



# ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

SANDRA CHAMBERS, Personal )  
 Representative for the Estate of Fred )  
 Chambers, Deceased, )  
 )  
 Plaintiff/Appellee, )  
 )  
 vs. )  
 )  
 EM OPERATIONS, LLC dba Medical )  
 Park West Rehabilitation and Skilled )  
 Care; and STONEGATE SENIOR )  
 LIVING, LLC, )  
 )  
 Defendants/Appellants. )

**FILED**  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

OCT - 2 2023

JOHN D. HADDEN  
CLERK

Case No. 120,196

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APPEAL FROM THE DISTRICT COURT OF  
CLEVELAND COUNTY, OKLAHOMA

HONORABLE JEFF VIRGIN, TRIAL JUDGE

**AFFIRMED**

David Bernstein  
BERNSTEIN LAW FIRM  
Oklahoma City, Oklahoma

For Plaintiff/Appellee

Matthew B. Free  
Thomas A. LeBlanc  
BEST & SHARP  
Tulsa, Oklahoma

For Defendants/Appellants

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

EM Operations, LLC, d/b/a Medical Park West Rehabilitation and Skilled Care, and Stonegate Senior Living, LLC (collectively "defendants" or "appellants"), appeal a decision of the district court finding that the estate of

Fred Chambers alone—and not surviving spouse, Sandra Chambers, individually—was the “plaintiff” liable for fees resulting from an offer to confess judgment made pursuant to 12 O.S. § 1011.1. On review, we find no error in the decision of the district court and affirm.

### **BACKGROUND**

On September 17, 2018, Sandra Chambers filed suit against the appellants, among others. Sandra was identified in the caption as an individual plaintiff, and also as the representative of the estate of her late husband, Fred Chambers. The petition alleged that various tortious acts by the medical and nursing home defendants had injured Fred Chambers and caused his death. Sandra filed an amended petition on January 25, 2019, in which she was again named as plaintiff in both her representative and individual capacities. On July 26, 2019, however, Sandra filed a second amended petition identifying her as the representative of the estate only, and not as an individual plaintiff. This petition neither made reference to nor incorporated any part of the previous petitions, and we will regard it as the controlling petition here.<sup>1</sup> It states that suit was brought pursuant to the claims provided by 12 O.S. § 1053 – “wrongful death.”

On February 8, 2021, after the second amended petition was filed, the defendants filed an offer to confess judgment for \$250,000 pursuant to 12 O.S.

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<sup>1</sup> See *Timmons v. Royal Globe Ins. Co.*, 1982 OK 97, ¶ 15, 653 P.2d 907, 912 (filing of an amended petition complete in itself, not referring to original petition or prior amendments, is an abandonment of all prior averments not contained in the amended petition).

§ 1101.1. The offer was to settle “all claims made by plaintiff in the above-styled case,” and was addressed to “Sandra Chambers, individually and as personal representative for the Estate.” The offer was rejected. In March 2021, the court approved an agreed motion by the parties to amend the case style to match that of the second amended petition. The court recognized that the plaintiff was only “Sandra Chambers, personal representative for the estate of Fred Chambers, deceased” and that all defendants other than the appellants herein had been previously dismissed.

In October 2021, a jury found in favor of the defendants. A dispute then arose as to the fees granted by operation of the defendants’ § 1101.1 offer. The defendants argued that Sandra was personally liable for these fees. Sandra argued that only the estate could be liable. In January 2022, the court ruled that the estate was liable for \$471,754.41<sup>2</sup> in fees, but that Sandra was not personally liable. Defendants now appeal the decision that Sandra was not personally liable for fees.

### **STANDARD OF REVIEW**

This case involves the interpretation of a fee statute. Questions concerning statutory interpretation are subject to this Court’s *de novo* review. *Christian v. Christian*, 2018 OK 91, ¶ 5, 434 P.3d 941, 942. In exercising *de novo* review, “this court possesses plenary, independent, and non-deferential authority to

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<sup>2</sup> No question related to defendants’ entitlement to these fees as against the estate, or the reasonableness of the award, is presented in this appeal.

examine the issues presented.” *Benedetti v. Cimarex Energy Co.*, 2018 OK 21, ¶ 5, 415 P.3d 43, 45.

### ANALYSIS

In this context, 12 O.S. § 1101.1 allows “an offer of judgment for a sum certain to any plaintiff” and allows the defendant to recover attorney fees if the eventual judgment awarded the plaintiff is less than the offer. It does not define who the “plaintiff” is in the context of this case. No case law associated with § 1101.1 appears to do so either.<sup>3</sup>

Defendants rely primarily on *Boler v. Sec. Health Care, L.L.C.*, 2014 OK 80, 336 P.3d 468, for their argument that both Sandra individually and the estate were “plaintiffs” for the purposes of a § 1101.1 offer. The question in *Boler* was not a fee question, however, but whether an arbitration agreement signed by a representative of the deceased before his death upon the deceased’s admission

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<sup>3</sup> *Lawson v. Nat’l Steel Erectors Corp.*, 2000 OK CIV APP 69, 8 P.3d 171 involves an estate and a § 1101.1 offer, but the plaintiff prevailed there. *Morava v. Cent. Oklahoma Med. Grp., Inc.*, 2001 OK CIV APP 84, 26 P.3d 779, involves a § 1101.1 offer and a personal representative, but concerns prejudgment interest, not the identity of the plaintiff. *Tucker v. Benevolent & Protective Order of Elks Lodge # 417*, 2000 OK CIV APP 51, 6 P.3d 1082, holds that an offer of judgment under § 1101.1 terminates upon the commencement of trial but does not address the identity of the “plaintiff” under the statute. The appellants point to *State ex rel. Baltimore & O. R. Co. v. Daugherty*, 77 S.E.2d 338 (W. Va. 1953) as an example of a case where a court found a personal representative, without any finding of malfeasance on the part of the representative, personally liable for statutory costs in a wrongful death action, but we do not find the reasoning of the majority in that case to be persuasive. Indeed, we sympathize with the well-stated concerns of the dissent, including the following:

If an administrator of the estate of a person whose death results from the wrongful act, neglect, or default of another person, must assume liability for costs by underwriting the ultimate success of an action against the wrongdoer which the statute, by necessary implication, requires him to bring, few, indeed if any, persons acting in that capacity will bring such action.

*Id.* at 343 (Haymond, President, dissenting).

to a nursing home required arbitration of a subsequent wrongful death claim under 12 O.S. § 1053. In that context, *Boler* stated:

Oklahoma's Wrongful Death Act created a new cause of action for pecuniary losses suffered by the deceased's spouse and next of kin by reason of his or her death. Recovery under the wrongful death act does not go to the estate of the deceased but inures to the exclusive benefit of the surviving spouse and children or next of kin.

*Id.* ¶ 26. Because the claim for pecuniary losses in *Boler* accrued "separately to the wrongful death beneficiaries" rather than the estate, it was not a claim of the estate, and not governed by an arbitration agreement signed on behalf of the deceased. *Id.* ¶ 27.

Defendants extrapolate from *Boler* that any claim based in wrongful death is an individual claim, separate from any claims of the deceased's estate. Defendants argue that the statutory beneficiary of a § 1053 claim, not the estate, is therefore the "plaintiff" for fee purposes.

However, the Supreme Court has made clear that Ms. Chambers could not have brought the wrongful death claims in an individual capacity in this case. *Weeks v. Cessna Aircraft Co.*, 1994 OK CIV APP 171, 895 P.2d 731 (approved for publication by the Oklahoma Supreme Court). *Weeks* notes that there is a hierarchy of persons who may be the plaintiff in a wrongful death action. A personal representative, if appointed, *is the only proper person to bring suit*. While substitution of the proper plaintiff would be available if necessary (as in *Weeks* itself), individuals such as the spouse or children, or other next of kin, may act as plaintiff only where there is no appointed personal representative. *Id.* ¶ 11.

Sandra was appointed personal representative before this suit was filed. Her inclusion in the caption as an individual plaintiff in the first two petitions was in error from the beginning, as it was not possible for her to bring § 1053 claims in an individual capacity. *Weeks* is clear that her appointment as personal representative ended any individual capacity she had to sue or be a plaintiff. As such, the court's order of March 2021 did not remove Sandra as an individual plaintiff, but simply corrected a caption that was incorrect from the start.<sup>4</sup>

Section 1101.1 allows only "an offer of judgment for a sum certain to any plaintiff," and Sandra could not be a plaintiff in this case because a personal representative had been appointed. *Weeks*, ¶¶ 11-12. It is difficult to conceive that the statute allows a defendant to make an offer to a person who is neither named as a plaintiff, nor could be made a plaintiff. What defendants therefore propose is that the word "plaintiff" as used in § 1101.1 should be interpreted to include the "ultimate beneficiary" of a § 1053 wrongful death claim, even where that beneficiary cannot statutorily be a plaintiff.

This Court must strictly construe any authority for fees and expenses. *Borst v. Bright Mtg. Co.*, 1991 OK 121, n. 5, 824 P.2d 1102. Granting the defendants' request would amount to a revision of the statute rather than a strict interpretation. If it is advisable to revise § 1101.1 to accommodate the situation created here, this is a task reserved to the legislature. As § 1101.1 is presently

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<sup>4</sup> And had already been corrected by the plaintiffs. The second amended petition of July 2019 did not include Sandra as an individual at all.

written, the only plaintiff in this case is the estate, and thus, only the estate can be liable for fees under the statute.

**AFFIRMED.**

FISCHER, J., and WISEMAN, J. (sitting by designation), concur.

October 2, 2023