**[Cite as *Haga v. Albex Aluminum, Inc.*, 2005-Ohio-1059.]**

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| AMBER JEAN HAGA, et al. | : | JUDGES: |
| | : | William B. Hoffman, P.J. |
| Plaintiffs-Appellants | : | John W. Wise, J. |
| | : | Julie A. Edwards, J. |
| -vs- | : | |
| | : | Case No. 2003CA00312 |
| ALBEX ALUMINUM, INC., et al. | : | |
| | : | |
| Defendants-Appellees | : | O P I N I O N |

CHARACTER OF PROCEEDING: Civil Appeal From Stark Couty Court Of Common Pleas Case 2001CV02083

JUDGMENT: Dismissed

DATE OF JUDGMENT ENTRY: March 7, 2005

APPEARANCES:

For Plaintiffs-Appellants

ROBERT C. MEEKER
MICHAEL B. BOWLER
19 North High Street
Akron, OH 44308

For Defendant-Appellee

MARK D. KATZ
Penton Media Building
1300 East Ninth St., Suite 900
Cleveland, OH 44114-1583
Counsel for Albex Aluminum, Inc.

JOHN R. O'NEIL
MARTIN T. GALVIN
1400 Midland Building
101 Prospect Ave., West
Cleveland, OH 44115
Counsel for RVM Industries, Inc.

*Edwards, J.*

**{¶1}** Plaintiffs-appellants Amber Jean Haga , Chrystal Lee Dickey, Chad Lee Garabrandt and Tina Weimer, as Guardian to Cora Lee Dickey, appeal from the August 6, 2003, and September 9, 2003, Judgment Entries of the Stark County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

**{¶2}** Appellee Albex Aluminum, Inc. is a wholly owned subsidiary of appellee RVM Industries, Inc. Roger Lee Dickey, was hired by appellee Albex on June 23, 2000, as an age oven operator. On August 7, 2000, while operating the oven's exit door, Dickey [hereinafter "the decedent"] was killed after the oven door fell on him.

**{¶3}** The decedent was survived by his spouse, Patricia Barnard, and his three adult children, appellants Amber Jean Haga, Chrystal Lee Dickey, and Chad Lee Garabrandt. Appellant Tina Weimer is the guardian of Cora Lee Dickey, the decedent's minor child. The decedent's children shall hereinafter be referred to as "appellants."

**{¶4}** Subsequently, Barnard, as Administratrix for the Estate of Roger Lee Dickey and in her individual capacity, along with appellants filed a complaint against appellees Albex Aluminum, Inc. and RVM Industries, Inc. Barnard and appellants, in a second amended complaint filed on October 2, 2002, asserted claims for employer intentional tort, intentional or reckless infliction of severe emotional distress, and wrongful death pursuant to R.C. 2125.01 et seq. against appellee Albex and asserted wrongful death and alter ego (piercing of the corporate veil) claims against appellee RVM.

**{¶5}** Both appellee Albex and appellee RVM filed Motions for Summary Judgment. Pursuant to a Judgment Entry filed on August 6, 2003, the trial court granted

the motions, finding that appellees were entitled to summary judgment on the intentional tort claim. The trial court, in its entry, stated in footnote 1 as follows: [b]ecause the Court finds that the Defendants are entitled to summary judgment on the intentional tort claim, the Court will not address Plaintiffs' additional claims (intentional or reckless infliction of severe emotional distress; alter ego (piercing the corporate veil); wrongful death)." The trial court indicated that its order was a final appealable order.

**{¶6}** Thereafter, on August 19, 2003, appellants filed a Notice of Dismissal without Prejudice pursuant to Civ.R. 41(A) of "ALL party Defendants, Defendant Does, causes of action and claims in the above-entitled action…"

**{¶7}** On August 22, 2003, appellee Albex filed a "Motion to Amend Judgment of August 6, 2003, NUNC PRO TUNC," seeking an order revising the trial court's August 6, 2003, Judgment Entry "so as to expressly dismiss, with prejudice, the claims set forth in Counts 2, 3 and 4 of Plaintiffs' Second Amended Complaint." Appellee, in its motion, stated, in relevant part, as follows:

**{¶8}** "While Court did not explicitly dismiss the non-intentional tort claims, it is apparent that the Court considered these claims to be based upon and dependent upon the viability of the intentional tort claim so that if the intentional tort claims were dismissed, the other claims must also fail as a matter of law.

**{¶9}** "Specifically, Plaintiffs Claim 4 is for the wrongful death of Roger Dickey. In that the wrongful death claim is the same identical claim as the intentional tort claim, dismissal of one is tantamount to dismissal of the other.

**{¶10}** "Finally, Plaintiff's Claim 2 for intentional or reckless infliction of severe emotional distress is, by its very allegations, based upon the identical assertions made

with respect to the intentional tort claims, which were dismissed. Therefore, the dismissal of the intentional tort claims is tantamount to a dismissal of this claim."

**{¶11}** Appellants, on August 29, 2003, filed a Notice of Appeal from the trial court's August 6, 2003, Judgment Entry.

**{¶12}** Thereafter, the trial court, in a Judgment Entry Nunc Pro Tunc filed on September 9, 2003, added the following language to its August 6, 2003, Judgment Entry: "This is to clarify that this Judgment Entry dismisses all claims, with prejudice, of Plaintiffs against Defendants." The trial court also added the underlined language to footnote 1: "The Court finds that the Defendants are entitled to summary judgment on the intentional tort claim, the Court will not address Plaintiffs' additional claims (intentional or reckless infliction of severe emotional distress; alter ego (piercing the corporate veil); wrongful death). The Court finds that these claims are based upon and dependent upon the viability of the intentional tort claim and, therefore, fail as a matter of law."[1]

**{¶13}** Subsequently, on September 18, 2003, Patricia Barnard, as Administratrix of the Estate of Roger Lee Dickey and individually, filed a Notice of Dismissal Without Prejudice pursuant to Civ.R. 41(A) of all "claims and causes of action against ALL party Defendants and Defendant Does…."

**{¶14}** Appellants now raise the following assignments of error on appeal:

**{¶15}** "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT NO GENUINE ISSUES OF FACT EXISTED WITH REGARD TO ALBEX

[1] After the Nunc Pro Tunc Judgment Entry was filed, appellants amended their docketing statement to indicate that they were appealing from the trial court's September 9, 2003, Judgment Entry.

ALUMINUM, INC.'S KNOWLEDGE OF A DANGEROUS PROCESS, PROCEDURE, INSTRUMENTALITY, OR CONDITION IN THE OPERATION OF THE AGE OVEN.

**{¶16}** "II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT NO GENUINE ISSUES OF FACT EXISTED WITH REGARD TO ALBEX ALUMINUM, INC.'S KNOWLEDGE THAT, IF ROGER LEE DICKEY WAS SUBJECTED BY ALBEX ALUMINUM, INC. TO SUCH DANGEROUS PROCESS, PROCEDURES, INSTRUMENTALITY, OR CONDITION IN THE OPERATION OF THE AGE OVEN, THEN HARM TO ROGER LEE DICKEY WAS A SUBSTANTIAL CERTAINTY.

**{¶17}** "III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT NO GENUINE ISSUES OF FACT EXISTED WITH REGARD TO ALBEX ALUMINUM, INC.'S REQUIREMENT OF ROGER LEE DICKEY TO PERFORM DANGEROUS TASKS DESPITE THE DANGEROUS PROCESS, PROCEDURE, INSTRUMENTALITY, OR CONDITION IN THE OPERATION OF THE AGE OVEN.

**{¶18}** "IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS FAILURE TO FIND, INDEED DISREGARD [SIC} , FACTS THAT THE AGE OVEN OPERATION ENCOMPASSED THE ENTIRE OPERATION OF THE AGE OVEN AND NOT LIMITED TO THE OPERATION OF THE OVEN DOORS.

**{¶19}** "V. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING WITH PREJUDICE ALL REMAINING CLAIMS OF PLAINTIFFS AFTER SAID CLAIMS WERE DISMISSED BY PLAINTIFFS WITHOUT PREJUDICE PURSUANT [TO] CIV. R. 41(A)."

**{¶20}** As an initial matter, this Court must consider whether it has jurisdiction to consider appellants' appeal. Appellees specifically contend that this Court lacks

jurisdiction to consider the appeal since a personal representative of the decedent's estate did not file a timely Notice of Appeal. We agree.

**{¶21}** Pursuant to R.C. 2505.04, "[a]n appeal is perfected when a written notice of appeal is filed, in the case of an appeal of a final order, judgment, or decree of a court, in accordance with the Rules of Appellate Procedure…" App. R. 4(A) provides that "[a] party shall file the notice of appeal…within thirty days of the later of the entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure. "The timely filing of a notice of appeal is a prerequisite to a civil appeal as of right." *Moldovan v. Cuyahoga Cty. Welfare Dept*. (1986), 25 Ohio St.3d 293, 294-295, 765 N.E.2d 466, 467.

**{¶22}** As is stated above, Patricia Barnard, as Administratrix for the Estate of Roger Lee Dickey and in her individual capacity, along with appellants filed a complaint against appellees Albex Aluminum, Inc. and RVM Industries, Inc. The complaint set forth claims for employer intentional tort, wrongful death, intentional or reckless infliction of severe emotional distress, and alter ego (piercing of the corporate veil). After the trial court granted summary judgment to appellees, appellants, who are the decedent's children, filed a Notice of Appeal. No Notice of Appeal was filed by Patricia Barnard either in her capacity as Administratix or in her personal capacity as the decedent's surviving spouse.

**{¶23}** R.C. 2125.02, the Ohio Wrongful Death Statute, states, in relevant part, as follows: "(A)(1)…[A]n action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving

spouse, the children, and the parents of the decedent…" While appellants have classified their claim as an intentional tort claim, we concur with appellees that, since it involved someone's death, it is governed by the wrongful death statute. The personal representative of decedent is the sole person authorized to pursue beneficiaries' claims against the tortfeasor in a wrongful death suit. *Gibson v. State Farm Mut. Auto. Ins. Co.* (1997) 123 Ohio App.3d 216, 704 N.E.2d 1. As stated in *DeGarza v. Chetister* (1978), 62 Ohio App.2d 149, 155- 156, 405 N.E.2d 331, 335-336, the statutory requirement that a wrongful death action be brought in the name of the personal representative of the deceased is proper even though the statutory beneficiaries are the real parties in interest and the personal representative acts merely as a nominal party. Civ.R. 17(A) specifically allows this as an exception to the general rule that an action must be prosecuted in the name of the real party in interest. Id. at 156. We find that, since, by statute, the personal representative of a decedent is the sole person authorized to pursue beneficiaries' claims against the tortfeasor in a wrongful death suit, the personal representative of a decedent is the sole person authorized to file a Notice of Appeal in such a lawsuit.

**{¶24}** In the case sub judice, Patricia Barnard, the Administratrix of record in this case at the time appellants filed their Notice of Appeal, did not file a Notice of Appeal. Based on our conclusion above, she would have been the sole party authorized to file a Notice of Appeal to the dismissal of the wrongful death claims.

**{¶25}** With respect to appellants' claim in their complaint, that Roger Lee Dickey suffered extreme emotional distress due to appellees' intentional or reckless actions which occurred prior to his death, we note that R.C. 2305.21, on survival of actions,

states as follows: “In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.” Since Roger Lee Dickey died prior to the filing of the complaint in this case, his claim for intentional or reckless infliction of severe emotional distress is an action that survives his death pursuant to R.C. 2305.21. See *Bowman v. Parma Bd. of Edn*. (1988), 44 Ohio App.3d 169, 542 N.E. 2d 633 in which the court stated that, as a general rule, claims of infliction of emotional distress survive. Under R.C. 2305.21, a victim's right of action for personal injuries survives and passes to his or her personal representative, and may be instituted for the benefit of the estate. See *Shinaver v. Szymanski* (1984), 14 Ohio St.3d 51, 55, 471 N.E.2d 477. Therefore, we conclude that decedent’s personal representative is the sole party authorized to file a Notice of Appeal to a dismissal of actions that survive the death of the person. As is stated above, no personal representative of Dickey’s Estate ever filed a timely Notice of Appeal in this case.

**{¶26}** While appellants argue that they should be permitted to substitute Amber Jean Haga, the new Administratrix, who was appointed on December 22, 2003, for Barnard pursuant to App. R. 29,[2] we disagree. App.R. 29 states, in relevant part, as follows:

**{¶27}** “(B) Substitution for other causes

[2] Appellants filed a Motion to Substitute with this Court on October 21, 2003, requesting that, once a new Administratrix is appointed, they be permitted to substitute the new Administratrix for Barnard. This Court, pursuant to a Judgment Entry filed on January 15, 2004, held such motion in abeyance pending the merit review.

**{¶28}** "If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (A)." (Emphasis added).

**{¶29}** In the case sub judice, the Administratrix, who was represented by different counsel than appellants[3], did not file a Notice of Appeal and, therefore, was not a party to the appeal. From the record, it is clear that Patricia Barnard was the Administratrix of record at the time the Notice of Appeal was filed by appellants,[4] but for some unknown reason, declined to appeal the trial court's order granting summary judgment to appellees. Appellants cannot substitute Amber Jean Haga, the new Administratrix, for appellants themselves.

**{¶30}** In addition, pursuant to R.C. 2505.04, "[a]n appeal is perfected when a written notice of appeal is filed, in the case of an appeal of a final order, judgment, or decree of a court, in accordance with the Rules of Appellate Procedure…" App.R. 4(A) specifies that a party shall file a notice of appeal "within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure." In the case sub judice, the Administratrix, who was the proper party to perfect an appeal as representative of the decedent's estate, did not

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[3] We note that, after the Notice of Appeal was filed in the case sub judice, Patricia Barnard, as Administratrix and individually, filed a Notice of Dismissal pursuant to Civ.R. 41(A) in the trial court. At such time, Barnard was represented by counsel other than appellant's counsel and as noted by appellee Albex, was capable of filing a timely Notice of Appeal but declined to do so.

[4] While Barnard, on May 29, 2003, signed a notice stating that she was resigning as Administratrix, as noted by appellants in their October 21, 2003, Motion for Substitution, she was Administratrix of record as of such date. Barnard's notice of resignation was attached to Amber Jean Haga's Motion for Substitution of Fiduciary for the Estate of Roger Lee Dickey, which was filed in the Tuscarawas County Court of Common Pleas, Probate Division, on November 4, 2003.

file an appeal within the time set forth in App.R. 4. A timely appeal, therefore, has been not been perfected.

**{¶31}** We find, therefore, that since the Administratrix of the decedent's estate did not file a Notice of Appeal, there has been no legally sufficient Notice of Appeal filed and this Court has no jurisdiction to hear appellants' appeal.

**{¶32}** Accordingly, the appeal is dismissed for lack of jurisdiction.

By: Edwards, J. and

Wise, J. concur

Hoffman, P.J. dissents

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JUDGES

JAE/0107

*Hoffman, P.J., dissenting*

**{¶ 33}** Because I would grant appellant's Motion to Substitute Administratrix for the Estate of Roger Lee Dickey, I dissent from the majority's disposition of this case.

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JUDGE WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

| | | |
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| AMBER JEAN HAGA, et al. | : | |
| Plaintiffs-Appellants | : | |
| -vs- | : | JUDGMENT ENTRY |
| ALBEX ALUMINUM, INC., et al. | : | |
| Defendants-Appellees | : | CASE NO. 2003CA00312 |

For the reasons stated in our accompanying Memorandum-Opinion on file, the within appeal is dismissed. Costs assessed to appellant.

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JUDGES