

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

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**CASE NO. 2010-0951**

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**WILLIAM MOHAT, et al.  
Plaintiff-Respondents**

**-vs-**

**MENTOR EXEMPTED VILLAGE SCHOOL  
DISTRICT BOARD OF EDUCATION, et al.  
Defendant-Petitioners**

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**BRIEF OF AMICUS CURIAE,  
OHIO ASSOCIATION FOR JUSTICE  
IN SUPPORT OF PLAINTIFF-RESPONDENTS, WILLIAM MOHAT, et al.**

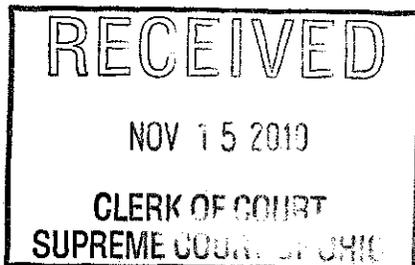
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## INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (“OAJ”). The OAJ is comprised of over a thousand attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

The purpose of this Brief is to urge this Court to adhere to the maxim that legitimate disputes should be resolved upon their merits instead of procedural grounds. It is evident that Civ.R. 17(A) specifically contemplates that lawsuits sometimes will not be brought in the name of the real party in interest, either due to an oversight or circumstances beyond the plaintiff’s control. The Rule specifically permits “ratification” to be effectuated in order to avoid the injustice that would result if the action was snuffed-out on the basis of a mere technicality.

The positions which have been devised by Defendant-Petitioners, Mentor Exempted Village School District Board of Education, *et al.*, advance no legitimate objectives and promote only the prospect of still more procedural gamesmanship. The District Court should be advised that neither the Wrongful Death Act, R.C. Chapter 2125, nor any other provision of Ohio law, precludes relation back under the corresponding federal rule.

## ARGUMENT

### **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.**

Defendants' first Proposition of Law is correct to a certain extent. The General Assembly has directed that wrongful death actions "shall be brought in the name of the personal representative of the decedent \*\*\*." *R.C. §2125.02(A)(1)*. But no requirement has been imposed for an "estate" to first be formally opened. Subsection (C) does imply that a "court" will make the "appointment" of the personal representative. It would thus appear that any duly empowered judge could designate a "personal representative" for purposes of managing a wrongful death action, and not necessarily one who sits on a probate court. Any other interpretation of R.C. §2125.02 requires terms to be added to this statute, which is impermissible. "In matters of construction, it is the duty of [the] court to give effect to the words used, not to delete words used or to insert words not used." *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St. 3d 50, 524 N.E. 2d 441, paragraph three of the syllabus (citation omitted).

Adhering strictly to the actual terminology employed in R.C. §2125.02 offers the additional advantage of sparing the plaintiffs from having to undertake the effort, and incur the expense, of opening a probate estate in every wrongful death claim. In countless instances, such as those involving decedents who were children or possessed no assets, the estate serves no purpose apart from facilitating the wrongful death claim.

It is far preferable to allow the common pleas judge who is assigned the wrongful death action to appoint the "personal representative" at the outset of the proceeding. That jurist will be in the best position to monitor the personal representative and confirm that his/her function is being fulfilled. Being intimately

familiar with the course of the litigation, the judge will also be ideally suited to review and approve any settlement agreements and attorney fee payments.

This strict but sensible interpretation of R.C. §2125.02(C) is, of course, at odds with Justice Wright's reasoning in *Ramsey v. Neiman*, 69 Ohio St. 3d 508, 1994-Ohio-359, 634 N.E. 2d 211. That was, however, just a plurality opinion and is not binding on this Court. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 271, 2010-Ohio-1027, 927 N.E. 2d 1066, 1086 ¶ 89. Even though the legislature had not limited the phrase "personal representative" to only those individuals who had been appointed by probate courts to administer existing estates, the *Ramsey* plurality judicially engrafted the restriction into the statute. This *Amicus* respectfully submits that R.C. §2125.02(C) should be afforded its plain and ordinary meaning, regardless of any perceived policy implications. *State ex rel. Myers v. Chiaramonte* (1976), 46 Ohio St. 2d 230, 238, 348 N.E. 2d 323; *Board of Edn. v. Fulton Cnty Budget Comm.* (1975), 41 Ohio St. 2d 147, 156, 324 N.E. 2d 566.

The construction of the Wrong Death Act which is being proposed by the OAJ is entirely consistent with Justice Pfeifer's concurring opinion in *Ramsey*, 69 Ohio St. 3d at 513-514. Interesting, three other Justices joined him in this regard, forming a full majority. *Id.* Adhering closely to actual terms which had been selected by the General Assembly, Justice Pfeifer reasoned that:

The language in R.C. 2125.02(A)(2) 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.

*Id.*, at 514. The involvement of a probate court therefore is not essential, and the appointment can be made by the common pleas judge assigned to the action after filing. *Id.* Defendants' First Proposition of Law should therefore be accepted only to this limited extent.

**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.**

The answer to the question which has been certified has already been provided in the Ohio Rules of Civil Procedure. Undoubtedly by design, the Merit Brief of Defendants-Petitioners never mentions Civ. R. 17(A), which directs that:

\*\*\* 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. [emphasis added].

This provision permits a standing deficiency to “be cured by the proper party’s substitution or ratification so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter.” *Newman v. Enriquez* (4<sup>th</sup> Dist. 2007), 171 Ohio App. 3d 117, 128, 2007-Ohio-1934, 869 N.E. 735, 743, citing *State ex rel. Jones v. Suster*, 84 Ohio St. 3d 70, 77, 1998-Ohio-275, 701 N.E. 1002, 1008. Ratification can be implied under the circumstances. See e.g., *Dallas v. Childs* (June 23, 1994), 8<sup>th</sup> Dist. No. 65150, 1994 W.L. 284991, p. \*3. A complaint ratified in this manner, i.e., substitution of the real party in interest, relates back to the original filing date of the complaint. *Kinder v. Zuzak* (July 31, 2009), 11<sup>th</sup> Dist. No. 2008-L-167, 2009-Ohio-3793, 2009 W.L. 2357800, p. \*4 (“While the statute of limitations would have run on plaintiff’s claim at the time of . . . ratification, such action in curing the deficiency has ‘the same effect as if the action had been commenced in the name of the real party in

interest.”) (citation omitted). See also *Newman*, 171 Ohio App.3d 117, 129-130.

Ohio’s Rule differs little from Fed. R. Civ. P. 17(a)(3), which provides that:

*Joinder of the Real Party in Interest.* The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest. [emphasis added]

As is the case with respect to the Ohio counterpart, there is no requirement that ratification, joinder, or substitution must be perfected before the statute of limitations expires. *Ratner v. Sioux Nat. Gas Corp.* (5<sup>th</sup> Cir. 1985), 770 F. 2d 512, 520; *Executive Jet Aviation, Inc. v. United States* (6<sup>th</sup> Cir. 1974), 507 F. 2d 508, 514. One federal court has explained that: “The purpose of this provision is to allow the court to avoid forfeiture and injustice when a technical mistake has been made in naming the real party in interest.” *Lavean v. Cowels* (W.D. Mich. 1993), 835 F. Supp. 375, 389, citing 6A Wright & Miller §1555 at 412-13.

This Court’s holdings in *Douglas v. Daniels Bros. Coal Co.* (1939), 135 Ohio St. 641, 123 A.L.R. 761, 15 O.O. 12, 22 N.E.2d 195, *Canterbury v. Pennsylvania R. Co.* (1952), 158 Ohio St. 68, *Kyes v. Pennsylvania R. Co.* (1952), 158 Ohio St. 362, 49 O.O.239, 109 N.E.2d 50, and *Burwell v. Maynard* (1970), 21 Ohio St. 2d 108, 50 O.O.2d 268, 255 N.E.2d 628, are controlling. In fact, in a disciplinary case decided this year, this Court cited an unbroken line of precedent dating back to *Douglas* as support for an attorney’s action of bringing a wrongful death claim in the name of the Estate before the plaintiff was actually appointed administrator. *Toledo Bar Ass’n v. Rust* (2010), 124 Ohio St. 3d 305, 921 N.E.2d 1056, P20-P23. If the Defendants’ Proposition of Law were correct, none of these authorities could have been decided as they were.

The significant legal question in this case is how *Douglas* and its progeny apply to modern cases that are governed by the Civil Rules. This Court's *Rust* case acknowledged the ongoing precedential force of these earlier authorities, but did not take the additional step of reconciling the "nominal party" concept of *Douglas* with the Civil Rules. The obvious answer is Rule 17(A)'s recognition that actions must be prosecuted in the name of the real party in interest. This term is an exact fit to this Court's earlier "nominal party" construct. Applying the real party in interest rules in this case is the way to integrate this Court's older precedents into the post-Civil Rules era.

*Douglas* states the law of Ohio. In *Douglas*, this Court reviewed this issue and held that the naming of the correct nominal party relates back so long as no new claims or parties are introduced, and the defendant is not subject to multiple judgments:

The requirement of the wrongful death statute that the prosecution of the action be in the name of the personal representative is no part of the cause of action itself, but relates merely to the right of action or remedy. That requirement was obviously intended for the benefit and protection of the surviving spouse, children and next of kin of a decedent, the real parties in interest. The personal representative is only a nominal party. *Wolf, Admr., v. Lake Erie & W. Ry. Co.*, 55 Ohio St., 517, 45 N. E., 708, 36 L. R. A., 812. **Nor does the statute require that the personal representative shall bring the action (*Wolf, Admr., v. Lake Erie & W. Ry. Co.*, supra), but merely provides that the action, if brought, shall be brought in the name of the [\*648] personal representative. The only concern defendants have is that the action be brought in the name of the party authorized so that they may not again be haled into court to answer for the same wrong. [Emphasis added.]**

*Douglas*, 135 Ohio St. 641, 646-648

In *Douglas*, as in this case, the substitution of the actual administrator of an estate relates back filing of the Complaint. In *Douglas*, this Court found that where a widow had brought suit under the mistaken belief that she was the Administratrix of

her deceased husband's estate, correction of the pleadings by amendment after the statute of limitations had expired, related back to the originally filed complaint. The *Douglas* Court could not possibly have reached this conclusion under the Propositions urged by the Defendant's in this case.

Ohio appellate courts are in accord. In *Garza v. Chetister* (6<sup>th</sup> Dist. 1978), 62 Ohio App.2d 149, 405 N.E.2d 331, a widow, who was a Mexican citizen and resident, filed a wrongful death action in Ohio following the death of her husband there. Of relevance here, the widow was not properly appointed as Administratrix of her husband's estate, which, among other grounds, supported the defendant's motion to dismiss. On appeal, the court reversed the dismissal, however. The *Garza* court opined:

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. \* \* \*[W]e find the remedy not to be a dismissal of the action, but rather the granting of a delay until the proper personal representative could be substituted. (citations omitted).

*Id.*, 62 Ohio App.2d at 155-156.

This Court has long recognized that an Administrator of an estate is a nominal party only. *Wolf, Admr., v. Lake Erie & W. Ry. Co.* (1986), 55 Ohio St., 517, 45 N. E., 708, 36 L. R. A.; 812. *Baker v. McKnight* (1983), 4 Ohio St.3d 125, 129, 4 OBR, 371, 447 N.E.2d 104. The key underlying fact of *Douglas* that bears on the case at hand is that Mrs. Douglas' attorney, acting on her misunderstanding of the law and belief that she was the appropriate party to bring the action, filed the action under a misnomer. The essential points are that the wrongful death statute, like Rule 17(A), requires only that the action be brought "in the name" of the administrator. Under *Douglas* and all its progeny, any defect in the nominal party's actual authority to act for the Estate will relate back if it is cured in time to commence the case.

Defendants Propositions of Law is incorrect because this Court's syllabus law is that the substitution of the administrator of an estate relates back to an earlier filed complaint:

1. Where a widow institutes an action, as administratrix, for damages for the wrongful death of her husband, under the mistaken belief that she had been duly appointed and had qualified as such, thereafter discovers her error and amends her petition so as to show that she was appointed administratrix after the expiration of the statute of limitation applicable to such action, **the amended petition will relate back to the date of the filing of the petition**, and the action will be deemed commenced within the time limited by statute. [Emphasis added.]

*Douglas v. Daniels Bros. Coal Co.* (1939), 135 Ohio St. 641, syllabus 1.

This Court has reasoned similarly when deciding related issues, even reversing a trial court's refusal to substitute a minor's next friend to fix the pleadings:

The bringing of an action by a minor in his own name constitutes simply a failure to follow procedural statutes. The minor is the true plaintiff and it is for him that recovery is sought and for his benefit that the action is prosecuted.

*Canterbury v. Pennsylvania R. Co.* (1952), 158 Ohio St. 68, 71-72, 62 Ohio App. 149, 405 N.E.2d 331, 16 O.O.3d 335. The deficiency of a minor bringing suit in her own name is the same deficiency as a deceased person bringing suit in her name. While neither has capacity, it is clear that both are the real parties in interest. And there is no question who that real party is, and therefore no prejudice to the defendant. In this case, Petitioners do not even allege prejudice. Rule 17(A) allows the correction of an incorrectly named real party. Rule 17(A) carries this Court's older precedents forward to the current time, and governs this case.

Similarly, this Court held that the substitution of a proper personal representative for one who became incapacitated after having been appointed related back to the filing of the complaint. *Kyes v. Pennsylvania R. Co.*, (1952), 158 Ohio St. 362. In *Kyes*, wrongful death claims were first pled by a personal representative who

was later found to lack capacity. The defendant in that case challenged the substitution of a proper representative. But, citing *Douglas*, this Court held that so long as the cause of action is not changed, the substitution of a proper representative relates back to the filing of the claim. The Court based this conclusion on the fact that the wrongful death statute is “remedial in its nature, and should be construed liberally.” *Id.* at syllabus 2. In fact, the *Kyes* Court identified the “controlling” facts as these:

However, in making these contentions the defendant disregards the **controlling facts that this cause of action remains unchanged and that the plaintiff is not the real party in interest but acts merely as a nominal or formal party or statutory trustee for the .... real parties.** [Emphasis added.]

*Kyes*, 158 Ohio St. 362, 364. As in *Douglas*, therefore, this Court found that a substitution of a proper personal representative would relate back to the filing of the complaint, so long as the underlying claims were the same. *Id.* at syllabus 5.

Considering another related issue, this Court quoted *Douglas* with approval, and repeated the fact that the defendant’s **only legitimate concern** is that it not be subjected to multiple judgments:

In an action for wrongful death, the personal representative is merely a nominal party and the statutory beneficiaries are the real parties in interest. As this court stated in *Douglas v. Daniel Bros. Coal Co.* (1939), 135 Ohio St. 641, 647, 22 N. E. 2d 195:

The requirement of the wrongful death statute that the prosecution of the action be in the name of the personal representative is no part of the cause of action itself, but relates merely to the right of action or remedy. That requirement was obviously intended for the benefit and protection of the surviving spouse, children and next of kin of a decedent, the real parties in interest. The personal representative is only a nominal party. [citing *Wolf* ] Nor does the statute require that the personal representative shall bring the action ..., but merely provides that the action, if brought, shall be brought in the name of the personal representative. **The only concern defendants**

**have is that the action be brought in the name of the party authorized so that they may not again be haled into court to answer for the same wrong.**

\*\*\*

To hold that one qualified as a beneficiary under Section 2125.02, Revised Code, is not qualified to present a claim to the executor or administrator of the estate of the deceased wrongdoer ... would be inconsistent with the principles stated above. It would also be paying obedience to form rather than recognizing that the statutory beneficiary of the wrongful death action is the real party in interest and that the appellant had sufficient timely notice of a claim against the estate. [Emphasis added.]

*Burwell v. Maynard* (1970), 21 Ohio St. 2d 108, 111, 255 N.E.2d 628, 50 O.O.2d 268 (probate statutes requiring timely presentation of claims against an estate were satisfied when a wrongful death beneficiary, rather than the administrator, provided notice). In this case, there is no question that Defendants will not be subject to any other claims brought by Eric Mohat's estate, *because* the estate was properly made a party. Under *Douglas* and *Burwell*, this Court repeated the same formulation: an incorrect nominal party can act for the real party so long as the defendant is not subject to duplicative claims.

In a closely analogous situation, this Court considered a contribution action brought by a civil tortfeasor whose liability insurance carrier had actually satisfied the entire judgment against the tortfeasor. *Shealy v. Campbell* (1985), 20 Ohio St. 3d 23, 24-25 20 OBR 210, 483 N.E.2d 701. In *Shealy*, contribution was sought against an alleged co-tortfeasor, that party moved for dismissal on the basis that the liability insurance carrier was the "real party in interest," and that the contribution claim could only be pursued by the liability carrier. This Court held that, indeed, the insurer was the only party who could pursue contribution rights. However, rather than find that the remedy was dismissal, the Court agreed with the Court of Appeals that remand for substitution was the proper course:

Accordingly, this court concurs with the judgment of the court of appeals that, in accordance with the language in Civ. R. 17(A), " \* \* \* [n]o 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. \* \* \* " Accordingly, this cause is remanded to the trial court for further proceedings and to permit the prompt substitution of Celina Mutual Casualty Company as the real party in interest in this cause of action.

*Shealy*, 20 Ohio St. 3d at 26. In *Shealy*, the Motion to Dismiss was not filed until about a year and a half after the contribution claim was commenced. *Id.* at 23. With the appellate process, the final disposition remanding to allow for substitution did not occur until three and one half years after the complaint was filed. *Id.* Still, the Court found that the proper action was the substitution of the liability carrier for the incorrectly named party, on whose behalf the carrier had paid damages.

The Eleventh District Court of Appeals has also repeated the rules that the administrator is merely a nominal party, and that the only real concern is that the defendant not be subject to multiple claimants' actions:

Yet it is equally settled that the representative is a nominal party, unless he is also a beneficiary, and that the beneficiaries are the real parties in interest. [Citing *Kyes* and *Burwell*.] Thus, it has been stated that the statute is satisfied if the action is merely brought in the representative's name, *Kyes*, supra, and that **the name requirement was designed to avoid multiple actions for the same wrong.** *Burwell*, supra. [Emphasis added.]

*In re Estate of Ross* (Geauga Ct. App. 1989), 65 Ohio App. 3d 395, 400 583 N.E.2d 1379 (holding that beneficiaries were not entitled to separate counsel from administrator's).

It is difficult to believe that Defendants did not appreciate the implications of Rule 17(a) when they prepared their brief. They have relied heavily upon *Whitley v. River's Bend Health Care*, 183 Ohio App. 3d 145, 2009-Ohio-3366, 916 N.E. 2d 515.

*Merit Brief of Defendant-Petitioners*, pp. 13-15. They have also acknowledged that this Court had accepted jurisdiction over that decision, but then dismissed the appeal as improvidently accepted after briefing and oral argument. *Id.*, p. 14 fn. 5.

Defendants have expressed no qualms, however, with the dissenting opinion which had been authored by Chief Justice Brown and joined by Justice Pfeifer. *Merit Brief of Defendant-Petitioners*, pp. 13-15. After examining the issue at length, they concluded that “the nullity theory is logically inconsistent with the expressed terms of Civ. R. 17(A).” *Whitley v. River’s Bend Health Care*, 126 Ohio St. 3d 1217, 1219, 2010-Ohio-3269, 931 N.E.2d 583 ¶ 11. They further noted that the theory had been predicated upon a Supreme Court decision which had subsequently been overruled. *Id.*, at 1219-1220 ¶ 12-13. Interestingly, Justice O’Donnell issued a concurring opinion, which Justice Lundberg Stratton joined, indicating that he would have included “language in the judgment entry ordering that the opinion of the court of appeals may not be cited as a authority except by the parties to this action.” *Id.*, at 1217 ¶ 2. This sentiment apparently has not dissuaded the instant Defendants from predicating their argument squarely upon the illogical *Whitley* appellate court decision. *Merit Brief of Defendants-Petitioners*, pp. 13-15. In accordance with the more persuasive authorities cited herein, the second Proposition of Law should be rejected.

**CONCLUSION**

For the foregoing reasons, this Court should answer the question which has been certified by the District Court by holding that there is nothing in the text of the Wrongful Death Act, or any other provision of Ohio substantive law, which precludes a newly joined personal representative from ratifying and pursuing a wrongful death claim pursuant to Ohio Civ. R. 17(A) or Fed. R. Civ. P. 17(a), even after the statute of limitations has expired.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Brief** was served by regular U.S. Mail on this  
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