

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

FRED S. SILVERMAN  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 North King Street, Suite 10400  
Wilmington, DE 19801-3733  
Telephone (302) 255-0669

September 27, 2011

**(VIA E-FILED)**

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RE: *Daniel J. McDonald, Executor, et al. v. Emeritus Corporation*  
*C.A. No. 10C-02-199 FSS*

**Upon Plaintiff's Motion to Amend Complaint – GRANTED;**  
**Upon Defendant's Motion to Dismiss – DENIED;**  
**and,**  
**Upon Defendant's Motion for Certification**  
**of an Interlocutory Appeal – DENIED.**

Dear Counsel:

This case is brought on behalf of a deceased Plaintiff. It was filed in the name of the deceased's brother, who mistakenly thought he was the estate's executor. In fact, the deceased died without a will and no letters had been taken out. For that

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reason, Defendant moved to dismiss. In response, Plaintiff took out letters and he now asks to amend the caption to reflect his current status as administrator, not executor. Defendant recognizes that “leave to amend a pleading shall be freely given when justice so requires.” Defendant does not argue that allowing Plaintiff to re-designate himself as administrator, rather than executor, is unfairly prejudicial. Instead, Defendant argues that Plaintiff cannot present the deceased’s claim because Plaintiff and his counsel were inexcusably careless. Thus, justice dictates that Defendant does not have to answer for its alleged wrong.

It appears that Plaintiff, a layman, told counsel that Plaintiff was the deceased’s “executor,” and the estate had been “settled.” The court will assume counsel took Plaintiff at face-value and filed suit. It also appears, however, that when Defendant raised it, Plaintiff readily agreed to take care of the problem without fuss. Taking everything into account, justice requires that Plaintiff be allowed to refer to himself in his actual representative capacity. Thus, amendment is **GRANTED** under Superior Court Civil Rule 15(a) and Defendant’s motion to dismiss is **DENIED**.

At oral argument, Defendant stressed the fact that the estate did not exist when it filed suit. That is true, but the deceased’s interest that is pursued here existed and Defendant cannot rely on the erstwhile representative’s mistake to avoid liability for its wrong. It is not clear that the court must consider relation-back because the amendment does not change “the claim,”<sup>1</sup> nor does it change “the party or the naming of the party against whom a claim is asserted . . . .”<sup>2</sup> Here, Plaintiff is simply changing his title, so to speak. Thus, Rule 15(c) does not expressly address this situation because there is no need for it to do so.

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<sup>1</sup>Super. Ct. Civ. R.15(c)(2).

<sup>2</sup>Super. Ct. Civ. R 15(c)(3).

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If Rule 15(c) applied, the court would allow relation-back because Defendant has known all along that decedent's representative on earth, his brother, was trying to pursue this exact claim against Defendant. And, other than to insist that Plaintiff accurately name his representative capacity, Defendant has no reason for concern about this amendment. Much less, Defendant has not shown unfair prejudice.

Defendant has also not shown cause for an interlocutory appeal. To be sure, if dismissal were warranted that would end the case. On the other hand, if Defendant chooses to file an appeal after final judgment, Defendant can raise the procedural issues associated with this court's exercising its discretion as it did. Thus, denying an interlocutory appeal means the Supreme Court will consider this case only once, at most.

For the foregoing reasons, Plaintiff's motion to amend the caption of the complaint is **GRANTED**, Defendant's motion to dismiss is **DENIED**, and Defendant's motion for certification of an interlocutory appeal is **DENIED**.

**IT IS SO ORDERED.**

Very truly yours,

/s/ Fred S. Silverman

FSS:mes  
oc: Prothonotary (Civil)