

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
JOHN B. ROBBINS, JUDGE

DIVISION III

CA 07-13

FEBRUARY 6, 2008

JASON FORRESTER, Administrator of  
the Estate of Tawnya Lynn Forrester  
APPELLANT

APPEAL FROM THE FAULKNER  
COUNTY CIRCUIT COURT  
[NO. CV-04-190]

V.

HONORABLE DAVID LEE  
REYNOLDS, JUDGE

JACQUELYN WHITE, M.D.  
APPELLEE

REVERSED AND REMANDED

This is a medical malpractice case. Appellant Jason Forrester, as administrator of the estate of Tawnya Lynn Forrester, appeals from an order dismissing his complaint against appellee Jacquelyn White, M.D. We reverse and remand.

Mrs. Forrester died on March 23, 2001. On October 10, 2002, Mr. Forrester, the husband of the deceased, filed a petition for appointment as administrator of her estate. On October 23, 2002, the trial court entered an order appointing Mr. Forrester, which recites in pertinent part:

It is therefore by the Court CONSIDERED and ORDERED that Jason Forrester is hereby appointed as the Administrator of the Estate of Tawnya [sic] Forrester and he shall be allowed to serve without bond; that Letters Testamentary shall be issued to said Administrator upon filing of his Acceptance of Appointment; and that any notice required by Law may be made through the ordinary mail to the last known address of the person to whom notice is required.

On March 5, 2003, Mr. Forrester filed his original complaint against Dr. White, alleging that Dr. White failed to properly diagnose, treat, and admit Mrs. Forrester to the hospital for pneumonia ultimately resulting in her death. On July 9, 2003, appellant's original complaint was nonsuited and dismissed without prejudice. On March 1, 2004, Mr. Forrester filed his second complaint, continuing to allege medical negligence against Dr. White.

On January 26, 2005, Mr. Forrester filed his acceptance of appointment as personal representative, and on that same day the clerk of court issued letters of administration. The letters of administration provide that Mr. Forrester "is hereby authorized to act as such personal representative for and in behalf of the estate and to take possession of the estate's property as authorized by law." Mr. Forrester later amended his second complaint by filing an amended petition on August 23, 2006.

On August 29, 2006, Dr. White filed a motion to dismiss appellant's second complaint. In her motion, Dr. White asserted that both of appellant's complaints were nullities because they were filed prior to the issuance of letters of administration. Further, Dr. White asserted that dismissal of appellant's complaint should be with prejudice because the applicable two-year statute of limitations had expired, and alternatively because it was the second dismissal of appellant's action requiring dismissal with prejudice under Ark. R. Civ. P. 41(b).

On September 12, 2006, Mr. Forrester filed a response to Dr. White's motion to dismiss, and Dr. White filed a reply in support of her motion on September 13, 2006. On

September 14, 2006, a hearing was held on Dr. White's motion to dismiss. At the conclusion of the hearing, the trial court announced that the motion to dismiss would be granted because "the personal representative in this case, Jason Forrester, did not have authority or capacity to sue at the time this lawsuit was filed because he had not accepted the letters nor had the letters been issued." The trial court entered an order dismissing Mr. Forrester's complaint with prejudice on September 15, 2006, and Mr. Forrester now appeals from that order.

For reversal of the trial court's order, Mr. Forrester argues that the October 23, 2002, order appointing him administrator vested him with the authority to act on behalf of the estate. He contends that the letters of administration were merely evidence of his authority, and were not required to grant the authority. Mr. Forrester asserts that the purpose of letters of administration is only to provide notice to those dealing with a personal representative of his capacity to act. We agree.

The 2007 General Assembly enacted Act 438, which amended the statutory provisions pertaining to the issuance of letters of administration. That legislation is codified at Ark. Code Ann. § 28-48-102(d) (Supp. 2007), and provides:

(d)(1)(A) Letters of administration are not necessary to empower the person appointed to act for the estate.

(B) Letters of administration are for the purpose of notifying third parties that the appointment of an administrator has been made.

(2) The order appointing the administrator empowers the administrator to act for the estate, and any act carried out under the authority of the order is valid.

This Act became effective on July 31, 2007, more than ten months after entry of the September 15, 2006, order dismissing Mr. Forrester's complaint.

In *Steward v. Statler*, \_\_ Ark. \_\_, \_\_ S.W.3d \_\_ (Nov. 1, 2007), our supreme court was presented with the question of whether Act 438 applies retroactively or only prospectively.

In holding that Act 438 applies retroactively, the supreme court wrote:

Statutes which do not create, enlarge, diminish, or destroy contractual or vested rights, but relate only to remedies or modes of procedure, are not within the general rule against retrospective operation. In other words, statutes effecting changes in civil procedure or remedy may have valid retrospective application, and remedial legislation may, without violating constitutional guarantees, be construed to apply to suits on causes of action which arose prior to the effective date of the statute.

In this case, it is clear to this court that Act 438 of 2007 does not disturb a vested right or create a new obligation. Before Act 438, a personal representative already had the right to bring a wrongful-death action against a defendant. Act 438 of 2007 simply provides that the personal representative has the right to bring the action at the time the order appointing the personal representative is entered, not merely at the time the letters of administration are entered. Therefore, we conclude that Act 438 is procedural and was meant to be applied retroactively.

(citations omitted.) In *Steward, supra*, the supreme court relied on Act 438 in reversing an order dismissing appellants' complaint, where the complaint was filed after appellants were appointed as special co-administrators of the estate, but before the letters of special administration were issued by the clerk. The supreme court held that the appointment as co-administrators gave the appellants the power to file the complaint. As in the case at bar, the dismissal order in *Steward* was entered before Act 438 became effective.

Subsequent to the supreme court's decision in *Steward, supra*, we had occasion to address this same issue. See *Banks v. Wilkin*, \_\_ Ark. App. \_\_, \_\_ S.W.3d \_\_ (Jan. 23, 2008). We held that the order appointing the personal representative, not the letters of administration, empowered the administrator to file the wrongful death action.

Consequently, in light of Act 438, our supreme court's holding in *Steward, supra*, and our decision in *Banks, supra*, Mr. Forrester was empowered to act when the trial court entered the October 23, 2002, order appointing him as administrator. The letters of administration were not necessary to vest Mr. Forrester with the authority to sue, and thus each of his complaints was validly filed. Therefore, the trial court's order granting Dr. White's motion to dismiss must be reversed.

Reversed and remanded.

GRIFFEN and MARSHALL, JJ., agree.