

STATE OF MICHIGAN
COURT OF APPEALS

AUDREY CHERNOFF, Personal Representative
of the Estate of JANIS CHERNOFF SACHS,
Deceased,

UNPUBLISHED
March 22, 2002

Plaintiff-Appellee,

v

SINAI HOSPITAL OF GREATER DETROIT,
a/k/a SINAI HOSPITAL and THE DETROIT
MEDICAL CENTER,

No. 228014
Wayne Circuit Court
LC No. 99-929550-NH

Defendants-Appellants.

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendants Sinai Hospital of Greater Detroit and The Detroit Medical Center (defendants) appeal by leave granted the order denying their motion for summary disposition brought pursuant to MCR 2.116(C)(5) and (7) in this wrongful death medical malpractice action. Defendants contend that they were entitled to summary disposition because plaintiff did not have the legal capacity to bring suit because the letter of authority appointing her as personal representative had expired before she filed the notice of intent and the complaint.

The decedent died on September 29, 1995, while she was a patient at Sinai Hospital. Plaintiff was appointed personal representative of the decedent's estate on April 23, 1997. The letter of authority appointing plaintiff as personal representative expired on June 18, 1998, and plaintiff was discharged as personal representative on September 22, 1998.

On April 16, 1999, plaintiff filed a notice of intent to sue and thereafter filed a complaint on September 17, 1999. The filing would have been within the statutory period, which defendants contend expired on September 24, 1999,¹ provided plaintiff had remained the

¹ Ordinarily, the statute of limitations would have expired on April 23, 1999, or two years after plaintiff was first appointed personal representative. Because plaintiff filed a notice of intent on April 16, 1999, the limitation period was tolled under MCL 600.5856(d) until September 24, 1999.

personal representative.² Defendants moved for summary disposition on February 9, 2000, asserting that plaintiff's authority as personal representative had expired before she filed the notice of intent and the complaint and thus she had no authority to file suit.

On February 24, 2000, plaintiff filed a petition to reinstate letters of authority nunc pro tunc, which the probate court granted on March 15, 2000. On May 31, 2000, the Wayne Circuit Court denied defendants' motion for summary disposition. The circuit court relied on the relation-back doctrine to hold that the probate court's order related back to the date of the filing of the complaint, avoiding the bar of the statute of limitations. We agree and affirm.

Pursuant to MCL 600.2922(2), a wrongful death action must be brought by and in the name of the personal representative. *Smith v Henry Ford Hosp*, 219 Mich App 555, 557-558; 557 NW2d 154 (1996). The pivotal issue presented is whether a plaintiff can have reasonable belief in his or her authority to file suit as a personal representative when the estate is closed and the letters of authority have expired.³ Defendant relies primarily on *Fisher v Volkswagenwerk Atkiengesellschaft*, 115 Mich App 781; 321 NW2d 814 (1982).⁴ The *Fisher* plaintiffs brought a wrongful death suit as personal representatives of the decedents, their parents, after the estates had been closed and their authority as personal representatives had expired. The defendants moved for summary disposition, arguing that the plaintiffs lacked the capacity to sue. The probate court then reopened the estates and reestablished the plaintiffs as personal representatives. The trial court permitted the order to relate back. *Id.* at 783.

This Court acknowledged in *Fisher* that where a validly appointed personal representative institutes a wrongful death action under the mistaken belief that she has the authority, yet later discovers her error and procures the proper authorization by probate order

² The statute of limitations had not expired on the claim provided plaintiff had the authority to file suit.

³ This Court has applied the relation-back doctrine in several other cases. For example, in *Osner v Boughner*, 152 Mich App 744; 394 NW2d 411 (1986), the Court held that a misrepresentation in good faith will not bar the application of the relation-back doctrine. In *Wieczorek v Volkswagenwerk*, 731 F2d 309 (CA 6, 1984), the Court held that the appointment of an administrator after the statute of limitations expired relates back to the filing of a wrongful death suit if at the time the suit was filed the plaintiff reasonably believed he had authority to bring suit as administrator. In *Castle, supra*, the Court held that the probate court order granting personal representative status to the plaintiff could relate back to the complaint. In *Doan v Chesapeake & O R Co*, 18 Mich App 271; 171 NW2d 27 (1969), the Court held that the trial court should have granted the plaintiff-widow's request to amend her complaint as personal representative to relate back to the original complaint.

⁴ The other cases cited by defendants are distinguishable from the issue in the present case; that is, whether plaintiff had a reasonable belief that she was the personal representative so as to permit the probate order to relate back to the filing of her complaint. For example, in *Turner v Mercy Hosp & Health Services*, 210 Mich App 345; 533 NW2d 365 (1995), the issue was not the relation-back doctrine, but whether the statute of limitation was tolled while the personal representative's letters of authority were suspended because of the personal representative's negligence. Likewise, in *Smith, supra*, the issue was whether the medical malpractice tort reform would apply, not the relation-back doctrine.

after the statute of limitations expires, the probate order will relate back to the complaint such that the action is timely. *Id.* at 785-786. However, based on the Court's finding that the plaintiffs "clearly knew that their tenure as coadministrators ended when the estates were closed,"⁵ the Court held that the plaintiffs had misrepresented their capacity to sue under the wrongful death act when they filed suit and therefore the subsequent reopening of the decedent's estate after the limitations period had expired did not relate back to the filing of the lawsuit. *Id.* at 786. Relying on *Fisher*, defendant suggests that where an estate is closed and letters of authority have expired a plaintiff cannot, as a matter of law, have a reasonable belief in his or her authority to institute a lawsuit on behalf of the estate.⁶

Fisher, however, is not so limited. In *Fisher*, the Court specifically held that, "Clearly, these plaintiffs knew that their tenure as coadministrators ended when the estates were closed in 1978." The opinion, however, does "not reveal whether the plaintiffs' knowledge that their tenure as administrators had expired was imputed to them from the closing of the estates or whether there was some other basis for their knowledge." *Saltmarsh v Burnard*, 151 Mich App 476, 489; 391 NW2d 382 (1986). This Court has followed *Fisher* once, in *Warren v Howlett*, 148 Mich App 417; 383 NW2d 636 (1986), where it held that the plaintiff-father's first suit was barred because the plaintiff, an attorney, should have known that he was not able to bring suit without having been appointed personal representative.

In *Saltmarsh*, *supra*, the decedent's widow filed a legal malpractice claim arising out of a wrongful death matter after the estate had been closed. After the defendants moved for summary disposition on the basis that the plaintiff-widow lacked capacity to sue, the probate court

⁵ The facts on which the Court based its finding that the plaintiffs clearly knew that their tenure as coadministrators had ended when the estates were closed are not disclosed in the opinion.

⁶ In the *Fisher* dissent, Judge Cynar opined that the trial court correctly applied the doctrine of relation back to the reappointment of the plaintiffs as coadministrators of the estates of the decedents. *Id.* at 787. Judge Cynar explained:

I would find, as did the trial court, that *Castle v Lockwood-MacDonald Hospital*, 40 Mich App 597; 199 NW2d 252 (1972), provides ample authority to allow the application of the doctrine of relation back in the instant case. While it is true that *Castle* presents a stronger case than the one at bar, the instant case satisfies the substantive requirements for allowing the relation back. Suit was filed against defendants before the period of limitations had run, thereby putting defendants on notice that they would have to defend against the claims. Plaintiffs brought suit on behalf of the estates. The trial court found that plaintiffs did not act in bad faith, and the only defect in plaintiffs' action was the fact that they had ceased being the coadministrators of the estates by reason of the closing of those estates. *Castle* acknowledges that relation back has been applied where the parties were not appointed until after the period of limitations had run. *Id.*, 603. The instant case is one where a valid claim should not be defeated by legal technicalities. *Id.*, 604.

reopened the estate and reappointed the plaintiff as personal representative. The trial court declined to apply the relation-back doctrine and granted the defendant's motion. *Id.* at 479-482.

On appeal, this Court found that the relation back doctrine was applicable. The Court distinguished *Fisher, supra*, because the *Fisher* opinion "did not reveal whether [the plaintiff's knowledge that their tenure as administrators had expired was imputed] to them from the closing of the estates or whether there was some other basis for their knowledge." *Id.* at 489. In *Saltmarsh*, the record was not clear whether the plaintiff was aware of her discharge as personal representative of her husband's estate. Consequently, the Court held that "an appointment as administrator after the period of limitations has expired relates back to the filing of suit if, at the time the suit was filed, the plaintiff holds a good faith reasonable belief that he has authority to bring suit as administrator, provided that the defendant is not prejudiced by the application of the relation-back doctrine in such situations. *Id.* at 491. The Court observed that application of the relation-back doctrine should be done on a case-by-case basis. *Id.* This Court noted that justice would not be served by using a legal technicality to preclude a valid claim where the plaintiff was acting in good faith with a reasonable belief that he or she had authority, provided the defendant was not prejudiced. *Id.*

This case is more akin to *Saltmarsh* than to *Fisher*. In *Fisher*, the plaintiffs were credited with the knowledge that their tenure as coadministrators had ended. *Id.* at 786. In contrast, plaintiff stated in her affidavit that the attorneys she initially retained "at no time" told her that her authority as personal representative for the estate had expired and, based on a letter from those attorneys, she "assumed that [she] was still the personal representative, that the estate was still open, and that [she] could pursue a lawsuit." Further, the underlying reason behind the motion for summary disposition was plaintiff's untimely reappointment as personal representative, not her failure to file her claim within the statutory period. Defendants have not shown that they were prejudiced by the fact that plaintiff's letter of authority had expired. There is no indication that plaintiff acted other than in good faith, mistakenly believing herself as having the legal authorization to institute the lawsuit even though her letter of authority had expired. Under these circumstances, we conclude that the doctrine of relation back applies.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael T. Talbot