

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

TWYLA J. RODGERS	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila Farmer, J.
Plaintiff-Appellee	:	Hon. Julie Edwards, J.
	:	
-VS-	:	
	:	Case No. 2002CA00340
FORD MOTOR COMPANY, et al.	:	
	:	
Defendant-Appellants	:	
	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas Case 2001CA00357
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JUDGMENT:	Reversed
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DATE OF JUDGMENT ENTRY:	March 3, 2003
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APPEARANCES:	For Defendants-Appellants
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For Plaintiff-Appellee

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*Edwards, J.*

{¶1} Defendant-appellant Ford Motor Company appeals from the October 2, 2002, Judgment Entry of the Stark County Court of Common Pleas denying its Motion to Dismiss and granting the Motion for Substitution of the Estate of Twyla Rodgers as a party plaintiff.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On February 8, 2001, Twyla Rodgers filed a Notice of Appeal from the November 21, 2000, order of the Staff Hearing Officer of the Industrial Commission disallowing her claim for workers' compensation death benefits for the death of her husband, Charles Rodgers. On the same date, Twyla Rodgers filed a complaint against appellant Ford Motor Company and the Administrator of the Ohio Bureau of Workers' Compensation, alleging that Charles Rodgers' employment at Ford Motor Company "was a direct and proximate cause of his death from colon cancer." Charles Rodgers allegedly was exposed to asbestos in the workplace.

{¶3} Twyla Rodgers died on February 15, 2002. Thereafter, on May 24, 2002, her counsel filed a "Notice of Suggestion of Death and Motion for Substitution of Parties." Counsel specifically requested that the Estate of Twyla Rodgers be substituted as the real party in interest. In response, appellant, on May 28, 2002, filed a Motion to Dismiss pursuant to Civ.R. 12(B)(1), alleging that Twyla Rodgers' claim had abated due to her death and that, therefore, the trial court lacked jurisdiction over the subject matter.

{¶4} As memorialized in a Judgment Entry filed on June 26, 2002, the trial court denied appellant's Motion to Dismiss and ordered that the Estate of Twyla Rodgers be substituted as a party plaintiff. Thereafter, a Nunc Pro Tunc Judgment Entry adding the words "This constitutes a final, appealable order. There is no just cause for delay" was

filed on October 2, 2002.

{¶5} It is from the trial court's October 2, 2002, Nunc Pro Tunc Judgment Entry that appellant now appeals, raising the following assignment of error:

{¶6} "THE TRIAL COURT COMMITTED ERROR BY PERMITTING THE SUBSTITUTION OF THE ESTATE OF THE PLAINTIFF AS A PARTY PLAINTIFF UPON THE DEATH OF THE PLAINTIFF AS THE CLAIM ABATED UPON PLAINTIFF'S DEATH."

{¶7} This case comes to us on the accelerated calender. App. R. 11.1, which governs accelerated calender cases, provides, in pertinent part: (E) Determination and judgment on appeal. The appeal will be determined as provided by App. R. 11. 1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form.

{¶8} This appeal shall be considered in accordance with the aforementioned rule.

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{¶9} Appellant, in its sole assignment of error, argues that since the claim of Twyla Rodgers abated upon her death, the trial court erred in permitting the substitution of the Estate of Twyla Rodgers as a party plaintiff. We agree.

{¶10} O.A.C. 4123-5-21, captioned "abatement of claims," states as follows:

{¶11} "(A) When a claimant dies, action on any application filed by the claimant, and pending before the bureau or the industrial commission at the time of his death, is abated by claimant's death.

{¶12} "(B) Abatement of action, as described in paragraph (A) of this rule, does not apply to payment for medical and hospital treatment, for medicine, nursing, and other health care services rendered as a result of the injury or occupational disease for which the claim was allowed during the deceased claimant's lifetime, provided that the respective bills

were filed within the time as required by law and by the rules of the industrial commission and the bureau.”

{¶13} Cases have held that where the Industrial Commission has allowed the benefits in question, or the claimant prevails in the trial court before he or she dies, there is no abatement of a claim. *Estate of Orecny v. Ford Motor Co.* (1996), 109 Ohio App.3d 462, 467 - 468, 672 N.E.2d 679. For example, in *State ex rel. Nossal v. Terex Div. of I.B.H.*, 86 Ohio St.3d 175, 1999-Ohio-144, 712 N.E.2d 747, the Ohio Supreme Court held that where the Industrial Commission awards death benefits to the widow of a deceased employee, but the widow dies before the funds are disbursed, the accrued benefits between the deceased employee’s death and the spouse’s death shall be paid to the spouse’s estate. The court in *Nossal*, held that it would be illogical and unfair to deny benefits simply because a claimant failed to live long enough to survive delays in the administrative process. *Id.* at 177.<sup>1</sup> In contrast, in *Bozzelli v. Indus. Comm.* (1930), 122 Ohio St. 201, 171 N.E. 108, the Ohio Supreme Court held that the claimant’s appeal from an adverse ruling by the Industrial Commission abates on the claimant’s death.

{¶14} As stated in the complaint in the case sub judice, both the District Hearing Officer of the Industrial Commission and the Staff Hearing Officer disallowed Twyla Rodgers’ claim for death benefits. Since the Industrial Commission never awarded death benefits to Twyla Rodgers and since she did not prevail on appeal to the trial court before she died, her claim for death benefits abated in accordance with O.A.C. 4123-5-21(A). In short, since there was no accrual of benefits that existed at the time of Twyla Rodgers’

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<sup>1</sup> See also *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 2000-Ohio-73, 737 N.E.2d 519, in which the Ohio Supreme Court followed *Nossal* in holding that the estate of a deceased worker was entitled to permanent partial and permanent total disability compensation that accrued to the worker, but had not been paid to him at the time of his death.

death, her Estate would not be entitled to any death benefits.

{¶15} The trial court, in its Judgment Entry, cited to *Johnston v. Bur. Of Workers' Comp.*, 92 Ohio St.3d 463, 2001-Ohio-1284, 751 N.E.2d 974 in holding that Twyla Rodgers' claim did not abate upon her death and that her Estate could proceed with her claim. In *Johnston*, James Johnston's workers' compensation claim was allowed and he received total temporary disability compensation from May 16, 1992, to November 29, 1994, and began receiving wage loss compensation on September 7, 1996.

{¶16} Thereafter, on May 21, 1997, an "Application for Approval of Settlement Agreement," signed by James and his employer was filed with the Ohio Bureau of Workers' Compensation seeking the Bureau's approval of a final settlement of James' entire claim in a lump sum amount. While the application was pending, James died. After being notified of his death, the Bureau notified James' counsel that it would approve a settlement in a lesser amount. Although James' counsel accepted the approved amount, the Bureau then notified his counsel that the settlement application was denied since it abated on James' death.

{¶17} After the Court of Appeals for Franklin County denied appellant Judy Johnston's<sup>2</sup> complaint in mandamus seeking a writ that the settlement agreement was not abated by James Johnston's death, an appeal to the Ohio Supreme Court was filed. While noting that O.A.C. 4123-5-21(A) generally applies to joint applications for approval of a State Fund settlement provided that the claimant's death occurs before the settlement is approved by the Administrator of Workers' Compensation, the Ohio Supreme Court held that O.A.C. 4123-5-21(A) was nullified in situations where the Administrator failed to process the application for approval of a State Fund settlement within a reasonable period

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<sup>2</sup> Judy Johnston was James Johnston's wife.

of time. The Ohio Supreme Court held that since the Administrator's eight month delay in processing the application for approval of a settlement was unreasonable, the settlement application was not abated by James' death and that, therefore, the writ requested by Judy Johnston should have been granted.

{¶18} In the case sub judice, there was no such application for approval of a settlement. Rather, as is stated above, Twyla Rodgers's claim for death benefits was denied at each and every level of the Industrial Commission and no compensation had ever been awarded to her. For such reason, we find that the *Johnston* case is not applicable.

{¶19} Appellant's sole assignment of error is, therefore, sustained.

{¶20} Accordingly, the judgment of the Stark County Court of Common Pleas is reversed.

By Edwards, J.

Gwin, P.J. and

Farmer, J. concurs

In Re: Death Benefit - Substitution of Party Plaintiff