

[Cite as *Mousa v. Mt. Carmel Health Sys., Inc.*, 2013-Ohio-2661.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Marium Mousa, Administratrix of the	:	
Estate of Jeremiah Mousa, Deceased et al.,	:	
	:	
Plaintiffs-Appellants,	:	
	:	No. 12AP-737
v.	:	(C.P.C. No. 09CVA-11-16351)
	:	
Mount Carmel Health System, Inc. et al.	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	
	:	

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D E C I S I O N

Rendered on June 25, 2013

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*Plevin & Gallucci, Frank Gallucci, III, and Michael D. Shroge; Paul W. Flowers Co., L.P.A., and Paul W. Flowers, for appellants.*

*Arnold Todaro & Welch Co., L.P.A., Gregory B. Foliano, and Karen L. Clouse, for appellees.*

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Plaintiffs-appellants, Marium Mousa, individually and as the Administratrix of the Estate of Jeremiah Mousa, Deceased, and Alex Mousa, individually, appeal from the judgment of the Franklin County Court of Common Pleas granting a motion for reconsideration and entering judgment on the pleadings in favor of defendants-appellees, Dr. Nicholas John Behrendt, Mount Carmel Heath System, Inc., and Mount Carmel St. Ann's Hospital. For the following reasons, we reverse the judgment of the trial court.

## **I. BACKGROUND**

{¶ 2} This medical malpractice action arises from the birth of Jeremiah Mousa on November 2, 2008, at a facility owned and operated by Mount Carmel Health System, Inc., and Mount Carmel St. Ann's Hospital. Jeremiah Mousa sustained brain damage from the delivery, which was performed by Dr. Behrendt, and Jeremiah died on December 6, 2008. He was survived by his parents, Marium and Alex Mousa.

{¶ 3} On November 2, 2009, appellants filed a complaint raising claims of wrongful death (Count I), survivorship (Count II), and loss of consortium (Count III). The complaint indicated that the suit was brought by Marium and Alex Mousa in their individual capacities and the Estate of Jeremiah Mousa, Deceased, with Marium Mousa as the administratrix. Appellants noted in the complaint that Marium Mousa was "seeking to be the representative of the Estate of Jeremiah Mousa, Deceased and will ratify this Complaint once authorized to do so." (Complaint, ¶ 1.) Appellants also brought suit against Dr. Michael Sprague, Northeast Obstetricians and Gynecologists, Inc., Dr. Richard Marger, Dr. Andrew Bokor, Abramovitz & Bokor, M.D., Inc., and John Does Number 1-10.

{¶ 4} Dr. Marger, Dr. Bokor, and Abramovitz & Bokor, M.D., Inc., were dismissed from the proceedings on April 26, 2010. On February 25, 2011, Marium Mousa was appointed as administratrix of the decedent's estate, and she ratified the complaint in her capacity as administratrix.

{¶ 5} Pursuant to Civ.R. 12(C), Mount Carmel Health System, Inc., Mount Carmel St. Ann's Hospital, Dr. Behrendt, Dr. Sprague, and Northeast Obstetricians and Gynecologists, Inc., filed motions for judgment on the pleadings. They maintained that the lawsuit was a nullity because Marium Mousa had not yet been appointed as administratrix of the decedent's estate when the complaint was filed. In their memorandum in opposition, appellants contended that the Civ.R. 12(C) motion challenged Marium Mousa's capacity to sue as administratrix of the decedent's estate, and they argued that the issue was waived because it was not asserted in their opponents' answers as an affirmative defense.

{¶ 6} The trial court denied the motion, and appellants voluntarily dismissed, without prejudice, claims against Dr. Sprague and Northeast Obstetricians and Gynecologists. Appellees filed a motion for reconsideration contending that appellants should not be able to pursue their wrongful death claim because, not only was the decedent's estate not open when the claim was filed, an administrator for the estate was not appointed until after the statute of limitations expired. Appellees also argued that appellants cannot prevail on their survivorship claim because an administrator of the decedent's estate was not appointed within the statute of limitations for that claim and contended that appellants cannot prevail on their loss of consortium claim because it is derivative to the invalid wrongful death and survivorship claims.

{¶ 7} The trial court concluded that appellees raised a standing defense and noted that standing cannot be waived. The trial court determined that appellant lacked standing and dismissed the wrongful death claim because Marium Mousa had not been appointed administratrix within the applicable two-year statute of limitations. The trial court dismissed all remaining claims on grounds that they are "a corollary" of the "wrongful death issue." (Aug. 28, 2012 Decision, 1, fn. 1.)

## **II. ASSIGNMENT OF ERROR**

{¶ 8} Appellants filed a timely notice of appeal and assign the following as error:  
The trial judge erred as a matter of law by granting a motion for reconsideration and entering judgment on the pleadings in favor of defendant[s]-appellees.

## **III. DISCUSSION**

{¶ 9} In their single assignment of error, appellants contend that the trial court erred by granting a motion for reconsideration and entering judgment on the pleadings in favor of appellees. We agree.

{¶ 10} Pursuant to Civ.R. 12(C), a defendant may file a motion for judgment on the pleadings after the close of the pleadings on grounds that the plaintiff failed to state a claim upon which relief can be granted. *Burnside v. Leimbach*, 71 Ohio App.3d 399, 402 (10th Dist.1991). A motion for judgment on the pleadings presents only questions of law and may only be granted when no material issues of fact exist and the moving

party is entitled to judgment as a matter of law. *Anetomang v. OKI Sys. Ltd.*, 10th Dist. No. 10AP-1182, 2012-Ohio-822, ¶ 12. Pursuant to Civ.R. 12(C), pleadings and any reasonable inferences to be drawn from the pleadings are to be liberally construed in the light most favorable to the nonmoving party. *Id.* Appellate review of motions for judgment on the pleadings is de novo. *Id.*

{¶ 11} Appellants brought a wrongful death claim, pursuant to R.C. 2125.01, which states, "[w]hen the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued \* \* \* shall be liable to an action for damages." A wrongful death action "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." R.C. 2125.02(A)(1). The personal representative brings a wrongful death action for the injuries suffered by the beneficiaries of the decedent as a result of the death. *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, ¶ 11. In Ohio, a personal representative of the decedent is a court-appointed administrator or executor of the decedent's estate and is not defined according to familial relationships. *Ramsey v. Neiman*, 69 Ohio St.3d 508, 511 (1994). The personal representative is only a nominal party, and the real parties in interest are the beneficiaries of the decedent because they have suffered an injury. *Toledo Bar Assn. v. Rust*, 124 Ohio St.3d 305, 2010-Ohio-170, ¶ 21.

{¶ 12} A party must have both standing and capacity to sue to commence a lawsuit. Standing to sue is required to invoke the jurisdiction of the common pleas court in every lawsuit, and standing is to be determined at the commencement of suit. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 24. A person lacks standing unless he has a real interest in the subject matter of the action. *Id.* at ¶ 22. A person has such an interest if he has suffered an injury by the defendant. *Id.* at ¶ 36. See also *State ex rel. Walgate v. Kasich*, 10th Dist. No. 12AP-548, 2013-Ohio-946, ¶ 11 (noting that a plaintiff has standing to sue if he demonstrates

an injury caused by the defendant). Because a real party in interest is an individual who has suffered an injury in a matter, a party lacks standing if not a real party in interest. *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, ¶ 12 (10th Dist.). See also *Pinzone v. Pinzone*, 11th Dist. No. 2011-L-133, 2012-Ohio-6126, ¶ 16 (recognizing that standing is similar in nature to a real party in interest and, therefore, the two terms and their underlying principles are used interchangeably). Standing is a jurisdictional requirement and may be raised at any time. *Schwartzwald* at ¶ 22.

{¶ 13} In addition to standing, a party must have the capacity to sue. *Natl. Crime Reporting, Inc. v. McCord & Akamine, LLP*, 177 Ohio App.3d 551, 2008-Ohio-3950, ¶ 7 (10th Dist.). Capacity concerns a determination as to whether an individual may properly sue, either as an entity or on behalf of another. *Natl. City Mtge. v. Skipper*, 9th Dist. No. 24772, 2009-Ohio-5940, ¶ 11. See also *Wanamaker v. Davis*, 2d Dist. No. 2005-CA-151, 2007-Ohio-4340, ¶ 42 (stating that capacity to sue refers to the eligibility of a person to commence an action). Capacity to sue is not a jurisdictional requirement. *Skipper* at ¶ 11. Lack of capacity is an affirmative defense. *Id.* at ¶ 12. Therefore, pursuant to Civ.R. 9(A), a capacity challenge is waived if a party does not specifically raise it in his answer. *State ex rel. Downs v. Panioto*, 107 Ohio St.3d 347, 2006-Ohio-8, ¶ 30.

{¶ 14} Appellants challenge the trial court's decision to enter a judgment on the pleadings in favor of appellees on grounds that Marium Mousa lacked standing to bring a wrongful death action on behalf of the estate of Jeremiah Mousa. Appellants argue that the issue of Marium Mousa's authority to bring the wrongful death action pertains to whether she had capacity to sue, and appellants argue that appellees waived that issue by failing to raise it as an affirmative defense in their answer.

{¶ 15} Appellees argue that they have raised a standing defense, and they assert that standing did not exist at the time the complaint was filed because there was no estate opened or administrator appointed on behalf of the decedent. Appellees also argue that, although Marium Mousa was eventually appointed personal representative of the decedent's estate, the appointment had no impact on her standing to bring the

wrongful death suit because it occurred after the statute of limitations expired. To support their argument, appellees rely on *Mohat v. Mentor Exempted Village School Dist. Bd. of Edn.*, N.D.Ohio No. 1:09 CV 688 (June 1, 2011), in which the court dismissed a wrongful death action because the decedent's estate had not been opened when the complaint was filed, and the administrator was not appointed until after the statute of limitations expired.

{¶ 16} A review of *Mohat* reveals that it was not based on principles of standing, but, rather, was decided on grounds that no party had authority, i.e., capacity, to bring a wrongful death suit on behalf of the beneficiaries. Recently, the same court in *Klinger v. Corr. Corp. of Am., Inc.*, N.D.Ohio No. 4:11cv2299 (Dec. 12, 2012), held that a personal representative need not be appointed by a court before filing a wrongful death suit. The *Klinger* court held that when an individual brings suit prior to being appointed by the court as an administrator that that person has capacity to sue and concluded that a party may proceed with a wrongful death claim upon the proper appointment of a personal representative.

{¶ 17} Preceding *Mohat*, the Supreme Court of Ohio held in *Douglas v. Daniels Bros. Coal Co.*, 135 Ohio St. 641, 647-48 (1939), that where a widow had brought a wrongful death suit under the mistaken belief that she was the administratrix of her deceased husband's estate, she was allowed to proceed in her suit even though she received her appointment after the statute of limitations had expired. The Supreme Court determined that the widow's status as administratrix concerns her capacity to sue. *Id.* at 648.

{¶ 18} In *Stone v. Phillips*, 9th Dist. No. 15908 (Aug. 11, 1993), the court followed *Douglas* and held that a trial court was not required to dismiss a wrongful death suit on grounds that the administrator of the decedent's estate was not appointed until after the complaint was filed and even though the decedent's estate had not been opened at the time the complaint was filed. In *De Garza v. Chetister*, 62 Ohio App.2d 149, 155 (6th Dist.1978), the court held that when a question exists as to whether an individual in a wrongful death action had been properly appointed an administrator of a decedent's

estate, the proper remedy is the substitution of the proper representative rather than dismissal of the action.

{¶ 19} Here, the decedent's parents, Marium and Alex Mousa, are the injured parties in the wrongful death action and, as beneficiaries of the decedent, are the real parties in interest. Thus, Marium and Alex Mousa have standing to bring a wrongful death action in this matter. Accordingly, we find the wrongful death action does not fail for lack of standing.

{¶ 20} As discussed above, an individual bringing suit must have capacity to sue to be a proper party. Consistent with *Douglas* and *Klinger*, when a wrongful death action is filed, pursuant to R.C. 2125.01, the issue of whether it was brought by a properly appointed administrator of the decedent's estate pertains to the capacity to sue requirement and not standing. Because appellees failed to raise the affirmative defense of capacity to sue in their answer, appellees waived the defense, and we need not examine the issue.

{¶ 21} Given our decision on the trial court's disposition of the wrongful death claim, we conclude that the trial court erred by granting the motion for reconsideration and entering judgment on the pleadings in favor of appellees on all claims. Therefore, we must reverse the judgment of the trial court. For all these reasons, we sustain appellants' single assignment of error.

#### **IV. CONCLUSION**

{¶ 22} Having sustained appellants' single assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter to that court for further proceedings consistent with this decision.

*Judgment reversed;  
cause remanded.*

KLATT, P.J., and VUKOVICH, J., concur.

VUKOVICH, J., of the Seventh Appellate District, sitting by  
assignment in the Tenth Appellate District.

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