLY

Re: Proposition of Law No. I:

The substitution of a Deceased Plaintiff's Estate relates back to the filing of the Complaint.

The issue before this Court is a simple one. This Court has long characterized the issue of this case as a matter of misnomer. In short, a substitution that cures the misnomer relates back so long as no new claims are added, no new parties are added, and the defendant is not subjected to multiple judgments. *Douglas v. Daniels Bros. Coal Co.* (1939), 135 Ohio St. 641, 646-648. That is the law of Ohio.

Appellees' attempts to re-frame the issue are understandable because the law of Ohio is directly contrary to Appellees' position. The Appellees' alternative proposition, that "A action [*sic*] can be commenced only by legal entity [*sic*], either a natural or artificial person," is not the law of Ohio. Appellees' long discussion about the nature of a "natural or artificial person" may be interesting as a metaphysical inquiry, but it eschews the main issue of this case. No one disputes that a deceased person is not a legal entity. The question of this case, as in *Douglas*, is whether an incorrect designation that is later cured can relate back. *Douglas* enacted the test, *Douglas* states the law of Ohio, and *Douglas* controls this case.

Appellees' 'entity theory' has little relation to, or application in reality. None of the controlling authority cited by Appellants in their previously filed Merit Brief would have been decided as they were had the proposed entity theory been applied. See, *Douglas*, *supra*; *Kyes v. Pennsylvania R. Co.* (1952), 158 Ohio St. 362, 49 O.O.239, 109 N.E.2d 50 (Amended petition filed after the expiration of the statute of limitations by

newly appointed administratrix will relate back to the date of the filing of the original petition.) Clearly, Appellees' heavy reliance on this proposition is neither supported by the law, nor at issue before this Court as Ohio law is replete with cases filed by or against a non-entity by reason of misnomer or other deficiencies which were later amended to correct the proper name where there was no fear that the defendant would be later "haled in court to answer for the same wrong." *Douglas*, supra at 648. See, e.g., *Burwell v. Maynard* (1970), 21 Ohio St. 2d 108; 255 N.E.2d 628, 50 Ohio Op. 2d 2681, *Bar Ass'n v. Rust* (2010), 124 Ohio St. 3d 305, 921 N.E.2d 1056. *Wolf, Admin. v. The Lake Erie Western Railway Co.* (1896), 55 Ohio St. 517; 45 N.E. 708; *Bentley v. Grange Mut. Cas. Ins. Co.* (1997), 119 Ohio App. 3d 93; 694 N.E.2d 526; *Toledo Bar Ass'n v. Rust* (2010), 124 Ohio St. 3d 305, 921 N.E.2d 1056; *De Garza v. Chetister* (1978), 62 Ohio App. 2d 149, 405 N.E.2d 331; *Gottke v. Diebold* (1990), 1990 Ohio App. LEXIS 3564, (Licking Cty.).

Further, Appellees' entity theory cannot properly be at issue before the Court, since it is, in fact, a challenge to capacity, and was waived by Appellees' failure to timely and properly raise this issue. Civ. R. 9(A) makes clear that any challenge to the legal existence of any party or one's lack of capacity to sue or be sued must timely raise the defense and include a specific negative averment in their responsive pleading, or those defenses are deemed to have been waived. Here, Appellees failed to raise the issue of the capacity of Plaintiff-Appellants until moving for Summary Judgment in July of 2007, two years after the pleading misnomer was corrected.¹

¹ Supplement to Merit Brief of Appellants, 47, 53.

More specifically, Civ.R. 9(A) states, in pertinent part:

When a party desires to raise an issue as to the **legal existence of any party** or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he **shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.** [Emphasis added.]

Based on the clear language of the rule, this Court need look no further to resolve Appellees' legal entity argument since the "legal existence of any party" falls squarely within the purview of the rule. Appellees' Merit Brief asserts at page 18 that their ability to challenge capacity was preserved by the boilerplate assertions in each of their Answers.² This precise issue was recently addressed by the Second District Court of Appeals, who explained the issue as follows:

Although many Ohio courts have used "real party in interest" and "capacity to sue" interchangeably, the real party in interest requirement is to be distinguished from capacity to sue. *Guide to the Ohio Rules of Civil Procedure* 17-9, Section 17:3. Capacity to sue "refers to the eligibility of a person to commence an action. A person may be a real party in interest yet lack capacity, for example, because she is a minor or legally incompetent." *Id.* at 17-10. "

* * *

Civ.R. 9(A) governs capacity and provides in pertinent part that "[w]hen a party desires to raise an issue as to the *** capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." Thus, Civ.R. 9(A) places the pleading burden upon a defendant to deny, by specific negative averment or with particularity, a plaintiff's capacity to sue. The defense of lack of capacity to sue is typically waived when an answer only contains a general

² Supplement to Appellants' Merit Brief, p. 17 and 40.

denial and when the defense is not raised by specific
negative averment

* * *

In the case at bar, Davis raised the affirmative defense of real party in interest in his answer. ... The answer is devoid of any specific negative averment as required under Civ.R. 9(A). We therefore find that Davis waived the defense of lack of capacity.

Wanamaker v. Davis (2007) 2007 Ohio 4340, 42-44 (Ohio Ct. App., Greene County Aug. 24, 2007), cert. denied (2008) 116 Ohio St. 3d 1477; 2008 Ohio 153; 879 N.E.2d 785.

The case at hand is strikingly similar to that of *Wanamaker*. Despite Appellees' efforts to avoid the use of the term 'capacity' by their instance on framing the issue whether or not the originally named plaintiff was a "legal entity," they cannot avoid the mandates of Civ. R. 9(A). Given Appellees' failure to comply with either the pleading or the specific averment requirements of the rule, they waived their right to raise the issue at summary judgment.

Ohio Courts recognize that correction of an improper plaintiff, even one lacking capacity, can be corrected by substitution.

Whatever error could have been claimed because of the overruling of the defendant's demurrer in which the capacity of the then plaintiff to maintain the action, was challenged, must now be considered in the light of the subsequent substitution of party plaintiff.

Renner v. Pa. R.R. Co. (1951), 103 N.E.2d 832, 834 61 Ohio L. Abs. 298 (Ohio Ct. App., Columbiana County). Clearly, this Court must also consider whatever capacity challenges that Appellees could have made in light of the subsequent substitution of the correct party plaintiff.

While the issue is clearly resolved by the language and application of Civ. R.

9(A), Appellants would be remiss not to point out that Appellees' failure to properly and timely raise the issue of capacity is directly responsible for Appellants' inability to supplement the trial court record with evidentiary support in the factual record which they now assert as a basis for a finding in their favor. Specifically, Appellants were precluded from obtaining information or testimony from Marcella Christian (decedent's guardian and the originally-named plaintiff) regarding her reasons for failing to inform counsel of her mother's death prior to the filing of the original Complaint because she was also deceased by the time the issue was raised. Appellees' should not be allowed to rely on a lack of evidentiary support for Appellants' assertion that she did not understand the legal implications of her mother's death, when they waited until two years after the substitution was perfected to raise the issue. Regardless of this diversion into the factual record, however, the issue before this court is purely a legal one, to wit: Does the substitution of the proper representative of the estate relate back to the filing of the complaint?

Appellees next insinuate that Appellants perpetrated some type of fraud on the trial court by seeking substitution and filing an amended complaint.³ This allegation is both unnecessary and not made in good faith as the record clearly reflects that the trial court was provided both the date of Ethel Christian's death and letters of administration, and Suggestion of Death, all clearly indicating that Ms. Christian's death pre-dated the filing of the original complaint. Here again, Appellees attempt merely to distract the Court from the legal issue with red herring factual issues that should have been raised at the time of the filing of the Amended Complaint, not for the first time before this Court. Appellees' did not oppose Plaintiffs' (Appellants') Motion to Substitute Party, or make

³ Merit Brief of Appellees, 3-4.

any other objection or motion in response the trial court's Judgment Entry. If they truly believed that the "carefully worded" substitution was an attempt to trick the trial court, surely they could have, and should have raised the issue prior to their most recently filed Merit Brief.

As thoroughly detailed by the dissent in the Appellate Court Opinion, as well as the Merit Brief of Appellant, the lower court's majority opinion relied on a line of cases stemming from the overruled holding of *Barnhart v. Schultz* (1978), 53 Ohio St.2d 59, 7 O.O.3d 142, 372 N.E.2d 59. Appellees characterization of this Court's decision in *Baker v. McNight* (1983), 4 Ohio St.3d 125 as one that "did not disturb the core principal underlying the *Barnhart* decision" and "followed a rationale that would preserve [the *Barnhart*] principal" is completely inaccurate.⁴ This Court could not have been more precise about their intentions when holding:

We find it preferable to overrule *Barnhart* outright than to nibble away for years at the overly technical rule of law announced in that case. *Id.* at 129

It only stands to reason that the result of this Court's action in *Baker* was to completely abandon its previous holding, thereby also overruling all decisions made in reliance on it, such as those relied on by the lower court in the instant matter.

Re: 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.

As set forth clearly in the Merit Brief of Appellants, the daughter of Ethel Christian, Marcella, had the explicit statutory right to bring an action on behalf of her mother as the adult child of a nursing home resident whose rights had been violated.

⁴ Merit Brief of Appellees, 13-14.

Ohio R.C. §3721.17(I)(1) is clear and unambiguous and states:

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

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

(i) The resident's spouse;

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

(iii) The resident's guardian if the resident is a minor child;

(iv) The resident's brother or sister;

(v) The resident's niece, nephew, aunt, or uncle.

R.C. 3721.17(I)(1) [emphasis added].

Despite the specific language contained in The Nursing Home Bill of Rights, Appellees contend that Marcella did not have standing to bring suit on behalf of her deceased mother because she had not been appointed the administrator of her mother's estate. To reach this conclusion, the Appellees are clearly asking this court to insert statutory language that the General Assembly did not contemplate – a course of action this Court has repeatedly expressed its opposition to embracing. *See, generally Wheeling Steel Steel Corp. v. Porterfield* (1970), 24 Ohio St. 2d 24, 263 N.E.2d 249; *East Ohio Gas Co. v. Limbach* (1991), 61 Ohio St. 3d 363, 575 N.E.2d 132; *State ex rel. Moorehead v. Indust. Comm.* (2006), 112 Ohio St. 3d 27; 857 N.E.2d 1203; *Parkinson v.*

Limbach (1990) 49 Ohio St. 3d 163; 551 N.E.2d 200; 1990.

Besides those individuals listed above which R.C. 3721.17(I)(1) gives specific authority to commence an action under the Nursing Home Bill of Rights, the Fourth District previously found that a “sponsor,” within the meaning of the Nursing Home Bill of Rights, has standing to bring an action as provided by the statute:

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

Shelton v. LTC Mgmt. Servs. (Highland Ct. App. 2004), 2004 Ohio 507, p. 5-6. The First District Court of Appeals has agreed. *Belinky v. Drake Ctr.* (Hamilton Ct. App. 1996), 117 Ohio App. 3d 497, 503-504, 690 N.E.2d 1302.

Particularly relevant to the facts at bar, the *Shelton* court further stated that even where there has been a misnomer in the caption, the error is not fatal where it is clear from the body of the complaint that the individual person bringing the action only represents the aggrieved resident:

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

Shelton, 2004 Ohio 507, P7.

Likewise, Marcella, as the adult child of Ethel Christian, and “in her capacity as a sponsor for her mother,” was authorized to commence this action against the Defendants. In terms of determining who has standing in instances such as this, the Ohio Fourth District is not alone in placing the focus where it should be, that being whether the individuals **intent** is to “act on a resident’s behalf.” Appellees assert that the statutory language should somehow be interpreted to allow certain persons to act “prospectively” on behalf of a nursing home resident. An interpretation that allows a party to commence an action under the statute “**before** they are violated”⁵ is nonsensical, as it would obviously be completely unnecessary to commence an action under the statute where no violation of a patient’s rights had already occurred. No one would have, or need, standing to commence suit for violations or injuries before they occurred.

Finally, Appellees assertion the statute requires a showing that both the nursing home resident **and** the resident’s legally appointed representative are unable to act for the resident is not supported by law. Although the Court of Appeals acknowledged that language inserted into R.C. 3721.17(1)(1)(b) essentially overrules *Shelton*, *Shelton* did not rely on the same portion of R.C. 3721.13(B) which remains unchanged:

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

⁵ Merit Brief of Appellees, 21 (emphasis in the original).

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

The statutory language is clear, particularly: “[i]f the resident *or* the resident's legal guardian or other legally authorized representative is unable to commence an action,” then a sponsor may act. The statute uses the word “or,” not the word “and.” Had the General Assembly intended to require showings that both the resident *and* her legal representative were unable to act on her behalf, they would have written the statute to reflect that intent.

CONCLUSION

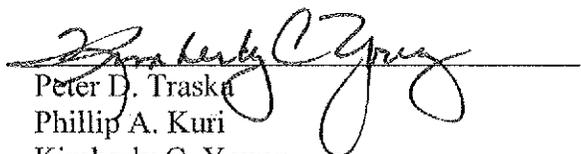
Appellees’ alternative propositions are incorrect statements of Ohio law. Appellees offer no reason to disturb the well decided, well founded, and controlling Ohio precedent on the issue of whether the substitution of an incorrectly designated nominal party relates back to the filing of the original complaint. The Appellees’ assertion that the Nursing Home Bill of Rights requires a “showing” that an appointed Administrator is unable to act on behalf of the nursing home resident would re-write the statute. This Court is not in the habit of grafting additional language onto unambiguous statutes, and should resist the Appellees’ entreaty to do so in this case.

The Appellants’ substitution of the correct Administrators of Ethel Christian’s Estate cured the Appellees’ only legitimate concern two years before the Appellees even raised the issue. The substitution ensured that the Appellees would not be subject to multiple actions or judgments, and it relates back to the filing of the original Complaint.

For these reasons, Appellants urge this Court to reverse the decisions of the lower courts, and remand this case to the Court of Common Pleas for further proceedings on the merits.

Respectfully submitted,

Phillip A. Kuri, Counsel of Record

A handwritten signature in black ink, appearing to read "Kimberly C. Young", is written over a horizontal line. The signature is cursive and stylized.

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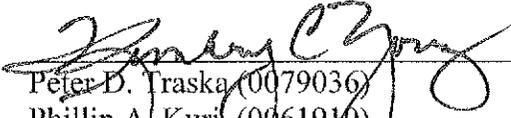
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