

[Cite as *Smith v. Bond*, 2015-Ohio-2585.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CHARLES E. SMITH, JR., et al.)	CASE NO. 13 BE 27
)	
PLAINTIFFS-APPELLANTS)	
)	
VS.)	OPINION
)	
ROBERT E. BOND)	
)	
DEFENDANT-APPELLEE)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Belmont County, Ohio
Case No. 12 CV 262

JUDGMENT: Vacated and Remanded.

APPEARANCES:

For Plaintiffs-Appellants: Atty. Frank X. Duff
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For Defendant-Appellee: Atty. Donald P. Wiley
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 15, 2015

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WAITE, J.

{¶1} Appellants Charles E. Smith, Jr. and Emma J. Smith appeal the decision to grant summary judgment to the defendant in a personal injury case. Charles E. Smith, Jr. alleges that he was injured when Appellee Robert E. Bond struck him with his van as he crossed the street as a pedestrian. Smith argues that summary judgment was improper because there is a genuine issue of material fact as to whether Bond failed to exercise due care while driving his van. The record indicates, though, that Bond died shortly after his summary judgment motion was filed. A suggestion of death notice was filed pursuant to Civ.R. 25(E). After that notice was filed, the trial court lost its authority to rule on Bond's motion for summary judgment until a proper substitution of parties was made. Appellant filed a notice of appeal prior to the expiration of the time for filing a substitution of parties, but the issue of substitution remains pending before the trial court. Accordingly, the trial court's judgment in favor of Bond is vacated, and the matter is remanded.

Facts and Procedural History

{¶2} On November 5, 2011, Charles E. Smith Jr. attempted to cross Central Ave. North, a one-way street, when he was struck by Bond. The facts suggest that Smith did not use the crosswalk, and there are conflicting statements as to whether it had been maintained as a crosswalk.

{¶3} Bond filed a motion for summary judgment on July 15, 2013, and the Smiths opposed the motion on July 29, 2013. On August 5, 2013, Bond's attorney filed a suggestion of death informing the trial court that on July 31, 2013, he had acquired actual knowledge that Bond had died. On August 29, 2013, the trial court

granted Bond's motion for summary judgment on the merits. The suggestion of death notice was not addressed by the trial court. Appellant filed a timely appeal on September 26, 2013. None of the parties filed a motion for substitution of parties pursuant to Civ.R. 25 prior to filing the appeal.

ASSIGNMENT OF ERROR

The trial court erred in its Opinion and Judgment Order dated August 29, 2013, (Exhibit 1) granting summary judgment to defendant Robert E. Bond.

{¶4} On appeal, Appellant challenges the decision of the trial court to grant summary judgment to Appellee. Although not directly addressed by the parties, it is apparent that the trial court's decision to rule on the summary judgment motion raised a jurisdictional problem that determines the outcome of this appeal. Since a suggestion of Bond's death was filed while the motion for summary judgment was pending, and since no substitution of parties was made, the trial court could not properly sustain Bond's motion for summary judgment. The court did not have personal jurisdiction over Bond in order to grant summary judgment because Bond was deceased. As a result, we are constrained from reaching the merits of the Smiths' appeal as it arises from a judgment that is a nullity due to lack of personal jurisdiction.

{¶5} Generally, the term jurisdiction contemplates the exercise of a court's judicial power, and is more specifically delineated as either subject matter or personal jurisdiction. Where both are present, a court has the authority to resolve all the

issues among the parties in a particular action before it. *Keeley v. Stoops*, 7th Dist. No. 13 BE 23, 2014-Ohio-4161, ¶10-12. Subject matter jurisdiction defines a court's authority to hear a particular claim and grant the requested relief, whereas personal jurisdiction is the authority a court must exercise over the person of both the plaintiff and the defendant before a court can grant judgment in favor of or adverse to the parties' respective interests. *Valmac Industries, Inc. v. Ecotech Mach., Inc.*, 137 Ohio App.3d 408, 411-412, 738 N.E.2d 873 (2d Dist.2000). Subject matter jurisdiction cannot be conferred on the court by agreement of the parties, and cannot be waived. Lack of subject matter jurisdiction is subject to mandatory *sua sponte* dismissal, and as it raises a question of law, is reviewed *de novo*. *Keeley* at ¶9-10.

{¶6} The death of a party raises different jurisdictional concerns, which are addressed in part by Civ.R. 25(A)(1):

If a party dies and the claim is not thereby extinguished, the court *shall*, upon motion, order substitution of the proper parties. The motion for substitution *may be made by any party* or by the successors or representatives of the deceased party and * * * shall be served on the parties as provided in Rule 5[.] * * * Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record * * * the action shall be dismissed as to the deceased party. (Emphasis added.)

{¶17} A dismissal pursuant to Civ.R. 25(A)(1) is without prejudice due to a lack of personal jurisdiction. *Perry v. Eagle-Picher Indus., Inc.*, 52 Ohio St.3d 168, 173, 556 N.E.2d 484 (1990).

{¶18} By virtue of a party's death, a court loses personal jurisdiction over that party. *Lierenz v. Bowen*, 6th Dist. No. E-90-13, 1991 WL 38039, *3. Thus, the effect of a filed suggestion of death is that personal jurisdiction over that party is temporarily abated and the court is without authority to take any action with respect to the party-decedent's interest until a proper substitution of parties is made, service is obtained, and personal jurisdiction is regained. *Id.*; *Abood v. Nemer*, 128 Ohio App.3d 151, 165, 713 N.E.2d 1151 (9th Dist.1998). Where the decedent's successor or personal representative has not been substituted for the party-decedent, the result is a lawsuit with only one party because, in effect, there is no longer an opposing party over which the court can continue to retain personal jurisdiction. *Id.*

{¶19} Civ.R. 25 provides the mechanism through which to restore personal jurisdiction. Although Civ.R. 25(A) gives the parties 90 days to make substitution, that time period may be extended due to excusable neglect. Civ.R. 6(B); *Markan v. Sawchyn*, 36 Ohio App.3d 136, 137, 521 N.E.2d 824 (8th Dist.1987). Thus, the 90-day window in Civ.R. 25(A) is not in itself jurisdictional in nature, even though the matter it regulates is personal jurisdiction. "[T]he ultimate burden of complying with the temporal requirement of Civ.R. 25(A) rests with the party who brings the action." *Barrett v. Franklin*, 32 Ohio App.3d 51, 54, 513 N.E.2d 1361 (1st Dist.1986),

overruled on other grounds by *Perry v. Eagle-Picher Industries, Inc.*, 52 Ohio St.3d 168, 556 N.E.2d 484 (1990).

{¶10} In the event a proper party for the party-decedent is not substituted within 90 days of filing the suggestion of death pursuant to Civ.R. 25, a trial court must dismiss the case without prejudice. *Id.* In this case, though, Appellant filed a notice of appeal prior to the expiration of the 90 days due to the trial court's error in ruling on Bond's motion for summary judgment. The summary judgment was granted erroneously 24 days after the suggestion of death was filed. The notice of appeal was filed 57 days after the suggestion of death was filed. Thus, a considerable portion of the 90-day period specified in Civ.R. 25(A) remained unexpired at the time the appeal was filed. Once the court of appeals assumes jurisdiction after the filing of the notice of appeal, the trial court loses jurisdiction to take any further action which would conflict or materially affect that part or portion of the proceeding which is pending on appeal. *Vavrina v. Greczanik*, 40 Ohio App.2d 129, 318 N.E.2d 408 (8th Dist.1974). This would most certainly include ruling on a Civ.R. 25(A) motion for substitution, as it involves jurisdictional matters and would change the parties on appeal. *Perfection Graphics, Inc. v. Sheehan*, 11th Dist. No 95-G-1915, 1996 WL 648979, *3.

{¶11} Although App.R. 29 contains provisions for substitution of parties while on appeal, the specific provisions of the rule do not apply in this case. App.R. 29 deals with the situation in which a party dies after an appeal is filed, not before. Appellant indeed filed an App.R. 29 motion for substitution during this appeal, only

one day after the substitution issue was raised by us *sua sponte* during oral argument. Nevertheless, we cannot not grant the motion because App.R. 29 does not properly apply.

{¶12} Although it is clear that the trial court judgment must be vacated, due to the unusual facts of this case the complaint is not ripe for dismissal pursuant to Civ.R. 25(A)(1). Although more than 90 days have now passed since the filing of the suggestion of death, the trial court was without power to act on a motion for substitution once the notice of appeal was filed, and the time period for filing a motion for substitution had not yet expired on the date the appeal was filed. An appeal was properly filed here, because the court lacked jurisdiction to grant summary judgment in the first instance. Again, this Court has no jurisdiction to rule on the matter since it was properly raised, but not addressed, in the trial court. The parties have not even had an opportunity to brief the issue because the entire matter of substitution of parties as it relates to jurisdiction only arose at oral argument on appeal. We note that no case cited in the dissent presents this identical fact pattern. Because this case presents a unique fact pattern that requires an unusual application of the Civil Rules under the circumstances, any further question regarding Civ.R. 25(A) must be left to the trial court.

{¶13} Based on the unusual facts of this case, we hereby sustain Appellant's assignment of error for other reasons and vacate the trial court judgment. On remand, the trial court is to allow the parties, or the successors or representatives of the deceased party, their remaining time under the rule to file a proper motion for

substitution under Civ.R. 25(A). After that period has expired, if no appropriate motion for substitution has been filed the trial court shall dismiss Appellant's complaint without prejudice. If such a motion for substitution is timely filed, the trial court shall proceed to again determine the merits of the underlying civil case. The case is hereby remanded for further proceedings consistent with this Opinion.

Donofrio, P.J., concurs.

DeGenaro, J., dissents in part; see dissenting in part opinion.

DeGENARO, J., dissenting in part.

{¶14} While the majority has correctly stated the law generally with respect to App.R. 29, personal jurisdiction, Civ.R. 25 and Civ.R. 6, it has misapplied the latter two rules. As a result of Bond's death, the trial court was divested of personal jurisdiction over Bond, thus summary judgment in his favor is a nullity. Not only did Appellants fail to file a motion for substitution within the 90 days required by Civ.R. 25, they further failed to file a motion pursuant to Civ.R. 6(B) to extend the time to substitute the proper party for the decedent, let alone establish good cause for failing to do so. Because the majority incorrectly held that a notice of appeal tolls the time for filing a motion for substitution, I must dissent in part. The trial court's decision granting Bond's summary judgment motion should be vacated, and the matter remanded to the trial court to enter an order dismissing the action without prejudice.

{¶15} The relevant procedural history is as follows. Bond filed a motion for summary judgment on July 15, 2013, which Appellants opposed on July 29, 2013. On August 5, 2013 Bond's attorney filed a suggestion of death informing the trial court that on July 31, 2013, he had acquired actual knowledge that Bond had died, in addition to filing a separate reply brief in support of summary judgment. The certificate of service indicates the suggestion of death was served upon counsel for Appellants via ordinary mail on August 1, 2013.

{¶16} On August 29, 2013, the trial court granted Bond's motion for summary judgment on the merits. The suggestion of death was not addressed by the trial court, nor did either party file a motion for substitution pursuant to Civ.R. 25 in light of Bond's death. Finally, at no time during the course of this appeal did Appellants seek a limited remand from this court in order to file alternative motions in the trial court: either for substitution within the remaining 90 days; or to extend the time to file for substitution pursuant to Civ.R. 6(B) and make the requisite showing of excusable neglect for the untimely filing.

{¶17} In the event a proper party for the party-decedent is not substituted within 90 days of filing the suggestion of death pursuant to Civ.R. 25, a trial court

must dismiss the case without prejudice. *Id.* This court reached this precise conclusion in *Justice v. LeSueur*, 7th Dist. No. 01CA139, 2002-Ohio-6429. In that case, Justice filed a complaint against LeSueur, who subsequently died and counsel filed a suggestion of death, but no further action was taken until some eight months later when LeSueur's executor filed a motion to dismiss for failure to comply with Civ.R. 25(A)(1), which the trial court granted. *Id.* at ¶2. Affirming the trial court's dismissal, this court held:

Justice argues the executor's motion to dismiss effectively acts as an "appearance" and, therefore, the estate was named as the real party in interest. However, this procedure fails to comply with the Civ.R. 25(A)(1) in two ways. First, no motion to substitute a proper party was ever placed before the trial court as required by the rule. A person may not be substituted absent a motion to substitute that person as the proper party. *United Home Fed. v. Rhonehouse* (1991), 76 Ohio App.3d 115, 122, 601 N.E.2d 138. Second, the suggestion of death was filed on October 18, 2000 while the motion to dismiss was filed on June 20, 2001, two hundred forty-five days later. Thus, even if the motion to dismiss did qualify as a motion to substitute a proper party under Civ.R. 25(A)(1), that motion was made well after the ninety-day period provided for within Civ.R. 25(A)(1) and, accordingly, it must be dismissed.

Id. at ¶6.

{¶18} Thus, the majority's holding in this case is contrary to Seventh District precedent. Moreover, our sister districts are in accord regarding this conclusion of law. For example, in *Lee v. Burns*, 2d Dist. Nos. 14297, 14321, 1994 WL 164054, *1 (Apr. 21, 1994), although a suggestion of death was filed on July 12, 1993, stating that the defendant had passed away in March of that year, the next day counsel for both parties entered into an oral settlement agreement. The Second District held that the agreement was invalid since the defendant was deceased at

the time the agreement was made, and no party had been substituted for her. *Id.* at *2 Further, the court held that because a motion to substitute a proper party had not been made by either party 90 days after the suggestion of death was filed, the trial court should have dismissed the case. *Id.* Accordingly, the appellate court vacated the oral agreement and dismissed the case for failure to substitute a proper party within the time parameters of Civ.R. 25(A). *Id.*

{¶19} The First, Sixth and Eighth Districts have reached the same conclusion. See *St. Clair v. Inavie Person*, 1st Dist. No. C-010094, 2002-Ohio-1129, *2 (judgment entered in absence of substitute for party-decedent vacated, matter remanded to the trial court to enter dismissal without prejudice); *Terry v. Carney*, 6th Dist. No. OT-98-039, 1999 WL 316898, *2 (May 21, 1999) (trial court did not abuse its discretion granting defendant's motion to dismiss when substitute plaintiff not named within 90 days after suggestion of death filed); *Kelly v. Greene*, 8th Dist. No. 66359, 1994 WL 547767, *2 (Oct. 6, 1994) (if decedent not substituted by personal representative, lawsuit involves only one party as there is no opposing party over which trial court can properly exercise personal jurisdiction).

{¶20} The Eleventh District recently analyzed the circumstances present here within the context of an appeal from a trial court's decision denying a motion to vacate a judgment entered against a party-decedent after their death and in the absence of the substitution of a proper party for the decedent pursuant to Civ.R. 25. In *Third Fed. S. & L. Assn. of Cleveland v. Doles*, 11th Dist. No. 2014-G-3180, 2014-Ohio-5181, the panel reversed the trial court's decision and vacated the underlying judgment:

[T]he decedent's counsel should have entered a suggestion of death, pursuant to Civ.R. 25(E). After accomplishing this, a substitution of a proper party may occur no later than 90 days after the death was suggested on the record. Civ.R. 25(A)(1). A court may reacquire in personam jurisdiction, therefore, after a death is suggested on record and a proper party is substituted and service is procured before the expiration of the 90-day period. See *Rokakis v.*

Estate of Thomas, 8th Dist. Cuyahoga No. 89944, 2008–Ohio–5147, ¶ 3.

Although no suggestion of death had been filed, the trial court entered summary judgment without having personal jurisdiction over a properly substituted party. In truth, the judgment was entered against nobody. Because there was no opposing party, the trial court failed to acquire the necessary personal jurisdiction to enter judgment. Appellant contends the trial court erroneously denied his Civ.R. 60(B) motion as a result of this problem. Because courts are bound to take notice of the limits of their authority, however, the requirements of Civ.R. 60(B) are inapplicable. See *e.g. Vaughn v. Tucker*, 8th Dist. Cuyahoga No. 67089, 1994 Ohio App. LEXIS 4839, *7 (Oct. 27, 1994). Instead, where a court lacks personal jurisdiction, any judgment entered is simply void. *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 64 (1956). (A judgment rendered without personal jurisdiction over a defendant is void.). See also *Patton v. Diemer*, 35 Ohio St.3d 68 (1988).

Doles at ¶15-16.

{¶21} Here, Bond was alive when the action was filed and he was served with the complaint, vesting the trial court with personal jurisdiction over him, which continued through the date Bond filed the motion for summary judgment. But when Bond died and his attorney filed a suggestion of death on August 5, 2013, this divested the trial court of personal jurisdiction over Bond. Despite this, the trial court granted summary judgment on August 29, 2013. This was error.

{¶22} The trial court lost its authority to act either for or against Bond's legal interests as personal jurisdiction over him was lost once the suggestion of death was filed, and could only be reacquired by substituting the decedent with a proper party via a motion to substitute filed within 90 days after the suggestion of death, and by obtaining service on that party. Had such a motion been filed and the trial

court ordered substitution of the proper party in Bond's place pursuant to the mandate of Civ.R. 25, the trial court would have had the authority to issue a ruling either granting or denying summary judgment. However, because neither party moved the trial court to substitute a proper party for Bond before the trial court granted the motion for summary judgment, the trial court had personal jurisdiction over only one party to the lawsuit, the Appellants. Thus, as in *Doles*, "[i]n truth, the judgment was entered against nobody." *Doles* at ¶16.

{¶23} Consistent with the case law from our prior decision in *Justice*, as well as from other districts in *Perry* through *Doles*, summary judgment entered in favor of Bond after his death is a nullity. And because the 90 days within which to file a motion for substitution has long since expired, the judgment entered against Bond must be vacated, and the matter remanded to the trial court to dismiss the action without prejudice.

{¶24} The majority's decision to excuse Appellants' failure to timely file a motion to substitute is erroneous for three reasons. First, it is based upon a faulty premise. Contrary to the suggestion of the majority at ¶10, a notice of appeal does not toll the 90 days the parties have to file a motion for substitution after a suggestion of death has been filed. Civ.R. 25 contains no tolling provisions. Rather, it dictates that where a motion for substitution is not filed within 90 days of a filed suggestion of death, "the action shall be dismissed as to the deceased party." *Id.* Thus, any discussion regarding the amount of time that remained to file a motion for substitution on the date the notice of appeal was filed is based upon a flawed premise. The trial court did not grant summary judgment until 24 days after the suggestion of death had been filed, leaving time to *file* the motion for substitution; it did not need to be resolved within 90 days of the suggestion of death.

{¶25} Rather, the only recourse Appellants had was to file a Civ.R. 6(B) motion to extend the time with the trial court, and which requires a showing of excusable neglect in order to be granted. See *Young v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 88 Ohio App.3d 12, 15-16, 623 N.E.2d 94 (1993). Appellants failed to file a motion for an extension, let alone make a showing of excusable

neglect. Thus, at this late date they are not entitled to the relief granted by the majority here: the vacation of the judgment against the decedent and a remand in order to make a substitution for decedent. *See also Terry v. Carney*, 6th Dist. Ottawa No. OT-98-039, 1999 WL 316898, *1-2 (May 21, 1999); *First Union-Lehman Bros.-Bank of Am. Commercial Mtge. Trust v. Pillar Real Estate Advisors, Inc.*, 2d Dist. No. 2010-CV-9039, 2014-Ohio-1105, ¶17 (bank failing to open estate of decedent-debtor for almost fourteen months did not constitute excusable neglect).

{¶26} Second, the trial court retains concurrent jurisdiction over a case while an appeal is pending over issues that do not conflict with this court's jurisdiction. *Labate Chrysler, Jeep, Dodge, Inc. v. Fifth Third Bank*, 7th Dist. No. 05 CO 57, 2006-Ohio-3480, ¶12, citing *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978). There would have been no conflicting jurisdiction here. The majority's authority to the contrary is distinguishable and therefor unpersuasive. In *Vavrina*, a summary judgment was vacated *after* a notice of appeal had been filed. *Perfection Graphics* involved two separate final judgments within days of each other followed by an appeal that held the trial court had no jurisdiction to issue a second judgment and reinstated the first judgment. In both cases, the actions of the trial court materially affected any judgment on appeal. Here, the judgment was a nullity; its merits could not be reached on appeal.

{¶27} Third, a limited remand could have been sought from this court in order to file one of two motions with the trial court. First, Appellants could have filed a Civ.R. 25 motion to substitute if they were still within the 90 day period after the suggestion of death had been filed. The other procedural option open to Appellants would have been to file a motion pursuant to Civ.R. 6 to extend the time within which to make a substitution, which would have required a showing of excusable neglect for the delay in order to obtain relief from the trial court.

{¶28} Appellants have done none of these things. Instead, they have filed a motion for substitution with this court well over a year after the suggestion of death was filed, which the majority has properly rejected.

{¶29} In sum, Bond died and counsel filed a suggestion of death three weeks prior to the trial court entering summary judgment. As a result of Bond's death the trial court was divested of personal jurisdiction over Bond, and summary judgment in his favor is a nullity. Moreover, a motion for substitution was not filed within the 90 days required by Civ.R. 25, warranting a dismissal without prejudice. The instant appeal does not act as a tolling event enabling the trial court on remand to permit Appellants to file a motion for substitution because they are well beyond the 90 days allotted to do so by the Civil Rules. Accordingly, the trial court's decision should be reversed, summary judgment in favor of Bond should be vacated, and the matter should be remanded to the trial court to enter an order dismissing the action without prejudice.