

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

VEROL BLACKWOOD,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
WELLSPAN HEALTH, YORK HOSPITAL,	:	
WELLSPAN MEDICAL GROUP, FAMILY	:	
HEALTH ASSOCIATES YORK, DR.	:	
ROBERT PIZZIKETTI, M.D., CARDIAC	:	
DIAGNOSTIC ASSOCIATES, P.C.,	:	
	:	
Appellees	:	No. 2206 MDA 2013

Appeal from the Order entered on November 14, 2013
in the Court of Common Pleas of York County,
Civil Division, No. 2012-SU-004256-74

BEFORE: LAZARUS, WECHT and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED JULY 25, 2014

Verol Blackwood (“Blackwood”) appeals from the Order denying his Motion to Amend Case Caption to Correct Party Designation and dismissing, with prejudice, his case against Wellspan Health, York Hospital, Wellspan Medical Group, Family Health Associates York, Dr. Robert Pizziketti, M.D., and Cardiac Diagnostic Associates, P.C. (collectively “Defendants”). We affirm.

On October 16, 2010, Blackwood’s wife died in York Hospital after numerous medical problems that had occurred throughout the year. On March 28, 2012, Blackwood was named the Executor of his wife’s estate (“the Estate”). Blackwood, believing his wife’s death was the result of

medical malpractice, filed a Praecipe for Writ of Summons on October 12, 2012,¹ with the caption "Verol Blackwood, Plaintiff, v. Wellspan Health, York Hospital, Wellspan Medical Group, Family Health Associates York, Dr. Robert Pizziketti, M.D., Cardiac Diagnostic Associates, P.C., Defendants." Each Defendant filed a Praecipe for a Rule to File Complaint. On December 10, 2012, Blackwood filed a Complaint, but amended the caption to "Verol Blackwood, Individually, and on behalf of The Estate of Beverly Blackwood." Certificates of Merit were produced for each Defendant, and discovery commenced. Each Defendant filed Preliminary Objections arguing, *inter alia*, the dismissal of all claims Blackwood lacked standing to bring in his individual capacity.

In April 2013, Blackwood retained new counsel and, by agreement of the parties, was allowed to file an Amended Complaint. Blackwood filed a first Amended Complaint on July 5, 2013. He filed a second Amended Complaint, without leave of court or permission of the opposing parties, on July 19, 2013. On August 26, 2013, Blackwood filed a third Amended Complaint, again without leave of court or permission from the opposing parties. All of the Amended Complaints were captioned "Verol Blackwood, Individually, and as Administrator of The Estate of Beverly Blackwood." Defendants filed Preliminary Objections, in the nature of a demurrer, challenging, *inter alia*, Blackwood's standing to bring the claims as an

¹ A wrongful death action cannot be brought later than two years after the death. **See** 42 Pa.C.S.A. § 5524(2).

individual. Defendants argued that Blackwood, as an individual, should not be permitted to recover for the Estate, that only the Estate, or Blackwood as his wife's personal representative, can bring the claims Blackwood raised as an individual, and that the statute of limitations had expired for the claims. As such, Defendants argued that the case was filed by the incorrect party, it was too late for the case to be brought by the correct party, and it must therefore be dismissed. On September 27, 2013, Blackwood filed Responses and a Motion to Amend Case Caption to Correct Plaintiff Party Designation. On November 14, 2013, the trial court denied Blackwood's Motion to Amend Case Caption and dismissed his case with prejudice.

Blackwood filed a timely Notice of Appeal and a court-ordered Pennsylvania Rule of Appellate Procedure 1925(b) Concise Statement.

On appeal, Blackwood raises the following issues for our review:

- A. Whether the lower court committed an error of law, or committed an abuse of discretion[,] when it denied [Blackwood's] [M]otion to amend the caption of [his] [C]omplaint where [he] merely sought to designate [himself] in his proper capacity, as Executor of the Estate of his deceased wife, Beverly Blackwood[?]
- B. Whether the lower court committed an error of law, or committed an abuse of discretion, when it denied [Blackwood's] Motion to Amend the Case Caption which had requested, in the alternative, that [Blackwood] be permitted to amend the caption to include a claim by [] Blackwood against the [D]efendants as a guardian *ad litem*[?]
- C. Whether the [lower court] committed an error of law, or committed an abuse of discretion, when it prematurely dismissed the entire lawsuit when the [M]otion before the

[court] concerned only a motion to amend the case caption[?]

Brief for Appellant at 5 (*italics added*).

“We review the trial court’s decisions on requests for amendments on an abuse of discretion standard.” ***Fredericks v. Sophocles***, 831 A.2d 147, 150 (Pa. Super. 2003). “The decision of the trial [c]ourt to deny a motion to amend a complaint is within the sound discretion of the trial court, and the trial court’s determination will not be disturbed absent an abuse of that discretion.” ***Ferraro v. McCarthy-Pascuzzo***, 777 A.2d 1128, 1132 (Pa. Super. 2001).

We will address Blackwood’s first two claims together. Blackwood asserts that the Estate was opened prior to the commencement of this action (which was initiated before the statute of limitations expired), and that he was the Estate’s personal representative at that time. Brief for Appellant at 10, 13, 16. Therefore, he contends, his Motion to Amend would only correct his designation to one that he had since the beginning of the action, not add a new party. ***Id.*** at 13. Blackwood avers that because the Praecipe had his name listed as Plaintiff, Defendants could have easily associated his name with his deceased wife’s name and discovered the nature of the claim against them, *before* the statute of limitations expired. ***Id.*** at 16. Thus, he claims, Defendants were on notice, and his Motion to Amend did not add a new party. ***Id.*** at 13. Alternatively, Blackwood argues

that he should be allowed to amend the caption to designate himself as Guardian/Trustee *Ad Litem*. ***Id.*** at 16-17.

Here, the trial court set forth the relevant law and determined that Blackwood's claims are without merit. ***See*** Trial Court Opinion, 11/14/13, at 6-13.² For purposes of this appeal, we adopt the sound reasoning of the trial court regarding Blackwood's Motion to Amend Case Caption to Executor, or to Guardian/Trustee *Ad Litem*. ***See id.***

In his final claim, Blackwood asserts that the trial court committed error when it granted Defendants' Preliminary Objections raising the statute of limitations as a defense, and consequently, dismissed his case prematurely. Brief for Appellant at 18-19. Blackwood argues that a statute of limitations defense can only be raised in a responsive pleading as a new matter under Pennsylvania Rule of Civil Procedure 1030. Brief for Appellant at 18-19.

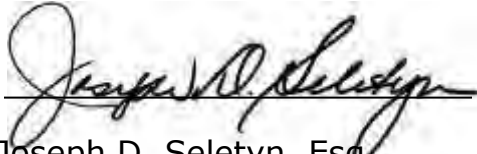
Blackwood failed to raise this argument in his Concise Statement of Matters Complained of on Appeal, and as such, this claim is waived. ***See*** Pa.R.A.P. 1925(b)(4)(vii); ***see also In re Estate of Daubert***, 757 A.2d 962, 963 (Pa. Super. 2000) (stating that any issue not raised in a 1925(b) statement is deemed waived).

² We note the trial court cites to decisions of the Court of Common Pleas in its Opinion. These decisions are not controlling authority. ***Goddard v. Heintzelman***, 875 A.2d 1119, 1121 (Pa. Super. 2005) (stating that the Superior Court is not bound by the decisions of the common pleas courts and is free to reach contrary holdings). However, the trial court's reasoning based on the relevant rules is correct.

J-A18015-14

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/25/2014

AL8015-14

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

VEROL BLACKWOOD,
Plaintiff

No. 2012-SU-4256-74

vs.

CIVIL ACTION - LAW

WELLSPAN HEALTH, YORK HOSPITAL,
WELLSPAN MEDICAL FAMILY GROUP,
FAMILY HEALTH ASSOCIATES YORK,
DR. ROBERT PIZZIKETTI, M.D., CARDIAC
DIAGNOSTIC ASSOCIATES, P.C.,
Defendants

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JUDICIAL CENTER
YORK, PA

APPEARANCES:

ANTHONY W. PARKER, Esquire
For the Plaintiff

SHAUN MUMFORD, Esquire
For Defendants Wellspan Health, York Hospital, and
Wellspan Medical Group

LEIGH A.J. ELLIS, Esquire
CINDY M. ELLIS, Esquire
For Defendant Cardiac Diagnostic Associates, P.C.

DANIEL L. GRILL, Esquire
CARRIE E. HYAMS, Esquire
For Defendants Dr. Robert Pizziketti, M.D., and Family
Health Associates York

**OPINION DENYING MOTION TO AMEND CASE CAPTION AND
DISMISSING CASE WITH PREJUDICE**

This matter commenced by praecipe for writ of summons on October 12, 2013 will be DISMISSED WITH PREJUDICE as the claims in this matter were not raised by the appropriate party within the applicable statutes of limitations. Plaintiff Verol Blackwood does not have standing to bring this action and the addition to the caption of Verol Blackwood, as personal representative of the estate of Beverly Blackwood, would impermissibly add a new party to this action after the expiration of the statute of limitations. The Motion to Amend Case Caption to Correct Plaintiff Party Designation will therefore be DENIED.

Facts and Procedural History

Plaintiff Verol Blackwood filed a Motion to Amend Case Caption to Correct Party Designation on September 27, 2013. Defendants Wellspan Health, York Hospital, and Wellspan Medical Group ("Wellspan") filed a Response and Brief on October 10, 2013, Defendants Dr. Robert Pizziketti, M.D., and Family Health Associates York ("Pizziketti") filed a Response and Brief on October 16, 2013, and Defendant Cardiac Diagnostic Associates, P.C. ("Cardiac") filed a Response on October 17, 2013. The Motion to Amend was presented at Civil Motions Court on October 24, 2013, at which time Counsel for all the Parties appeared. In light of the unique nature of the request in this case and certain strange facts

that have come to light, as well as the strong opposition to the request, the Court took the matter under advisement.

Plaintiff's request in his Motion is limited to requesting that the Plaintiff's name in the case caption be amended from "Verol Blackwood" to "Verol Blackwood, Individually and as Administrator of the Estate of Beverly Blackwood." In the alternative, Plaintiff requests that the case caption be amended from "Verol Blackwood" to "Verol Blackwood, Trustee *Ad Litem* on Behalf of All Persons Entitled to Share in the Damages of the Estate of Beverly Blackwood." In his Complaint first filed December 10, 2012, Plaintiff raised only negligence claims based on medical malpractice that allegedly occurred during a period of time in 2010 ending October 16, 2010, the date of the deceased's, Beverly Blackwood's, death. The Complaint was filed after the two year statute of limitation on medical malpractice claims had expired. However, the case was commenced by the filing of a praecipe for writ of summons on October 12, 2012, within two years of the death of the decedent. However, the writ is peculiar.

The substance of the praecipe for writ of summons only requests that the Prothonotary issue a writ of summons against Defendants and does not specify on what grounds the Plaintiff believes he may have a case. However, Plaintiff claims that the medical box under the professional liability section on the cover sheet for the writ has been marked off. Plaintiff in fact produced a time stamped

copy of the cover sheet which clearly has two boxes marked, the "Other" box in Tort, under which is typed in "Negligence," and the "Medical" box in Professional Liability. Plaintiff's copy was time stamped within seconds of the copy docketed with the Court. However, the copy of the cover sheet docketed with the Court only has the "other" tort box marked. Counsel for one of the Defendants had her copy of the cover sheet available and it also did not have the medical professional liability box marked. Strangely, the cover sheet in the physical Prothonotary file for this case in fact looks and feels like it has been whited out; specifically, the "Medical" box under Professional Liability appears to have been filled in with a white-out type product. No party has an explanation for this phenomenon and the Court cannot imagine any explanation.

Besides the issue with the praecipe for writ of summons, the progress of the Complaint has been inappropriate. The original Complaint filed December 10, 2012 only raises medical malpractice claims. That original Complaint was also inappropriately amended to designate Plaintiff as personal representative of the estate. The amendment was made unilaterally by previous Counsel for Plaintiff and without agreement of all Parties or leave of Court. The amendment therefore violated Pa. R. Civ. Pro. No. 1033. Current Counsel in this matter has filed three Amended Complaints all of which retained the impermissibly amended caption and all of which have been subject to Preliminary Objections for that

reason, among others. In addition, while Plaintiff did receive leave to amend the Complaint by Order of Honorable Michael W. Flannelly filed May 9, 2013, the subsequent two amended Complaints have been filed without leave of court or consent of the Parties. The First Amended Complaint was filed on July 5, 2013, and raises for the first time a wrongful death and a survival claim.

Returning to Plaintiff's request to amend, Plaintiff argues that leave to amend should be permitted even though the statute of limitations has run because the effect would simply be to correct a party name. The Estate of Beverly Blackwood was opened prior to commencement of this action and Verol Blackwood was the personal representative of the estate at that time. Therefore, argues Plaintiff, amendment would only correct the designation of Plaintiff, a designation Plaintiff always inhabited but that was not clearly spelled out in the caption. Defendants strongly disagree and believe that permitting amendment would result in the impermissible addition of a new party, the estate. Defendants also argue that they will be prejudiced by the amendment as they were never given notice about the existence of the estate, the personal representative, or even the decedent, prior to the running of the statute of limitations. Plaintiff argues that Defendants did have notice as Defendants should have been able to use their computer systems to cross-check "Verol Blackwood's" name and come up with Beverly Blackwood. Defendants raised several good arguments as to

why that would not be possible but the Court does not care whether such a search was possible: it is not the Defendants duty to figure out who is suing them.

During Motions Court, Counsel for the Plaintiff and Counsel for the Defendants also cited trial court case law which they believed supported their positions. No Party has identified binding appellate case law. The Court has taken this matter under advisement to review any applicable persuasive or binding case law that may exist and to fully review the responses and briefs filed in this case.

Issue Presented

- (1) Whether Plaintiff's name may be amended in the caption of the Complaint after the running of the statute of limitations to additionally designate Plaintiff as the personal representative of the decedent's estate?
- (2) Whether Plaintiff's name may be amended in the caption of the Complaint to designate Plaintiff as *Trustee Ad Litem*?

Discussion

Pennsylvania Rule of Civil Procedure 1033 liberally allows amendment at any time with agreement of all parties or leave of Court. Leave to amend a

complaint is within the sound discretion of the trial court. *Feldman v. Lafayette Green Condominium Ass'n*, 806 A.2d 497 (Cmwlth.2002). However, if the statute of limitations has run, amendment of a party name will only be permitted if the effect is to correct the name, i.e., where the right party was sued under the wrong designation. Amendment that adds a new party is prohibited. *Anderson Equipment Co. v. Huchber*, 690 A.2d 1239, 456 Pa.Super. 535 (Super.1997); *Borough of Berwick v. Quandt Group Inc.*, 655 A.2d 606, 440 Pa.Super. 367 (1995); *Fredericks v. Sophocles*, 831 A.2d 147 (Super.2003) ("Although Pa.R.C.P. 1033 permits amendments to the caption at any time, changes effected subsequent to the running of the statute of limitations are restricted to minor rectifications, not substitution of parties.").

In the present case, amendment of the Plaintiff's name in the caption to include Plaintiff as the personal representative of decedent's estate is necessary because Plaintiff as an individual does not have standing to bring the claims raised in this matter. In *La Bar v. New York, S. & W. R. Co.*, 218 Pa. 261, 263 (Pa. 1907), the Supreme Court stated that "[i]t is authoritatively settled in this state that, when a suit is brought for injuries resulting in death, the action must be instituted in the name of the persons, or personal representatives, to whom the right of action is given by the statutes of the state in which the injuries were inflicted and the death occurred." Pa. R. Civ. Pro. No. 2202 provides that a

wrongful death action "shall be brought only by the personal representative of the decedent," although "[i]f no action for wrongful death has been brought within six months after the death of the decedent, the action may be brought by the personal representative or by any person entitled by law to recover damages in such action as trustee ad litem on behalf of all persons entitled to share in the damages." A wrongful death action must be "must be brought no later than two years after the date of death." *Moyer v. Rubright*, 438 Pa.Super. 154, 161, 651 A.2d 1139, 1142 (1994). In addition,⁴ a wrongful death action is derivative of the underlying negligence action and will not survive unless it is determined that the decedent was injured as a result of defendant's negligence.

A survival action must also be brought by the personal representative of the decedent's estate and "[a] survival action, unlike a wrongful death action, is not a new cause of action, but, merely continues in his personal representative the right of action which accrued to the deceased at common law." *Salvadia v. Ashbrook*, 923 A.2d 436, 440, 2007 PA Super 108 (Super.2007); *Harvey v. Hassinger*, 461 A.2d 814, 816, 315 Pa.Super. 97, 102 (Super.1983) (internal quotations omitted). For this reason, the survival action is derivative of the negligence action and the survival claim can only succeed if the surviving claim, medical negligence in this case, is proved. In addition, the two year statute of limitations does not begin to run until "the date when the victim ascertained, or in the exercise of due diligence should have ascertained, the fact of a cause of

action. In no case, however, can that date be later than the date of death; hence, the statute runs, at the latest, from death." *Moyer*, 438 Pa.Super at 160 (quoting *Pastierik v. Duquesne Light*, 514 Pa. 517, 524, 526 A.2d 323, 327 (1987)).

Beginning with the second issue first, the Court cannot allow Plaintiff to amend the case caption in this matter to designate Plaintiff as a Trustee *Ad Litem*. While the wrongful death claim could have been brought by a trustee *ad litem* because no wrongful death claim was filed within six months of decedent's death, no person has been appointed trustee *ad litem* in this case. Appointment as a trustee *ad litem* is governed by the Pennsylvania Orphan's Court Rules, specifically Rule 12.4, and must proceed through Orphan's Court. An Orphan's Court matter cannot be presented at Civil Motions Court and the Court cannot circumvent the procedural requirements for the appointment of a trustee *ad litem*. The request that the Complaint be amended to name as Plaintiff "Verol Blackwood, Trustee *Ad Litem* on Behalf of All Persons Entitled to Share in the Damages of the Estate of Beverly Blackwood" will be denied.

The primary issue in this case is whether amending the caption to add Verol Blackwood as the personal representative of the estate should be permitted. Counsel for Defendants Wellspan and Pizziketti rely heavily on *La Bar* and *Appenzeller v. Philadelphia Protectant Home*, 2007 WL 3236698

(C.P.Phila.Cnty.2007), *aff'd per curiam*, 945 A.2d 753 (Super.2007), for their contention that amendment will result in the impermissible addition of a new party after the running of the statute of limitations.

In *La Bar*, the crux of the decision was the fact that the law did not allow the widow to bring suit individually; the personal representative of the estate was required to bring suit. In *Appenzellar*, the Honorable Allen L. Tereshko denied plaintiff's request to amend the caption from "Paul Appenzellar, an individual" to "Paul Appenzellar, Individually and as Personal Representative of the Estate of Abraham Appenzellar, deceased, Plaintiff." The statute of limitations had run before a proper request for amendment was filed. Judge Tereshko determined that Paul Appenzellar, as personal representative of the estate, "was not an original party to this action, and therefore [amendment] does not amount to a mere substitution of names, but rather the addition of a new party." Accordingly, amendment was not permitted.

Plaintiff argued during Civil Motions Court that the above cases are distinguishable from the present case as the plaintiffs in those matters were designated specifically as individuals in the captions. Plaintiff believes that the personal representative designation can be read into the designation of Plaintiff as "Verol Blackwood" because the estate was opened before the commencement of this case and because Verol Blackwood was the personal representative at the time of the filing of the writ. In support of his position,

Plaintiff relies heavily on Judge Older's Opinion in *Grouse v. Miller & Norford, Inc.*, 42 Pa. D. & C. 4th 408 (Cumber.1999), *aff'd*, 829 A.2d 369 (Super.2003).

In *Grouse*, the estate was named as plaintiff in the caption on the writ of summons and on the complaint. Plaintiff sought to amend the caption after the running of the statute of limitations to include the personal representative of the estate. The Court determined that "reference to the administratrix of the estate, did not, in the court's view, introduce a new party to the case, where the estate was in existence at the time of the filing of the praecipe for writ of summons." *Grouse*, 42 Pa. D. & C. 4th at 414. The amendment was allowed. *Grouse* is distinguishable for the current case for several important reasons.

Defendants in this case had no notice prior to the running of the statute of limitations that an estate for decedent Beverly Blackwood existed; in fact, Defendants had no notice that Beverly Blackwood was the subject of the lawsuit as only Verol Blackwood was named in the writ. The existence of the estate and the fact that this is a medical malpractice case only became known to Defendants when the Complaint was filed on December 10, 2012; over two years after Beverly Blackwood had died. In addition, the fact that this case would include a claim for wrongful death and a survival claim was not known until the filing of the First Amended Complaint on July 5, 2013. Had the estate originally commenced this action, or had this action been commenced in the decedent's name, the Court would be more comfortable permitting the requested

amendment. However, the egregious procedural violations committed by and substantive failures attributable to Plaintiff in this matter have convinced the Court that the request for amendment must be denied.

The writ of summons in this matter named "Verol Blackwood" as the Plaintiff. While Mr. Blackwood may wear many hats, including personal representative of his wife's estate, this is not apparent from the caption or elsewhere in the writ. It was apparent, however, that an individual named Verol Blackwood was bringing a suit against Defendants alleging negligence. While the mystery of the conflicting time stamped cover sheets to the praecipe for writ of summons may never be solved, the cover sheet docketed in this case does not identify this as a medical malpractice action and the record will speak for itself. Defendants were notified by the writ only that an individual was considering bringing a negligence suit. Notice that Verol Blackwood was bringing a claim as an individual *and* as the personal representative of Beverly Blackwood's estate was not provided until after the statute of limitations on the medical malpractice claim had run. Notice that claims based in wrongful death and survival were being brought was not provided until well after the statute of limitations had run on both of those claims. While Judge Flannelly did once give Plaintiff leave to amend by the brief Order Removing Defendants' Preliminary Objections from One-Judge Disposition List and Granting Leave to Amend

Complaint, it is unclear from the docket what communication elicited Judge Flannely's decision and what representations were made as to the content of the Amended Complaint. What is clear is that the amendments Plaintiff has already made to its Complaint and the amendment currently requested introduce new causes of action and bring a new party to the case after the statute of limitations has expired. Pennsylvania law does not permit such an amendment and the Motion filed by Plaintiff will be denied.

Conclusion

As discussed herein, Verol Blackwood as an individual does not have standing to bring either the medical malpractice, wrongful death or survival claims that have been raised in this action. The claims can only be raised by the personal representative of the decedent's estate; however, the statute of limitations on all the claims has run and the personal representative is therefore barred from bringing suit. The procedural and substantive defects in this case cannot be cured. Amendment will not be permitted.

Defendants have requested that the Court dismiss this matter with prejudice because the statute of limitations has run on all the claims that could have been brought on the Estate's behalf. The Court will grant that request as

the Complaint in this matter cannot be salvaged and the statute of limitations has long since expired.

The Court will therefore DENY Plaintiff's Motion to Amend Case Caption to Correct Party Designation and DISMISS the above-captioned matter WITH PREJUDICE. An Order consistent with this Opinion will be entered.

BY THE COURT,

A handwritten signature in black ink, appearing to be 'Stephen P. Linebaugh', written over a horizontal line.

Stephen P. Linebaugh, President Judge
19th Judicial District of Pennsylvania

Dated: _____

11/13/13