

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES BABBISH and LEONA BABBISH,

Plaintiffs-Appellants,

UNPUBLISHED
September 16, 2008

v

WILLIAM F. SPENCER and UROLOGY
SPECIALISTS OF MICHIGAN, P.C. d/b/a
CENTER FOR UROLOGIC ONCOLOGY,

No. 279328
Oakland Circuit Court
LC No. 2005-070038-NH

Defendants-Appellees.

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff Leona Babbish appeals as of right from the circuit court's order granting summary disposition to defendants. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Charles Babbish was under treatment from defendants for abdominal pain. Claiming misdiagnoses or misinformation from the latter, plaintiffs filed suit alleging medical malpractice. Plaintiffs agreed to extend the deadline for defendants to answer, but no answer was filed by the agreed-upon date. Ten days later, a default was entered. Defendants thereafter persuaded the trial court to set aside the default.

Approximately two months later, Charles Babbish died, apparently from causes unrelated to the malpractice claim. Four months later, plaintiffs' attorney persuaded the trial court to allow him to withdraw from the case. No estate had yet been opened for Charles Babbish. Several months later, because there had been no motion to substitute the deceased party's estate for that party, the trial court dismissed Charles Babbish from the case.

Plaintiff Leona Babbish, operating through substitute counsel, then moved the trial court to substitute the Estate of Charles Babbish for that deceased plaintiff, and, alternatively, to reconsider its decision to dismiss Charles Babbish from the case. The court denied the motions. The following day, because this left only a plaintiff whose interest in the case was derivative of

the deceased and dismissed plaintiff, the trial court granted summary disposition of the malpractice action.

On appeal, plaintiff¹ argues that the trial court abused its discretion in setting aside the default, then did so again in refusing to allow substitution of her late husband's estate for the deceased plaintiff. We conclude that the court was within its rights in refusing to allow the substitution, and thus need not reach the question concerning the setting aside of the default.²

A trial court's denial of a motion to substitute a party is reviewed for abuse of discretion. See *Zurich Ins Co v Logitrans, Inc*, 297 F3d 528, 530 (CA 6, 2002). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

MCR 2.202(A) provides in pertinent part as follows:

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties.

* * *

(b) Unless a motion for substitution is made within 91 days after filing and service of a statement of the fact of the death, the action must be dismissed as to the deceased party, unless the party seeking substitution shows that there would be no prejudice as to any other party from allowing later substitution.

In this case, there is no dispute that there was no motion for substitution until approximately four months after the statement of death was filed.

Plaintiff argues that the trial court interpreted the court rules governing dismissal for failure to substitute for a deceased party as mandatory in nature. We disagree. Plaintiff

¹ For purposes of this opinion, we will use the singular "plaintiff" when discussing Leona Babbish's advocacy after the death of plaintiff Charles Babbish.

² Plaintiff argues that the issue of substitution would not have arisen had the trial court not set aside the default in the first instance. However, neither plaintiff, nor this Court, can presume that retention of the default would have led to sufficiently speedy resolution of the question of damages—especially if that meant trial and appeal—that the whole matter would have been entirely wrapped up during what was left of Charles Babbish's life. In any event, it was plaintiff's responsibility, as sole surviving plaintiff whose interest in the case was derivative of that of a deceased plaintiff, to ensure that an entity with personhood cognizable in court occupy the lead plaintiff's place for the life of the litigation. That an earlier alleged error on the part of the trial court may have resulted in prolonging the litigation is ultimately beside the point.

additionally argues that the opposition would have suffered no prejudice from the late substitution. We conclude that the trial court in fact signaled its agreement in this regard, even while deciding not to allow the substitution.

Plaintiff points to no language from the trial court that suggested that it felt it had no choice but to deny the motion to substitute. Our review of the pertinent rules, and the court's comments, suggests that the court in fact acted as a matter of discretion.

Plaintiff additionally protests that she was left at a great disadvantage when the trial court allowed her attorney to withdraw without first opening an estate for her late husband. However, the propriety of the court's decision in that regard is not at issue.

Plaintiff further complains that the estate was not opened until March 2007, and that she was an elderly widow suffering confusion concerning whether the opposition would stipulate to the substitution. She does not otherwise explain why confusion led her to sit on her hands with regard to obtaining substitute counsel, or otherwise prosecuting the case with reasonable vigor.

MCR 2.202(A)(1) states that a court "may" order substitution of parties, which wording indicates that the decision is at the court's discretion. But subrule (A)(1)(b) in turn states that the court "must" dismiss the action in connection with a deceased party if no timely substitution has been made, "unless the party seeking substitution shows that there would be no prejudice" Accordingly, absent a showing that there would be no prejudice, dismissal of the deceased party is mandatory, but where that showing has been made, the decision whether to allow substitution is again at the discretion of the court.

In this case, the trial court expressed concern that plaintiff had opposed defendants' motion to set aside their default on grounds of defendants', or defense counsel's, mere neglect, but then sought to avoid the consequences of failing to meet the deadline for moving for substitution even though that failure was occasioned by similar neglect. That the court was looking beyond the undisputed tardiness of the motion to substitute indicates that the court recognized that the discretionary language of MCR 2.202(A)(1) held sway over the mandatory language of subrule (A)(1)(b) in this instance. Because plaintiff's failure to move for substitution of the deceased party in timely fashion was not a matter in doubt, the court's treating of the matter as one at its discretion indicates that the court was satisfied that defendants would suffer no prejudice from the late substitution.

In light of plaintiff's negligence in obtaining substitute counsel, opening an estate for her late husband, and moving the court for substitution, the trial court's decision not to allow the late substitution did not fall outside the range of reasonable and principled outcomes, and thus was not an abuse of discretion. See *Saffian, supra*.

Plaintiff does not challenge the trial court's decision to dismiss the case once she was left as the only living plaintiff, on the ground that her interest was derivative of that of the deceased plaintiff. Accordingly, because we hold that the trial court did not err in refusing to allow the

deceased plaintiff's estate to enter the case, this case comes to this Court with no one to whom to grant relief from the trial court's earlier decision to set aside the default.

For these reasons, we conclude that the trial court properly granted summary disposition to defendants.

We affirm.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio