

IN THE SUPREME COURT OF OHIO

WILLIAM MOHAT, <i>et al.</i> ,)	Case No. 2010-0951
)	
Plaintiffs-Respondents,)	On Review of Certified Question from
)	The United States District Court for the Northern
v.)	District of Ohio, Eastern Division
)	
MENTOR EXEMPTED VILLAGE)	U.S. District Court Case No. 1:09 CV 688
SCHOOL DISTRICT BOARD OF)	
EDUCATION, <i>et al.</i> ,)	
)	
Defendants-Petitioners.)	

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I. STATEMENT OF THE FACTS

Plaintiffs-Respondents William and Janis Mohat (“Plaintiffs” or “Plaintiff Parents”) allege their son Eric Mohat (“Eric”) was bullied by fellow students at Mentor High School. (First Amended Complaint [“Am. Compl.”], ¶¶ 9-10, SUPP. 23). Plaintiffs allege Defendants-Petitioners Mentor Exempted Village School District Board of Education, Superintendent Dr. Jacqueline Hoynes, high school principal Joseph Spiccia, and Eric’s math teacher Thomas Horvath (“Defendants”) “knew or should have known” about the harassment. (Am. Compl. ¶ 12, SUPP. 24). Plaintiffs further claim Defendants were deliberately indifferent to Eric’s rights, as two other students in Eric’s class allegedly committed suicide, in part, because of “issues stemming from bullying and harassment received in school.” (Am. Compl. ¶ 16, SUPP. 24). As such, Plaintiffs allege Defendants’ “actions and omissions” caused Eric to become so depressed that he committed suicide on March 29, 2007. (Am. Compl. ¶¶ 8, 20, SUPP. 23, 25).

On March 26, 2009, Plaintiffs filed suit in the United States District Court, Northern District of Ohio, alleging that all Defendants: (1) violated the substantive and procedural due process clauses of the Fourteenth Amendment of the United States Constitution via 42 U.S.C. 1983; (2) violated Title IX, 20 U.S.C. 1681; (3) committed negligence and/or gross negligence; and (4) violated R.C. 2744.02(A)(6) by committing wanton and reckless acts with malicious purpose and in bad faith.¹ (Complaint [“Compl.”] ¶¶ 25-36, SUPP. 6-8). Plaintiffs Parents filed these claims on their own behalf and on behalf of the estate of Eric Mohat. (Compl. at caption). On the date of filing, however, neither Plaintiff Parent had been named personal representative of

¹ In their Response to Defendants’ Motion for Judgment on the Pleadings, Plaintiffs concede that many of their claims lack merit, including: (1) their procedural due process claim; (2) their Title IX claim against Defendant Board; (3) the Title IX claim filed on behalf of William and Janis Mohat individually; and (4) Plaintiffs’ state claims against Defendant Board.

Eric's estate, nor had anyone else. The estate did not exist. (Order Certifying Question of Law, APPX. 3).

On May 18, 2009, Defendants filed their Answer, explaining that Eric's estate did not exist and, therefore, neither William nor Janis Mohat had been named personal representative of that estate. (Answer ¶ 1, SUPP. 10). On June 18, 2009, the parties attended a case management conference with Northern District of Ohio Judge Donald C. Nugent, and only then did Plaintiffs admit to their failure to create an estate.

In an effort to rectify Plaintiff Parents misrepresenting their capacity to file suit on behalf of a non-existent estate, Plaintiffs attempted to establish Eric's estate more than two years after his death – on June 25, 2009 – by filing to create an estate in Cuyahoga County Probate Court. (Order Certifying Question of Law, APPX. 3) Cuyahoga County Probate Court named Janis Mohat personal representative of the estate on that day. Eric, however, did not reside in Cuyahoga County; his address was 8623 Hilltop Drive, Mentor, Ohio, located in Lake County, Ohio. Plaintiffs, therefore, did not establish the estate in the court with legal authority to create the estate when they filed in Cuyahoga County Probate Court.

On September 16, 2009, Defendants filed their Motion for Judgment on the Pleadings, arguing the federal court could dismiss all of Eric's estate's claims, because the estate was never established in the court with subject-matter jurisdiction over Eric's estate and because, even if Cuyahoga County had been the proper court, the estate's claims were time-barred. On November 1, 2009, Plaintiffs filed their Response to Defendants' Motion for Judgment on the Pleadings. On November 27, 2009, Plaintiffs also filed a Supplement to their Response Brief, explaining that on November 9, 2009, Plaintiffs filed to create Eric's estate for a second time,

this time in the court with subject-matter jurisdiction over the estate: Lake County Probate Court. (Plaintiffs' Supplement in Response to Motion to Dismiss, SUPP. 38-40).

On January 28, 2010, Judge Nugent issued an Order Certifying Question of State Law to the Ohio Supreme Court. (Order Certifying Question of Law, APPX. 1-8). Specifically, Judge Nugent asks this Court to decide whether Eric's estate's claims are time-barred, as Plaintiff Parents filed suit on behalf of his estate, which did not exist, and only after the estate's claims' statutes of limitations expired was Plaintiff Janis Mohat named personal representative of Eric's estate.

On June 16, 2010, both parties filed their Preliminary Memoranda, asking this Court to decide the certified issue. Defendants, however, asked the court to answer a modified version of the federal court's question. On August 25, 2010, this Court determined that it would answer the following modified question, as stated in Defendants' Preliminary Memorandum:

Whether, under Ohio law **an 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 **the capacity** 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 to the original filing of the claims.

(Defendants' Preliminary Memorandum, 1).

II. ARGUMENT

In a justice system where defendants are not presumed to be liable for civil claims, it is illogical and patently unfair to allow plaintiffs to circumvent statutes of limitations by filing suit on behalf of an estate when the plaintiffs have no capacity to do so and, in fact, when that estate does not exist. That is exactly what happened here, when Plaintiffs filed suit on behalf of their

son's non-existent estate three days before the estate's claims' two-year statutes of limitations expired. Plaintiffs did this despite well-established Ohio case law holding that only the personal representative has the capacity to sue on behalf of an estate. This Court should not permit Plaintiffs to avoid the statutes of limitations by allowing a subsequent appointment as the estate's personal representative to relate back to the initial filing date. Instead, the Court should hold that an individual must have the capacity to sue on behalf of an estate as the estate's personal representative and do so within the statutory time period for the estate's claims to survive a motion to dismiss for lack of capacity. To hold otherwise nullifies the requirement to sue within a statutory time period, may subject defendants to multiple suits, and requires defendants to expend the time and money necessary to litigate a case that the plaintiff had no capacity to bring, and may never have the capacity to bring.

A. Proposition of Law No. 1:

Individuals who are not appointed personal representative of an estate that, in fact, does not exist lack the capacity to sue on the decedent's behalf.

Ohio law is clear: only an estate's personal representative – not the decedent's heirs – have the capacity to sue on behalf of the estate. *See McBride v. Vance* (1906), 73 Ohio St. 258, 262, 76 N.E. 938. Capacity relates to a party's personal or official right to litigate the issues presented in the pleadings. *Federal Practice and Procedure, Wright-Miller-Kane, Volume 6A, Section 1542, p. 327. Lack of capacity to sue deprives a party of the right to come into court. Id.; Kovacs v. Aetna Life Ins. Co.* (April 21, 1994), 8th Dist. No. 65295, 1994 Ohio App. LEXIS 1699, *10, fn 1; *Ses v. Scott* (Dec. 11, 1981), 6th Dist. No WD-81-44, 1981 Ohio App. LEXIS 10390, (appellate court affirming trial court's dismissal of case by holding that an unincorporated entity had "no capacity to bring its action initially and amendment of the complaint to substitute another party cannot correct this initial defect"); *Security Pacific Financial Services, Inc. v.*

Duncan (1988), 44 Ohio Misc. 2d 21, 22, 541 N.E.2d 638 (explaining that person adjudicated mentally incompetent is without capacity to sue).

Plaintiffs do not dispute that they did not have the capacity to sue on behalf of Eric's estate when they filed in federal court on March 26, 2009, three days before the estate's claims' two-year statutes of limitations expired.² Despite this, Plaintiffs' Complaint states that both parents were filing "on their own behalf and on behalf of the estate of Eric Mohat," although the estate did not exist and Plaintiffs clearly were not named personal representatives of that non-existent estate. (Complaint at ¶ 3, SUPP. 3). Thus, neither Plaintiff had the capacity to sue on behalf of the estate when they did.

Apparently recognizing that error, Plaintiffs filed their First Amended Complaint on July 14, 2009, stating that Janis Mohat was now suing "on her own behalf and as Administratrix of the Estate of Eric Mohat on behalf of the Estate." (Am. Compl. at caption, ¶ 1, SUPP. 21). Plaintiffs, however, misrepresented Janis Mohat's status as administratrix of the estate, as a properly created estate still did not exist on July 14, 2009. Instead, Plaintiffs filed to create an estate in The Probate Court of Cuyahoga County, Ohio, which did not have subject-matter jurisdiction over the estate, as Eric resided in Mentor, Ohio, located in Lake County, Ohio. Plaintiffs, therefore, did not establish the estate in the court with legal authority to create the

² In fact, the certified question this Court chose to answer assumes only personal representatives have the capacity to sue on behalf of an estate. The question asks "[w]hether, under Ohio law an 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 the capacity to sue on the decedent's behalf*)" (emphasis added). The question, therefore, identifies the estate's personal representative as the individual with the capacity to sue in the foregoing "i.e." parenthetical.

estate when they filed in Cuyahoga County; thus, the estate was void.³ Plaintiffs still lacked the capacity to sue nearly four months after filing their Complaint and nearly four months after the statutes of limitations expired.

In fact, Plaintiffs waited until November 9, 2009, to create the estate in Lake County, Ohio, naming Plaintiff Janis Mohat as personal representative of the estate. Seven months after the statutes of limitations expired, she finally had the right to come into court, despite twice representing to the court that she had the authority to do so before that date.

B. Proposition of Law No. 2:

An individual being named personal representative of an estate after the estate's claims' statutes of limitations expire does not relate back to the original filing of claims and, therefore, the estate's claims are time-barred.

This Court should hold that an individual must have the capacity to sue on behalf of an estate as the estate's personal representative and do so within the statutory time period for the estate's claims to survive a motion to dismiss for lack of capacity. The subsequent formation of the estate and appointment of a personal representative should not relate back to the original filing date.

1. *The doctrine of relation back should not be used to reward Plaintiffs for failing to file suit, with the capacity to do so, within the statutory time period or to reward Plaintiffs for misrepresenting to the Court their authority to sue on behalf of an estate that, in fact, did not exist.*

³ Ohio Revised Code 2113.01 states that, “[u]pon the death of a resident of this state intestate, letters of administration of his estate shall be granted by the probate court of the county in which he was a resident at the time he died.” (emphasis added). Where an estate is filed in a probate court other than “the county in which [the decedent] was a resident,” that probate court lacks subject-matter jurisdiction, and the decedent’s estate is subject to collateral attack and void. *Black v. Aristech Chemical Co.*, 4th Dist. No. 07CA3155, 2008-Ohio-7038 (holding that “R.C. 2113.01 is a subject-matter jurisdiction statute, and probate court’s judgment exercising jurisdiction over a nonresident decedent’s estate is void and thus subject to collateral attack”); *See In re Anderson*, 7th Dist. No. 05MO14, 2007-Ohio-1107 (holding that decedent was county resident; thus, court has jurisdiction to administer estate).

This Court should follow the rules established by the Second District and Fifth District Courts of Appeals in *Wanamaker v. Davis* and *Gottke et al. v. Diebold, Inc.*, respectively, which explain that individuals cannot sue without the capacity to do so to avoid running afoul of the estate's claims' statutes of limitations. *Wanamaker*, 2nd Dist. No. 2005-CA-151, 2007-Ohio-4340, ¶ 10 (discussed below); *Gottke* (Aug. 9, 1990), 5th Dist. No. CA-3484, 1990 Ohio App. LEXIS 3564 (discussed below). In *Wanamaker*, the appeals court rejected the personal representative's argument that re-opening an estate after the statute of limitations ran relates back to the estate's original filing date. 2007-Ohio-4340 at ¶ 10. The plaintiff was appointed personal representative of her father's estate, the estate closed, the plaintiff filed a malpractice suit on behalf of the estate, and then the statute of limitations ran. *Id.* at ¶ 5. Apparently realizing that she lacked the capacity to sue when she did, the plaintiff convinced the probate court to re-open the estate and back-date her appointment to the original filing date. *Id.* at ¶ 6. The plaintiff argued that the re-opening related back to the original filing date and, therefore, she had the capacity to sue on behalf of the estate. *Id.* at ¶ 8. The court of appeals rejected the plaintiff's relation back argument, explaining that the plaintiff lacked the capacity to sue when she filed the original complaint and that the subsequent re-opening of the estate, therefore, could not relate back to a time before the statute of limitations ran. *Id.* at ¶¶ 9-11.

The *Wanamaker* court distinguished *Douglas v. Daniels Bros. Coal Co.*, a case Plaintiffs may rely upon, where a widow thought she was appointed personal representative of her deceased husband's estate, although she was not, and filed suit on behalf of that *open estate*. *Id.* at ¶ 27, citing *Douglas* (1939), 135 Ohio St. 641, 15 O.O. 12, 22 N.E.2d 195. Under those circumstances, this Court held the widow's subsequent appointment related back to the day she filed the original complaint—a day before the statute of limitations ran. *Id.* In *Wanamaker*,

however, the appeals court explained that there was no mistake regarding appointment, and the estate was not open when the plaintiff filed her complaint. *Id.* at ¶¶ 8-11. Thus, the subsequent appointment did not relate back, and the plaintiff lacked the capacity to sue on behalf of the estate. *Id.* at ¶¶ 10-11.

In *Gottke*, the plaintiff filed suit “individually, and as the personal representative of” the decedent’s estate. 1990 Ohio App. Lexis 3564 at *1-2. The plaintiff, however, misrepresented her status to the court, as the decedent’s husband was the estate’s administrator. *Id.* at *2. The trial court granted the defendant’s motion to dismiss the claim, as the plaintiff lacked standing to file the action. *Id.* at *3. The appeals court affirmed the trial court’s decision, holding that “[w]e conclude that an action for wrongful death must be brought in the name of the personal representative.” *Id.* at *6. Moreover, “the doctrine of relation back does not apply where the plaintiff misrepresents his/her capacity, and fails to procure appointment within the time prescribed by the appropriate statute of limitations, or file ‘in the name of’ the personal representative.” *Id.*

Here, each of Eric’s estate’s claims has a two-year statute of limitations. *See Coeey v. Strickland* (C.A. 6, 2007), 479 F.3d 412 (42 U.S.C. 1983); *Giffin v. Case Western Reserve Univ.* (C.A. 6, 1999), 181 F. 3d 100 (Title IX); R.C. 2305.10(A) (negligence). Like in *Wanamaker* and *Gottke*, Plaintiffs filed suit on behalf of Eric’s estate, the applicable statutes of limitations ran, and then Plaintiff Janis Mohat was appointed personal representative of the estate. Specifically, Plaintiffs filed the original Complaint on March 26, 2009, and the statutes ran two years after Eric’s death, on March 29, 2009. Janis Mohat was not appointed personal representative of Eric’s estate by the court with subject-matter jurisdiction over the estate, Lake County Probate Court, until November 9, 2009, more than seven months after the statutes expired. Like in

Wanamaker, the subsequent filing of the estate should not relate back, as Plaintiffs lacked the capacity to sue on March 26, 2009. That is especially true here, where Plaintiffs' Complaint misrepresented that Eric's estate existed, and where Plaintiff Janis Mohat misrepresented her status as administratrix of a legally established estate in the Amended Complaint. Thus, unlike in *Douglas*, Plaintiffs cannot allege they mistakenly thought one of Plaintiff Parents was appointed personal representative of an existing estate. Having not even established the estate until well over two years after Eric's death, the claims are untimely and must be barred.

Plaintiffs may attempt to rely on a number of Ohio cases in support of their position that the subsequent appointment of Plaintiff Janis Mohat relates back to the complaint's original filing date. Those cases, however, are distinguishable. In *Ramsey v. Neiman*, a father sued for wrongful death on behalf of his deceased daughter and grandchildren. (1994), 69 Ohio St.3d 508, 634 N.E.2d 211, 213. The father claimed in his complaint to be the personal representative of his daughter's estate, even though he was never appointed representative. *Id.* The trial court granted the defendants' motion to dismiss and the appeals court and this Court affirmed, with the lead opinion holding an estate's cause of action must be brought by and in the name of its court-appointed personal representative. *Id.* at 211, 214 (holding in context of wrongful death suit).⁴ In addition, the father argued that if he were appointed the estate's representative, then that appointment should relate back to the date he filed the complaint, even though the statute of limitations had run on the estate's claim. *Id.* at 214. The Court refused to address this, stating "we cannot decide the question whether [the father's] appointment will relate back to the date he

⁴ The concurring opinion, joined by three justices, disagreed with the lead opinion that the personal representative must be appointed before a suit is properly filed. *Id.* at 214-215. The concurring justices stated, in dicta, that an individual must be named personal representative before the case is settled or judgment is entered, but not necessarily before that time. *Id.* at 215. This analysis, however, relied on the text of the wrongful death statute, which does not apply here.

filed his complaint because the question is based on an assumed set of facts,” since the father was not named the estate’s representative at any time during the pendency of the case. *Id.* Thus, the Court “decline[d] to hold that appellant’s future appointment as personal representative of the decedent’s estate—should such an appointment ever occur—will relate back to the date he filed his complaint.” *Id.* *Ramsey* specifically declined to answer the question at issue in this case and, therefore, does not apply.

Plaintiff may also rely on *Kyes v. Pennsylvania RR. Co.*, a 1952 case that the *Ramsey* lead opinion identified and, in dicta, rejected as support for the father’s argument that his subsequent appointment should relate back to the complaint’s filing date. *Id.* at 214, citing *Kyes v. Pennsylvania RR. Co.* (1952), 158 Ohio St. 362, 49 O.O. 239, 109 N.E.2d 503. In *Kyes*, an ancillary personal representative filed suit on behalf of the decedent’s estate before the wrongful death claim’s statute of limitations expired. *Id.* at 504. *The estate, therefore, was open before the complaint was filed and the personal representative of the estate filed suit.* The representative’s appointment was vacated after the time limit ran, and the proper individual was substituted as personal representative of the estate. *Id.* The lower courts held that the substitution was proper, and this Court affirmed, explaining that the cause of action remained the same and the representative was not the real party in interest. *Id.* at 505.

Here, *Kyes* does not apply. Unlike in *Kyes*, neither Janis nor William Mohat were appointed Eric’s estate’s representative before filing their complaint. They were also not appointed representative before the statutes of limitations expired on the estate’s claims. Moreover, the *Ramsey* court in dicta recognized that *Kyes* should be limited to its facts, explaining that “*Kyes* addressed the substitution of one appointed plaintiff for another” meaning, one plaintiff with the capacity to sue at the time of filing being appointed for another.

See Ramsey, 634 N.E.2d at 214. There is, likewise, no justification for this Court to expand the decision beyond its facts.

Plaintiffs may also cite to *Stone v. Phillips*, where a mother sued on behalf of her deceased children's estate, erroneously claiming she was the estate's administrator. (Aug. 11, 1993), 9th Dist. No. 15908, 1993 Ohio App. LEXIS 3989, *2. The trial court granted the mother leave to amend the case caption by substituting the name of her attorney as administrator of the estate. *Id.* It is unclear from the court's opinion whether the substitution occurred after the estate's claim's statute of limitations expired, as the court did not analyze the issue in depth. The court compared *Stone* to *Ramsey*, explaining that *Ramsey* did not apply because the *Ramsey* plaintiff never took "steps to be appointed as personal representative, so there would have been nothing to relate back." *Id.* at *9. (*Ramsey*, of course, does not apply here, as the court specifically declined to answer the question at issue in this case.). The *Stone* court, therefore, analyzed whether a caption change would relate back to the complaint's original filing date as opposed to answering the more substantive question of whether a court should disregard the statute of limitations when an estate is filed after the limitations period expired.

Assuming the trial court in *Stone* allowed a caption change after the statute of limitations expired, this Court should note that no Ohio court has relied on *Stone* for that issue since it was decided in 1993. Other courts have, instead, re-affirmed that the statute of limitations' purpose is fairness to both sides. "Once a plaintiff knows of an injury and the cause of the injury, the law gives the plaintiff a reasonable time to file suit." *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 2002-Ohio-2007, ¶ 19, 766 N.E.2d 977.

Here, Plaintiffs had two years to file suit on behalf of Eric's open estate, which they failed to do. Plaintiffs will likely argue that this Court should ignore that fact, because

Defendants will not be prejudiced by this failure. Plaintiffs cannot, however, avoid the effect of a statute of limitations by showing that a defendant in a particular case is not affected by the inability to defend itself against stale claims. *Theobald v. Univ. of Cincinnati*, 10th Dist. No. 09AP-269, 2009-Ohio-5204, ¶ 19. Plaintiffs should not be rewarded for repeatedly failing to create an estate within the statutes of limitations.

Finally, Plaintiffs may rely on this Court's recent decision in *Toledo Bar Assoc. v. Rust*, where the Board of Commissioners on Grievances and Discipline recommended that this Court suspend an attorney's license, but stay the suspension on conditions, because the attorney filed a wrongful death action on behalf of the estate's administrator without obtaining the Administrator's authority to file suit. 124 Ohio St.3d 305, 2010-Ohio-170, ¶ 1, 921 N.E.2d 1056. The attorney filed suit without this authority because the wrongful death statute of limitations was set to expire in one week or ten days. *Id.* at ¶ 6. Although the attorney attempted to have himself appointed as administrator and named as plaintiff in the lawsuit after the statute of limitations expired, the common pleas court dismissed the wrongful death action. *Id.* at ¶¶ 7-12.

This Court held that the attorney had at least "an arguable basis in law and fact that was not frivolous for filing the claim," because precedent "at least arguably permitted [the attorney] to file the action to avoid the statute of limitations for wrongful-death actions and to then obtain his client's appointment under the statute as the administrator" *Id.* at ¶¶ 2, 13. In making this decision, this Court examined most of the cases discussed above to determine whether wrongful death suits need only be brought "in the name of" the personal representative, as opposed to "by" the personal representative.

Here, unlike in *Toledo Bar Assn.*, suit was not brought "in the name of" the administrator nor by the administrator, as no administrator existed on the day Plaintiffs filed suit. Moreover,

this Court did not decide the issue addressed in this case, but, instead, examined whether an attorney accused of misconduct had some cognizable argument for filing suit on behalf of an administrator who objected to the suit. It is certainly telling, however, that the Board of Commissioners on Grievances and Discipline went so far as to recommend that the *Toledo Bar* attorney's license be suspended for filing suit on behalf of an estate without authority to avoid the statute of limitations.

2. *Plaintiff Janis Mohat's appointment cannot relate back to the original filing date, as the original lawsuit was a nullity.*

An alternative line of Ohio case law explains that the relation back doctrine does not apply when the original suit was not filed by a natural or legal person. Those cases address lawsuits filed by a deceased person, i.e., those who do not legally exist. That same analysis applies here, where Plaintiff filed suit on behalf of an estate that did not legally exist at that time, making the initial filing a "nullity" to which the amended complaint cannot relate back.

In *Whitley v. River's Bend Health Care*, a daughter, as guardian of her mother, filed suit on behalf of her mother. 183 Ohio App. 3d 145, 2009-Ohio-3366, 916 N.E.2d 515. The mother, however, had died two months before the lawsuit was filed. 2009-Ohio-3366 at ¶ 15, fn 4. The trial court subsequently allowed the estate to be substituted as a party, and the plaintiff estate voluntarily dismissed the case. *Id.* at ¶ 4. The plaintiff estate re-filed within the time period allotted by the savings statute, but after the initial one-year statutory period expired. *Id.* at ¶ 5. The defendants filed a motion for summary judgment, arguing that the action was time-barred. *Id.*

The trial court granted that motion, and the appellate court affirmed, explaining that the initial lawsuit was a "nullity," since it was not filed on behalf of a natural person. *Id.* at ¶¶ 7, 12-17. The court explained that in *Barnhart v. Schultz*, the Ohio Supreme Court affirmed summary

judgment in favor of an estate's personal representative who was substituted as a party to a lawsuit in place of the decedent after the statute of limitations expired. *Id.* at ¶ 12, citing *Barnhart*, (1978), 53 Ohio St.2d 59, 372 N.E.2d 589. "The Ohio Supreme Court noted that the decedent died before the complaint against her was filed and that parties to a lawsuit must 'actually or legally' exist in order to have the capacity to be sued. In ruling that the action was, in essence, a nullity, the Court held that the substitution of the administrator for the decedent did not preserve the action for purposes of the limitations period as 'there [was] nothing to amend.'" *Id.*

The appeals court further explained that, although this Court overturned *Barnhart* in *Baker v. McKnight*, it was overturned because naming the decedent, rather than the decedent's estate, *as defendant*, is "a technical 'misnomer' in pleading" *Id.* at ¶¶ 13-14, *Baker*, (1983), 4 Ohio St.3d 125, 4 O.B.R. 371, 447 N.E.2d 104. The issue in *Whitley*, the appeals court stated, was not a technical misnomer, but squarely addressed "the legal authority for a plaintiff to commence an action in the first instance," i.e., the plaintiff's capacity to sue. *Id.* at ¶ 14. Thus, because the guardian did not have legal authority to sue because her mother had passed away, the initial lawsuit was null and void. *Id.* at ¶¶ 12-17. The subsequent lawsuit, therefore, was the first suit filed by a viable plaintiff in the case, and the statute of limitations had passed when that second suit was filed.⁵ *Id.*

Likewise, the Fifth District Court of Appeals also held that a suit filed on behalf of a decedent—i.e., a person that does not actually or legally exist—is a nullity. *Simms v. Alliance Community Hosp.*, 5th Dist. No. 2007-CA-00225, 2008-Ohio-847, ¶ 22. The court explained

⁵ This Court accepted jurisdiction to review the appellate court's decision in *Whitley*, but ultimately dismissed the appeal as improvidently accepted. *Whitley v. River's Bend Health Care*, 126 Ohio St. 3d 1217, 2010-Ohio-3269, 931 N.E.2d 583.

that *Barnhart* and *Baker* only apply to suits filed *against* a decedent, as a plaintiff might not know an individual has died on the date of suit. *Id.* The Third District Court of Appeals also recently held that a lawsuit filed on behalf of a deceased plaintiff is a “nullity” and, therefore, a subsequent suit could not relate back to the first lawsuit filed by the decedent. *Estate of Newland v. St. Rita's Med. Ctr.*, 3rd Dist. No. 1-07-53, 2008-Ohio-1342, ¶ 22.

Likewise, in this case, this Court should hold that Plaintiff Parents’ initial lawsuit filed on March 26, 2009, was a “nullity,” because they filed on behalf of “the estate of Eric Mohat,” when that estate did not exist. As stated in *Whitley*, plaintiffs must actually or legally exist to be the viable plaintiff in a lawsuit. This Court’s reasoning in *Baker* to overturn *Barnhart* should apply – and among the appellate courts, has applied – only to suits filed *against* decedents, as a deceased or legally non-existent plaintiff is materially different from a deceased defendant. Specifically, this Court in *Baker* found that it would be an “unnecessarily severe rule” to punish an innocent plaintiff who filed a complaint without knowing the defendant had already died. 4 Ohio St.3d at 129. There is no such concern regarding claims being brought on behalf of decedents, as counsel should know whether his client is deceased, and then open an estate to sue on the decedent’s beneficiaries’ behalf via the estate’s personal representative. That is particularly true here, where Plaintiffs’ attorney knew no estate existed, but filed suit on its behalf anyway.

3. *The relation back doctrine should not be utilized to gut the requirement to file within the statutory time period or to prejudice defendants forced to litigate a case against a plaintiff that may never gain the capacity to sue on behalf of an estate.*

For numerous policy reasons, this Court should hold that individuals cannot sue on behalf of non-existent estates to avoid running afoul of the estate’s claims’ statutes of limitations. First, to hold otherwise would allow for the indefinite extension of an estate’s claims’ statutes of

limitations, thereby gutting the requirement that the proper party must file suit within the allotted statutory time period. Were this counter-intuitive rule to exist, individual plaintiffs would have, for example, only two years to file federal civil rights suits or two years to file Title IX suits. Those seeking damages on behalf of a decedent would have two years to file suit without the capacity to sue, plus some undefined additional time period to get the necessary capacity by being named personal representative of the decedent's estate.

Of course, that individual suing on behalf of the estate may *never be named personal representative of the estate*. There is certainly no guarantee the individual plaintiff will be appointed to that position. In the interim, defendants in these suits will expend time, resources, money, and energy on a lawsuit brought by a plaintiff that may never have legal capacity to sue. In fact, multiple individuals could file suit "on behalf of the estate," requiring defendants to defend those suits until a probate court decides who is the proper personal representative of a decedent's estate. *Norgard*, 2002-Ohio-2007 at ¶ 19 (explaining that purpose of statute of limitations is fairness to both sides).

Thus, the *Ramsey* concurring justices' suggestion that capacity be challenged at the summary judgment stage requires defendants to litigate a case on the merits through discovery and dispositive motions. *Ramsey*, 69 Ohio St.3d at 514. That is unnecessary and costly, particularly where case law is clear that capacity refers to the eligibility of a person to commence an action and is generally determined without regard to the claims being asserted. *Wanamaker*, 2007-Ohio-4340; *See* Ohio Rule of Civil Procedure 9(A). There is no need to litigate a case on the merits when the merits are irrelevant to the issue of capacity.

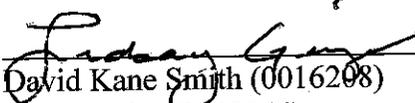
In addition, this Court should note that applying for and opening an estate is not a lengthy process. Here, Plaintiffs filed to open an estate in Cuyahoga County, Ohio, on June 12, 2009,

with Plaintiff Janis Mohat appointed personal representative of this void estate on June 25, 2009. Likewise, Plaintiffs filed to open an estate in Lake County, Ohio, on November 5, 2009, with Plaintiff Janis Mohat appointed personal representative on November 9, 2009. Plaintiffs, therefore, cannot argue that requiring family members or others to open an estate is an undue hardship or extensive process.

III. CONCLUSION

For the foregoing reasons, this Court should answer the federal court's certified question, holding that, under Ohio law, an action filed on behalf of a decedent before an estate is legally established by someone who is not a legally appointed personal representative is 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 a personal representative is duly appointed and named in the Complaint. Any other rule could work a severe injustice on defendants.

Respectfully submitted,


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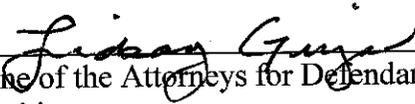
Attorneys for Defendants-Petitioners

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Merit Brief Of Defendants-Petitioners* was sent this 4th day of October, 2010, by electronic transmission and regular U.S. Mail, postage prepaid, to the following:

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One of the Attorneys for Defendants-
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STANDARD

Ohio Supreme Court Practice Rule XVIII states that "a federal court may certify questions to the Supreme Court of Ohio when a state law is at issue. That Rule states in pertinent part:

The Supreme Court may answer a question of law certified to it by a court of the United States. This rule may be invoked when the certifying court, in a proceeding before it, determines there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court, and issues a certification order.

Federal courts have utilized this Rule freely when the moving party demonstrates both the determinative and lack of controlling precedent prongs of the Rule.

PROCEDURAL and FACTUAL HISTORY

The Plaintiffs filed this action in March of 2009 on their own behalf, and on behalf of the Estate of Eric Mohat (their minor son). The Complaint seeks declaratory, injunctive, and monetary relief against the Mentor Public School District, Jacqueline A. Hoynes (Superintendent of the Mentor Public School District), Joseph Spiccia (Principal of Mentor High School), and Thomas Horvath (Teacher at Mentor High School) for alleged violations of their civil rights. (ECF #1). The Complaint alleges that Eric Mohat, a seventeen year old student at Mentor High School, was regularly bullied and harassed at school; that the school and, in particular, Mr. Horvath knew about the bullying and harassment; that the school did nothing to intervene or alleviate the problem; and, that as a result of the constant bullying and harassment, Eric Mohat eventually committed suicide. Plaintiffs allege that as a result of these circumstances, they have been deprived of their parental rights without due process; that they were deprived of their right

to companionship and Eric was deprived of his right to life in violation of 42 U.S.C. §1983 (Monell claim); that the school was negligent, and has violated Title IX, 20 U.S.C. §1681; and, that the schools actions or failures to act were wonton, reckless, and malicious.

This lawsuit was filed on March 26, 2009. The Cuyahoga County Probate Court named Janis Mohat personal representative of Eric Mohat's estate on June 25, 2009. There is no dispute that Eric's estate was not established until June of 2009 - after the filing of the lawsuit, and after the running of the statute of limitations for the estate. Further, there is no dispute that the estate was mistakenly opened in Cuyahoga County rather than Lake County, the county where Eric resided at the time of his death. Plaintiffs admit that this was in error and that have taken steps to have Mrs. Mohat duly appointed as administrator in the proper county (Lake County). Plaintiffs recently filed a supplement to their Response in Opposition with the Court indicating that Mrs. Mohat was duly appointed as administrator of her son's estate in Lake County on November 9, 2009.

Defendants contend that the Estate's claims are time-barred and void, and that 42 U.S.C. §1983 and Title IX do not support causes of action on behalf of his parents. Moreover, Defendants argue that a school's failure to recognize a student's suicidal tendencies stemming from bullying do not create liability under any of the Plaintiffs legal theories. Plaintiffs contend that under Ohio law, the formation of the estate, and the appointment of Mrs. Mohat as administrator, relates back to the filing of the Complaint. Therefore, Plaintiffs contend that the Complaint is not barred by the two year statute of limitations and the claims of the estate should be allowed to go forward on the merits.

QUESTION OF LAW TO BE ANSWERED

The Court seeks a ruling by the Ohio Supreme Court as to:

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 to the original filing of the claims.

The answer to this question will determine whether or not the claims made by the estate may proceed, or whether they are time-barred pursuant to the applicable statute of limitations.

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.

Both parties in the instant case cite to the Supreme Court of Ohio's opinion in *Ramsey v. Neiman*, 69 Ohio St.3d 508 (1994) in support of their position on this issue. The Court was

unanimous in its judgment in that case, but was split on its reasoning. The lead opinion, which is not actually the majority opinion in this instance, held that “[a] cause of action in wrongful death arising under R.C. Chapter 2125 must be brought in the name of a person appointed by a court to be the administrator, executor, or personal representative of the decedent’s estate.” The lead opinion addressed the issue of whether a later appointed administrator could relate back to a timely filing by someone who lacked standing to bring the action in order to save the case from dismissal on statute of limitations grounds. The Court distinguished the case before it from other cases that had allowed actions to proceed, indicating that there was no clear precedent that would address the facts of the case before it, but refused to answer the specific question because the question was based on a hypothetical situation not actually present in the case before it.

The concurring opinion, which actually constituted the majority opinion based on the number of judges who signed on, did not find any requirement in R.C. 2125.02(A)(1) that the person initiating a wrongful death lawsuit be a legally appointed representative of an estate. Those Justices who joined in that opinion stated their belief that a personal representative “must be court-appointed after the complaint has been filed, but before any judgment is entered or settlement is reached.” *Ramsey v. Neiman*, 69 Ohio St.3d 508 (concurring opinion). They also indicated, without providing any reason or legal basis, that the summary judgment stage would be an appropriate time to determine whether plaintiffs had or would obtain proper court appointment after filing their complaints. Although this perspective was held by the slim majority of the Court in 1994, the interpretations and guidelines set forth in that opinion were dicta in the underlying case, and therefore are not controlling precedent for us to follow.

In trying to come to a determination on this issue, this Court has also reviewed Ohio’s

statute on wrongful death and finds the language in O.R.C. §2125.02 to be unclear with regard to the issue set forth above. Section 2125.02(A)(1) states that: "a civil 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..." This would tend to support the argument that a wrongful death action cannot be brought by anyone other than a legally appointed personal representative, making such an action void from its inception and ineffective at tolling the statute of limitations.

Section 2125.02 © however, lends support to the alternative argument, stating that "[a] personal representative appointed in this state, with the consent of the court making the appointment and at any time before or after the commencement of a civil action for wrongful death, may settle with the defendant the amount to be paid." *Id.* (Emphasis added.) The highlighted language in this section would seem superfluous if, in fact, an action brought by anyone other than the legally appointed personal representative were void at the time of filing.

The lower courts in Ohio offer no additional clarity on the issue. The ninth district has held that R.C. §2125.02 is to be construed liberally, and that generally the appointment of an administrator is deemed to relate back to the time of filing of a complaint. *Stone v. Phillips*, 1993 Ohio App. LEXIS 3989 (9th Dist. 1993). Conversely, the Fifth District has held that an action for wrongful death must be brought in the name of the personal representative of the decedent, and if it is not, neither Rule 17 nor the doctrine of relation back will apply to save the action from an expired statute of limitations if the decedent's representative is added after the statute has run. *Gottke v. Diebold, Inc.*, 1990 Ohio App. LEXIS 3564 (5th Dist. 1990).

PARTIES AND LEGAL COUNSEL

Pursuant to the requirements of Sct. R. XVIII, Section 2 (C),(D), and (E), the Court hereby designates the Defendant, Mentor Exempted Village School District Board of Education as the moving party and identifies the parties and their counsel below.

Plaintiffs:

- (1) William Mohat
- (2) Janis Mohat, individually
- (3) Janis Mohat, on behalf of the Estate of Eric Mohat

Plaintiffs are represented by Kenneth D. Myers, 6100 Oak Tree Blvd., Ste. 200, Cleveland, OH 44131. Mr. Myers phone number is (216) 241-3900.

Defendants:

- (1) Mentor Public School District Board of Education
- (2) Jacqueline Hoynes
- (3) Joseph Spiccia
- (4) Thomas M. Horvath

Defendants are represented by David Kane Smith, Krista K. Kleim, and Lindsay F. Gingo, all of Britton, Smith, Peters & Kalail - Independence, 3 Summit Park Drive, Ste. 400, Independence, OH 44131. Their phone numbers are (216) 503-5055, (216) 642-0323, and (216) 503-5058, respectively.

CONCLUSION

For all of the reasons set forth above, the Court hereby certifies the above stated question to the Ohio Supreme Court for its consideration and determination. The remainder of the case is stayed, pending a decision by the Ohio Supreme Court on this certification order.

IT IS SO ORDERED.


DONALD C. NUGENT
United States District Judge

DATED: January 29, 2010