

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Toby D. Wilcox,
Plaintiff

vs

Case No. 1:07-cv-554-SJD-TSH
(Dlott, C. J.; Hogan, M. J.)

Ohio Penal Industries, et. al.,
Defendants

**REPORT AND RECOMMENDATION
and
ORDER**

This matter is before the Court on Defendants' motion to dismiss defendant Oral Gulley (Doc. 36), defendants' motion for an order enlarging the time to file dispositive motions (Doc. 37), plaintiff's motion to substitute party (Doc. 40) and the parties' responsive memoranda. (Docs. 38, 39, 41, 42).

This Court has construed pro se plaintiff Wilcox's complaint as stating a § 1983 claim for deliberate indifference to plaintiff's safety in violation of his Eighth Amendment rights. (Doc. 4, Sua Sponte Order of Dismissal as to Defendants Ohio Penal Industries and Defendant Proehl, pp. 2-3). On November 24, 2009, defendants filed a Suggestion of Death indicating that defendant Oral Gulley died on October 16, 2008. (Doc. 31). Defendants move the Court to dismiss defendant Oral Gulley pursuant to Fed. R. Civ. P. 25(a)(1), arguing that dismissal is appropriate because plaintiff failed to file a motion to substitute party within the ninety day time period

prescribed by the rule. Defendants also seek an extension of time for filing dispositive motions until thirty days after this Court rules on the motion to dismiss. Plaintiff opposes defendants' motions, arguing that he never received a copy of the Suggestion of Death filed by defendants (Doc. 39), and moves the Court to permit substitution of "the beneficiarie (sic) of Oral Gulley's assets as his replacement . . . pursuant to Fed. R. Civ. P. 25(a)(1). . . ." (Doc. 40, p. 2). In reply, defendants argue that there is no indication on the record that plaintiff was not served with the Suggestion of death and that the 90-day time period for filing a motion for substitution has run. Defendants assert that the rule requires dismissal of defendant Gulley.

Fed. R. Civ. P. 25 provides in relevant part:

If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

. . .

A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

Fed. R. Civ. P. 25(a)(1) & (a)(3). On its face, the rule requires a motion for substitution to be made within ninety days of the suggestion of death. The time period does not begin to run, however, absent strict compliance with the filing and service requirements of the Rule. *Long v. Time Ins. Co.*, 2008 WL 3200844, * 1 (S.D. Ohio Aug. 7, 2008)(Sargus, J.); *Jenkins v. Macatawa Bank Corp.*, 2007 WL 737746, *1 (W. D. Mich. March 7, 2007)(For 90-day period to commence, suggestion of death must be made upon record by party or deceased representative and suggestion of

death must be served upon other parties and deceased's successor.).

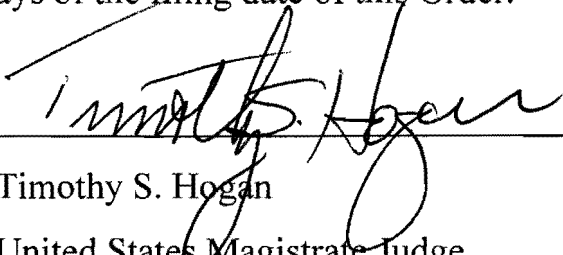
Defendants' Suggestion of Death and subsequent Motion to Dismiss filed in reliance on Fed. R. Civ. P. 25(a)(1) presume that plaintiff's claims against defendant Gulley survive the officer's death. The Court concurs. See *Hall v. Wooten*, 506 F.2d 564, 568 (6th Cir. 1974); *Jaco v. Bloechle*, 739 F.2d 239, 241 (6th Cir. 1984); *Carney v. Stericycle, Inc.*, 2007 WL 2236605, * 1 (N. D. Ohio 2007); Ohio Rev. Code §§ 2305.21 & 2311.21. Nevertheless, in the present case, the Suggestion of Death filed by counsel for defendants Gulley and Lizak does not comport with Rule 25's requirements for commencing the 90-day time period. Consequently, the 90-day time period has not been triggered. The Suggestion of Death fails to name a successor or representative of the deceased party. (See Doc. 31, Suggestion of Death). "The law is well settled that the Suggestion of Death must identify the successor or representative of the deceased." *Long*, 2008 WL 3200844, at * 2 (citing *Deitrich v. Burrows*, 164 F.R.D. 220, 222 (N.D. Ohio 1995))(internal quotations omitted). Moreover, there is no indication that the Suggestion of Death was served on the successor or representative pursuant to Fed. R. Civ. P. 4, as required by Rule 25. *Jenkins*, 2207 WL 737746 at * 1; *Long*, 2008 WL 3200844, at * 1. Consequently, defendants' motion to dismiss defendant Gulley is not well-taken and should be denied.

As for plaintiff's "Motion to Substitute Party," it likewise fails to comply with the requirements of Fed. R. Civ. P. 25. Plaintiff does not name a successor or representative. Rather, he asks that the action be brought against defendant Gulley's "beneficiaire (sic)." When a defendant sued in his individual capacity in a § 1983

action dies, the proper party to substitute is the successor of the deceased or the representative of his estate. *See Graham v. Henderson*, 224 F.R.D. 59 (D.C.N.Y. 2004). The true successor of defendant Gulley is decedent's estate and the executor of the estate should be named the party to be substituted. *Kentucky v. Graham*, 473 U.S. 159, 166 & n.11 (1985). As noted above, under Rule 25, the successor must also be served with any motion to substitute. Even assuming *arguendo* that a beneficiary of defendant Gulley's estate is a proper successor or representative, plaintiff also failed to serve his motion to substitute as required by Rule 25. Consequently, plaintiff's motion should likewise be denied.

IT IS THEREFORE RECOMMENDED THAT: Defendants' motion to dismiss be denied.

It is Hereby ORDERED that plaintiff's motion to substitute be DENIED. IT IS FURTHER ORDERED that counsel for defendant Lizak file an Amended Suggestion of Death within fourteen days of the filing date of this Order.



Timothy S. Hogan
United States Magistrate Judge

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NOTICE

Attached hereto is the Report and Recommended decision of the Honorable Timothy S. Hogan, United States Magistrate Judge, which was filed on 11-4-09. Any party may object to the Magistrate's findings, recommendations, and report within (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all Parties, the Judge, and the Magistrate, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations, or report to which objection is made along with a memorandum of law setting forth the basis for such objection, (such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate's Findings, Recommendations and Report, all other parties shall respond to said Motion to Review within ten (10) days after being served a copy thereof.

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