



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL
INJURY LITIGATION

CIVIL ACTION NO.: 02-C-9500
Honorable Jay M. Hoke

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VIRLEY FERGUSON, *Administratrix of the Estate*
Of LARRY R. FERGUSON, *Deceased*,

Plaintiff,

v. *(formerly Circuit Court of Kanawha County, W.Va., Civil Action 18-C-897)*

A.O. SMITH CORP., *etc., et al., and*
CSX TRANSPORTATION, INC.,

Defendant.

FINAL ORDER
GRANTING CSX TRANSPORTATION, INC.'S
MOTION TO DISMISS UNDER RULE 25(a)

Defendant CSX Transportation, Inc. (hereinafter "CSXT"), by counsel, moved the Court to dismiss the above-styled action for failure to substitute a proper party as required by Rule 25(a), W.Va.R.Civ.P.. A duly-noticed hearing was held on that motion on January 25, 2019, at which appeared counsel for CSXT, and no one appearing for the plaintiff. For the reasons stated below, CSXT's motion is **GRANTED**.

FINDINGS OF FACT

1. The plaintiff filed her Complaint in the Circuit Court of Kanawha County, West Virginia on July 16, 2018. (*Transaction I.D. No. 62252167*)
2. By Administrative Order of the Chief Justice this case was transferred to the West Virginia Mass Litigation Panel for asbestos litigation.
3. Plaintiff Virley Ferguson died on or about August 3, 2018 after her Complaint was filed.

4. On August 17, 2018 defendant suggested on the record the death of the plaintiff.
See Suggestion of Death, Transaction I.D. No. 62361235.
5. On November 19, 2018, more than ninety days after service of the Suggestion of Death, counsel for CSXT served its Motion to Dismiss under Rule 25, W.Va.R.Civ.P. (*Transaction ID 62682627*).
6. By Agreed Order of December 7, 2018 (*Transaction I.D. No. 62738596*), the plaintiff's claims were severed with her state-law claims referred to the Asbestos Mass Litigation Panel proceeding bearing the civil action number 03-C-9600 and her claims against CSXT, brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51, *et seq.*, referred to the Asbestos Mass Litigation Panel proceeding bearing the civil action number 02-C-9500.
7. Notice of Hearing on the Motion to Dismiss was served on December 19, 2018.
Transaction ID 62786454.
8. Plaintiff did not file a motion to substitute parties after the Suggestion of Death was served, did not seek additional time to file such a motion, did not file a response to the Motion to Dismiss for the failure to move to substitute, and did not appear at the hearing on the motion to dismiss.

CONCLUSIONS OF LAW

1. This case was brought under the Federal Employer's Liability Act (FELA), 45 U.S.C. §51, *et seq.*
2. In any FELA case pending in a state court, the state's law governs procedural issues, while federal law governs substantive questions. *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943); *McGraw v. CSXT*, 201 W. Va. 675; 500 S.E.2d 300 (1997).
3. Rule 25 of the West Virginia Rules of Civil Procedure controls the issue of

substitution of parties following a suggestion of death on the record.

4. Under Rule 25(a), “Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action *shall be* dismissed as to the deceased party.” (emphasis added)

5. Counsel for CSXT suggested the death of the plaintiff on the record on August 17, 2018. The ninety-day period within which representatives of the plaintiff could file a motion to substitute parties expired on Friday, November 16, 2018.

6. No motion to substitute parties having been filed within the ninety-day period provided within Rule 25, the plaintiff’s claims *must be* dismissed, with prejudice.

7. Plaintiff’s claims must be dismissed with prejudice because a dismissal authorized under Rule 25 constitutes an “adjudication on the merits.” Accordingly, it is

ORDERED that plaintiff’s case should be and hereby is **DISMISSED**, *with prejudice*, and **STRICKEN** from the docket of the Court.

The plaintiff’s objections and exceptions to the foregoing are noted.

The Clerk is directed to send a copy of this order to counsel of record shown below.

ENTER: ~~January~~ February 10, 2019.


Honorable Jay M. Hoke, Judge.

Submitted by:

/s/ Luke A. Lafferre

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