2010 WL 629791 (Ohio) (Appellate Brief)
Supreme Court of Ohio.

Marian C. WHITLEY, and Patricia Mazzella, Individually and as Co-Administrators for the Estate of Ethel V. Christian, Appellants,

v.

RIVER'S BEND HEALTHCARE, et al., Appellees.

No. 2009-1484.
February 8, 2010.

On Appeal from the Lawrence County Court of Appeals, Fourth Appellate District

Merit Brief of Appellants Marian C. Whitley, and Patricia Mazzella, Individually and as Co-Administrators for the Estate of Ethel V. Christian

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CASES

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1 STATEMENT OF FACTS

This case arises out of a nursing home stay by Ethel V. Christian, who is now deceased, at the facility run by Appellees, River's Bend Health Care & River's Bend Health Care, LLC (collectively, hereinafter, “RBHC”), in South Point, Ohio. (Supp. 3.) Mrs. Christian was admitted to RBHC in February of 2004, and she remained at the Appellee's facility until April 25, 2004. (Supp. 3.) This case concerns several instances of neglect occurring during her stay. These facts are not in dispute.

Ethel Christian died on February 7, 2005. (Supp. 25.) This action was timely filed on April 15, 2005, in the Lawrence County Court of Common Pleas, Case No. 05PI309, albeit by and through Ethel's Conservator and Guardian, Marcella Christian (hereinafter referred to as “the 2005 case”) (Supp. 1.) As stated in the trial court, Marcella Christian did not inform Counsel of her mother's passing until May 31, 2005. (Supp. 66.) Marcella, who was Ethel's adult child, is also now deceased, having passed away in April 2007 (Supp. 66, 67.). Marcella was her mother's guardian during Ethel's lifetime, but did not act as Administrator of her Estate upon her passing. (Supp. 66.) Marcella's two sisters, Marian C. Whitley and Patricia Mazella, were jointly appointed as Administrators. (Supp. 37.) On June 8, 2005, Appellant filed a Notice of Suggestion of Death, and moved for, and the trial court allowed, the substitution of the co-Administrators of Ethel's estate and the named plaintiffs in the action. (Supp, 23, 25, 27.) ***Nine months later,*** on March 6, 2006, the 2005 case was dismissed without prejudice pursuant to Civ.R. 41(A). (Supp. 28.) This case was timely re-filed on February 27, 2007 pursuant to Ohio's savings statute, R.C. 2305.19. (Supp. 30.)

***2** On July 5, 2007, RBHC filed a Motion for summary judgment, asserting one ground for dismissal. (Supp. 47.) Appellees argued that, this case is untimely because the *prior* action was not commenced properly, and that therefore the savings statute could not be used. (Supp. 47-8.) The purported detect with the first action was the fact that the Estate of Ethel Christian was not formally made a party until June 8, about two months subsequent to the filing of the Complaint. Thus, Appellees argued, the first Complaint was a nullity, and the only action commenced was the one filed on February 27, 2007. (Supp. 53-4.)

It must be noted that this Motion to Substitute in the first action was not occasioned by any Motion or objection raised by the Appellees. Appellants, through discussions with Counsel, identified an error in the pleadings, and promptly moved to correct it. The record in the trial court is completely devoid of any objection by the Appellees to this substitution, either at the time the motion was made or during the nine month subsequent pendency of the 2005 case.

In the re-filed case, Appellants opposed the Motion for the Summary Judgment, arguing that the substitution of the "Estate of Ethel V. Christian" for the person of Ethel Christian, made by the trial court on June 8, 2005, relates back to the time of the first-filed complaint. (Supp. 60-64.) The trial court adopted the Appellees' position, and granted Appellees' Motion for Summary Judgment, by the Entry of August 3, 2007. A prior appeal, case number 07CA25, was dismissed for want of a final, appealable order.

Upon remand the Appellants sought reconsideration of the entry of August 3, 2007. Appellants specified that Appellees' statute of limitations argument had not been asserted in the '05 case. And Appellants argued that the Nursing Home Bill of Rights allowed Mareella standing to bring the case for her deceased mother, as Ethel Christian's daughter, regardless of ***3** whether her powers as guardian had terminated. The trial court rejected these arguments, and formally dismissed the case. (Appx. 21.)

On June 30, 2009, the Fourth District Court of Appeals issued the Decision and Entry now appealed. (Appx, 4.) The opinion indicates an unusually vigorous debate between the two judges of the majority, and the dissenting judge, concerning the effect of the substitution of Mrs. Christian's estate for her person, Following the argument presented by the Appellant, the dissent would have held that just as an estate may be substituted for a deceased defendant, there is no reason for treating a deceased plaintiff differently. (Appx. 5, fn 1.)

ARGUMENT

Under this Court's controlling precedent, the substitution of an Estate for an improperly named plaintiff relates back so long as no new claims are added, no new parties are added, and the substitution does not have the effect of subjecting the defendant to multiple claims or judgments, This rule is well settled, workable, and has been applied to a variety of situations by both this Court and other courts of Ohio. In fact, this Court identified the issue of a defendant not being subject to multiple judgments as the defendant's "only concern," and repeated this analysis just two weeks ago.

Appellees have argued that the Appellants have not made the showing necessary to place this case within the purview of this Court's precedents. But the fact is that Marcella Christian died two months before the Appellees ever raised the issue. This was two years after the substitution was made in the '05 case. It is also undeniable that Appellees never pled a lack of capacity as required by Ohio Civ. R. 9(A), either in the '05 case or the '07 case.

***4** Neither the Civil Rules nor Ohio precedent allow the destruction of statutorily created claims when the *defendant* is deceased when the case is filed. There is no reason to deny plaintiffs the same treatment where, as here, no prejudice inures to the defendant.

***Proposition of Law No. I*:**

The substitution of a Deceased Plaintiff's Estate relates back to the filing of the Complaint.

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A. IT IS UNDISPUTED THAT THE ESTATE OF ETHEL V. CHRISTIAN WAS SUBSTITUTED FOR THE DECDEDENT NINE MONTHS BEFORE THE FIRST CASE WAS DISMISSED.

The general rule in Ohio is that when the correct nominal party can be substituted for an incorrectly named one. So long as the substance of the underlying cause is not affected, the substitution relates back to the filing of the complaint.

There is no dispute that the correct nominal party, the "Estate of Ethel V. Christian," was substituted for "Ethel V. Christian." The court's entry of June 8, 2005 reflects that leave is granted for the substitution. Even in the Entry granting summary judgment, the trial court made it clear that the substitution was completed:

> This Court did not substitute the Administrator for the Guardian/Conservator until June 8, 2005.

(Entry of August 3, 2007, p.2.) No further action was required on the part of the Plaintiff below because the trial court's approval of the Motion to substitute made that substitution complete.

Ohio Civ. R, 25 states, in relevant part:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

***5** Ohio Civ. R. 25(C). Under the plain language of the rule, there is no requirement that any party amend the pleadings to affect the substitution or joinder. Rather, the Court can join the other interested party by its own action, as in this case.

Case law is clear that the court may even act on its own under Civil Rule 25 to join a real party in interest. *Holiday Props. Acquisition Corp. v. Lowrie* (Summit Ct. App., 2003), 2003 Ohio 1136, at P. 14; *Hawkins v. Anchors* (Portage Ct. App., 2004), 2004 Ohio 3341, P41 (trial court added real party in interest).

In this case, Marcella Christian simply did not appreciate the legal significance of Ethel Christian's passing. Once Mrs. Christian's family members made her passing known to Counsel, Appellants moved promptly to substitute the Estate of Ethel V. Christian for Ethel, personally. It is clear that a Court can make this substitution by its own action, or upon a Motion made by the party who should be substituted, as in this case. Even while granting summary judgment, the trial court in this case acknowledged that the Estate was made a party in June of 2005. Thus, the substitution of the Estate is established, and the only question is whether this substitution relates back to the filing of the Complaint in the '05 case, on April 15, 2005.

B. THIS COURT HAS HELD REPEATEDLY THAT THE SUBSTITUTION OF THE CORRECT NOMINAL PARTY FOR AN INCORRECTLY NAMED ONE RELATES BACK TO THE FILING OF THE COMPLAINT.

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 0.0.239, 109 N.C.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 just two weeks ago, this Court cited an ***6** 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, when his client was not the administrator, and the actual administrator did not want to bring the claim. *Toledo Bar Ass'n v. Rust* (2010), ___ Ohio St.3d ___, 2010 Ohio 170, P20-P23.

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This action was originally filed on April 15, 2005 incorrectly identifying Marcella Christian as the person acting for Ethel Christian, in Marcella's capacity as Guardian or Conservator. Nine months prior to the Appellants' voluntary dismissal of the claim, the Estate moved for, and effected the substitution of the appropriate Administrators who could act on behalf of the Estate of Ethel Christian. Not only did the trial court order the substitution, but Appellees made no objection whatsoever either at the time of the motion, nor at any time prior to the voluntary dismissal.

Douglas states the current 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:
Whether the substitution of a party plaintiff, having capacity to bring the suit, in the stead of the original plaintiff who filed the action without capacity to bring [*647] the suit, is a change in the original cause of action depends entirely upon the allegations in the amended petition. The mere substitution of parties plaintiff, without substantial or material changes from the claims of the original petition, does not of itself constitute setting forth a new cause of action in the amended petition. As was said in the opinion in the case of *Van Camp v. McCulley, Trustee*, supra: "The mere change of the name of the plaintiff in the title would not of course change the cause of action." In the instant case the cause of action set up in the petition is in no way affected by the corrections contained in the amendment. The amendment corrects the allegations of the petition with respect to plaintiffs capacity to sue and relates to the right of action as contradistinguished from the cause *of* action. A right of action is remedial, while a cause of action is substantive, and an amendment ***7** of the former does not affect the substance of the latter, [cites to treatises omitted.] An amendment which does not substantially change the cause of action may be made even after the statute of limitations has run.

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 Eric & 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

Thus under *Douglas*, the substitution relates back if these three conditions are met:
• The substitution does not introduce any new claims,

• The substitution does not introduce any new parties,

• The defendant is not subject to multiple judgments obtained by multiple plaintiffs.

Id, at 646-648.

In *Douglas*, as in this case, the substitution of the actual administrator of an estate an incorrectly pled estate representative *relates back* filing of the Complaint. The court of appeals completely ignored controlling precedent of this Court. Considering that *Douglas* is factually indistinguishable from the case at bar, and has never been overruled by this Court, the Fourth ***8** District's silence as to *Douglas* is deafening. While subsequent decisions of this Court discuss related issues, there is no plausible explanation for the lower court's refusal to deal with a valid precedent, on exactly the same issue. 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

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estate, correction of the pleadings by amendment after the statute of limitations had expired, related back to the originally filed complaint.

Similarly, in the case at bar, Marcella Christian's mistaken belief that she could act on her mother's behalf was corrected by court order substituting the administrators of her mother's estate as the correct nominal party. This correction in no way prejudiced Appellees, nor changed the nature of the claims against them. Most significantly, however, absolutely no objection to the substitution was raised by Appellants either at that time, or during the subsequent 9 months that the matter was pending.

Although Appellees attempt to distinguish *Douglas* by pointing out that Mr. Douglas ultimately became the Administratrix of her husband's estate, this is a difference without distinction. 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. Likewise, Marcelia Christian's failure to understand the legal import of her mother's death on her status as Guardian caused counsel herein to file the action under a similar misnomer.

***9** The Appellees' Motion should have been denied 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.

The *Douglas* Court explained that the subsequent naming of an administrator is merely a substitution of the correct nominal party for the incorrectly named one, The underlying cause is unaffected. Therefore, the only sensible outcome is for the naming of the administrator to relate back to the time the complaint was filed. In this case, as in *Douglas*, the Complaint was filed by the decedent's *guardian*, who believed that she retained authority to act for the Plaintiff after her death. Within ten days of learning of Mrs. Christian's passing, the Appellants suggested her death on the record and moved for leave to substitute her estate. These are the same circumstances as in *Douglas*, where this Court found that the substitution relates back to the filing of the complaint.

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:

... [T]he question presented is whether the Court of Appeals erred when it reversed the judgment of the Court of Common Pleas dismissing the petition of Nettie Jane Canterbury for the reason that she was a minor and had not instituted her action by a next friend.

***10** The trial court refused to permit an amendment of [*72] the petition and the substitution of a next friend as plaintiff .....

****

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.

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It is true that under Section 11247, General Code, an infant, as a procedural matter, must sue by a guardian or next friend, but where an infant sues in his own name and no attack for lack of capacity has been made ... the lack of capacity is deemed waived.

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 35.

In a similar case, 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 rejected many of the same arguments the Appellees have advanced in this case:
The defendant seeks to distinguish [Douglas] by asserting that there was no difference of persons involved, that the original plaintiff actually became qualified, and that there was an honest intent and mistake, while in the instant case there was a substitution of an entirely different person acting in a different capacity, there was a failure of the ancillary administrator to ***11** qualify, and there was knowledge of the lack of capacity.

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.

It must be noted that in this case, no claims, neither for wrongful death nor otherwise, were added by the substitution of Ethel Christian's estate for her person. The issue here has always been an incorrectly identified nominal party, for prosecuting Mrs. Christian's survival claims, only. Although this is not a wrongful death action, this Court recently repeated that wrongful death claims and survivor claims are both brought by the same nominal party. *Peters v. Columbus Steel Castings Co*. (2007), 115 Ohio St. 3d 134, 136-137, 873 N.E. 2d 1258. The case law discussing the correct nominal party for a wrongful death claim therefore applies with equal force.

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 ***12** 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.**

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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 Appellees will not be subject to any other claims brought by Mrs. Christian's estate, *became* 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 ***13** 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.

Finally, this Court took up this issue in a case where the correct party had not actually been brought into the case. Four justices of this Court held that because any number of factors can result in a plaintiff's inability to bring the action under the correct name, the Civil Rules require that the substitution of the correct nominal party relates back:
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 ***14** 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,

[*514] 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.

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.

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Ramsey v. Neiman (1994), 69 Ohio St, 3d 508, 513-514, 634 N.E.2d 211 (Justices Pfeiffer, Douglas, Resnick and F.E. Sweeney concurring in the judgment).

Appellees may object that *Ramsey* does not apply because *Ramsey* concerned a wrongful death claim. However, the above reasoning actually applies with *greater* force because the limitations period for a nursing home neglect claim is only one year, not the two years provided under the wrongful death statute. Secondly, the fact that the wrongful death statute allows for the appointment of the estate after filing, but before resolution, belies the notion that an action filed by the incorrect nominal party is a "nullity." *Ramsey* is yet another of this Court's precedents showing that the issue is simply misnomer, which may be corrected.

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:
This and similar language has been interpreted to mean that only the personal representative has the legal capacity to sue under this statutory cause of action. ***15** *Moss v. Hirzel Canning Co.* (1955), 100 Ohio App. 509, 60 O.O. 397, 137 N.E.2d 440. If the action is brought by the beneficiaries, it must be dismissed **or the correct party substituted.***Sabol v. Pekoe* (1947), 148 Ohio St. 545, 36 O.O. 182, 76 N.E.2d 84.

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. *Kyes v. Pennsylvania Rd. Co.* (1952), 158 Ohio St. 362, 49 O.O. 239, 109 N.E.2d 503;*Burwell v. Maynard* (1970), 21 Ohio St.2d 108, 50 O.O.2d 268, 255 N.E.2d 628. 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).

There is no question that the matter of the relation back of an incorrectly designated nominal party is long settled, upon the terms defined by the *Douglas* case.

C. THE FOURTH DISTRICT RELIED ON OVERTURNED AUTHORITY IN DECIDING THIS CASE.

As thoroughly detailed by the dissent in the Appellate Court Opinion, the majority opinion relied on a line of cases stemming from the overruled holding of *Barnhart v. Schultz* (1978), 53 Ohio St.2d 59, 7 O.O.3d 142, 372 N.E.2d 59. Specifically the Appellate Court reasoned, at page 2 of their opinion:

> First, although the dissent does not discuss *Simms v. Alliance Community Hosp.*, [citation omitted] and *Estate of Newland v. St. Rita's Medical Ctr.* [citation omitted], it does argue that those cases are based on another case, that was based on still another case, that has been overruled. We are aware that *Simms* and *Estate of Newland* cite to *Levering v. Riverside Hospital* (1981), 4 Ohio St.3d 125, 447 N.E.2d 59, and that *Levering* cites to *Bamhart v. Schultz* (1978), 53 Ohio St.2d 59, 372 N.E.2d 589, which of course was overruled in *Baker v. McKnight* (1983), 4 Ohio St.3d 125, 447 N.E.2d 104, at the syllabus. However, merely because *Barnhart* was overruled does not necessarily mean that *Levering* is bad law, ***16** nor does it mean that *Simms* and *Estate of Newland* are bad law for relying on *Levering*. We point out that the Fifth District in *Simms*, 2008-Ohio-847, at ¶¶20-22, expressly considered the effect of *Bamhart* being overruled on Levering, but concluded that the reasoning of *Levering* is still sound.

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It is inexplicable that the lower court seems to have asserted that this Court's decision to overrule *Bamhart* was of no consequence to the subsequent cases which reached their conclusions by relying on the holding and rationale of that decision. Instead the court below concluded that the "reasoning" *of Levering* was "still sound." An examination of rationale used in *Levering v. Riverside Hospital* (1981), 4 Ohio St.3d 125, 447 N.E.2d 59, makes that statement impossible to reconcile, since *Levering's* analysis relied **exclusively** on the *Bamhart* in finding. Specifically, it held:

Plaintiff seeks to distinguish *Barnhart* on the basis that *Barnhart* involved a deceased defendant and this case involves a deceased plaintiff. However, that distinction is without merit. The complaint filed in *Barnhart* was a nullity because there was no party-defendant, the named defendant having been deceased prior to the filing of the complaint. Similarly, the complaint in this case was a nullity because there was no party-plaintiff, the named plaintiff having been deceased prior to the filing of the Complaint.

Levering, at 159 [emphasis added].

It is clear that *Barnhart* was the only pillar supporting the court's conclusion is *Levering*. Actually, the *Barnhart* Court was quite correct to find that there was no appreciable difference between situations involving a deceased defendant and those involving a deceased plaintiff. Given that, if the court were to truly rely on the "reasoning" of *Levering* as opposed its holding, it would have concluded that there could be no distinction between the holding of *Baker*, which involved a deceased defendant, and the case at bar, involving a deceased plaintiff. Certainly ***17** plaintiffs and defendants deserve equal treatment.

D. APPELLEES WAIVED THEIR RIGHT TO CHALLENGE CAPACITY.

Furthermore, as Civ. R. 9(A) makes clear, a proper challenge to the capacity of the Marcella Christian to bring the action, would have been made in Appellees' Answer to the original Complaint. The rule states, in pertinent part:

> When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific averment, which shall include such supporting particulars as are within the pleader's knowledge.

In other words, if the originally filed case was, in fact, a "nullity" by virtue of lack of capacity, the time for Appellees to raise that issue was in their responsive pleading to the 2005 Complaint. Having failed to so plead, with the specificity outlined by Civ. R. 9(A), Appellees right to do so during the refilled action was clearly waived:

> Thus, Civ.R. 9(A) places the pleading burden upon a defendant to deny, by specific negative averment or with particularity, a plaintiffs capacity to sue. The defense of lack of capacity to sue is typically waived when an answer only contains a general denial and when the defense is not raised by specific negative averment. See Log*an & Co., Inc. v. Cities of America, Inc.* (1996), 112 Ohio App.3d 276, 678 N.E.2d 613;*Gove Associates, Inc. v. Thomas* (1977), 59 Ohio App. 2d 144, 392 N.E.2d 1093.

Wanamaker v. Davis (Greene Ct. App. 2007), No. 2005-CA-151, 2007 Ohio 4340, P43.

Assuming, however, *arguendo*, that this failure can be overlooked, Appellees voiced absolutely no objection to the motion to substitute the proper administrators of the Estate of Ethel Christian either at the time the substitution was affected or for the subsequent nine months of the pendency of the matter. Given both the law's preference for resolution on the merits and Appellees' failure to plead incapacity at a time where Appellants could have corrected the ***18** misnomer in its original filing without prejudicing their right to resolution on the merits, this Court must find that the trial court's action in allowing the substitution of the proper administrators of the Estate relates back to the time the first complaint was filed.

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***Proposition of Law No, II*:**

The Ohio Nursing Home Bill of Rights allows the adult child of a nursing home resident to represent said resident in Court.

Individuals who reside in nursing homes are uniquely vulnerable, and are therefore uniquely protected by statute, The Nursing Home Bill of Rights is the instrument that ensures their protection. *Cramer v. Auglaize Acres* (2007), 113 Ohio St. 3d 266, 273, 865 N.E.2d 9.

In the case at hand, Marcella Christian timely brought the initial action on behalf of her then-deceased mother, Ethel Christian. As the daughter of Ethel Christian, Marcella had the explicit right to bring an action on behalf of her mother as the adult child of a nursing home resident whose rights had been violated:

(1)(1)(a) Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation.

(b) An action under division (I)(1)(a) of this section may be commenced by the resident or by the resident's legal guardian or other legally authorized representative on behalf of the resident or the resident's estate. **If the resident or the resident's legal guardian or other legally authorized representative is unable to commence an action under that division on behalf of the resident, the following persons in the following order of priority have the right to and may commence an action under that division on behalf of the resident or the resident's estate;**

(i) The resident's spouse;

(ii) The resident's parent or adult child;

(iii) The resident's guardian if the resident is a minor child;

***19** (iv) The resident's brother or sister;

(v) The resident's niece, nephew, aunt, or uncle.

R.C. 3721.17(I)(1), emphasis added.

Despite the specific language contained in The Nursing Home Bill of Rights, Appellees contend that Marcella did not have standing to bring suit on behalf of her deceased mother because she had not been appointed the administrator of her mother's estate. The Nursing Home Bill of Rights nonetheless allows an adult child to commence such an action. However, notwithstanding the specific language of R.C. 3721.17(I)(1), Appellees' belief that only an appointed administrator has standing to act in a situation such as that which is involved here is misguided.

Besides those individuals listed above which R.C. 3721.17(I)(1) gives specific authority to commence an action under the Nursing Home Bill of Rights, the Fourth District previously found that a "sponsor," within the meaning of the Nursing Home Bill of Rights, has standing to bring an action as provided by the statute:

Edgewood questions whether Shelton has standing to bring this action. We answer this legal question using a de novo standard of review.

[*P6] A non-resident of a nursing home does not have standing to sue in his or her individual capacity for a violation of R.C. Chapter 3721.10 - .17, which is known as the nursing home patients' bill of rights, because it only provides protection for a resident of a nursing home. *Belinky v. Drake Center. Inc.* (1996), 117 Ohio App. 3d 497, 503, 690 N.E.2d 1302, However, **"[a]**

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sponsor may act on a resident's behalf to assure that the home does not deny the residents' rights under sections 3721.10 to R.C. 3721.17 of the Revised Code." R.C. 3721.13(B). " 'Sponsor' means an adult relative, friend, or guardian of a resident who has an interest or responsibility in the resident's welfare." 3721.10(D). [Emphasis added.]

Shelton v. LTC Mgmt. Servs. (Highland Ct. App. 2004), 2004 Ohio 507, p. 5-6. The First District ***20** Court of Appeals has agreed. *Belinky v. Drake Ctr.* (Hamilton Ct. App. 1996), 117 Ohio App. 3d 497, 503-504, 690 N.E.2d 1302.

The court in *Shelton* went on to state that even where there has been a misnomer in the caption, the complaint is not fatal where it is clear from the body of the complaint that the individual person bringing the action only represents the aggrieved resident:

> [*P7] Here, the caption of the case shows that Shelton brought this action in her individual capacity, instead of her capacity as a sponsor of her mother. However, absent a showing of prejudice, a defective caption does not deprive a court of its power to look beyond the caption to the body of the complaint to determine the legal capacity of a party. Sec, e.g., *Porter v. Fenner* (1966), 5 Ohio St.2d 233, 215 N.E.2d 389;*Gibbs v. Lemley* (1972), 33 Ohio App. 2d 220, 293 N.E.2d 324;*Scadden v. Willhite* (Mar. 26, 2002), Franklin App. No. 01AP-800, 2002 Ohio 1352;*Newark Orthopedies, Inc. v. Brock* (Oct. 5, 1995), Franklin App. No. 95APE03-246, 1995 Ohio App. Lexis 4423. The body of Shelton's complaint indicates that she is the daughter of Etta Mae Beatty and that she does not claim any injury to herself. She alleges in her complaint that Edgewood violated her mother's rights. Moreover, Edgewood does not allege that it is prejudiced by the defective caption. Hence, we find that Shelton has standing because she qualifies to bring this action in her capacity as a sponsor for her mother.

Shelton, 2004 Ohio 507, P7.

Marcella, as the adult child of Ethel Christian, and "in her capacity as a sponsor for her mother," was authorized to commence this action against the Defendants. In terms of determining who has standing in instances such as this, the Ohio Fourth District is not alone in placing the focus where it should be, that being whether the individuals **intent** is to "act on a resident's behalf."

Courts from other jurisdictions with similar provisions applicable to nursing home residents are in accord. In the Court of Appeals for Florida in the Third District, as is the case here, the dispute surrounded an adult son's standing to bring suit on behalf of his ***21** incompetent mother. His mother had not appointed him to be her guardian. In regard to the issue of standing the court staled:
Florida *Rule of Civil Procedure 1.210* provides that "a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought." Section 400.023, Florida Statutes, provides that:

Any resident whose rights as specified in this part are deprived or infringed upon shall have a cause of action against any licensee responsible for the violation. The action may be brought by the resident or his guardian, [or] *by a person or organization acting on behalf of a resident with the consent of the resident* (Emphasis added.) This section authorizes a person acting on behalf of a nursing home resident to sue to enforce the rights granted in Chapter 400. Construed with *Fla. R. Civ. P, 1.210, section 400.023* authorizes Roberto Garcia to sue Brookwood on behalf of the real party in interest - his mother - in his mother's name.

Garcia v. Brookwood Extended Care Ctr. of Homestead, (Dade Ct. App. 1994), 643 So. 2d 715.

The ultimate issue is whether the individual bringing suit is doing so to do what is in the best interest of the resident. After all this is the legislative intent behind Ohio's Nursing Home Bill of Rights, and similar statutes across this nation.

The **ElderAbuse** Act of California states:

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> Standing, for purposes of the **ElderAbuse** Act, must be analyzed in a manner that induces interested persons to report **elderabuse** and to file lawsuits against **elderabuse** and neglect. In this way, the victimized will be protected.

Estate of Lowrie, 118 Cal. App. 4th 220.

The intent is similar in *Bachtel v. Miller County Nursing Home* 110 S.W.3d 799:

> The obvious purpose of this statute is to protect the health and safety of citizens who are unable fully to take care of themselves, particularly the more **elderly** persons, who, from necessity or choice, spend their later years in homes of the type statute would license or regulate... Such an enactment as this is a vital and most important exercise of the state's police power. . . .”

***22** As such its construction, consistent with its terms, should be sufficiently liberal to permit accomplishment of the legislative objective. *Bachtel*, 110 S.W.3d 799.

Appellees seek to avoid the obvious by instead focusing on two arguments that are simply incorrect. First, Appellees argue that because the statute now requires a showing that both the nursing home resident ***and*** the resident's legally appointed representative are unable to act for the resident. The Court of Appeals agreed with the argument that new language inserted into R.C. 3721.17(1)(1)(b) essentially overrules *Shelton*. But *Shelton* relied on a different portion of the statute, R.C. 3721.13(B), a portion that remains unchanged since the time *Shelton* was decided:
However, “[a] sponsor may act on a resident's behalf to assure that the home does not deny the residents' rights under sections 3721.10 to R.C. 3721.17 of the Revised Code.” R.C. 3721.13(B). “ ‘Sponsor’ means an adult relative, friend, or guardian of a resident who has an interest or responsibility in the resident's welfare.” 3721.10(D).

Shelton v. LTC Mgmt. Servs. (Highland Ct. App. 2004), 2004 Ohio 507, P6. Again, while language may have been added to R.C. 3721.17(1), the clause the Fourth District relied upon in *Shelton-R.C.* 3721.13(B)- is exactly the same today as when that court decided *Shelton*.

Secondly, Appellees are incorrect to assert that both the resident ***and*** the resident's legal representative must be shown, under R.C. 372***l***.l7(I)(1)(b), to be unable to act in the resident's interest. The statute says, “If the resident ***or*** the resident's legal guardian or other legally authorized representative is unable to commence an action,” then a sponsor may act. The statute uses the word “or,” not the word “and.” Therefore, the showing that the statute applies is made upon filing the suggestion of death of the resident. Had the General Assembly intended to require showings that both the resident ***and*** her legal representative were unable to act on her ***23** behalf, then that is how the statute would have been written. But “or” is not equivalent to “and,” and the Fourth District's “ready” conclusion to the contrary is inconsistent with the plain language of R.C. 3721. 17(I)(1)(b). The court decided this issue based on what it would like the statute to say, rather than what the statute actually does say.

***24** *CONCLUSION*

Failure to recognize that the substitution of a the estate for the incorrect nominal party plaintiff in this case is inconsistent with controlling precedent of this Court as well as with the letter and spirit of the Ohio Rules of Civil Procedure. This Court must overturn the Appellate Court's holding, finding the substation of the Estate related back to the original filing of the Complaint and remand this matter back to the trial court for adjudication. Holding otherwise will deny Ethel Christian and her family the ability to vindicate the harm she suffered based on technical rules of pleading rather than on the merits of her claim, an anathema to justice and fairness.

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The Nursing Home Bill of Rights creates unique remedies, and a unique avenue by which they may be pursued when the resident cannot act for herself. A specific Code provision allowed Marcella to act for her mother in Case No. 05P1309. There is no dispute this case was filed timely, voluntarily dismissed, then re-filed as the instant case. Ohio law explicitly allowed Marcella Christian to act for Ethel Christian in the prior case, and this case was timely re-filed.

For these reasons, Appellants urge this Court to REVERSE the decisions of the lower courts, and to REMAND this case to the Court of Common Pleas for further proceedings.

Appendix not available.

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