COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP796 **Cir. Ct. No. 2011CV1246**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

ESTATE OF THOMAS H. ERTL, BY ITS PERSONAL REPRESENTATIVE, JEFFREY A. ERTL,

PLAINTIFF-APPELLANT,

UNITED GOVERNMENT SERVICES MEDICARE PART A AND WPS HEALTH PLAN, INC. MEDICARE PART B,

INVOLUNTARY-PLAINTIFFS,

V.

WAUKESHA MEMORIAL HOSPITAL,

DEFENDANT-RESPONDENT.

APPEAL from judgment of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. The Estate of Thomas H. Ertl ("the Estate") appeals from a judgment granting dismissal on summary judgment of its complaint against Waukesha Memorial Hospital. We conclude that the circuit court properly granted summary judgment. Accordingly, we affirm.

¶2 On November 5, 2008, Thomas H. Ertl allegedly slipped and fell at Waukesha Memorial Hospital. On April 1, 2011, following Thomas's death,[1] his son Jeffrey A. Ertl filed a lawsuit in an attempt to recover damages for Thomas's accident. The caption of the complaint indicated that Jeffrey was suing Waukesha Memorial on behalf of the Estate; he was not suing in his individual capacity.

¶3 On August 4, 2011, Jeffrey filed an amended complaint, revising the designation of the defendant from "Waukesha Memorial Hospital Foundation, Inc." to "Waukesha Memorial Hospital." However, with that exception, the caption remained the same, i.e., it indicated that Jeffrey was suing on behalf of the Estate; he was not suing in his individual capacity.

¶4 On September 13, 2011, Waukesha Memorial filed an answer to the amended complaint. In it, it affirmatively alleged that (1) there was no Estate; and (2) Jeffrey had not been appointed personal representative and therefore lacked the capacity to sue on the Estate's behalf.

¶5 On December 12, 2011, after the statute of limitations expired, Waukesha Memorial filed a summary judgment motion, arguing that dismissal was required because Jeffrey lacked the capacity to sue on the Estate's behalf. In response, Jeffrey argued that dismissal would be improper under WIS. STAT.

[1] Thomas died of unrelated causes on December 10, 2010.

§ 803.01(1) (2011-12).[2] Citing that statute, Jeffrey argued that his subsequent appointment to act as the personal representative of the Estate on December 21, 2011, (after the statute of limitations expired) ratified the commencement of the lawsuit.

¶6 Following a hearing on the motion, the circuit court ruled that a lawsuit of this nature (i.e., a survival action) must be brought by the personal representative. Because it was undisputed that Jeffrey was not the personal representative of the Estate at the time that he filed this lawsuit, the court concluded that (1) he improperly commenced the lawsuit, and (2) he could not save it after the statute of limitations expired. The court explained:

> There was no such personal representative; therefore, the action in its truest form was never properly commenced. The effort now is to substitute back the now named personal representative after the expiration of the statute of limitations. You can't save the action by substitution of a party when the time for action has run.

Accordingly, the court dismissed the lawsuit and entered judgment in favor of Waukesha Memorial. This appeal follows.

[2] All references to the Wisconsin Statutes are to the 2011-12 version. WISCONSIN STAT. § 803.01(1) provides that:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

¶7 We review a grant of summary judgment de novo, using the same methodology as the circuit court. ***Estate of Sheppard v. Schleis***, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85. Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***id.;*** WIS. STAT. § 802.08(2).

¶8 On appeal, the Estate contends that the circuit court erred in granting Waukesha Memorial's summary judgment motion. It maintains that the appointment of Jeffrey as personal representative for the Estate on December 21, 2011, relates back to the filing date of the summons and complaint pursuant to WIS. STAT. §§ 803.01(1) and 802.09(3)[3] so that the summary judgment motion should have been denied.

¶9 We conclude that this case is governed by ***Schilling v. Chicago, North Shore & Milwaukee R. Co.***, 245 Wis. 173, 13 N.W.2d 594 (1944). In ***Schilling***, Ragna Marie Schilling filed a lawsuit in her individual capacity to recover damages caused by an automobile accident that killed her husband. *See* ***id.*** at 174-75. The defendants argued that she lacked capacity to sue. ***Id.*** at 175.

[3] WISCONSIN STAT. § 802.09(3) provides that:

> If the claim asserted in amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party.

Schilling subsequently gained the capacity to sue by being appointed to act as the special administratrix of her husband's estate. *See* ***id.*** This was done after the two-year statute of limitations had expired on the claim. *See* ***id.*** at 175, 179. When Schilling moved for leave to amend the complaint and substitute parties, the circuit court denied her request and dismissed the lawsuit. ***Id.*** at 174.

¶10 On appeal, Schilling asked the Wisconsin Supreme Court to decide "whether a personal representative, after the running of the statute of limitations, may be substituted as party plaintiff in an action commenced by one who has no cause of action and thereby escape the bar of the statute." ***Id.*** at 178. Ultimately, the court concluded that Schilling could not save the lawsuit. The court explained in relevant part:

> No one had a right to bring this action except the representative of the deceased and no such action was brought within the two-year period. Ragna Marie Schilling had no right to bring the action as an individual, and if she had no right to bring an action it cannot be said that an action was commenced within the period required. The mere fact that under certain conditions she could bring an action for the death of her husband does not mean that an action has been commenced to which the representative can be substituted where no lawful action is pending. At the time the motion was made to substitute the special administratrix for the individual, the individual had no more right of action than a stranger had, which was none. Certainly it cannot be said that the representative of the estate could start a new action on February 20, 1943, when the death occurred on October 25, 1940, and to allow her to be substituted as representative of the estate in this action is equivalent to permitting her, as such representative, to commence an original action at that time.
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> …
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> We do not hold that an amended complaint cannot be filed and a substitution made if it is within the two-year period, but it is considered that such *substitution cannot revert to the date of the commencement of the original action and thus revive a cause which has been extinguished by law.*

Id. at 179-80 (emphasis added).

¶11 Although the Estate correctly notes that ***Schilling*** was decided nearly thirty-two years prior to the effective date of the current Wisconsin Civil Procedure Code, it appears to remain good law and has not been abrogated by the statutes that the Estate cites. Consequently, we are bound to follow it unless or until the Wisconsin Supreme Court says otherwise. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).[4] Applying ***Schilling*** to the case at hand, we conclude that the circuit properly dismissed the lawsuit on summary judgment because Jeffrey did not create the capacity to sue on behalf of the Estate until after the statute of limitations expired.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] We acknowledge that some could read ***Estate of Kitzman v. Kitzman***, 163 Wis. 2d 399, 402-04, 471 N.W.2d 293 (Ct. App. 1991), as having changed the law in Wisconsin. But ***Kitzman*** is a court of appeals case and ***Schilling*** has not been expressly identified and rejected in any subsequent case. We note that the ***Kitzman*** panel never mentioned ***Schilling*** let alone address it.