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IN THE SUPREME COURT OF OHIO

MENTOR EXEMPTED VILLAGE SCHOOL  
DISTRICT BOARD OF EDUCATION, et al., ) Case No. 2010-0951

Petitioners, )

-vs- )

WILLIAM MOHAT, et al., )

Respondents. )

FILED  
JUN 16 2010  
CLERK OF COURT  
SUPREME COURT OF OHIO

RESPONDENTS' PRELIMINARY  
MEMORANDUM ON CERTIFIED  
QUESTION

Now come Respondents, by and through undersigned counsel, and, pursuant to Ohio Supreme Ct. Prac. Rule XVIII, hereby submit their preliminary memorandum regarding the question certified to this Court by the U.S. District Court for the Northern District of Ohio in Mohat v. Mentor Exempted Village School District Board of Education, N.D. Ohio Case No. 1:09 CV 688.

The District Court asks the following question:

Whether, under Ohio law a wrongful death action filed on behalf of a decedent before an estate is legally established, by someone who is not a legally appointed administrator or personal representative (i.e. is without legal standing to sue on the decedent's behalf), are barred by the statute of limitations if later, after the running of the statute of limitations but before resolution of the claims, an estate is legally established and an administrator or personal representative is duly appointed and named in the Complaint - or whether the formation of the estate and the appointment of the administrator relates back

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WILLIAM MOHAT, et al., )

Respondents. )

RESPONDENTS' INITIAL  
BRIEF ON CERTIFIED  
QUESTION

)

)

Now come Respondents, by and through undersigned counsel, and, pursuant to Ohio Supreme Ct. Prac. Rule XVIII, hereby submit their initial brief regarding the question certified to this Court by the U.S. District Court for the Northern District of Ohio in Mohat v. Mentor Exempted Village School District Board of Education, N.D. Ohio Case No. 1:09 CV 688.

The District Court asks the following question:

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to the original filing of the claims.  
(Emphasis in original.)

#### PROCEDURAL AND FACTUAL HISTORY

Respondents accept the District Court's recitation of the procedural and factual history, for purposes of determining whether this Court should accept this matter for review, and incorporate the District Court's recitation of the procedural and factual history of the case as if fully rewritten.

#### LAW AND ARGUMENT

Respondents believe this Court should accept this case and answer the question posed by the District Court. Although the matter seems clear-cut, the federal court, the parties and litigants all over the state would benefit from a pronouncement by this Court as to the standards that apply to this particular situation.

The petitioners argue that all claims on behalf of Eric Mohat should be dismissed since the estate was not formed until after the statute of limitations.

However, the claims on behalf of the estate should not be dismissed as Janis Mohat is the duly-appointed administratrix of the estate and even though the estate was formed after the Complaint was filed and after the statute of limitations had run, the claims are not barred because the formation of the estate relates back to the filing of the Complaint.

In Ramsey v. Neiman, 69 Ohio St.3d 508 (1994), a father filed a wrongful death action on behalf of his daughter, who died in a house fire. He claimed to be the personal representative and duly appointed administrator of the estates of his daughter and her two children, who also died in the fire. The defendants filed a motion to dismiss, claiming the plaintiff lacked standing because he had never been appointed administrator of the estates.

The Ohio Supreme Court ruled that the plaintiff lacked standing, but only because he had never applied or been appointed administrator. "R.C. 2125.02(C) requires the personal representative to be appointed before settlement of the case." Ramsey, supra at hn 2, emphasis added.

While this Court declined to answer the then-hypothetical question of whether the appointment of the plaintiff as administrator would have related back to the date of the filing of the lawsuit had he been appointed administrator after the statute of limitations (the question raised here), this Court cited two cases in which the appointment of an administrator after the statute of limitations was permitted to relate back.

In Kyes v. Penn. Rd. Co., 158 Ohio St. 362 (1952), an ancillary administrator was appointed in Ohio before the time limit for bringing a wrongful death action had expired. The administrator's appointment was later vacated after the time limit expired, and a new administrator was substituted as the plaintiff. The court in Kyes held that the substitution was permissible because the cause of action remained unchanged and the

administrator was only a nominal plaintiff and not the real party in interest.

In Douglas v. Daniels Bros. Coal Co., 135 Ohio St. 641 (1939), the plaintiff filed a wrongful death action under the mistaken belief that she had been appointed administrator of the decedent's estate. She later discovered her mistake and corrected it by seeking and obtaining court appointment to be administrator. The court in Douglas allowed her amended petition to relate back to the date of the filing of the complaint because "the cause of action set up in the petition [was] in no way affected by the corrections contained in the amendment." Douglas, supra at 647, cited in Ramsey, supra at 512.

In the concurring opinion in Ramsey, Justice Paul Pfeiffer--who was joined in the concurrence by three other justices--made the common-sense argument that should decide this issue:

I agree with the lead opinion's conclusion that R.C. 2125.02(C) mandates that a personal representative in a wrongful death case be appointed by a court before the case is settled. That is what the statute expressly requires.

I do not agree with the lead opinion's conclusion that R.C. 2125.02(A)(1) mandates that the personal representative be appointed before he or she can enter the courthouse to file a wrongful death complaint. That is not what the statute expressly requires.

Grief-stricken families spend significant periods of time deliberating whether a wrongful death action should be brought on behalf of a deceased loved one. These lengthy deliberations often result in a wrongful death complaint being filed at the last minute.

A relative who finally decides to file a wrongful death complaint must not be obligated to first go through the lengthy process of obtaining a court appointment before filing the complaint. This delay would unnecessarily jeopardize a personal representative's chances of filing the complaint within the two-year limitations period.

The language of R.C. 2125.02(A)(1) and 2125.02(C) indicates that the personal representative must be court-appointed after the complaint has been filed, but before any judgment is entered or any settlement is reached.

Summary judgment would provide the appropriate mechanism to screen out those plaintiffs who have not received court appointment after filing their complaints. In the present case, the plaintiff was not appointed as the decedents' personal representative after he filed his complaint. Thus, the trial court correctly granted defendants' motions for summary judgment, but for the wrong reason.

Ramsey v. Neiman, 69 Ohio St. 3d 508, concurring opinion.

In this case, although the facts have not been developed sufficiently because it is only at the dismissal phase, as opposed to summary judgment, the scenario is exactly as envisioned by Justice Pfeiffer. Eric Mohat had no assets at his death, and therefore the parents did not open up an estate in his name. The decision to file suit was made at the last minute relative to the statute of limitations. It was only after the filing of the lawsuit that the parents realized that in order to settle the case at some point, an estate would have to be opened. Mrs. Mohat was subsequently named administratrix of the estate, but the estate was inadvertently opened in Cuyahoga County rather than Eric's county of residence, Lake County. This was due to an error by the Mohats'

probate attorney, who subsequently corrected the error by having Mrs. Mohat named the duly-appointed administrator in the proper county.

This Court should accept this case and apply the logic and reasoning of the Justice Pfeiffer concurrence in Ramsey to these facts for the following reasons:

Unlike in Ramsey, there is an administrator to the estate. The fact that the estate was opened after the lawsuit was filed and after the statute of limitations ran should be of no consequence, because the defendants are not prejudiced by the change in the status of the plaintiffs and they were on notice as to the claims and the identities of the parties at the time the complaint was filed. As the Court said in Stone v. Phillips, 1993 Ohio App. LEXIS 3989 (Ohio Ninth Dist. App. 1993):

Ohio Rev. Code Section 2125.02(A)(1) provides, in pertinent part, that an action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death. The statute is procedural and remedial in nature and should be given a liberal construction. O.R.C. 1.11 requires that remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.

Justice abhors the loss of causes of action by pure technicalities. Trial courts liberally permit pleadings to be amended to cure a defect, so that determinations may be made on the merits. The change of the name of a plaintiff in the caption merely corrects a

formality and does not change the cause of action. The mere substitution of the name of a party entitled to bring the action for the name of one not so entitled does not change the cause of action and may be made even after the statute of limitations has run. An amendment which corrects allegations with respect to a plaintiff's capacity to sue relates to the right of action and does not affect the substantive cause of action. Therefore, substitution of parties is the proper remedy, rather than dismissal of the action.

As to the doctrine of "relation back," the general rule is that the appointment of an administrator relates back to the time of the filing of the petition. This rule appears just and equitable where a wrongful death claim may be the only asset of an estate. Relation-back is generally not applied if the defendant will be prejudiced by the introduction of a new cause of action.

Stone v. Phillips, 1993 Ohio App. LEXIS 3989 (Ohio Ninth Dist. App., (1993) at hn 1-3, emphasis added.

The Stone court specifically distinguished its ruling in Ramsey:

In Ramsey v. Neiman (Jan. 27, 1993), Summit App. No. 15786, unreported, this court denied relation-back. It appears from the facts recited in the opinion in that case, however, that the plaintiff may never have taken any steps to be appointed as personal representative, so there would have been nothing to relate back. At any rate, we chose not to extend the holding in Ramsey beyond its own facts; we do not believe that that decision mandates a similar result in this case.

Stone v. Phillips, supra at p. 4.

In DeGarza v. Chetister, 62 Ohio App.2d 149 (1978), the Ohio Sixth District Court of Appeals invoked Ohio Civ.R. 17(A) in

overturning a trial court's dismissal of an action in which the plaintiff was not properly appointed administrator of an estate.

Civil Rule 17(a), real party in interest, provides in pertinent and applicable parts as follows:

\*\*\*\*\*

"No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

\*\*\*\*\*

It has long been recognized in Ohio that the proper remedy in cases of this kind is a substitution of parties, rather than a dismissal of the action. Kyes v. Pennsylvania Rd. Co. (1952), 158 Ohio St. 362; Canterbury v. Pennsylvania Rd. Co. (1952), 158 Ohio St. 68; and H.S. Leyman Co. v. Piggly-Wiggly Corp. (1944), 45 Ohio Law Abs. 528.

DeGarza v. Chetister, 62 Ohio App.2d 149,155 (1978).

In this case, Janis Mohat has been named the administrator of the estate of Eric Mohat, so Justice Pfeiffer's reasoning should hold sway. Further, the case should be permitted to proceed on its merits as opposed to being dismissed on a technicality. This Court should accept this case and answer the federal court's question so that the questions raised in Ramsey, which were not directly answered because the facts of that case did not permit it, can be resolved definitively.

CONCLUSION

For the reasons set forth above, this Court should accept the matter for review and answer the question posed by the District Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The foregoing has been sent, via regular U.S. Postal Service mail delivery, to David Kane Smith, Esq., Britton, Smith, Peters & Kalail, 3 Summit Park Drive, Suite 400, Cleveland, OH 44131, this 18<sup>th</sup> day of June, 2010.



KENNETH D. MYERS

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