

ORIGINAL

IN THE SUPREME COURT OF OHIO

WILLIAM MOHAT, et al.,

Plaintiffs/Respondents.

-vs-

MENTOR EXEMPTED VILLAGE  
SCHOOL DISTRICT BOARD OF  
EDUCATION, et al.,

Defendants/Petitioners.

) Case No. 2010-0951

)  
) On Review of Certified  
) Question from The United  
) States District Court for  
) the Northern District of  
) Ohio, Eastern Division

)  
) U.S. District Court  
) Case No. 1:09 CV 688

)

)

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## I. STATEMENT OF THE FACTS

The plaintiffs in the underlying federal litigation, William and Janis Mohat, are residents of Mentor, Ohio. Their son, Eric Mohat was 17 years old and a student at Mentor High School when, on March 29, 2007, he took his own life. (Amended Complaint at para. 8, Defendants/Petitioners' Supplement ["Def. Supp."] at 23.)

For many months prior to his death, Eric endured harassment and bullying at school at the hands of numerous other students. This harassment and bullying took the form of constant name-calling, teasing and verbal intimidation in one particular class and constant pushing, shoving and hitting both in class and in hallways of the high school. The name-calling was usually sexually-themed; Eric was called "gay," "fag," "queer" and "homo" among other names. (Amended Complaint at para. 9-11, Def. Supp. at 23-24.)

The defendants knew or should have known about the harassment because much of it occurred in one class taught by defendant Thomas Horvath; because Eric had complained to defendant Horvath about the harassment and because on the day of Eric's death, a student said to him, in what was believed to be in front of defendant Horvath, "Why don't you go home and shoot yourself? No one would miss you." The defendants also knew or should have known about the harassment because Eric wrote about it on a social networking page that was monitored by school

officials; because on the day of Eric's death, at least one administrator saw Eric crying in the hallway of the high school and because prior to Eric's death, at least two other students had taken their own lives due, at least partially, to issues stemming from bullying and harassment received in school. (Am. Comp. at para. 12-16, Deft. Supp. at 24.)

On March 26, 2009, Mr. and Mrs. Mohat filed suit in U.S. District Court in Cleveland, on their own behalf and on behalf of the estate of Eric Mohat, naming the Mentor Public School District Board of Education, Superintendent Jacqueline Hoynes, Mentor High School Principal Joseph Spiccia and teacher Thomas Horvath as defendants. The lawsuit alleged violations of federal and state law, including the constitutional right to familial relationships. (Comp. at para. 23, Deft. Supp. at 6.)

Unbeknownst to the plaintiffs' counsel, the Mohats had not opened an estate for Eric at the time of the filing of the federal complaint.

When this oversight was brought to counsel's attention via the defendants' answer to the complaint filed on May 18, 2009, counsel advised the Mohats to have an estate opened for Eric.

Unfortunately, the probate attorney hired by the Mohats to open the estate filed it in the wrong county, opening an estate in Cuyahoga County, rather than Lake County. That estate was opened on June 25, 2009.

On July 14, 2009, plaintiffs filed an Amended Complaint (with leave of court) correctly naming Mrs. Mohat as

administratrix of Eric's estate.

On September 16, 2009, defendants filed a motion for judgment on the pleadings, arguing that the estate had not been established prior to the filing of the complaint, and that the estate that had been established in the wrong jurisdiction and that the estate had been filed after the statute of limitations had expired.

On November 1, 2009, after correcting the error of having filed in the wrong court, plaintiff Janis Mohat was named administratrix of Eric's estate in Lake County, which was the proper court.

On January 29, 2010, Judge Donald Nugent issued an Order Certifying Question of State Law to the Ohio Supreme Court and staying the rest of the case pending the outcome of the Certified Question. The case was stayed during the discovery phase and there is no dispute that at the time the case was stayed, Mrs. Mohat was the legally-appointed administratrix of Eric's estate and there is no dispute that there was no judgment or settlement at the time. (Order Certifying Question of Law, Deft. APPX. 1-8.)

On August 25, 2010, this Court determined that it would answer a slightly modified version of the question asked by the federal court.

## II. ARGUMENT

The question to be answered by this Court is relatively simple; does the Court's rulings and policies favor deciding cases on their merits, or does the Court's rulings and policies favor dismissing cases based on procedural technicalities and tortured readings of statutes? If the answer is affirmative to the first question, then this Court will rule in favor of the plaintiffs/respondents; if the answer is affirmative to the second question, then this Court will rule in favor of the defendants/petitioners.

Defendants state: "...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....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." Deft. Merit Brief at 3-4.

This statement might have some validity if not for the plain language of the relevant statute.

O.R.C. 2125.02(A)(1) states, in pertinent part:

Except as provided in this division, 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, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. (Emphasis added.)

O.R.C. 2125.02(C) states:

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. (Emphasis added.)

While O.R.C. 2125(A)(1) seems to require the civil action to be brought in the name of the personal representative of the decedent, the language at the beginning of the section--"except as provided in this division"--qualifies that statement. O.R.C. 2125.02(C) provides the exception justifying the qualifying language in the (A)(1) section of the statute. It clearly states that a personal representative may settle a claim at any time before or after the commencement of a civil action. Why would the legislature have placed this language in the statute if, in fact,

only a personal representative appointed prior to the commencement of litigation could settle a claim? As Judge Nugent pointed out, the highlighted language--"before of after the commencement of a civil action for wrongful death"--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. Order Certifying Question at 6, Deft. APPX at 6.

Thus, just on the face of the statute there is ample evidence that the legislature did not intend to bar a personal representative--even if appointed after the filing of a lawsuit--from settling a wrongful death claim.

However, as one dissects the relevant cases, one can see even more clearly that the certified question should be answered in favor of plaintiffs, i.e., that having Mrs. Mohat appointed after the filing of the lawsuit, even if the appointment was after the running of the statute of limitations, is not a bar to the lawsuit proceeding on its merits.

As Amicus Curiae Nikki C. Hardy pointed out in her Preliminary Memorandum, the law in Ohio on this question has been well-settled since Ramsey v. Neiman (1994), 69 Ohio St. 3d 508, when a majority of the justices of this Court interpreted the Ohio wrongful death statute as not expressly requiring that "the personal representative be appointed before he or she can enter the courthouse to file a wrongful death complaint." Id at 513, cited in Amicus Preliminary Memorandum at 2. "As the four members of this Court concluded in construing the provisions of

R.C. 2125.02(A)(1) and R.C. 2125.02(C) in para materia, a personal representative of the decedent's estate '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.'" Id. at 514, cited in Amicus Preliminary Memorandum at 2.

The defendants in this case raised the issue at the motion to dismiss stage and framed it as a lack of capacity issue. Contrary to the procedures set forth in Ramsey, they did not give the plaintiffs an opportunity to obtain a court appointment as personal representative and did not wait until summary judgment. Not only does the procedure set forth in Ramsey prove that the statute was not intended to automatically bar suits by those who had not obtained court appointment prior to filing (or else this Court would not have approved a procedure for obtaining appointment after filing suit and "screening out" those who did not obtain appointment after filing suit), but the Mohats followed that procedure and should not be punished for violating a rule that was not in effect at the time of their actions. Mrs. Mohat, unlike the plaintiffs in Ramsey, did file to be and was appointed personal representative after filing but before disposition (and before summary judgment). The process worked exactly as this Court envisioned in Ramsey. The screening process was to occur later in the litigation (summary judgment as

opposed to dismissal stage) and was to allow for an individual to become personal representative after filing suit.

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, 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.

This 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. Contrary to defendants' assertion that "[p]laintiffs' attorney knew no estate existed, but filed suit on its behalf anyway" (Defts. Merit Brief at 15), there is no factual basis for that statement and in fact, the opposite is true; plaintiffs' counsel erred in assuming an estate had been opened, but did not knowingly misrepresent the existence of the estate and file the lawsuit naming the estate. 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 name the duly-appointed administrator in the proper county.

The opening of the estate in no way changed the parties to the case or the facts of the case and it in no way prejudiced the defendants.

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 this case, the position taken by defendants is at odds with the concept of a liberal construction of the statute.

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:

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"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."

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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).

The case cited by Judge Nugent that seems to favor the defendants' position, Gottke v. Diebold, Inc., 1990 Ohio App. LEXIS 3564 (5th Dist. 1990), was an appellate court decision which was decided prior to Ramsey, so it should not have any precedential, or even persuasive value.

#### A. Defendants' First Proposition of Law

In its first proposition of law, defendants ask this Court to find that individuals who are not appointed personal representatives of an estate that does not exist lack the capacity to sue on the decedent's behalf. (Deft. Merit Brief at 4.)

Defendants cite a number of cases defining "capacity" and finding, in other factual scenarios, that people who lacked

capacity could not sue. However, each of the cases cited by defendants was decided prior to this Court's decision in Ramsey, which was decided on June 29, 1994. The logic and reasoning in Justice Pfeiffer's concurring opinion in Ramsey should be adopted by this Court in the instant case, especially since the same logic and reasoning have been adopted since that time. See Toledo Bar Association v. Rust (2010), 124 Ohio St. 3d 305. Also, Ohio courts have refused to extend the lead opinion in Ramsey beyond the specific facts of that case and have held that Ramsey is not applicable where the plaintiff had subsequently applied to the probate court to become personal representative of the decedent's estate. See Wanamaker v. Davis, 2007 Ohio 4340 (2007).

Ramsey did not find that a lack of capacity at the time of filing the complaint was fatal to the complaint. Ramsey took the common-sense approach that a personal representative had to be appointed by the time the suit concluded and that as long as there was no prejudice to the defendants, relation back and amendment were the proper remedies, as opposed to dismissal.

Because all of the cases cited by defendants pre-dated Ramsey and because the logic and reasoning espoused in Ramsey has been followed by most courts that have decided similar issues since Ramsey, this Court should adopt Judge Pfeiffer's logic and reasoning in Ramsey and find that individuals who are appointed personal representatives prior to the settlement or judgment in a case have capacity to sue on behalf of the decedent.

B. Defendants' Second Proposition of Law

In defendants' second proposition of law, defendants ask this Court to hold that when an individual is named personal representative after the statute of limitations has expired for the filing of a wrongful death suit, the estate's claims are time-barred. (Defts.' Merit Brief at 6.) Defendants assert that plaintiffs should not be able to use the relation back rules to "reward" them for "misrepresenting" their authority to sue on behalf of an estate that did not exist at the time of filing. (Defts.' Merit Brief at 6.) Defendants ask this Court to adopt and follow the findings of Wanamaker v. Davis, 2007 Ohio 4340 (2d Dist. 2007) and Gottke v. Diebold, Inc., 1990 Ohio App. LEXIS 3564 (5th Dist. 1990).

Gottke was determined prior to Ramsey and therefore should hold no sway with this Court. In addition, Gottke is distinguishable because the plaintiff in that case actually misrepresented her status as personal administrator when in fact, someone else had already been named personal administrator. That case did not rely on the timing of the naming of the personal representative; that case concerned a situation in which an individual not only was not personal representative at the time the suit was filed, but could not have been named personal representative since someone else already held that position.

In Wanamaker, the only case cited by defendants that was decided after Ramsey, the personal representative actually closed the estate, then asked to have the estate re-opened for the

purpose of filing a medical malpractice suit. The appellate court did not allow this and distinguished that situation from others in which relation back had been permitted, notably Douglas v. Daniels Bros. Coal Co. (1939), 135 Ohio St. 641, mainly because in Wanamaker, the closing and re-opening of the estate was intentional, compared with the situation in Douglas in which the failure of the plaintiff to be appointed personal representative prior to filing suit was inadvertent.

Here, although defendants try mightily to impute ill motive to plaintiffs by using terms such as "misrepresentation" and invoking a disciplinary case as a way of suggesting that plaintiffs or their counsel made some attempt to trick the federal court, the record suggests that the failure to name Mrs. Mohat as Eric's personal representative, and the subsequent failure to name her personal representative in the proper county, were inadvertent and were corrected as soon as they were called to the attention of the plaintiffs by the defendants. Further factual development of the record in this case will bear this out. (Since the case was at the motion to dismiss phase, where additional factual and evidentiary materials are not normally accepted, plaintiffs did not submit affidavits attesting to the inadvertence of the failure to open an estate and the mistaken filing in the wrong county. However, should this Court or the federal court deem it appropriate, plaintiffs would be happy to provide such factual evidence.)

Defendants even seem to acknowledge the inadvertence of

plaintiffs' conduct. "Apparently recognizing that error, Plaintiffs filed their First Amended Complaint on July 14, 2009, stating that Janis Mohat was now suing...." (Defts.' Merit Brief at 5.)

Thus, the only post-Ramsey case cited by defendants in which the relation back was not permitted turned on the intentional conduct of plaintiff in closing, then re-opening the estate. Since it is not disputed that plaintiffs' conduct in this case was not intentional, Wanamaker should not be used as support for the position that intentionally closing an estate forecloses the use of relation back as a mechanism to bypass the statute of limitations.

Further, although defendants state that "plaintiffs will likely argue that this Court should ignore that fact [that they had two years to file on behalf of Eric's open estate], because Defendants will not be prejudiced by this failure (Defts. Merit Brief at 11-12)" and although defendants argue that allowing the relation back "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" (Defts. Merit Brief at 4), defendants never rebut the valid argument--used by this Court in Ramsey--that they will not be prejudiced. Nor do they explain how granting the relation back could subject defendants to multiple suits or to expend time and money to litigate a case plaintiffs had no capacity to bring. Obviously, if this Court

rules in favor of plaintiffs and the federal court permits the case to move forward, the defendants will have to spend time and money on a case in which plaintiffs did have the capacity to bring. So contrary to defendants' assertion, a ruling in favor of plaintiffs will not cause defendants to spend time or money on a suit in which plaintiffs have no capacity to sue. Further, a ruling in favor of plaintiffs will not expose defendants to multiple lawsuits; rather, the instant lawsuit will merely proceed as filed by plaintiffs, with the Court recognizing that the facts have been adjusted to comport to the Amended Complaint. i.e., that Janis Mohat now is suing on behalf of the estate of Eric in her capacity as his personal representative.

In addition, a ruling in favor of defendants does not necessarily save defendants any time, money or exposure; even if the claims on behalf of Eric's estate are dismissed, Eric's parents will continue to litigate this case on their own behalf. Thus, there will be no multiple lawsuits whether defendants prevail on this point or not, and there be no additional time and money spent by defendants whether they prevail or not. And there is no prejudice to defendants if plaintiffs prevail (nor has any been claimed by defendants), as the claims remain the same and defendants were on notice of those claims prior to the running of the statute of limitations.

Finally, while defendants ask this Court not to "reward" plaintiffs for filing a lawsuit without having capacity to do so, it is undisputed that the law creates exceptions to the statute

of limitations in a number of situations just for that purpose. The entire concept of "relation back" is a way of allowing for situations in which mistakes are made that the law regards as not being serious enough to punish a party for making them. Substitutions that cure mistakes relate 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. Civ.R. 60(B) allows a court to vacate an entire judgment if the judgment were made due to a mistake or an error by counsel; Civ.R. 15 and 17 allow relation back as a way of correcting errors; a judge can issue a "nunc pro tunc" order, in essence back-dating an order, to correct a mistake. The statute of limitations in some cases is extended, tolled or disregarded if a plaintiff is a minor or otherwise incapacitated, or if the plaintiff did not know an offense had occurred or if the plaintiff did not know the identity of the tort-feasor or if the offense is ongoing. Citizens are given extensions on deadlines to pay their taxes without penalty. Litigants are given extensions to file court pleadings by leave of court or if a deadline falls on a weekend or holiday. All of this is done in the name of justice and in order for cases to be heard on their merits.

These provisions of the law exist because "[t]he spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies." Peterson v. Teodosio (1973), 34 Ohio St.2d 161, 175. Decision on the merits should not be

avoided on the basis of mere technicalities; pleading is not "a game of skill in which one misstep by counsel may be decisive to the outcome[;]...[rather] the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson (1957), 355 U.S. 41,46; Foxman v. Davis (1962), 371 U.S. 178,181-182."

Given this and other Courts' pronouncements that the law favors deciding legal issues on their merits, and given the voluminous examples cited above of the flexibility of deadlines, including statutes of limitations, defendants' argument that the statute of limitations is inviolate and this Court should not make allowances for errors to be corrected, even after a deadline has passed, rings hollow.

Also, defendants do not even address the fact--raised by Judge Nugent--that the clear language of O.R.C. 2105.02(C) allows a personal representative to be named at any time "before or after the commencement of a civil action...." (Order Certifying Question at 6.)

Defendants also fail to address the language of Civ.R. 17(A), which calls for relation back so that the real party in interest can be named.

In this case, the real party in interest is the estate of Eric Mohat. Dismissing those claims, rather than allowing for substitution and relation back, would violate Civ.R. 17(A).

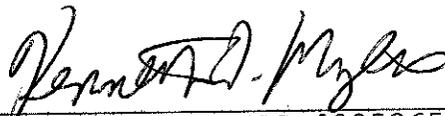
Janis Mohat has been named the administrator of the estate of Eric Mohat, so Justice Pfeiffer's reasoning in Ramsey should

hold sway. Further, the case should be permitted to proceed on its merits as opposed to being dismissed on a technicality. This Court should use this opportunity to pronounce that the reasoning in Ramsey is the law of the land in Ohio.

### III. CONCLUSION

For the reasons set forth above, this Court should answer the question posed by the District Court by holding that under Ohio law, an action filed on behalf of a decedent before an estate is legally established is not barred if the plaintiff is subsequently appointed the decedent's personal representative any time prior to judgment or settlement of the case, even if the appointment of the personal representative comes after the statute of limitations expires, as the appointment would relate back to the date of the filing of the complaint.

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 22<sup>nd</sup> day of November, 2010.

  
\_\_\_\_\_  
KENNETH D. MYERS

Counsel for Plaintiffs/Respondents

IN THE SUPREME COURT OF OHIO

JEFFRIES BROS. EXCAVATING AND )	SUPREME COURT CASE NO. 2010 1734
PAVING, INC., )	
	)
Appellant, )	<i>On Appeal From The Stark County Court of</i>
	)
vs. )	<i>Appeals, Fifth Appellate District</i>
	)
WHEELING & LAKE ERIE RAILWAY )	<u>Court of Appeals Case No 2009-CA-00252</u>
COMPANY, )	
	)
Appellee. )	

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**THE WHEELING & LAKE ERIE RAILWAY'S  
MEMORANDUM IN OPPOSITION TO JURISDICTION**

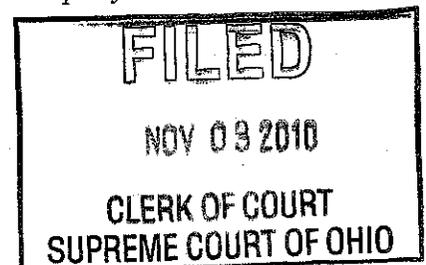
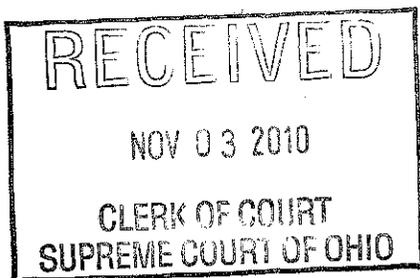
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**I. THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This case presents highly individualized factual issues pertaining to a private property dispute between a disgruntled property owner who failed to adequately investigate the real estate before purchase, and a railroad who refused to grant the mistaken purchaser the right to use previously abandoned and dangerous “at grade” railroad crossings.

This case is not one of public or great general interest for two reasons. First, application of Ohio Revised Code Section 4955.27, concerning private railroad crossings, is clear and its plain language requires no further clarification from this Court. Secondly, an examination of the factual history of this dispute demonstrates that it is too factually specific to be of great interest or use to the public.

Appellant Jeffries Bros. Excavating and Paving, Inc.’s (“Appellant”) memorandum attempts to portray this case as one of a disputed interpretation of an Ohio statute pertaining to private crossings which requires clarification by the Supreme Court of Ohio. The Wheeling & Lake Erie Railway Company (“Wheeling & Lake Erie Railway”) respectfully submits that the plain language of Ohio Revised Code Section 4955.27 is clear, unambiguous, and requires no interpretation from this Court. The unanimous agreement of the Stark County Court of Common Pleas and all three Judges of the Fifth District Court of Appeals who considered the statutory language demonstrates that the interpretation of the statute is not as disputed or controversial as Appellant contends.

Indeed, Appellant’s primary argument before this Court is that it could not be expected to understand that a statute which allows, in limited circumstances, for a private crossing sufficient “to enable such landowner to pass with a loaded team” does not allow it to have a private crossing sufficient for industrial vehicles to pass. Based on the plain language of the statute and

clear existing precedent, neither the Stark County Court of Common Pleas nor the Fifth District Court of Appeals had difficulty rejecting Appellant's argument.

Furthermore, this case contains several factual nuances that are unique to this case and impact the application of the farm crossing statute. As discussed more fully, *infra*, there had been two crossings on the property that Appellant purchased. However, both of them were either cancelled or vacated prior to Appellant's purchase. One of the crossings (Heckett) was subject to a license which was cancelled after it was bargained away for a different crossing by Appellant's predecessor in interest. The second crossing (Trump Road) was vacated and legally abandoned by the Stark County Board of Commissioners in favor of a safer crossing by an elevated grade separation, which was constructed mere feet from the vacated crossing. In spite of the fact that both crossings had been terminated prior to Appellant's decision to purchase the property, Appellant proceeded with the purchase.

Another fact that makes this case unique is that Appellant actually has access to its property on each side of the railroad by virtue of the newly relocated Trump Road which passes over the railroad at a grade separation. All that was required by Appellant in order to access the property north of the railroad line was to construct a ramp or driveway from the newly relocated Trump Road to its property, which Appellant did during the course of this litigation. Appellant's only remaining complaint is that it cannot cross a creek running through its property to access six acres of its land. Instead of constructing a bridge on its own property to cross the creek, Appellant wants to force a crossing over the railroad.

This Court has previously recognized that unique facts that distinguish a case from other situations likely to arise often prevent the case from being one of public or great general interest. Generally, the right to have one appellate court consider a case is sufficient: "Except in [ ]

special circumstances, it is abundantly clear that in this jurisdiction a party to litigation has a right to but one appellate review of his cause.” *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254, 168 N.E.2d 876. There is no right to Supreme Court review where the case presents “questions of interest primarily to the parties.” *Id.* See also *City of Blue Ash v. Kavanagh*, 113 Ohio St.3d 67, ¶31 (Pfeifer, J., dissenting) (Noting that the case was “so fact-specific \* \* \* that it does not qualify as a case of ‘public or great general interest’ \* \* \* [and] is unlikely to provide meaningful guidance to the bench and bar.”). Essentially, the facts of this case have become so specific that the actual question that would be presented for review would be as follows: Whether a landowner who purchases property in which their predecessor in title gave up the right to a grade crossing is entitled to a private crossing for industrial purposes over the former grade crossing by virtue of Ohio Revised Code Section 4955.27 because that landowner cannot reach six acres of this land without either crossing a creek on his own property or crossing a railroad on Wheeling & Lake Erie Railway’s property?

If the scarcity and antiquity of the case law relied upon by Wheeling & Lake Erie Railway and Appellant were not, in and of itself, sufficient to convince this Court that the issues relating to this type of application of Ohio Revised Code Section 4955.27 are not often encountered by the general public, then the highly factual nature of this case must definitively compel that conclusion.

## **II. STATEMENT OF THE CASE AND FACTS**

Appellant commenced the underlying lawsuit on August 12, 2008, alleging that it acquired certain real estate from Republic Technologies International (“RTI”) on or about April 4, 2003, through which Wheeling & Lake Erie Railway’s railroad line was located. Despite the fact that Appellant acquired the property from RTI, Appellant’s Complaint claimed the right to

utilize two terminated grade crossings over Wheeling & Lake Erie Railway's railroad line: which are referred to as the "Trump Road Crossing" and the "Heckett Crossing." In an effort to cross Wheeling & Lake Erie Railway's railroad, Appellant's Complaint pursued many different legal theories. However, the only theory advanced in Appellant's Memorandum in Support of Jurisdiction is its alleged right to a private crossing over the Heckett Crossing.

**A. The Heckett Crossing**

The Heckett Crossing came into existence on September 26, 1955 when Wheeling & Lake Erie Railway's predecessor in interest, The New York, Chicago and St. Louis Railroad Company, entered into a License Agreement with Republic Steel Corporation.<sup>1</sup> The License Agreement was for a private at grade crossing. (Jaeger Affidavit, Exhibit 4). On July 17, 1970, the parties entered into a Supplemental Agreement. (Jaeger Affidavit, Exhibit 5).

In 1994, the Heckett Crossing license was cancelled and removed as a result of the negotiation of a license agreement for a new private grade crossing slightly south of where the Heckett Crossing had been located. On May 13, 1994, Wheeling & Lake Erie entered into a License Agreement with Republic Engineered Steels, Inc. for a new twenty-five foot (25') private road crossing located at Chaining Station 110+56 at Mile Post 2.09. (Jaeger Affidavit, Exhibit 6). On July 3, 2002, the new License Agreement was amended. (Jaeger Affidavit, Exhibit 7). The new amended License Agreement provides:

2. Agreement dated September 26, 1955 with the New York, Chicago & St. Louis Railroad Company, and Supplemental Agreement dated July 17, 1970 with the Norfolk & Western Railway Company, both predecessors to the Wheeling & Lake Erie Railway Company, and Republic Steel Company covering a sixty

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<sup>1</sup> See Affidavit of Clarence W. Jaeger, attached to Defendant Wheeling & Lake Erie Railway Company's Motion for Summary Judgment, filed June 1, 2009. All exhibits to this Affidavit will hereafter be referred to as "Jaeger Affidavit, Exhibit \_\_\_."

(60') foot grade crossing at Valuation Station 130+25, **shall be canceled as of the execution of this amendment.**

(Emphasis added.)  
Jaeger Affidavit, Exhibit 7

Following the creation of the new private road crossing, and prior to Appellant's 2003 purchase of the RTI property, the Heckett Crossing was cancelled and removed. There are no other license agreements for said property. No right or license to use the former Heckett Crossing existed when Appellant purchased the RTI property.

**B. The Trump Road Crossing**

Although not at issue in this appeal, a brief background of the Trump Road Crossing may be helpful to this Court's understanding of the issues. On October 21, 1939, Wheeling & Lake Erie Railway granted an easement to the Stark County Board of Commissioners to use the Trump Road Crossing "for HIGHWAY PURPOSES ONLY" and provided that if the Trump Road Crossing ceased to be used for highway purposes, "then the easement herein granted shall forthwith cease and determine." (Jaeger Affidavit, Exhibit 1). On December 6, 1999, the Board of Commissioners vacated portions of Trump Avenue, N.E. in order to relocate Trump Avenue to its current, safer grade separation. (Jaeger Affidavit, Exhibit 2). The Resolution by the Board of Commissioners provided that the Trump Road Crossing "shall cease to exist as a public roadway," and therefore the easement ceased by its own terms. (Jaeger Affidavit, Exhibit 1).

**C. Background of the June 11, 2008 "Near Miss" and Other Safety Considerations**

Both the Heckett and Trump Road Crossings were the result of former licenses or easements permitting at grade crossings over Wheeling & Lake Erie Railway's railroad line. However, the licenses or easements to both of those crossings terminated prior to Appellant's

purchase of the property in 2003. Nevertheless, Appellant continued to use the crossings without the permission of Wheeling & Lake Erie Railway.<sup>2</sup>

On June 11, 2008, a truck driver employed by Appellant's lessee made an unpermitted crossing of Appellee's right of way, which resulted in a "near miss" when one of Wheeling & Lake Erie Railway's locomotives came within 10 to 15 feet of colliding with the truck which was attempting to cross the previously vacated Trump Road Crossing.<sup>3</sup>

If a collision had occurred, it could have had disastrous consequences from both a safety and environmental standpoint. Obviously, a collision could result in serious personal injuries, not only to truck drivers, but also train crews. Conductor Jeffrey Levengood testified at the evidentiary hearing that the Wheeling & Lake Erie Railway moves hazmat materials over its right of way, including chemicals such as butane to be delivered to the Marathon facility in Canton, Ohio, and acetone to Plasticoat in Medina, Ohio.<sup>4</sup> Levengood also testified that if a derailment occurred, either from a "near miss" (when the locomotive engineer has to make an emergency application of brakes) or collision, not only would there exist a possibility of personal injury and loss of life to both truck drivers and train crews, but there could be a chemical spill of hazardous materials either onto the ground or into the adjacent Nimishillen Creek.<sup>5</sup>

After the "near miss" occurred on June 11, 2008, Appellee, in the interest of public safety, and believing that "safety trumps convenience," initiated action to remove the physical remnants of the dangerous and previously terminated Trump Road Crossing. When Wheeling & Lake Erie Railway took that initiative, Appellant filed this lawsuit and sought a temporary

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<sup>2</sup> See Transcript of Hearing on August 29, 2008, p.98.

<sup>3</sup> Id. at pp.98, 111.

<sup>4</sup> Id at p. 157.

<sup>5</sup> Id at p. 157.

restraining order to prevent Appellee from removing the remnant of the Trump Road Crossing that was located on Wheeling & Lake Erie Railway's property.<sup>6</sup> On August 29, 2008, the trial court held an evidentiary hearing on Appellant's request for a temporary restraining order which was denied. Subsequently, Wheeling & Lake Erie Railway did, in fact, remove the remnant of the Trump Road Crossing from its property. Appellant then constructed an alternate access road from the new Trump Road, which enables Appellant to cross from one side of the railroad to the other.<sup>7</sup> Appellant's only remaining complaint is that it cannot cross a creek running through its property to access six acres of its land. Instead of constructing a bridge or culvert on its own property to cross the creek, Appellant is attempting to force a crossing over the railroad at the Heckett Crossing which was cancelled in 2002.

### III. ARGUMENTS IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

#### A. Response to Proposition of Law #1:

##### The Provisions of O.R.C. Sec. 4955.27 through 4955.29 are Limited to Private Crossings for Agricultural Purposes, and Do Not Apply to Private Crossings for Industrial Uses

Appellant claims a right to a private crossing at the Heckett Crossing pursuant to Ohio Revised Code Section 4955.27 to 4955.29. Because the statutes to which Appellant refers only contemplate the use of a **farm crossing**, there exists no statutory right to use or construct a crossing for industrial use.

In *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Bradford*, (Cuy. App. 1919), 30 O.A.C. 40, the Court considered this very issue. In that case, the landowner sought to use a railway crossing for industrial purposes. *Id.* at 42. The Court traced the history of the statutory

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<sup>6</sup> *Id.* at 104:10, and 98.

<sup>7</sup> See Affidavit of Robert B. Daane, attached to Defendant Wheeling & Lake Erie Railway Company's Motion for Summary Judgment, filed June 1, 2009.

provision—then General Code Section 8858, now Ohio Revised Code Section 4955.27—and determined the underlying purpose of the statute. *Id.* at 41. The Court observed that in 1859, the act allowed persons to construct and maintain “crossings and cattle guards.” *Id.* Then in 1874, the act was amended to provide that “any farmer or person” could qualify for a private crossing. *Id.* Next, the Court observed, “When the Ohio laws were revised in 1880 the word ‘farmer,’ as the alternative of the owner of the acreage, was omitted, probably in the interest of brevity and word-compression.” *Id.* Finally, the statute was amended to state that the crossing, if constructed, should be sufficient “to enable such landowner to pass with a loaded team.” *Id.* at 42. The “loaded team” language is still contained in the statute.

From this statutory history, the Court concluded that the legislative intent was to allow the construction of a private crossing for farming purposes, but not for industrial purposes:

Upon a full consideration of the language of this enactment, in the successive stages of its development, the purposes we think it was intended to subserve, and the public policy underlying it, we have reached a substantial agreement with the plaintiff’s contention that the legislative end in view was a farm crossing. The amount of land designated as the least that could be served by the crossing would, it appears to us, be quite irrational if an industrial use was contemplated by it.

*Id.* Therefore, the Court concluded “without difficulty” that the landowner was not entitled to a crossing for industrial purposes. *Id.* at 43.

The Court’s interpretation of the statute is in harmony with the express words of the statute itself, which allow a crossing sufficient for “a loaded team.” R.C. 4955.27. In addition to being consistent with the plain meaning of the statute, it is also consistent with the general understanding of the statute in other judicial opinions. For example, in 1907 when this Court contemplated the statute, it described the statute as “requiring a railroad company to construct a **farm crossing.**” *Gratz v. Lake Erie & W.R. Co.* (1907), 76 Ohio St. 230, 81 N.E. 239, at

syllabus (Emphasis added). Other courts have long interpreted the statute to apply to farm purposes only. See also, *Holly v. New York Cent. R. Co.* (7th Dist. 1929), 35 Ohio App. 1, 171 N.E. 367 (Referring to the private crossing as a “farm crossing” throughout the opinion); *S & S Drive In & Carry Out, Inc. v. Norfolk & Western R. Co.* (Mar. 31, 1986), 4th Dist. No. 1775, 1986 WL 4216 (“Further, R.C. 4955.27 does provide for such a crossing for the use of farmers.”).

In contrast to the well-reasoned opinion of *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Bradford*, Appellant urges that this Court follow the reasoning set forth by Judge Pratt in the Common Pleas decision of *The Mitchell & Rowland Lumber Co. v. The Wabash R.R. Co.* (Lucas Cty. C.P. 1897), 6 Ohio Dec. 135. In that case, the Judge commented in a single paragraph that he did not see support for the argument that the statute applied only to farm crossings. *Id.* This dicta was only one of several legal and factual conclusions made by the Judge upon which he based his decision. The decision was affirmed by this Court, without opinion, and without passing upon the rationale of the trial court. See *Railroad Co. v. Mitchell & Rowland Lumber Co.* (1989), 59 Ohio St. 607, 54 N.E. 1107 (“No opinion. Judgment affirmed, without passing upon the liability of the railroad company for the expense of the crossing.”) From this decision, Appellant argues that the law controlling in Ohio is that the statutes are not limited to farm crossings.

However, this Court has had occasion to examine the statutes at issue since its 1898 ruling without opinion, and this Court’s more recent decisions indicate its acceptance that the statutes apply solely to farm crossings. For example, in the case of *Gratz v. Lake Erie & W. R. Co.*, this Court analyzed the statutes at issue and discussed the necessity of a railroad company

“to construct a farm crossing.” (1907), 76 Ohio St. 230, 81 N.E. 239, at the syllabus. As the Cuyahoga County Court of Appeals noted:

Judge Shauck’s use of the term in the *Gratz* case, 76 O.S., 230, as well as the syllabus, would have been more guarded had not the court regarded the crossing as a ‘farm crossing’ in the sense we are putting upon it.

*Bradford*, supra. Therefore, this Court as well as several other Ohio courts, and most recently the Stark County Court of Common pleas and the Fifth District Court of Appeals have indicated that the statutes apply solely to farm crossings. The interpretation of this statute is well-settled and need not be again addressed by this Court.

**B. Response to Propositional Law #2:**

**The Provisions of O.R.C. Sec. 4955.27 through 4955.29 are Limited to Situations in which the Landowner had Access to His Property and then Lost that Access**

The Fifth District Court of Appeals correctly distinguished this case from *The Mitchell & Rowland Lumber Co. v. The Wabash R.R. Co.* (Lucas Cty. C.P. 1897), 6 Ohio Dec. 135, because the Appellant’s lack of access to six acres of his property is the cause of its own doing. As explained by the Court, in the headnote in *Mitchell* it was clarified that a private crossing can only exist when the property owner “has not been compensated for the loss of such access” across the railroad. Indeed, the *Mitchell* Court did recognize that there was no obligation to provide for a private crossing for a property owner when the property owner has no reasonable expectation of such a crossing. The Court explained that “if the company has legally compensated the owner \* \* \* the owner would have no reason of complaining.” *Id.* at 139. Likewise, “if by the terms of the original charter it had not been required to provide further means of crossing” then a private crossing would not be required. *Id.* at 139. It is only where the railroad causes an owner to unexpectedly lose access to his property that the crossing is

necessitated. Where, as is the Appellant's situation, the owner purchases property with the opportunity to take the lack of crossing into consideration when setting the purchase price, the owner is not left with a remedy against the railroad. Although Appellant complains that the Fifth District Court of Appeals committed a "factual error"<sup>8</sup>—which it did not—this argument only further demonstrates the factually specific nature of this case and its lack of public or great general interest.

#### IV. CONCLUSION

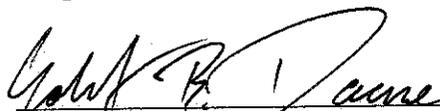
This is not a case of great public or general interest. It is a case involving a complicated factual history and an arcane and rarely addressed statutory provision. The mere fact that the primary cases relied upon by the parties to this dispute occurred over a century ago demonstrates that the statute is clear, and an interpretation of this statute is not greatly needed by the public. Additionally, the statutory interpretation is not much in dispute by anyone other than Appellant. The interpretation of this statute was authoritatively addressed in the well-reasoned opinion of *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Bradford*, (Cuy. App. 1919), 30 O.A.C. 40. The reasoning of this opinion was adopted by both the common pleas and appellate court as settled law. The common pleas and appellate court easily and unanimously concluded that plain language of the statute also speaks for itself. There is no need for this Court to wade into the facts of former vacated crossings, the highly specific topography of Appellant's property, and the arcane legislative history of a statute that is clear on its face. Appellant purchased his property after its predecessor in interest bargained away the very crossing it seeks to impose on The Wheeling & Lake Erie Railway Company. Both the common pleas and appellate court were correct in rejecting Appellant's attempt to impose such a crossing. This Court would not in any

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<sup>8</sup> Memorandum in Support of Jurisdiction, p.8.

way advance the public interest by granting Appellant a third opportunity to air its private grievance. The Wheeling & Lake Erie Railway Company respectfully requests that this Honorable Court deny jurisdiction over this appeal, as it does not concern an issue of public or great general interest.

Respectfully submitted,



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### **PROOF OF SERVICE**

I certify that a true copy of the foregoing was sent by regular U.S. mail to the following this 2<sup>nd</sup> day of November, 2010:

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