

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

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| THE LAKE SKI I-80, INC., | : | O P I N I O N |
| Plaintiff-Appellee, | : | |
| - vs - | : | CASE NO. 2015-T-0002 |
| RONALD J. HABOWSKI, | : | |
| ADMINISTRATOR FOR THE ESTATE | : | |
| OF WALTER HABOWSKI, | : | |
| Defendant-Appellant. | : | |

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2013 CV 01340.

Judgment: Vacated and remanded.

Thomas C. Nader, Nader & Nader, 5000 East Market Street, #33, Warren, OH 44484 (For Plaintiff-Appellee).

Ronald J. Habowski, 1951 Basswood Street, Kent, OH 44240 (Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Ronald J. Habowski, Administrator for the Estate of Walter Habowski, appeals from the judgment of the Trumbull County Court of Common Pleas, adopting the decision of its magistrate, and awarding The Lake Ski I-80, Inc., \$62,500 in damages for trespass. The administrator contends the trial court lacked personal jurisdiction over his late father. We agree, vacate the judgment, and remand.

{¶2} Lake Ski owns some 38 acres of land in Trumbull County, Ohio. Most of the land is occupied by a lake. The owners of Lake Ski use the property solely for recreational purposes, especially water skiing.

{¶3} Walter Habowski owned a timber property abutting the Lake Ski property. In 2009, he asked his friend Steve Hemberger to find someone to cut the trees along the border of his property bordering that of Lake Ski. Eventually, Mr. Hemberger suggested Mr. Habowski use Ray Hershberger for the work. In the autumn of 2009, Mr. Hemberger and Mr. Hershberger drove out to the area to be timbered. As it was raining heavily, the men did not leave Mr. Hemberger's truck. Mr. Hemberger indicated the location of the Habowski property's northern and southern line markers, but did not show them to Mr. Hershberger. Mr. Hershberger was not provided with a survey prior to commencing and completing the work in the autumn of 2009.

{¶4} Unfortunately, Mr. Hershberger cut down 21 trees on Lake Ski's property, and 19 straddling the property line. At trial, Mark Sterling, one of Lake Ski's shareholders, testified the trees lost were large, and provided a wind screen for the lake. He testified that minimizing wind is important in providing a quality water skiing experience. He also testified Lake Ski intended to put in new camping sites along the edge of the lake, and could not, because the trees were not available for shade.

{¶5} Joseph Gregory, a certified arborist for Davey Tree, testified regarding damages, which he placed at \$62,500.

{¶6} Lake Ski filed an action sounding in trespass and conversion against Mr. Habowski. Trial was had before the magistrate August 4, 2014. She filed her decision, finding Mr. Habowski liable in trespass for \$62,500, September 30, 2014. Sadly, Mr.

Habowski died October 4, 2014, at the age of 89. His counsel filed a suggestion of death, Civ.R. 25(E), with the trial court October 9, 2014. Objections to the magistrate's decision were filed by each side. December 18, 2014, without any substitution of parties having been made regarding Mr. Habowski, the trial court adopted the magistrate's decision.

{¶7} This appeal was filed January 15, 2015. The notice of appeal included the objection the trial court lacked personal jurisdiction, since no party defendant had been substituted for Mr. Habowski. Lake Ski filed a cross appeal, which we dismissed as untimely. Lake Ski also moved to dismiss this appeal, due to the fact no substitution had been made for Mr. Habowski. By a judgment entry filed March 23, 2015, we granted 60 days for a substitution to be effected. May 18, 2015, Ronald Habowski noticed this court he had been appointed administrator of his father's estate, and moved to substitute himself as appellant. We granted the motion by a judgment entry filed June 10, 2015.

{¶8} There are five assignments of error. The first is: "On December 18, 2014, the trial court erred in adopting that portion of the Magistrate's Decision against Habowski because the trial court had notice that, approximately two months prior to its judgment, Habowski passed away on October 4, 2014." The administrator notes that pursuant to Civ.R. 25(E), his late father's counsel filed a suggestion of death within fourteen days of the death. Civ.R 25(A) provides that a party may be substituted for the decedent within 90 days of the filing of the suggestion of death. In this case, the 90 day period for substitution had not run when the trial court adopted the magistrate's decision December 18, 2014. The administrator cites to our recent decision in *Third Fed. Sav.*

and Loan Assn. of Cleveland v. Doles, 11th Dist. Geauga No. 2014-G-3180, 2014-Ohio-5181, for the proposition a trial court lacks personal jurisdiction to proceed to judgment if a party to an action dies, and no proper substitution is made.

{¶9} In *Doles*, Third Federal filed a foreclosure action against Sharon Rosenberg. *Id.* at ¶2. Ms. Rosenberg answered, and Third Federal filed for summary judgment. *Id.* Ms. Rosenberg died immediately thereafter, but no suggestion of death was filed. *Id.* The trial court granted Third Federal summary judgment, and entered an order of sale. *Id.* at ¶3. Her executor, Mr. Doles, thereafter filed a suggestion of death, and moved for relief from judgment, since no substitution of parties had been made prior to the grant of summary judgment. *Id.* at ¶4. The trial court denied the motion for relief from judgment, and the executor appealed. *Id.* at ¶8. On appeal, he asserted the trial court lacked jurisdiction to enter any judgment against his decedent. We held:

{¶10} “The legal term ‘jurisdiction’ denotes the authority conferred by law on a court to exercise its judicial power in a case or controversy before it. See *e.g. Valmac Industries, Inc. v. Ecotech Machinery, Inc.*, 137 Ohio App.3d 408, 411, * * * (2d Dist.2000). There are two types of jurisdiction: subject matter and personal. Subject matter jurisdiction refers to the authority that a court has to hear a particular claim and grant relief. *Id.* at 412. Alternatively, personal jurisdiction refers to the authority a court possesses over the defendant’s person, which is required before a court can enter a judgment contrary to that party’s legal interests. See *Pennoyer v. Neff*, 95 U.S. 714, * * * (1877). Whether a court has jurisdiction of the subject matter of an action and of the parties to that action is a question of law. *Id.*, citing *Burns v. Daily*, 114 Ohio App.3d 693, * * * (11th Dist.1996).

{¶11} “In this matter, upon the filing of the complaint and the filing of the decedent’s answer, the court possessed subject matter jurisdiction over appellee’s claim as well as personal jurisdiction over the decedent. When the decedent passed without a party substitution, however, there was no defendant against which the court could render a judgment. A cause of action may only be brought and sustained against a party who actually or legally exists and who has the capacity to be sued. *Baker v. McKnight*, 4 Ohio St.3d 125, 127, * * * (1983). The party may be a natural or artificial person, but it must be an entity that the law regards as ‘competent.’ Because ‘actual or legal’ existence as well as legal competency are conditions precedent for being sued, a deceased individual cannot be a party to an action. *Id.* Accordingly, ‘(i)f a decedent’s personal representative has not been substituted for the decedent, the end result is a lawsuit with only one party.’ *Perry v. Eagle-Picher Indus. Inc.*, 52 Ohio St.3d 168, 173, * * * (1990). And, without an opposing party, there was no one over whom the court could properly acquire personal jurisdiction.

{¶12} “To cure this fatal problem, the 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.

{¶13} “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. * * * [W]here 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).” (Parallel citations omitted.) *Doles* at ¶13-16.

{¶14} In this case, a suggestion of death was filed, but the trial court adopted the magistrate’s decision before any party was substituted for Mr. Habowski. It lacked jurisdiction to do so. Lake Ski argues the subsequent substitution of the administrator during this appeal cures this defect. It does not, since this court’s power to substitute a party under App.R. 29(A) is limited to situations in which a party dies after the right to appeal has accrued. See, e.g., *Smith v. Bond*, 7th Dist. Belmont No. 13 BE 27, 2015-Ohio-2585, ¶11. Walter Habowski died before any judgment from which appeal might be taken was entered. The substitution was incorrect.

{¶15} The trial court lacked the necessary personal jurisdiction to enter judgment when it did. The judgment is void.

{¶16} The first assignment of error has merit.

{¶17} The second through fifth assignments of error are:

{¶18} “[2.] The trial court erred in adopting that portion of the Magistrate’s Decision that found Habowski trespassed on the Plaintiff’s property.

{¶19} “[3.] The trial court erred in adopting that portion of the Magistrate’s Decision that tacitly found Hershberger was hired as an employee.

{¶20} “[4.] The trial court erred in adopting that portion of the Magistrate’s Decision that found Habowski’s actions were negligent.

{¶21} “[5.] The trial court erred in adopting that portion of the Magistrate’s Decision regarding the reasonableness of the damages recommended by the Magistrate.”

{¶22} Given our disposition of the first assignment of error, we decline to reach these, deeming them moot. App.R. 12(A)(1)(c).

{¶23} The judgment of the Trumbull County Court of Common Pleas is vacated, and this matter is remanded with instructions that the trial court dismiss the case without prejudice. Civ.R. 25(A)(1); *Perry v. Eagle-Picher Indus., Inc.*, 52 Ohio St.3d 168, 173 (1990).

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in part and concurs in judgment only in part.

TIMOTHY P. CANNON, P.J., concurring in part and concurring in judgment only in part.

{¶24} I concur with the majority that this matter should be vacated and remanded to the trial court. I write separately to address the analysis and remedy recently implemented by the Seventh District Court of Appeals in *Smith v. Bond*, 7th Dist. Belmont No. 13 BE 27, 2015-Ohio-2585, a case that nearly duplicates the unusual fact pattern before us.

{¶25} In *Smith*, the 90-day period in which to substitute a deceased party had not expired when the trial court entered judgment or when the appeal was filed. After the appeal was filed, the trial court lost jurisdiction to substitute a party or to dismiss the case. See *id.* at ¶10 (holding that a “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,” including “ruling on a Civ.R. 25(A) motion for substitution, as it involves jurisdictional matters and would change the parties on appeal”). The *Smith* Court held that the trial court’s judgment must be vacated due to a lack of personal jurisdiction, but that the complaint was not ripe for dismissal because “a considerable portion of the 90-day period specified in Civ.R. 25(A) remained unexpired at the time the appeal was filed.” *Id.* at ¶10.

{¶26} Here, the 90-day period in which to substitute a party had expired by the time the appeal was filed. Therefore, although I agree with the outcome in *Smith*, it cannot apply to the case sub judice. Under the circumstances, I agree we must remand for the trial court to dismiss the case without prejudice.