

STATE OF OHIO                    )  
  )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

ROBERT REYNOLDS

C.A. No.       27411

Appellant

v.

HCR MANORCARE, INC., et al.

Appellees

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CV-2013-11-5276

DECISION AND JOURNAL ENTRY

Dated: July 22, 2015

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MOORE, Judge,

{¶1} Plaintiff-Appellant, Robert Reynolds, individually and on behalf of the wrongful death beneficiaries of June Reynolds, appeals from the entry of the Summit County Court of Common Pleas dismissing the complaint for lack of jurisdiction. We reverse.

I.

{¶2} Shortly before the expiration of the statute of limitations, Mr. Reynolds filed an 11-count wrongful death and survivor complaint in the instant matter on November 7, 2013, against Defendants-Appellees HCR ManorCare, Inc., HCR ManorCare Services, LLC,<sup>1</sup> Heartland Employment Services, LLC, ManorCare Health Services-Akron, OH, LLC, Megan Lubin, NHA, John Does 1-10, and Unidentified Entities 1-10. In it he alleged that, the Plaintiff

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<sup>1</sup> The party was misnamed Manor Care Services, Inc. in the complaint; the correct title is HCR ManorCare Services, LLC and will be used throughout this opinion.

was “the Estate of June Reynolds, by and through [Mr.] Reynolds, for the Estate of June Reynolds, and for the use and benefit of the Estate of June Reynolds, and for the use and benefit of the wrongful death beneficiaries of June Reynolds[.]” Mr. Reynolds asserted that June Reynolds was a resident of ManorCare Health Services-Akron, OH, LLC, a skilled nursing facility, from June 2011 until her death on November 11, 2011. Mr. Reynolds alleged that HCR ManorCare, HCR ManorCare Services, and Heartland Employment Services were entities engaged in “the custodial and personal care of elderly, helpless individuals who are chronically infirm, mentally impaired, and/or in need of nursing care and treatment at Manor[C]are Health Services-Akron.” Ms. Lubin was alleged to be an administrator at ManorCare Health Services-Akron. Mr. Reynolds further asserted that the “Defendants owned, operated, managed and/or controlled Manor[C]are Health Services-Akron[.]” All of the claims in some way related to the care and treatment of June Reynolds during her stay at ManorCare Health Services-Akron.

{¶3} HCR ManorCare, HCR ManorCare Services, Heartland Employment Services, and Ms. Lubin (collectively “ManorCare”) filed a joint answer denying the majority of the allegations. Additionally, ManorCare asserted numerous affirmative defenses including failure to state a claim, standing, statute of limitations, and lack of jurisdiction due to failure to comply with pleading requirements required by the Ohio Revised Code.

{¶4} After answering, Ms. Lubin filed a motion to dismiss pursuant to Civ.R. 12(B)(6) and/or motion for summary judgment asserting that she was not an administrator at the nursing home at the time of June Reynolds’ stay. That same day, ManorCare filed a motion to dismiss pursuant to Civ.R. 12(B) and/or motion for partial summary judgment asserting, inter alia, that Mr. Reynolds lacked standing because he was not a personal representative of June Reynolds as required by R.C. 2125.02(A)(1) and 2305.21. ManorCare alleged that because Mr. Reynolds

failed to demonstrate that an estate had been opened or that he was appointed by a probate court as an administrator or executor of June Reynolds' estate, he did not demonstrate standing to bring the action. Mr. Reynolds responded in opposition and ManorCare filed a reply.

{¶5} Subsequently, Mr. Reynolds filed a motion to compel the production of June Reynolds' medical records and for a second extension of time to file an affidavit of merit. Mr. Reynolds stated in his motion that the medical providers refused to provide the medical records absent receiving letters of administration. Mr. Reynolds indicated that he was in the process of seeking appointment as administrator of June Reynolds' estate. The trial court granted the motion. ManorCare sought reconsideration arguing that ManorCare was not served with the motion to compel and that Mr. Reynolds had no authority to authorize release of the records or file suit in the matter. ManorCare attached several documents to its motion including docket items from the probate court.

{¶6} The trial court did not rule on ManorCare's motion for reconsideration. However, the trial court did ultimately grant ManorCare's motion to dismiss the complaint for lack of standing. The trial court stated that, "upon the filing of the complaint, [Mr.] Reynolds had not been appointed in a fiduciary capacity because there had not yet been an estate filed for June Reynolds. Such estate was not filed until some four months after. At the time the lawsuit was initiated, he lacked standing to bring an action on behalf of her beneficiaries. Therefore, this court has no jurisdiction over the matter."

{¶7} Mr. Reynolds has appealed, raising three assignments of error for our review. We note that a dismissal for lack of standing is an adjudication other than on the merits and is without prejudice. *See Douglas v. Williams*, 9th Dist. Summit No. 27459, 2015-Ohio-1721, ¶ 5. Such a dismissal is typically not final and appealable, as it does not prevent a party from refiling

his or her complaint. *See id.* However, given the unique circumstances of this case, we conclude the judgment before us is final and appealable and proceed to examine the merits. *See Sunkin v. Collision Pro, Inc.*, 174 Ohio App.3d 56, 2007-Ohio-6046, ¶ 9-11 (9th Dist.).

## II.

### **ASSIGNMENT OF ERROR I**

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF IN A WRONGFUL DEATH ACTION MUST BE APPOINTED PERSONAL REPRESENTATIVE OF THE ESTATE IN ORDER TO HAVE STANDING.

{¶8} Mr. Reynolds asserts in his first assignment of error that the trial court erred in concluding that he had to be appointed personal representative of the estate in order to have standing to file a wrongful death action. Because we agree that the trial court erred in concluding it lacked jurisdiction based upon the arguments made by ManorCare, we sustain Mr. Reynolds' first assignment of error. We note that Mr. Reynolds has only discussed the wrongful death claims and has not mentioned the survivor claims or statute in his briefing in this Court. While it is true that it appears the trial court considered the wrongful death and survivor claims under the same standard, we cannot say that challenging the trial court's findings related to the wrongful death claims, without even mentioning the survivor claims, also inherently challenged the trial court's dismissal of the survivor claims. *See App.R. 16(A)(7)*. Accordingly, the issue of whether the trial court properly dismissed the survivor claims is not before us and will not be addressed in this appeal.

{¶9} At the time ManorCare filed its motion to dismiss pursuant to Civ.R. 12(B) and/or motion for partial summary judgment, ManorCare had already answered the complaint. While the trial court addressed the motion as a motion to dismiss, the motion and judgment could be construed as a motion for judgment on the pleadings. *See Savoy v. Kramer*, 9th Dist. Summit

No. 27418, 2015-Ohio-437, ¶ 5. Irrespective of how the motion is labeled, our standard of review would be de novo. *See id.* As neither party has raised this issue or discussed the propriety of the trial court’s consideration of the motion as a motion to dismiss, for purposes of this appeal we will review the judgment as a ruling on a motion to dismiss.

{¶10} In ManorCare’s motion to dismiss and/or motion for partial summary judgment, it referenced Civ.R. 12(B)(6). “Dismissal of a claim [under Civ.R. 12(B)(6)] is appropriate where, after accepting as true all factual allegations of the claim and resolving all reasonable inferences in favor of the nonmoving party, it appears beyond doubt that the nonmoving party cannot prove any set of facts entitling him to the requested relief.” (Internal quotations and citation omitted.) *Thomas v. Bauschlinger*, 9th Dist. Summit No. 26485, 2013-Ohio-1164, ¶ 12.

{¶11} In the motion to dismiss and/or motion for partial summary judgment, ManorCare argued that, pursuant to R.C. 2125.02(A)(1), only a personal representative of a decedent has standing to file a wrongful death action. ManorCare argued that Mr. Reynolds’ complaint failed to state a claim due to lack of standing because he “made no showing that (1) an estate has been opened in this matter, and (2) that he was appointed by an Ohio County Probate Court as the administrator or executor of an Estate of Ms. Reynolds.”

{¶12} “Wrongful death is a statutory claim created by R.C. 2125.01, which provides that ‘[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[.]’” *Cushing v. Sheffield Lake*, 9th Dist. Lorain No. 13CA010464, 2014-Ohio-4617, ¶ 4, quoting R.C. 2125.01. “Wrongful death actions must 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[.]’” *Cushing* at ¶ 4, quoting R.C. 2125.02(A)(1).

{¶13} While ManorCare repeatedly refers to Mr. Reynolds’ alleged *lack of standing* to file wrongful death claims, in actuality ManorCare’s arguments reflect that it was challenging Mr. Reynold’s *capacity* to bring the wrongful death action. “Capacity concerns a determination as to whether an individual may properly sue, either as an entity or on behalf of another.” *Mousa v. Mt. Carmel Heath Sys., Inc.*, 10th Dist. Franklin No. 12AP-737, 2013-Ohio-2661, ¶ 13, citing *Natl. City Mtge. v. Skipper*, 9th Dist. Summit No. 24772, 2009-Ohio-5940, ¶ 11. “Capacity to sue or be sued does not equate with the jurisdiction of a court to adjudicate a matter; it is concerned merely with a party’s right to appear in a court in the first instance.” (Internal quotations and citation omitted.) *Skipper* at ¶ 11. In order to establish standing, a party “must assert a personal stake in the outcome of the action \* \* \*.” (Emphasis omitted.) *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, ¶ 23. Lack of standing does not render a judgment void or affect the subject-matter jurisdiction of the court. *Id.* at ¶ 23, 25. Instead, the issue of standing addresses whether a court has jurisdiction over a particular case. *Id.* at ¶ 22.

{¶14} “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.” (Citation omitted.) *Mousa* at ¶ 12. With respect to the provisions of R.C. 2125.02(A)(1), this Court has stated that “[t]he real parties in interest in a wrongful death action are the beneficiaries, while the personal representative is a nominal party to the case.” *Cushing* at ¶ 4, citing *Toledo Bar Assn. v. Rust*, 124 Ohio St.3d 305, 2010-Ohio-170, ¶ 21.

{¶15} In its motion, ManorCare did not assert that Mr. Reynolds was not a beneficiary as contemplated by R.C. 2125.02(A)(1). Accordingly, while ManorCare stated Mr. Reynolds did

not have standing, its argument did not speak to the issue of standing; instead it dealt with the issue of capacity. *See Mousa* at ¶ 20 (“[W]hen 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.”).

{¶16} The trial court dismissed the action based upon ManorCare’s argument, which related to the issue of capacity and not standing. As “[c]apacity to sue is not a jurisdictional requirement[,]” *Mousa* at ¶ 13, citing *Skipper* at ¶ 11, the trial court erroneously concluded that it lacked jurisdiction. We note that, with respect to capacity, Civ.R. 9(A) provides that “[w]hen 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, [the party] shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader’s knowledge.” *See also RLB Eng. v. McGaw*, 9th Dist. Summit No. 22579, 2006-Ohio-655, ¶ 10, citing *State ex rel. Downs v. Panioto*, 107 Ohio St.3d 347, 2006-Ohio-8, ¶ 30 (noting the Ohio Supreme Court has held that the “failure to raise capacity to sue in a responsive pleading constitutes waiver of the issue[.]”). As the trial court’s conclusion that it lacked jurisdiction appears to be the sole basis upon which it dismissed the complaint, we conclude that it erred in doing so. Further, as ManorCare did not contend in its motion to dismiss that Mr. Reynolds was not a real party in interest, i.e. that he was not a beneficiary contemplated by the statute, that issue was not considered by the trial court, and we decline to do so in the first instance.

{¶17} Mr. Reynolds’ first assignment of error is sustained.

### **ASSIGNMENT OF ERROR II**

THE TRIAL COURT ERRED IN FINDING THAT ACCORDING TO R.C. [§2125 A PLAINTIFF IN A WRONGFUL DEATH ACTION MUST BE APPOINTED PERSONAL REPRESENTATIVE OF THE ESTATE PRIOR TO FILING A LAWSUIT[.]

### **ASSIGNMENT OF ERROR III**

THE TRIAL COURT ERRED BY REVIEWING EVIDENCE BEYOND THE FOUR CORNERS OF THE COMPLAINT IN GRANTING THE MOTION TO DISMISS BROUGHT PURSUANT TO OHIO RULE OF CIVIL PROCEDURE 12(B)(6)[.]

{¶18} Mr. Reynolds asserts in his second assignment of error that the trial court erred in concluding that R.C. 2125.02(A)(1) requires the wrongful death plaintiff to be appointed as the personal representative of the estate prior to filing a wrongful death action. Mr. Reynolds asserts in his third assignment of error that the trial court erred in reviewing evidence outside the complaint in granting the motion to dismiss.

{¶19} Given our resolution of Mr. Reynolds' first assignment of error, it is unnecessary for us to resolve the remaining assignments of error in this appeal, and we decline to do so.<sup>2</sup>

### III.

{¶20} We sustain Mr. Reynolds' first assignment of error and decline to address the remaining assignments of error. The judgment of the Summit County Court of Common Pleas is reversed and the matter is remanded for proceedings consistent with this opinion.

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<sup>2</sup> To the extent that Mr. Reynolds' third assignment of error could be broadly read to encompass an argument concerning claims other than the wrongful death claims, because no other claims are actually discussed in Mr. Reynolds' briefing in this Court, we decline to create an argument with respect to any other claims.



Judgment reversed,  
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

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CARLA MOORE  
FOR THE COURT

HENSAL, P. J.  
CONCURS.

CARR, J.  
CONCURRING IN JUDGMENT ONLY.

{¶21} I concur with the majority that the trial court erred by dismissing Mr. Reynolds' complaint for lack of jurisdiction based on lack of standing. Specifically, I agree that ManorCare's purported arguments below regarding standing instead challenged Mr. Reynolds' capacity to bring this suit.

{¶22} I write separately, however, to express concern regarding the majority’s parsing of Mr. Reynolds’ claims and declining to address his argument on appeal regarding any survivor claims. I would address the substantive arguments as they relate to all claims in his complaint for several reasons. First, Mr. Reynolds captioned his complaint as follows: “Robert Reynolds, Individually and on behalf of the Wrongful Death Beneficiaries of June Reynolds.” Accordingly, the indication is that he alleged the multiple counts in the complaint as a wrongful death action on behalf of the statutory beneficiaries, rather than as a survival action on behalf of June Reynolds’ estate. Second, in its motion to dismiss, ManorCare argued for dismissal of the claims, alternatively as wrongful death claims and survivor claims, without delineating which claims fit into which category. Third, in ruling on ManorCare’s motion to dismiss and dismissing all of Mr. Reynolds’ claims, the trial court reasoned that Mr. Reynolds lacked standing to bring the action “on behalf of [June Reynolds’] beneficiaries” as required in a wrongful death action, rather than on behalf of her estate as required in a survival action. Fourth, by merely writing that this Court will not address the survivor claims, it is unclear which counts in the complaint remain viable on remand.

{¶23} Based on my enunciated concerns, I would conclude that Mr. Reynolds has properly argued for reversal of the trial court’s order dismissing his complaint for lack of standing and, therefore, jurisdiction, as to all counts in his complaint.

APPEARANCES:

MICHAEL J. FULLER, JR., Attorney at Law, Appellant.

ROBERT M. ANSPACH, J. RANDALL ENGWERT, and DAVID J. BORELL, Attorneys at Law, for Appellees.