This Order Is Not Precedential
And Is Not To Be Cited

No. 2--06--1306

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ROBERT J. MANGAN, CLERK
APPELLATE COURT 2nd DISTRICT

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARGARITTE JORDAN, as Special Administrator of the Estate of Demetrius Jordan, Deceased,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellant,	)	
v.	)	No. 04--L--591
SHERMAN HOSPITAL, SHERMAN HEALTH SYSTEMS, ZUBAIR AHMAD, and MUJAHID HUSSAIN,	)	Honorable Donald J. Fabian,
Defendants-Appellees.	)	Judge, Presiding.

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RULE 23 ORDER

Plaintiff, Margaritte Jordan, was the grandmother of decedent, Demetrius Jordan. Decedent died after a mass in his lung began bleeding during a surgical procedure. Approximately two years after decedent died, plaintiff filed a wrongful death and survival action and moved the court to name her as the special administrator of decedent's estate. Plaintiff was improperly named special administrator after the statute of limitations had run. Plaintiff voluntarily dismissed that suit and filed a new one. After she filed her third amended complaint in the new action, decedent's half-brother sought to appoint plaintiff as special administrator. Defendants (Sherman Hospital, Sherman Health Systems, and Drs. Zubair Ahmad and Mujahid Hussain) moved to dismiss the third amended complaint, claiming that the complaint in the original suit was a nullity to which the third amended

complaint could not relate back. Thus, because the statute of limitations had run when the new suit was initiated, defendants argued that the third amended complaint must be dismissed. The trial court granted the motion to dismiss. We affirm.

In January 2002, decedent went to Sherman Hospital because he had difficulty breathing and was coughing up blood. Dr. Shyamala Revuluri cared for decedent, and, following a chest x-ray and computed tomography (CT) scan, it was determined that decedent had a mass in his right lung. Decedent was admitted to the hospital, where Drs. Hussain, Ahmad, Daniel Nepomuceno, and Charles Cavallo treated him.

Later that month, decedent underwent a brochoscopy, which Dr. Hussain and/or Dr. Ahmad performed. During that procedure, Dr. Hussain touched the mass and decedent began bleeding profusely. In response, Dr. Cavallo performed an emergency lobectomy. Decedent suffered severe anoxic encephalopathy and died on February 5, 2002.

When decedent died, he left surviving him plaintiff, his mother, and two adult siblings. The whereabouts of decedent's father are unknown.

On February 4, 2004, plaintiff filed a wrongful death and survival action against, among others, Sherman Hospital, Sherman Health Systems, and Drs. Ahmad, Hussain, Cavallo, Revuluri, and Nepomuceno (case No. 04--L--56). Plaintiff alleged that various acts of medical malpractice caused or contributed to decedent's death. Nowhere in plaintiff's complaint did she identify decedent's next of kin. Accompanying the complaint was plaintiff's motion to appoint herself as the special administrator of decedent's estate. An order appointing plaintiff as the special administrator was entered on March 10, 2004.

In October 2004, plaintiff moved for a voluntary dismissal of Drs. Ahmad, Hussain, Nepomuceno, and Cavallo. The trial court granted the motion, and the case proceeded against the remaining defendants. On November 8, 2004, while case No. 04--L--56 was pending against the remaining defendants, plaintiff refiled her wrongful death and survival action against Drs. Ahmad, Hussain, and Nepomuceno (case No. 04--L--591). Like the complaint in case No. 04--L--56, the complaint in case No. 04--L--591 did not identify decedent's next of kin.

Plaintiff subsequently moved to voluntarily dismiss case No. 04--L--56 in its entirety. The trial court granted that motion on February 7, 2005. On February 24, 2005, plaintiff filed her first amended complaint in case No. 04--L--591, adding Sherman Hospital, Sherman Health Systems, and Dr. Revuluri as defendants. The first amended complaint did not identify decedent's next of kin. On April 5, 2005, Sherman Hospital, Sherman Health Systems, and Dr. Revuluri moved to dismiss. The trial court granted the motion as to Sherman Hospital and Sherman Health Systems and gave plaintiff 28 days to replead her wrongful death and survival action.

A little over five months later, plaintiff filed her second amended complaint in case No. 04--L--591. At that time, Drs. Nepomuceno and Revuluri were dismissed. The second amended complaint did not identify decedent's next of kin.

In January 2006, Sherman Hospital and Sherman Health Systems moved to dismiss plaintiff's second amended complaint because plaintiff failed to identify decedent's next of kin or allege pecuniary injury. In March 2006, Drs. Ahmad and Hussain moved to dismiss on the same grounds. The court entered an agreed order to grant the motions to dismiss.

Approximately two months later, plaintiff filed her third amended complaint in case No. 04--L--591. In count I, plaintiff brought a wrongful death claim against Sherman Hospital and

Sherman Health Systems and named Brian Jordan, decedent's half-brother, and Sasha Jordan, decedent's half-sister, as decedent's next of kin. In counts III and V, plaintiff brought wrongful death claims against Drs. Ahmad and Hussain, and, as in count I, plaintiff named Brian Jordan and Sasha Jordan as decedent's next of kin. Plaintiff never named decedent's mother as next of kin. Pursuant to sections 2--619(a)(2) and (a)(5) of the Code of Civil Procedure (735 ILCS 5/2--619(a)(2), (a)(5) (West 2006)), defendants jointly moved to dismiss plaintiff's third amended complaint. They contended that the complaint in case No. 04--L--56 was a nullity to which the third amended complaint could not relate back, because no legally cognizable plaintiff was named in case No. 04--L--56. Thus, because the statute of limitations had run when case No. 04--L--591 was filed, defendants claimed that the third amended complaint had to be dismissed. Plaintiff responded, and Brian Jordan moved to appoint plaintiff as special administrator of decedent's estate.

The trial court granted the motion to dismiss, noting that plaintiff lacked standing to bring a wrongful death claim against defendants. The court then observed that the complaint in case No. 04--L--591 was filed after the statute of limitations expired and could not relate back to the complaint in case No. 04--L--56, which was a legal nullity. This timely appeal followed.

On appeal, plaintiff argues that her third amended complaint in case No. 04--L--591 should not have been dismissed, because it related back to the complaint in case No. 04--L--56. We review de novo an order granting a section 2--619 motion to dismiss. Robinson v. Toyota Motor Credit Corp., 201 Ill. 2d 403, 411 (2002).

In addressing the issue raised on appeal, we first make note of when the limitations period expired. Decedent died on February 5, 2002. Under the Wrongful Death Act (740 ILCS 180/0.01 et seq. (West 2006)), a complaint must be brought within two years following the decedent's death

(see 740 ILCS 180/2(c) (West 2006)). Thus, a cause of action for decedent's death expired on February 5, 2004, one day after plaintiff filed her complaint in case No. 04--L--56.

We now consider whether plaintiff's third amended complaint in case No. 04--L--591 was time-barred. Our resolution of that issue begins with addressing the validity of the complaint in case No. 04--L--56, which in turn depends on who may bring a wrongful death action. At common law, there was no cause of action to recover damages for the death of a decedent. Miller v. Kramarczyk, 306 Ill. App. 3d 731, 732 (1999). When the legislature enacted the Wrongful Death Act, it created one. Mio v. Alberto-Culver Co., 306 Ill. App. 3d 822, 825 (1999). Because the Wrongful Death Act created a cause of action, it must be strictly construed. Miller, 306 Ill. App. 3d at 732. Thus, we cannot read into the Wrongful Death Act any qualifications for which the legislature did not specifically provide. Miller, 306 Ill. App. 3d at 732.

The Wrongful Death Act delineates who may bring a wrongful death claim. Specifically, it provides:

> "In the event that the only asset of the deceased estate is a cause of action arising under [the Wrongful Death] Act, and no petition for letters of office for his or her estate has been filed, the court, upon motion of any person who would be entitled to a recovery under [the Wrongful Death] Act, and after such notice to the party's heirs or legatees as the court directs *** may appoint a special administrator for the deceased party for the purpose of prosecuting or defending an action." 740 ILCS 180/2.1 (West 2006).

When the special administrator is to be the plaintiff, the appointment must precede the filing of the complaint. Lindsey v. Special Administrator of the Estate of Phillips, 219 Ill. App. 3d 372, 377 (1991).

Here, when plaintiff filed the complaint in case No. 04--L--56, she had not been appointed special administrator; instead, she attached to her complaint a motion for appointment, which was granted. This procedure was defective in two respects. First, the appointment did not precede the filing of the complaint. Second, and in any event, plaintiff could not move for appointment because she was not "any person who would be entitled to a recovery under [the Wrongful Death] Act." 740 ILCS 180/2.1 (West 2006). The Wrongful Death Act provides that those entitled to recover include "the surviving spouse and next of kin of such deceased person." 740 ILCS 180/2 (West 2006). In deciding who qualifies as "next of kin," courts look to the Probate Act of 1975 (755 ILCS 5/1--1 et seq. (West 2006)). Miller, 306 Ill. App. 3d at 733. Relevant to this appeal, section 2--1(d) of the Probate Act provides:

> "If there is no surviving spouse or descendent but a parent, brother, sister or descendent of a brother or sister of the decedent: the entire estate to the parents, brothers and sisters of the decedent in equal parts." 755 ILCS 5/2--1(d) (West 2006).

Thus, according to the Probate Act, decedent's mother, half-brother, half-sister, and father, if he is living, are decedent's "next of kin," and they alone could move the court for the appointment of a special administrator.

Plaintiff claims that she was entitled to recover under the Wrongful Death Act because she was decedent's surrogate mother. But a surrogate parent may not recover under the Wrongful Death Act when the decedent's parent or sibling is still living. See In re Edwards, 106 Ill. App. 3d 635, 636, 638-39 (1982) (foster parents who began caring for 13-year-old decedent when she was 4 days old could not bring wrongful death claim when decedent's parents were still living). Moreover, plaintiff's status as decedent's grandmother does not change this result. While section 2--1(e) of the Probate

Act (755 ILCS 5/2--1(e) (West 2006)) provides for distribution of the decedent's estate to any surviving grandparents, section 2--1(e) applies only when, among other things, "there is no surviving spouse, descendent, parent, brother, sister or descendent of a brother or sister of the decedent." Thus, plaintiff was not entitled to recover under the Wrongful Death Act.

The fact that plaintiff was never properly appointed special administrator of decedent's estate is fatal to her claim that she could bring a wrongful death action against defendants. Bringing a lawsuit in the name of the personal representative is a condition precedent to the right to recover damages. Friend v. Alton R.R. Co., 283 Ill. App. 366, 369 (1936). Thus, without a proper appointment, plaintiff lacked standing to file the complaint in case No. 04--L--56, and her lack of standing rendered the complaint invalid. See Rodgers v. Consolidated R.R. Corp., 136 Ill. App. 3d 191, 193 (1985) (providing that "wrongful death suits must be brought by and in the name of the personal representative of the deceased" and that "[t]he personal representative possesses the sole right of action or control over the litigation").

As a final matter, we consider whether the third amended complaint in case No. 04--L--591 related back to the complaint in case No. 04--L--56. When plaintiff filed her complaint in case No. 04--L--591, she still had not been properly appointed the special administrator of decedent's estate. Thus, like the complaint filed in case No. 04--L--56, the complaint in case No. 04--L--591 was a nullity. As a result, the relation-back doctrine could not save the complaint filed in case No. 04--L--591, as the relation-back doctrine applies only when, among other things, the subsequent complaint was filed by or on behalf of a person possessing the legal capacity to file suit. See Bricker v. Borah, 127 Ill. App. 3d 722, 724 (1984). Because plaintiff never possessed the capacity to sue as the special administrator of decedent's estate, we cannot conclude that her complaint in case No.

04--L--591 related back to the complaint in case No. 04--L--56, as both complaints were equally defective.

Plaintiff relies on Pavlov v. Konwall, 113 Ill. App. 3d 576 (1983). There, the court held that a wrongful death action filed by a valid special administrator related back to one filed by an invalid special administrator. Here, although defendants raise several arguably pertinent distinctions, the most obvious is that the third amended complaint was not filed by a valid special administrator. When plaintiff filed that complaint, she still had not been appointed special administrator, and, although decedent's sibling eventually moved to appoint her, that motion was not granted before the filing of the complaint (and indeed never was). Thus, Pavlov is inapplicable. Even if a valid complaint can relate back to an invalid one (see Jablonski v. Rothe, 287 Ill. App. 3d 752, 754, 755, 757 (1997)), an invalid complaint certainly cannot relate back.

Similarly, we must reject plaintiff's claim that the third amended complaint was timely because she filed it within a year after she voluntarily dismissed the complaint in case No. 04--L--56. Although a plaintiff has one year in which to refile a complaint after voluntarily dismissing the original complaint (see 735 ILCS 5/13--217 (West 2006)), that law presupposes that neither complaint is a nullity. See Bavel v. Cavaness, 12 Ill. App. 3d 633, 637 (1973). Here, both complaints were nullities.

In determining that plaintiff's third amended complaint was properly dismissed, we recognize the hardship this may cause plaintiff. However, it is our obligation to follow the law, even when doing so leads to harsh results. Mio, 306 Ill. App. 3d at 828.

For these reasons, the judgment of the circuit court of Kane County is affirmed.

Affirmed.

CALLUM, J., with McLAREN and GILLERAN JOHNSON, JJ., concurring.