

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

APPELLEE'S MEMORANDUM OPPOSING MOTION
FOR RECONSIDERATION OF DISMISSAL

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The Court has dismissed this appeal as improvidently granted. Appellants have moved the court to reconsider its decision.

The Court's rule regarding reconsideration motions requires that the supporting argument be limited to the grounds for reconsideration and not constitute a reargument of the case. Appellants' argument on reconsideration is that the lower courts have departed from the decision in *Douglas v. Daniels Bros. Coal Co.* (1939), 135 Ohio St. 641, and the Court should use this case to hold that a complaint naming the decedent as a plaintiff that is filed after an administrator has been appointed is legally effective. This is, of course, the argument appellants made in their merit brief and at the oral argument.

The only thing new that appellants have offered is the federal court certified question in *Mohat v. Mentor Exempted Village School Dist. Bd. of Edn.*, Case No. 2010-0951, which was filed in June of 2010. The certified question in *Mohat* concerns the effect of a wrongful death complaint filed prior to the appointment of an administrator of the estate. Since the joint administrators in this case had been appointed months before the case was filed, a decision here would not answer the certified question.

Appellants reargue their claim that there is "confusion" in the lower courts on whether a complaint filed in the name of a decedent has legal effect. In fact, the lower courts agree that the filing of a complaint in the name of a decedent is a nullity. See *Simms v. Alliance Comm. Hosp.*, Stark App. No. 2007-CA00225, 2008-Ohio-847; *Estate of Newland v. St. Rita's Med. Ctr.*, Allen App. No. 1-07-53, 2008-Ohio-1342; and *Levering v. Riverside Methodist Hospital* (1981), 2 Ohio App.3d 157.

On page 2 of their memorandum, appellants write that the issues of this case "frequently recur." Not so. The issue here was whether a personal injury complaint filed in the name of

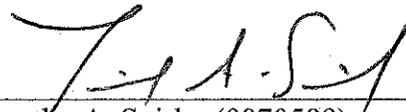
someone who had already died and that alleges the plaintiff is still living is effective to save a survival action under a relation-back argument when plaintiff later substitutes the administrators as plaintiffs after the statute of limitations has passed. Not only had the plaintiff already died when the complaint was filed but the co-administrators had even been appointed.

Appellants' time-bar problem arises out of very rare circumstances caused by erroneously filing a lawsuit for a deceased person. A lawyer can confirm whether his plaintiff client is living before filing the complaint. There was no claim here of any hardship in making that inquiry. Further, the co-administrators never explained their failure to file this case in a timely fashion, separate and apart from the invalid actions of the terminated guardian.

The rarity of the circumstances giving rise to this case was fully exposed through the briefing on the merits and at oral argument. Justice O'Donnell's separate concurring opinion underscores the unique nature of the facts of this case and the problems that would arise in using it to state principles that would fit other situations.

The Court was correct in dismissing this appeal. Appellants' reconsideration motion is an improper reargument of the case and the Court should deny the motion.

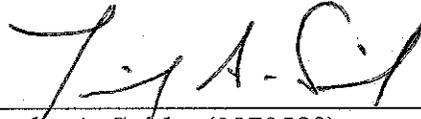
Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Appellee's Memorandum Opposing Motion for Reconsideration of Dismissal* 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 30th day of July, 2010.



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