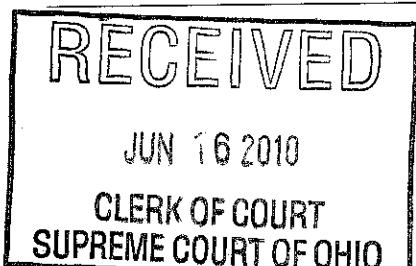


ORIGINAL

IN THE SUPREME COURT OF OHIO

MENTOR EXEMPTED VILLAGE SCHOOL)	CASE NO. 2010-0951
DISTRICT BOARD OF EDUCATION, <i>et al.</i> ,)	
)	
Petitioners,)	On Certified Question of State Law
)	from the United States District Court
vs.)	for the Northern District of Ohio
)	Case No. 1:09-cv-00688-DCN
WILLIAM MOHAT, <i>et al.</i> ,)	
)	
Respondents.)	

**PRELIMINARY MEMORANDUM ON CERTIFIED QUESTION OF
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**



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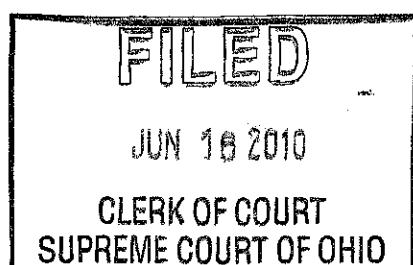


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If a wrongful death action was not originally commenced in the name of the real party in interest, and if the duly-appointed personal representative subsequently ratifies the commencement of the action, under Civ. R. 17(A) such ratification "shall have the same effect as if the action had been commenced in the name of the real party in interest." Therefore, pursuant to Civ. R. 15(A) and 17(A), an amendment to add the duly-appointed personal representative of the estate as the plaintiff in the wrongful death suit, and his or her ratification of the commencement of the action, will both relate back to the original filing of the wrongful death complaint.	3
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INTEREST OF *AMICUS CURIAE*

Amicus curiae, Nikki C. Hardy, is a duly-appointed personal representative of the estate of her brother in a wrongful death action now pending in the Court of Common Pleas in Cuyahoga County, Ohio. She was appointed, however, after the wrongful death action was commenced but before a resolution of that case by judgment or settlement.¹

Like hundreds of other grief-stricken relatives and family members throughout Ohio facing the decision whether to file a wrongful death complaint on behalf of a deceased loved one, she has relied on the opinion of a majority of the justices of this Court concurring in the judgment in *Ramsey v. Neiman* (1994), 69 Ohio St.3d 508, who interpreted the Ohio wrongful death statute, R.C. 2125.02(A)(1), as *not* expressly requiring that “the personal representative be appointed before he or she can enter the courthouse to file a wrongful death complaint.” *Id.* at 513. As the four members of this Court concluded in construing the provisions of R.C. 2125.02(A)(1) and R.C. 2125.02(C) *in pari materia*, a personal representative of the decedent’s estate “must be court-appointed after the complaint has been filed, but before any judgment is entered or any settlement is reached. Summary judgment would provide the appropriate mechanism to screen out those plaintiffs who have not received court appointment after filing their complaints.” *Id.* at 514.

She maintains that the majority’s interpretation of the Ohio wrongful death statute in *Ramsey* was correct as a matter of statutory construction and public policy. It represents the well-settled law of Ohio that has been relied upon by hundreds of family members, their

¹ The case is *Moysey, et al. vs. Saber Healthcare Group, LLC, et al.*, Cuyahoga County Court of Common Pleas, Case No. CV-08-655377, filed on March 31, 2008 by the five surviving next-of-kin of the deceased, Lewis Anthony Gabbard, including among others his sister, *amicus curiae* Nikki Hardy. The suit asserts wrongful death and survivorship claims arising out of Gabbard’s death on April 1, 2007. Gabbard’s sister, *amicus curiae* Nikki C. Hardy, was appointed personal representative of his Estate by the Probate Court of Butler County, Ohio, on May 20, 2010.

attorneys, and judges throughout the State. It would upset the settled expectations of those persons relying on the *Ramsey v. Neiman* concurring opinion by a majority of this Court to answer the certified question from the Northern District of Ohio in another other fashion.

As a litigant with a pending claim that depends on adherence and fidelity to this construction of the Ohio wrongful death statute, and whose meritorious wrongful death claim would be put in jeopardy by any answer other than the settled construction given by the concurring majority in *Ramsey*, the *amicus curiae* has a substantial interest in the outcome of this case and in the way in which this Court addresses the question of law certified to it.

ARGUMENT

Answer to the Certified Question: The Ohio Wrongful Death Statute, R.C. 2125.02(A)(1), requires that the duly-appointed personal representative of the decedent's estate must bring a wrongful death action. It does not require that the personal representative be appointed before the wrongful death action is filed. R.C. 2125.02(C) mandates that the personal representative must be appointed before the case is resolved by settlement or judgment. Therefore, construing R.C. 2125.02(A)(1) and R.C. 2125.02(C) *in pari materia*, the personal representative of the estate may be court-appointed either before or after the wrongful death complaint has been filed, but in all events must be court-appointed before any judgment is entered or any settlement is reached. *Ramsey v. Neiman* (1994), 69 Ohio St.3d 508, 513-514 (Pfeifer, J., on behalf of a majority of the Court, concurring in judgment only), followed and applied.

If a wrongful death action was not originally commenced in the name of the real party in interest, and if the duly-appointed personal representative subsequently ratifies the commencement of the action, under Civ. R. 17(A) such ratification "shall have the same effect as if the action had been commenced in the name of the real party in interest." Therefore, pursuant to Civ. R. 15(A) and 17(A), an amendment to add the duly-appointed personal representative of the estate as the plaintiff in the wrongful death suit, and his or her ratification of the commencement of the action, will both relate back to the original filing of the wrongful death complaint.

The relevant part of the Ohio wrongful death statute, R.C. 2125.02(A)(1), provides:

[A] civil action for wrongful death *shall be brought in the name of the personal representative of the decedent* for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent.

(Emphasis supplied.) In addition, R.C. 2125.02(C) provides:

A personal representative appointed in this state, with the consent of the court making the appointment and *at any time before or after commencement of a civil action for wrongful death*, may settle with the defendant the amount to be paid. (Emphasis added.)

With due respect to the U.S. District Court for the Northern District of Ohio, the answer to the certified question, and the proper construction of the foregoing statutes, is a matter of settled law that parties and their counsel have relied on for at least 16 years. In *Ramsey v. Neiman*, *supra*, the lead opinion represented the views of three justices – a minority of the Court. The record in *Ramsey* showed that the plaintiff had not been appointed administrator of the decedent's estate; the record did *not* show any attempt by the plaintiff to become appointed. 69 Ohio St.3d at 513. Based on those facts, the lead opinion declined to hold that the plaintiff's future appointment as personal representative of the decedent's estate (if that ever occurred) would relate back to the date he filed his complaint. *Id.*

Four justices, representing a majority of the Supreme Court, concurred in the judgment announced by the lead opinion. The four justices agreed with the lead opinion's conclusion that "R.C. 2125.02(C) mandates that a personal representative in a wrongful death case must be appointed by a court before the case is settled. That *is* what the statute expressly requires." 69 Ohio St.3d at 513 (Pfeifer, J., concurring in judgment only) (emphasis in original). However, the four justices did not agree with "the lead opinion's conclusion that R.C. 2125.02(A)(1) mandates that the personal representative be appointed before he or she can enter the courthouse to file a wrongful death complaint. That *is not* what the statute expressly requires." *Id.* (emphasis in original). The Supreme Court majority explained their reasoning as follows:

Grief-stricken families spend significant periods of time deliberating whether a wrongful death action should be brought on behalf of a deceased loved one. These lengthy deliberations often

result in a wrongful death complaint being filed at the last minute.

A relative who finally decides to file a wrongful death complaint must not be obligated to first go through the lengthy process of obtaining a court appointment before filing the complaint. This delay would unnecessarily jeopardize a personal representative's chances of filing the complaint within the two-year limitations period.

The language in R.C. 2125.02(A)(2) [*sic* – the court meant (A)(1)] and 2125.02(C) indicates that ***the personal representative must be court-appointed after the complaint has been filed, but before any judgment is entered or any settlement is reached.***

Summary judgment would provide the appropriate mechanism to screen out those plaintiffs who have not received court appointment after filing their complaints. In the present case, the plaintiff was not appointed as the decedent's personal representative after he filed his complaint. Thus, the trial court correctly granted defendants' motions for summary judgment, but for the wrong reason.

Id. at 513-14 (emphasis supplied).

The issues presented by the certified question fit exactly within Justice Pfeifer's analysis. They are also distinguished on their facts from *Ramsey*. Unlike in *Ramsey*, the example in the certified question is where a plaintiff has taken affirmative steps and appropriate action, after the wrongful death complaint was filed but before any judgment was entered or any settlement was reached in the case, to be duly appointed as the personal representative of the deceased's estate. Such a circumstance fulfills the requirements of R.C. 2125.02(A)(1) and 2125.02(C) as understood and explained by a majority of the Supreme Court in *Ramsey v. Neiman*.

The wrongful death statute is procedural and remedial in nature and should be given a liberal construction. *Kyes v. Pennsylvania R.R. Co.* (1952), 158 Ohio St. 362 (syllabus no. 2). R.C. 1.11 requires that "remedial laws and all proceedings under them shall be liberally construed in order to promote their subject and assist the parties in obtaining justice." *See also Perry v. Eagle-Picher Industries, Inc.* (1990), 52 Ohio St.3d 168, 170; *Stone v. Phillips* (9th Dist.

1993), 1993 Ohio App. LEXIS 3989, at *6.

In *Stone v. Phillips, supra*, decided a year before this Court's decision in *Ramsey v. Neiman*, the Ninth District Court of Appeals likewise ruled that a wrongful death suit should not be dismissed on the grounds that the party bringing the suit had not been court-appointed as the personal representative of the decedent's estate, even though the statute of limitations expired after suit was filed but before the proper party was substituted:

[T]he change of the name of a plaintiff in the caption merely corrects a formality and does not change the cause of action. The mere substitution of the name of a party entitled to bring the action for the name of one not so entitled does not change the cause of action and may be made even after the statute of limitations has run. An amendment which corrects allegations with respect to a plaintiff's capacity to sue relates to the right of action and does not affect the substantive cause of action. Therefore, substitution of parties is the proper remedy, rather than dismissal of the action.

As to the doctrine of "relation-back," the general rule is that the appointment of an administrator relates back to the time of the filing of the [complaint]."

Stone v. Phillips, supra, 1993 Ohio App. LEXIS 3989, at *8-9, citing *Douglas v. Daniels Bros. Coal Co.* (1939), 135 Ohio St. 641, 647; *De Garza v. Chetister* (1978), 62 Ohio App.2d 149, 155; *Bell v. Coen* (1975), 48 Ohio App.2d 325, 327; *Archdeacon v. Cincinnati Gas & Electric Co.* (1907), 76 Ohio St. 97, 107. The court in *Stone* also emphasized that Ohio cases illustrate that courts "liberally permit pleadings to be amended to cure a defect, so that determinations may be made on the merits," *Stone, supra*, at *8, citing *Archdeacon, supra*, and *Patterson v. V&M Auto Body* (1992), 63 Ohio St.3d 573, 577, because "justice abhors the loss of causes of action by pure technicalities." *Stone v. Phillips, supra*, at *7-8, citing *Bell v. Coen, supra*.

Finally, the Court of Appeals in *Stone* distinguished the appellate decision in *Ramsey v. Neiman* based on the fact that, since the plaintiff had never taken any steps to be appointed as personal representative, there would be nothing to relate back. "At any rate, we chose not to

extend the holding in *Ramsey* beyond its own facts; we do not believe that that decision mandates a similar result in this case.” *Stone v. Phillips, supra*, at *9.

The Eighth District Court of Appeals has recently hinted (without deciding) at the way it would view this issue under facts and circumstances extremely similar to those raised in the certified question:

The county defendants argue that this action was not timely commenced because at the time this action was filed, Maddox was not the personal representative of the estate, had no authority to file a wrongful death action, and the December 2008 amended complaint brought by Maddox as representative of Anderson’s estate did not “relate back.” The county defendants cite to *Gottke v. Diebold* (Aug. 9, 1990), Licking App. No. CA-3484, 1990 Ohio App. LEXIS 3564. ***We note that relation back has been permitted in certain circumstances, however.*** See *Stone v. Phillips* (Aug. 11, 1993), Summit App. No. 15908, 1993 Ohio App. LEXIS 3989. However, because we are not called upon to address the issues of “relation back” or timeliness of the amended complaint, ***we simply assume for purposes of this appeal, but do not decide, that this action was timely and that the amended complaint relates back.***

Maddox v. City of East Cleveland, 8th Dist. No. 92673, 2009-Ohio-6308, ¶ 13 n.3 (emphasis supplied).

Even more recently, this Court cited to the interpretation of the *Ramsey v. Neiman* majority:

Ramsey thus held that the reference in R.C. 2125.02(A)(1) to a “personal representative” required “an executor or administrator, *i.e.*, an individual appointed by a court, to bring the cause of action.” ... But according to the concurring opinion, joined by three other justices, ***the lead opinion incorrectly construed the statute to “mandate[] that the personal representative be appointed before he or she can enter the courthouse to file a wrongful death complaint.” As the opinion points out, this requirement is not specified anywhere in the statute:*** “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. ...”

Toledo Bar Association v. Rust, 124 Ohio St.3d 305, 2010-Ohio-170, ¶¶ 32-33, citing *Ramsey v. Neiman* (1994), 69 Ohio St.3d 508, 510, 513-14 (emphasis supplied).

Other Ohio courts have consistently allowed the post-filing substitution of the real party in interest, in accordance with the logic of the *Ramsey* concurrence:

R.C. 2125.02(A) provides that a wrongful death action “shall” be brought in the name of the deceased’s personal representative. 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. *If the action is brought by the beneficiaries, it must be dismissed or the correct party substituted.* Usually, the personal representative is the executor or administrator of the estate.

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*. Thus, it has been stated that the statute is satisfied if the action is merely brought in the representative’s name, and that the name requirement was designed to avoid multiple actions for the same wrong.

In re Estate of Ross (1989), 65 Ohio App.3d 395, 400, citing *Sabol v. Pekoc* (1947), 148 Ohio St. 545; *Kyes v. Pennsylvania R.R. Co.* (1952), 158 Ohio St. 362; *Burwell v. Maynard* (1970), 21 Ohio St.2d 108. This Court extensively and approvingly quoted the *Estate of Ross* opinion in *Toledo Bar Association v. Rust*, *supra*, 124 Ohio St.3d 305, ¶¶ 28-29.

Similarly, other Ohio courts of appeals have refused to extend the lead opinion in *Ramsey* beyond the specific facts in that case, and have ruled that *Ramsey* was not applicable where the plaintiff had subsequently applied to the probate court to become the court-appointed personal representative of the decedent’s estate. *See, e.g., Wanamaker v. Davis*, 2nd Dist. No. 2005-CA-151, 2007-Ohio-4340, ¶ 46.

Furthermore, Civil Rule 17(A) specifies that, when an action has not been commenced in the name of the real party in interest, the real party in interest shall be given a reasonable period of time after objection to ratify the commencement of the action. When so ratified, the

ratification “shall have the same effect as if the action had been commenced in the name of the real party in interest.” Civ. R. 17(A). As the Court of Appeals for Franklin County has noted:

Pursuant to Civ.R. 17(A), after defendants objected that plaintiff is not the real party in interest, *the trial court was required to give plaintiff a reasonable opportunity to cure the deficiency through the trustee’s ratifying commencement of the action*, or being substituted or joined in the action as the real party in interest. While the statute of limitations would have run on plaintiff’s claim at the time of joinder, ratification or substitution, *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.”*

McLynas v. Karr, 10th Dist. No. 03AP-1075, 2004-Ohio-3597, ¶ 22 (emphasis supplied). Thus, pursuant to Rule 17(A), the subsequent ratification of the commencement of a wrongful death action by the duly-appointed personal representative of the estate relates back to the original filing of the complaint.

For all of the foregoing reasons, the Court should answer the certified question, following settled law established by the concurring opinion in *Ramsey*, that the personal representative of a deceased’s estate may prosecute a wrongful death action for the benefit of the estate and its beneficiaries so long as the representative’s appointment occurs before there is a final resolution of the action by judgment or settlement. When the appointment occurs after the wrongful death action has been commenced, it and the representative’s ratification of the suit will both relate back to the filing of the original complaint.

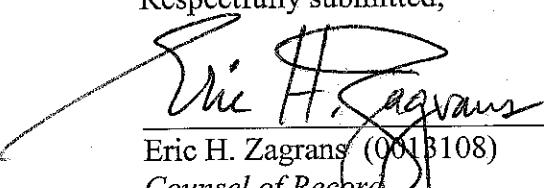
CONCLUSION

Accordingly, for the foregoing reasons, parties, lawyers and courts have correctly understood the law on the certified question to be settled under the majority concurrence in *Ramsey v. Neiman, supra*. Any other answer to the certified question would be contrary to the settled expectations and reliance of countless relatives and next-of-kin under the Ohio wrongful death statutes, not to mention their counsel, and would affect numerous pending cases around the

State. Thus, the Court should answer the certified question in the manner the *amicus* has indicated above. However, in the event the Court were to answer the certified question in any way at variance with the concurring opinion of the majority of this Court in *Ramsey*, any such answer should be treated as a change in the law operating only prospectively to new cases filed after the date of the Court's answer to the certified question. Any such answer contrary to the concurrence in *Ramsey* should be expressly limited not to apply to any case currently pending in any court, state or federal, in which this issue is relevant.

Dated: June 16, 2010

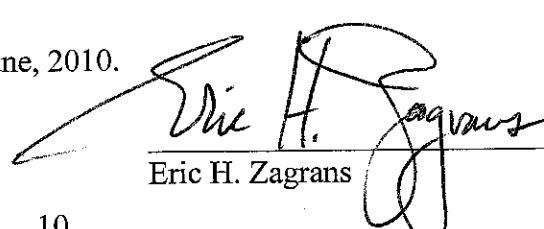
Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Preliminary Memorandum on Certified Question of *Amicus Curiae* in Support of Respondents was served by ordinary U.S. mail, postage prepaid, on Kenneth D. Myers, 6100 Oak Tree Boulevard, Suite 200, Cleveland, Ohio 44131, Attorney for Respondents, and David K. Smith, Krista K. Keim and Lindsay F. Gingo, BRITTON, SMITH, PETERS & KALAIL, 3 Summit Park Drive, Suite 400, Independence, Ohio 44131, Attorneys for Petitioners, this 16th day of June, 2010.


Eric H. Zagrans