

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2010 CA 1999**

**ARABIE BROTHERS TRUCKING CO. & AMERICAN INTERSTATE  
INSURANCE COMPANY**

**VERSUS**

**PATRICK GAUTREUX (DECEASED) & GRAHAM NEILL, INDIVIDUALLY  
AND AS OWNER OF A & G TREE AND STUMP REMOVAL AND A & G TREE  
AND STUMP REMOVAL**

**Judgment Rendered:** JUN 10 2011

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On Appeal from the Office of Workers' Compensation  
District 9  
In and for the Parish of Terrebonne  
State of Louisiana  
Docket No. 00-07938

Honorable Elizabeth C. Lanier, Judge Presiding

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Arabie Brothers Trucking Co. and  
American Interstate Insurance Co.

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**BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.**

*McDonald, J. concurs and assigns reasons.*

**McCLENDON, J.**

In this workers' compensation case, a judgment was rendered in favor of the claimant, awarding him medical and indemnity benefits, but denying his request for penalties and attorney fees. After a thorough review of the record, we vacate the judgment and remand for further proceedings.

On January 27, 2000, Patrick Gautreaux was seriously injured when a large tree, which he was cutting, fell, crushing him to the ground. Mr. Gautreaux remained in a coma until his death in October 2007.

At the time of the accident, Arabie Brothers Trucking Company (Arabie) was clearing a commercial site for the construction of a video store in Houma, Louisiana. Arabie sub-contracted with A & G Tree and Stump Removal (A & G) to grind and remove two stumps at the site. Mr. Gautreaux, an employee of A & G, was sent to the construction site to grind the two stumps. After grinding one of the stumps, he began cutting the other tree, which fell on him. Following the accident, Arabie, through its workers' compensation insurer, American Interstate Insurance Company (American), began paying workers' compensation benefits to and medical expenses on behalf of Mr. Gautreaux.

On October 5, 2000, Arabie and American filed a disputed claim for compensation and petition for declaratory judgment against Mr. Gautreaux, Graham Neill, individually and as owner of A & G, and A & G, asserting that Mr. Gautreaux was not in the course and scope of his employment with A & G at the time of the accident and that the accident did not arise out of his employment. Mr. Gautreaux answered, reconvened, and filed a cross claim. In his reconventional demand, Mr. Gautreaux contended that Arabie was his employer, statutory employer, or borrowing employer, entitling him to workers' compensation benefits. After a trial of the matter, the OWC judge determined that Mr. Gautreaux's injuries did not occur while in the course and scope of his employment with A & G, and, therefore, he was not entitled to further workers' compensation benefits. On appeal, this court reversed in part, finding that Mr. Gautreaux was a borrowed employee of Arabie, and remanded the matter to the

OWC judge for a determination of the amount of workers' compensation benefits and/or medicals due and for a determination of the amount of penalties and/or attorney fees due, if any. See Arabie Brothers Trucking Co. v. Gautreaux, 03-0120 (La.App. 1 Cir. 8/4/04), 880 So.2d 932, writ denied, 04-2481 (La. 12/10/04), 888 So.2d 846.

The matter was set for trial on July 15, 2009, and submitted on briefs. On July 29, 2010, oral reasons for judgment were rendered, awarding Mr. Gautreaux medical and indemnity benefits, but declining to award penalties and attorney fees. On August 9, 2010, a judgment was signed in accordance with the oral reasons of the OWC judge. A timely appeal was filed on behalf of Mr. Gautreaux, through counsel, in which it was asserted that the OWC judge erred in failing to award penalties and attorney fees, in failing to give Mr. Gautreaux the presumption of a forty-hour work week and calculating indemnity benefits in accordance therewith, and in failing to award Mr. Gautreaux costs. Counsel also asked for attorney fees for the preparation and work on the appeal. Because we are vacating the judgment, we decline to address these assignments of error.

Upon the death of a litigant, a proper party plaintiff must be substituted to allow the action to continue. LSA-C.C.P. art. 801. It is undisputed that Mr. Gautreaux was deceased at the time of the trial.<sup>1</sup> However, it does not appear from the record that his estate was substituted as a party plaintiff. Nonetheless, a judgment was rendered in his favor and is purportedly being appealed by him. While LSA-C.C.P. art. 801 permits the substitution of parties whenever a party dies during the pendency of an action, a substitution in this matter cannot cure the judgment. This court has consistently held that a judgment for or against a deceased person is an absolute nullity. See Page v. Page, 98-1625, p. 2 (La.App. 1 Cir. 9/24/99), 762 So.2d 18, 19 n.1; **White v. Givens**, 491 So.2d 63, 64 (La.App. 1 Cir. 1986). Thus, although the issue was not raised by the parties, the judgment in favor of Mr. Gautreaux is null. Accordingly, the August 9, 2010

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<sup>1</sup> At the July 15, 2009 hearing on remand regarding the amount of contribution due by A & G to Arabie and American, the OWC judge recognized that Mr. Gautreaux had died. This was reiterated in the judge's oral reasons for judgment on July 29, 2010.

judgment in favor of Patrick Gautreaux, deceased, is declared a nullity and vacated. This matter is remanded to the Office of Workers' Compensation for the substitution of the legal successor of the deceased party and the rendition and signing of a judgment in favor of the properly substituted party.

**JUDGMENT VACATED; CASE REMANDED.**

ARABIE BROTHERS TRUCKING CO.  
AND AMERICAN INTERSTATE INSURANCE

STATE OF LOUISIANA

VERSUS

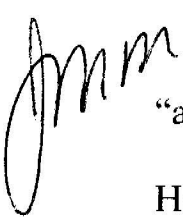
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**McDONALD, J. CONCURRING:**

 I agree with the majority but write separately to address the issue of “absolute” nullities. There is no question that the judgment in this case is a nullity. However, I question what the term “absolute” adds to the discussion when used in the context of a judgment. This term is normally used in reference to contracts. Contracts may be relative or absolute nullities. There are four effects that generally accompany the legal concept of absolute nullity. It is *void ab initio*; may not be confirmed; is imprescriptible; and the nullity may be noticed by the court on its own motion. These principles derive from the Civil Code articles governing absolutely null contracts. See La. C.C. art. 2030, 2032 and 2033. Judgments that may be annulled are governed by other principles, not the least of which is the necessity for finality of judgments.

I do not believe the provisions applicable to absolutely null contracts should be grafted onto judgments creating “absolutely null” judgments. The distinction between a null judgment and an absolutely null judgment is not apparent to me. Among the reasons this is true is the fact that the essence of a contract and of a judgment are antithetical. A contract is an agreement between parties that creates obligations. A judgment is a judicially imposed order creating obligations on parties that are not in agreement.<sup>1</sup> A judgment found to have no legal effect may be designated as null, without the use of the term “absolutely,” which adds nothing

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<sup>1</sup> Stipulated judgments are an exception to this rule.

to its effect and I believe generates confusion.

For these reasons I concur in the result reached by the majority.