

[Cite as *Smith v. Daniel*, 2015-Ohio-776.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

ANNICE SMITH,	:	APPEAL NO. C-140428
	:	TRIAL NO. A-1110325
Plaintiff-Appellant,	:	
	:	<i>OPINION.</i>
vs.	:	
KRISTEN DANIEL,	:	
	:	
and	:	
WILLIAM DANIEL,	:	
	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 6, 2015

*Gregory S. Young Co., L.P.A., and Christopher D. Byers, for Plaintiff-Appellant,  
Eagen & Wycoff Co., L.P.A., and Thomas L. Eagen, Jr., for Defendants-Appellees.*

Please note: this case has been removed from the accelerated calendar.

**SYLVIA SIEVE HENDON, Presiding Judge.**

{¶1} This action stems from a car accident, where six months later the defendant driver died of a heroin overdose. Plaintiff-appellant Annice Smith argues that the trial court should have permitted her to substitute a proper party for the deceased defendant, and should not have entered summary judgment in favor of the decedent's father on a negligent-entrustment claim. Because Smith failed to timely move for substitution following the suggestion of death of the decedent, and failed to produce evidence demonstrating that issues remained for trial, we affirm the trial court's judgment.

***Background***

{¶2} On December 27, 2009, Smith was involved in an automobile accident with Kristen Daniel, who was operating a vehicle owned by her father William Daniel.

{¶3} On December 22, 2011, Smith filed an action in the Hamilton County Common Pleas Court against Kristen and William Daniel. Smith obtained service on William Daniel at his Kentucky residence, and he subsequently filed an answer to her complaint.

{¶4} Smith's attempts to serve Kristen Daniel at her Ohio residence were unsuccessful. On January 26, 2012, certified mail service to Kristen Daniel was returned unclaimed. Six months later, on June 19, 2012, Smith requested regular mail service. But regular mail service to Kristen Daniel was returned on July 5, 2012, with the notation, "Addressee deceased."

{¶5} On August 10, 2012, defense counsel filed a suggestion of death to inform the court that Kristen Daniel had died on July 29, 2010, and served the notice on counsel for Smith.

{¶6} On January 24, 2013, defense counsel moved to dismiss Kristen Daniel from the action because Smith had failed to move to substitute a proper party within 90 days of the suggestion of death. The same day, Smith moved to amend her complaint to substitute Kristen's mother, Mary Daniel, as the proper party.

{¶7} The trial court dismissed the action against Kristen Daniel. Smith appealed the dismissal. We dismissed her appeal for lack of jurisdiction because the trial court's entry of dismissal was not a final appealable order. *Smith v. Daniel*, 1st Dist. Hamilton No. C-130261 (Dec. 11, 2013).

{¶8} The trial court later granted summary judgment in favor of William Daniel on Smith's claim that he had negligently entrusted his car to his daughter.

***Civ.R. 25 Substitution of Parties***

{¶9} Civ.R. 25 sets forth the procedure by which a decedent's personal representative is made a party to a pending action. Civ.R. 25(A)(1) requires a trial court to order substitution of the proper party for a deceased party if a motion for substitution is made within 90 days after the death is suggested upon the record. If a motion for substitution is filed outside the 90-day period, and in the absence of facts supporting excusable neglect as provided in Civ.R. 6(B), the court must dismiss the action as to the deceased party. Civ.R. 25(A)(1); *Perry v. Eagle-Picher Industries, Inc.*, 52 Ohio St.3d 168, 169, 556 N.E.2d 484 (1990).

{¶10} Smith's first and second assignments of error relate to the trial court's dismissal of the action against Kristen Daniel for failure to timely substitute a proper party pursuant to Civ.R. 25, so we address them together.

{¶11} In her first assignment of error, Smith argues that the trial court erred by denying her motion to amend the complaint. In the body of Smith's motion entitled "Motion for Leave to File an Amended Complaint," Smith sought to substitute "Mary Daniel, special administrator of the Estate of Kristen Daniel," as a proper party for the deceased Kristen Daniel. Because the operative effect of a pleading or motion is determined by its substance and not its caption, we must treat Smith's motion as one to substitute a proper party. *See Perry* at 170; *Lungard v. Bertram*, 86 Ohio App. 392, 395, 88 N.E.2d 308 (1st Dist.1949); *Morris v. Children's Hosp. Med. Ctr.*, 73 Ohio App.3d 437, 441, 597 N.E.2d 1110 (1st Dist.1991). In her second assignment of error, Smith argues that the trial court erred by dismissing the action against Kristen Daniel.

{¶12} In this case, it is undisputed that Smith's motion for substitution was filed well outside the time period prescribed by Civ.R. 25(A)(1). The record reveals that the motion was filed more than five months after the suggestion of death had been filed. And the motion was not filed until after the defense had filed its motion to dismiss Kristen Daniel from the action for Smith's failure to substitute a proper party.

{¶13} Smith acknowledges that her substitution motion was untimely filed. However, she contends that the trial court should have extended the time period for filing the motion because her failure to act within the 90-day period had been the

result of excusable neglect. She points to her “good faith efforts to actually serve the decedent by both certified and regular mail.”

{¶14} The record reveals that plaintiff’s counsel received notice on July 5, 2012, that regular mail service to Kristen Daniel had been returned due to the death of the addressee. On July 10, 2012, after not receiving a response to his telephone calls, defense counsel wrote to plaintiff’s counsel to inform him of Kristen’s death and asked him to call to discuss the case. On August 10, 2012, defense counsel filed the suggestion of death and served it on plaintiff’s counsel with a letter requesting a return telephone call. On August 22 and December 6, 2012, defense counsel sent letters to plaintiff’s counsel asking to talk about the case.

{¶15} More than a month before the suggestion of death was filed, Smith knew that service to Kristen Daniel had been returned because the addressee was deceased. And once the suggestion was filed, Smith took no action for five months. Under these circumstances, Smith failed to demonstrate that her inaction constituted excusable neglect. *See Perry*, 52 Ohio St.3d at 172, 556 N.E.2d 484. Consequently, we hold that the trial court properly dismissed Smith’s action against Kristen Daniel for failure to substitute a proper party within the period allowed by Civ.R. 25(A)(1). We overrule the first and second assignments of error.

***Negligent Entrustment***

{¶16} In her third assignment of error, Smith argues that the trial court erred by entering summary judgment in favor of William Daniel on her claim that he had negligently entrusted his vehicle to Kristen Daniel on the date of the accident. We review a trial court’s entry of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶17} Summary judgment is appropriately granted when no genuine issue of material fact exists, the movant is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion and that conclusion is adverse to the nonmoving party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189 (1994).

{¶18} To establish negligent entrustment, Smith had to demonstrate that William Daniel had knowingly entrusted his vehicle to an incompetent or inexperienced driver whose negligent operation resulted in injury. *See Heard v. Dubose*, 1st Dist. Hamilton No. C-060265, 2007-Ohio-551, ¶ 15; *see also Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, ¶ 36.

{¶19} William Daniel supported his summary-judgment motion with an affidavit wherein he asserted that Kristen had had a valid driver's license, that he knew of no prior accident that she had been involved in, and that he believed her to be a good and competent driver, both before and on the day of the accident.

{¶20} In her response, Smith argued that questions of fact remained as to whether William Daniel knew or should have known that his daughter was incompetent to drive his car. Smith noted that in William Daniel's deposition taken several months after the summary-judgment motion had been filed, he had testified that his daughter died of a heroin overdose about seven months after the accident. He had also testified that several months before the accident, Kristen's mother had told him that she thought Kristen was using drugs.

{¶21} In William Daniel's reply in support of his summary-judgment motion, he pointed to his own deposition testimony that made clear that he had had no reason to believe that his daughter had used heroin at or near the time of the

accident. He also submitted the police report for the accident, which showed that no drug or alcohol tests had been administered to Kristen, that she had not been suspected of being under the influence of drugs or alcohol, and that her condition had been “apparently normal.”

{¶22} Once William Daniel met his initial burden of identifying portions of the record showing that he had not breached any duty to Smith, Smith was required to put forth some evidence showing a genuine issue for trial. Civ.R. 56(E); *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988). Smith’s claim that Kristen Daniel was an incompetent driver “because of her apparent heroin addiction” is not supported by the record; that Kristen Daniel died from a heroin overdose months after the accident and may have used heroin months before the accident, does not prove that she was incompetent to drive on the accident date. Because Smith failed to produce evidence that William Daniel negligently entrusted his vehicle to his daughter, the trial court properly entered summary judgment in his favor. Consequently, we overrule the third assignment of error and affirm the trial court’s judgment.

Judgment affirmed.

**CUNNINGHAM and FISCHER, JJ., concur.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.