

IN THE
SUPREME COURT OF THE UNITED STATES

No. 06-179

CHARLES R. RIEGEL AND DONNA S. RIEGEL,
Petitioners,

v.

MEDTRONIC, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

**SUGGESTION OF DEATH AND
MOTION FOR SUBSTITUTION**

I. SUGGESTION OF DEATH

Petitioner Donna Riegel hereby gives notice of the death of her husband, petitioner Charles Riegel.

II. MOTION FOR SUBSTITUTION

Ms. Riegel, as the administrator of the estate of Charles Riegel for purposes of prosecuting this case and distributing any proceeds thereof, is its authorized representative. Pursuant to Supreme Court Rule 35.1, Donna Riegel, in her capacity as administrator of the estate of Charles Riegel, moves to be substituted as a party for Charles Riegel. Ms. Riegel will also continue to appear as a petitioner on her own behalf.¹

¹Respondent Medtronic, Inc. has indicated that it takes no position with respect to this motion at this time.

A. Factual background

The complaint in this case was filed on April 29, 1999, in the United States District Court for the Northern District of New York. The district court granted in part defendant Medtronic's summary judgment motion in March 2002, and dismissed the remaining claims in December 2003. Petitioners timely filed a notice of appeal in January 2004. The court of appeals affirmed in an order dated May 16, 2006. Petitioners filed a petition for certiorari on August 3, 2006. On November 6, 2006, the Court invited the Solicitor General to file a brief in the case, which he filed on May 23, 2007. The Court granted the petition on June 25, 2007.

Once the case was on appeal, counsel kept Petitioners apprised of the progress of the litigation by mail. Petitioner Charles Riegel died in December 2004; but none of Petitioners' counsel was informed of his death until late June 2007, after the Court granted certiorari in this case. Thereafter, counsel expeditiously worked to secure the formal appointment of Donna Riegel as administrator of the estate of Charles Riegel, so that, in that capacity, she could be substituted for him in this action. On July 24, 2007, the Surrogate's Court of the County of Chautauqua, State of New York, issued letters of limited administration, appointing Donna Riegel administrator of Charles Riegel's estate, and counsel received those letters on July 27, 2007.

B. Discussion

Supreme Court Rule 35.1 provides for the substitution of the authorized representative of a party after that party's death. The rule further provides that the substitution shall be made within six months of the party's death. At this time, more than six months have passed since Mr. Riegel's death. Administrator and co-petitioner Donna Riegel nonetheless requests substitution.

1. “The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion.” *Schact v. United States*, 398 U.S. 58, 63-64 (1970) (S. Ct. R. 22, providing that petition for certiorari in a criminal case “shall be deemed in time when . . . filed with the clerk within thirty days after the entry of such judgment,” is not jurisdictional and can be waived by the Court); *see Stern & Gressman, Supreme Court Practice* 350 (8th ed. 2002) (where time limitation established by rule of Court, the Court has consistently held that rule can be waived); *see, e.g., Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 446 n.4 (1974) (untimely filing of S. Ct. R. 13.1 statement not jurisdictional). Accordingly, the Court can waive the six-month provision of Rule 35.1.

In this case, waiver of the rule is appropriate. First, immediately after learning of Mr. Riegel’s death, counsel promptly moved to have Donna Riegel formally named the administrator of Charles Riegel’s estate. That process was completed on July 24, 2007, just last week.

Second, respondent has suffered no prejudice by the delay because the case would be on precisely the same footing if the substitution had been filed shortly after Mr. Riegel died, particularly because the case has been on appeal since before Mr. Riegel’s death and because Donna Riegel’s pending claim is part of the same case. In other words, substitution at this time, as opposed to earlier, will cause Medtronic no adverse consequence.

Third, the substitution would not be untimely under the analogous provisions of the Federal Rules of Civil Procedure or Federal Rules of Appellate Procedure. *See* Fed. R. Civ. P. 25(a)(1) (motion for substitution due within 90 days of filing suggestion of death); Fed. R. App. Pro. 43(a)(1) (no time limit). Moreover, this case, alleging only state-law claims, was brought in federal court based on diversity jurisdiction, 28 U.S.C. § 1332. Under New York law, if a plaintiff dies but the

claim is not thereby extinguished, the courts are instructed to substitute the proper party. N.Y. C.P.L.R. § 1015 (McKinney 2007). However, failure to do so within a reasonable time is not grounds for dismissal in “the absence of any showing that the delay prejudiced the defendant[s] . . . and the strong public policy that matters should be disposed of on the merits.” *Johnson v. Trivedi*, 836 N.Y.S.2d 474 (N.Y. App. Div. 2007) (denying motion to dismiss for failure to substitute estate approximately two years after plaintiff’s death) (citing cases). Here, as discussed above, Medtronic has suffered no prejudice. Thus, New York law would allow the substitution of Donna Riegel as the representative of Mr. Riegel’s estate, even at this time. Petitioner requests that this Court likewise allow the substitution.

2. Under the circumstances, Mr. Riegel’s case before this Court should not be deemed to have abated. Even if the motion for substitution is not granted, however, this case will not be moot. Donna Riegel independently alleged a claim for loss of consortium, *see* Complaint, Fifth Cause of Action, and her claim remains in the case, regardless of the status of Mr. Riegel’s claims. *See Haspil v. Church of St. Cyril*, 491 N.Y.S.2d 914 (N.Y. Sup. Ct. 1985) (loss of consortium claim continues after settlement of spouse’s personal injury claim); *cf. Buckley v. National Freight, Inc.*, 681 N.E.2d 1287, 1291 (N.Y. 1997) (loss of consortium claim is separate claim that can “stand or fall on its own,” if injured spouse does not assert her own claim, but if injured spouse brings her claim, then consortium claim must be brought while that claim is pending and joined with it). Accordingly, if the substitution is denied, the caption should be amended to reflect Donna Riegel as the sole petitioner.

C. Conclusion

For the foregoing reasons, the motion for substitution should be granted.

Respectfully submitted,

/s/

Wayne P. Smith
157 Barrett Street
Schenectady, NY 12305
(518) 393-1371

Allison M. Zieve
Counsel of Record
Brian Wolfman
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioners

August 1, 2007

IN THE
SUPREME COURT OF THE UNITED STATES

No. 06-179

CHARLES R. RIEGEL AND DONNA S. RIEGEL,
Petitioners,

v.

MEDTRONIC, INC.,
Respondent.

CERTIFICATE OF SERVICE

I, Allison M. Zieve, a member of the Bar of this Court and counsel for petitioners, hereby certify pursuant to Rules 29.3 and 29.5(b) of the Rules of the Supreme Court, that I served the attached Suggestion of Death and Motion for Substitution, filed this 1st day of August, 2007, on all parties required to be served, by causing copies of the document to be sent via email and first class mail, as indicated below:

Theodore Olson
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, DC 20036
[202-955-8500]

email to:
tolson@gibsondunn.com

Counsel for respondent

Paul D. Clement, Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
[202-514-2217]

email to:
supremectbriefs@usdoj.gov

Counsel for amicus curiae United States

/s/

Allison M. Zieve