

IN THE SUPREME COURT OF OHIO

ORIGINAL

MARIAN C. WHITLEY, and PATRICIA	:	
MAZZELLA, Individually and as	:	
Co-Administrators for the Estate of	:	Case No. 2009-1484
Ethel V. Christian,	:	
	:	
Appellants,	:	
	:	On Appeal from the
v.	:	Lawrence County Court
	:	of Appeals, Fourth
RIVER'S BEND HEALTHCARE, et al.,	:	Appellate District
	:	
Appellees.	:	

APPELLANTS' MOTION FOR RECONSIDERATION
OF *SUA SPONTE* DISMISSAL

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**APPELLANTS' MOTION FOR RECONSIDERATION
OF *SUA SPONTE* DISMISSAL**

Five Justices of this Court, Justices Moyer, Lanzinger, O'Connor, Lundberg Stratton, and Pfeifer, accepted review of this case. At that time, Justice O'Donnell dissented, but he now writes a separate concurrence that would limit the application of the Court of Appeals' decision in this case to only these parties. Justices Lanzinger and Pfeifer would have accepted on the third Proposition of Law as well. That is to say, at one time or another, six of the Justices of this Court have recognized, at a minimum, that the Court of Appeals decision in this case is a questionable precedent.

A very short time before dismissing this case, this Court received a certification order and preliminary memoranda on a certified question of Ohio law from the United States District Court for the Northern District of Ohio. In the certification order, the U.S. Court stated:

The Ohio Supreme Court has clearly held that a relative who has not been legally appointed as a personal representative of the decedent's estate lacks standing to pursue an action on behalf of the estate to its conclusion. **It is less clear, however, whether, under Ohio law, someone may file suit on behalf of the estate as a sort of "place holder" to avoid being barred by the statute of limitations, so long as an estate is formed and a personal representative is appointed prior to the resolution of the action.** [Emphasis added.]

Mohat v. Mentor Exempted Village Sch. Dist. (U.S.N.D. 1/29/2010), Case No. 1:09 CV 688, Supreme Court Case No. 2010-0951.

These are not matters of opinion, that the issues of this case are unclear under Ohio law and that they frequently recur. The *Mohat* court noted that under *Ramsey v. Neiman* (1994), 69 Ohio St. 3d 508, 634 N.E.2d 211, this Court made it clear that one who is not appointed administrator cannot see a case through to completion. But four Justices of that same Court would have held that had that plaintiff actually become the

Administrator, the appointment would have related back and cured the standing problem. The *Mohat* District Court remarked further that “The lower courts in Ohio offer no additional clarity on this issue.” (Order of 1/29/2010, p. 6.)

How three Justices of this Court changed their minds after after hearing the case is inexplicable. The briefing and arguing of this case did exactly what they were supposed to do: they brought the issues into specific relief.

- When a party erroneously brings suit for a deceased ward, is the defect in the pleadings a matter of capacity to sue, an incorrect real party in interest, a matter of standing, or an incorrect “nominal party” as this Court had consistently held in the past?
- When the Estate is properly substituted, does that act relate back as this Court had said so many times in the past?
- Given the consistency of the “nominal party” cases, why is there so much confusion in the lower courts?
- Does this issue turn on whether the same person who brought the suit later becomes the administrator, whether that person is a wrongful death beneficiary, or whether there is a showing of why the estate was not opened within the statute of limitations?
- Under what circumstances is this defense—be it capacity, lack of standing, or any of the other possibilities—waived by not being pled?

These were matters of public and great general interest when this Court accepted this case. The briefing and argument in this case only served to sharpen this Court’s focus. And now a Federal District Court has certified very closely related issues in the

Mohat case.

The briefing and argument herein did not somehow make this case of lesser public and general interest. Even Justice O'Donnell, who originally dissented on taking this case, recognizes that the Fourth District's Opinion in this case will continue to breed confusion when it is cited.

This case is actually an ideal and important companion to the *Mohat* case. In addition to claims belonging to the Estate, *Mohat* is also a wrongful death case. At page six of its Memorandum Addressing Certified Question of Law, the Defendant School District argues strenuously that this is not a real party issue, not a standing issue, but is instead a capacity issue. This is precisely the same question Justice Lanzinger posed at oral argument in this case, and that several Justices of this Court found to be difficult. If it is a difficult and recurring legal question, then it is a matter of public and great general interest. This case was not reviewed "improvidently."

The Defendant School District in *Mohat* is arguing that variations in this issue distinguish it from this Court's precedents. There was a long time, however, when Ohio law on this matter was stable, because courts knew to follow *Douglas v. Daniels Bros. Coal Co.* (1939), 135 Ohio St. 641, 22 N.E.2d 195. The "nominal party" construct of *Douglas* and its progeny worked well when this Court applied it to different variations of this issue. It worked just fine for wrongful death claims as well as survivorship claims. In fact it worked just fine until the lower appellate courts stopped following it. See *Levering v. Riverside Hospital* (1981), 4 Ohio St.3d 125, 447 N.E.2d 59, and its progeny.

The result is that this Court is likely to cover much of the same ground because a Federal District Court rightly identified that Ohio law in this area is a mess. The overlap

in issues between *Mohat* and this case is undeniable. Counsel for River's Bend in this case began his oral argument by saying that Ohio needs a "rule of law" to govern these situations consistently. That much is agreed. Even though *Douglas* announced that rule, now it is simply not a matter of opinion that Ohio courts, and Federal courts interpreting Ohio law, are struggling with how Ohio law treats a complaint erroneously brought on behalf of a deceased person, or her beneficiaries, but not through the administrator.

There is no reason for *Douglas*'s approach not to stay in force. So long as there are no new claims, no new parties, and no potential for defendant to be dragged into court twice for the same wrongs, a substitution of the correct party relates back. It is actually the substitution of the correct prosecuting party that *ensures* that the defendant is not subject to multiple suits. *Douglas* and Ohio Civil Rule 1(B) says about the same thing. This Court has the power to roll back either *Douglas* or Rule 1(B), but has not done so. The disposition of the Appellants' claims herein on a technical problem that was actually corrected ought to be repugnant to this Court, as it was in the past.

The *Mohat* court is now part of the chorus of Ohio Courts that cannot find clear answers in Ohio case law. *Mohat* is just another demonstration that Ohio law needs clarification. And because the issues in this case are both similar and distinct from those in *Mohat*, these two cases together provide the ideal opportunity to provide the guidance Ohio courts need on all of the permutations of this issue.

CONCLUSION

Through argument and through the certification of the *Mohat* case, the issues presented here have only proved to be of greater public and general interest since the time this Court accepted review of this case. This Court should reconsider its *sua sponte* dismissal, and reinstate this case. Appellants urge reconsideration under S. Ct. R. Prac. XI Sec. 2 (B)(2).

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of this Motion for Reconsideration was sent by First Class U.S. mail to Counsel for Appellees on 23rd day of July, 2010:

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