IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

ESTATE OF CYNTHIA GILKEY WALLACE, DECEASED — APPELLANT

V. — CIVIL ACTION NO. 2008-CA-01334

EMAD H. MOHAMED, ET AL. — APPELLEES

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Cynthia Gilkey Wallace, decedent that is the subject of the complaint.

Louis M. Wallace, Administrator of the Estate of Cynthia Gilkey Wallace,

Christopher S. Wallace, son of Cynthia Gilkey Wallace.

J'Bria Gilkey, daughter of Cynthia Gilkey Wallace.

Keith Magee, former husband of Cynthia Gilkey Wallace.

Emad H. Mohamed, M.D., Defendant in medical malpractice and products liability case filed by the Estate of Cynthia Gilkey Wallace.

Bristol-Myers Squibb Company and Sanofi-Synthelabo, Defendants in medical malpractice and products liability claim filed by the Estate of Cynthia Gilkey Wallace.

Bennie L. Turner, Esq., Turner & Associates, counsel for J'Bria Gilkey

Winston J. Thompson, former counsel for J'Bria Gilkey

Shirley C. Byers, Byers Law Firm, Counsel for Louis M. Wallace
Walter T. Johnson, Esq., Watkins & Eager PLLC, Counsel for Bristol-Myers Squibb C Company and Sanofi-Synthelabo

Diane Pradat, Esq., Wilkins, Stephens, & Tipton, Counsel for Emad H. Mohamed, M.D.

Lee J. Howard, Circuit Court Judge

SHIRLEY C. BYERS ([redacted])
ATTORNEY OF RECORD FOR LOUIS M. WALLACE

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STATEMENT OF ISSUES

I. Whether the Chancery Judge erred in failing to consider whether Appellee Emad Mohamed had third party standing in order to intervene in the action granting Letters of Administration to Louis M. Wallace.

II. Whether the lower court erred in removing Louis M. Wallace as Administrator of the Estate of Cynthia Gilkey Wallace.

STATEMENT OF THE CASE

Cynthia Gilkey Wallace passed away on November 26, 2004, survived by two (2) children, a daughter, J'Bria Gilkey (hereinafter "Gilkey"), and son, Christopher Wallace, and her husband, Louis M. Wallace(hereinafter "Wallace"). On September 25, 2005, the Appellant, Wallace, and Gilkey filed a Petition for Administration in the Chancery Court of Lowndes County, Mississippi pursuant to *Mississippi Code Annotated* § 91-7-61, alleging that the decedent, Cynthia Gilkey Wallace, died as a result of medical negligence and requesting the appointment of Wallace as Administrator of the estate to pursue claims as a result of the alleged medical malpractice. [R. 3-7]

On October 3, 2005, the Chancellor appointed Wallace as the Administrator of the decedent's estate. [R. 8-11] On October 4, 2005, Wallace's took the Oath of Administrator, which was filed on November 1, 2005. [R. 12] Letters of Administration issued that same day. [R. 14] On November 30, 2005, Wallace filed a Complaint against Emad H. Mohamed, M.D. [hereinafter "Mohamed"] alleging negligence and gross negligence in Mohamed's treatment of Cynthia Gilkey Wallace. On June 13, 2007, Wallace filed a First Amended Complaint, which named additional defendants and causes of action. [R. 56-73]

The parties found out during discovery that Wallace was a putative spouse, as ***unbeknownst to him,*** at the time of his marriage ceremony in 1989; Cynthia Gilkey Wallace allegedly had not divorced her first husband. Nevertheless, Wallace and Cynthia Gilkey Wallace subsequently held a marriage-equivalent relationship, rearing Gilkey and having a child, Christopher, a minor, of their own until her death in 2004.

On October 22, 2007, Mohamed filed a motion to intervene in the Chancery Court case alleging that the decedent had not divorced a previous husband, Keith Magee, before her marriage to Wallace. Therefore, Mohamed alleges Cynthia Gilkey Wallace's purported marriage to Wallace bigamous. Thus, Mohamed alleged Wallace ineligible to serve as Administrator. [R. 15-23] Wallace responded alleging among others, that Mohamed *lacked standing* to intervene in the Chancery matter and that the court should deny Mohamed's relief. [R. 166-172]

On June 24, 2008, the Chancellor issued an order granting Mohamed's Motion to Intervene, removing Wallace as Administrator, and appointing the Chancery Clerk as Administrator of the subject estate. [R. 179-180] The court made its ruling without any findings on the validity of the marriage of Cynthia and Louis M. Wallace. On July 7, 2008, Wallace filed a Motion for Reconsideration, which the court denied on July 10, 2008. [R. 181-185] On December 17, 2008, Wallace filed a Notice of Appeal. [1]

[1] As a result of the Chancery Court's erroneous order removing Mr. Wallace as Administrator for the Estate of Cynthia Gilkey Wallace, Mohamed filed a Motion to Dismiss in Circuit Court on the basis that Wallace had no standing to file the civil suit on behalf of the estate of Cynthia Gilkey Wallace. The Circuit Judge dismissed the action on the basis that Wallace lacked standing and therefore, no other party could be substituted.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error in granting Mohamed's motion to intervene and removing Mr. Wallace as Administrator for two reasons. First, Mohamed lacked standing to intervene in the matter. Second, the allegations related to the marriage were irrelevant to the appointment of Wallace as Administrator of Cynthia Gilkey Wallace's estate because Wallace petitioned the court pursuant to *Mississippi Code Annotated* § 91-7-61.

Mohammed filed a Motion to Intervene in the lower court for the sole purpose of trying to remove Wallace as Administrator of Cynthia Gilkey Wallace's estate so that he could derail the malpractice action pending against him. Mohammed's motion to intervene was based on his finding that the decedent previously had been married thereby raising a claim that her marriage to Wallace was bigamous and null and void. The Chancellor sustained that motion, removed Wallace as Administrator, and appointed the clerk of court as Administrator. [R. 179-180]

The Chancellor of Lowndes County committed reversible error by granting Mohamed's Motion to Intervene, removing Wallace as Administrator, and appointing the Chancery Clerk as Administrator of the subject estate. Mohamed was an *unrelated third-party* defendant in a medical malpractice suit filed by Wallace as the Administrator of the Estate of Cynthia Gilkey Wallace. See, Yazoo *v. Jeffries*, 99 Miss. 534, 55 So. 354 (Miss. 1911). Thus, Mohamed had no standing to intervene in the chancery matter and request the removal of Wallace as Administrator in order to derail a civil suit against him.

Importantly, the Chancellor seemed to have accepted the allegations of Mohamed when he was not the proper party to make them. Furthermore, after allowing Mohamed to intervene, the Chancellor made no findings as to the basis for the intervention, or whether Wallace and Cynthia Gilkey Wallace were lawfully married, or whether Wallace had notice of another

marriage at the time he married Cynthia Gilkey Wallace, or whether Wallace knowing made misstatements in his Petition about his marriage. Mohamed made baseless allegations of what Wallace knew, whereas Gilkey and the mother of Cynthia Gilkey Wallace were the only ones who definitively stated that Cynthia Gilkey Wallace was married to someone else at the time she wed Wallace. [R. 18, 122-125] They clearly contradicted what Wallace knew at the time of his marriage and the filing of the Petition for Letters of Administration. [R. 161 # 9-17]

ARGUMENT

I. Whether the Chancery Judge erred in failing to consider whether Appellee Emad Mohamed had third party standing in order to intervene in the action granting Letters of Administration to Louis M. Wallace.

Lack of Standing

The lower court erred in allowing Mohamed to intervene in the estate matter of Cynthia Gilkey Wallace, removing Wallace as the Administrator, and appointing the Chancery Clerk as Administrator. Mohamed, the Defendant in a medical malpractice claim filed by the estate via Wallace as the personal representative, lacked standing to intervene in the lower court case. He was and still is an *unrelated third party* to the proceeding.

It is well established that a third party lacks such standing beginning with the Supreme Court's decision in *Yazoo v. Jeffries*, 99 Miss. 534, 55 So. 354 (Miss. 1911). Similarly, in *Yazoo v. Jeffries* the Supreme Court held that an unrelated third party had no interest that would warrant a motion to remove an Administrator. *Id.*

In *Jeffries*, Yazoo & Mississippi Valley Railroad Company, the defendant in a civil action for injuries to the decedent, made a motion to set aside Letters of Administration granted to the wife of the decedent. *Id.* at 538. The estate was carrying forward with the suit. *Id.* The Court held that the railroad company had no interest that would warrant the motion to remove the

administrator. *Id.* It stated further that "[t]he railroad has no interest in the question of whether or not letters of administration are properly granted to Mrs. Jeffries, merely because it may give her a right to continue a suit against it." *Id.* Similarly, in the case at hand, the lower court allowed Mohamed to intervene to have Mr. Wallace removed as Administrator. Mohamed had, and has no interest in the appointment of Wallace as Administrator merely because it gives Wallace a right to bring suit on behalf of the Estate against him for the death of Cynthia Gilkey Wallace.

The cases cited by Mohamed in his Motion to Intervene, and obviously relied on by the lower court, also simply are not applicable to the facts of this matter. For example, *Tolliver v. Mladinero*, 987 So.2d 989 (Miss. App. 2007), involved a wrongful death action where the deceased's brother brought a wrongful death suit in his own name rather than on behalf of the heirs-at-law and wrongful death beneficiaries as herein. He later attempted to substitute the deceased's son as plaintiff after learning that he had no standing per§ 91-7-63. *Id.* The question before the *Tolliver* court was whether the substitution affected the Statute of Limitations. *Id.* In dicta, the Court stated that the child of a deceased parent would have priority of filing over a brother. *Id.* at 8. Obviously relying on *Mississippi Code Annotated* § 91-7-63.

Tolliver holds that the wrongful death statute of Mississippi has been construed through case law to create a hierarchy classification which gives preference to certain classes. *Id.* at 9. This classification puts children before brothers, but also puts a personal representative in the top echelon, above a child:

> Whenever the death of any person...shall be caused by any real, wrongful or negligent act or omission...[t]he action for such damages may be brought in the name of the *personal*

> *representative* of the deceased person...for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child or unborn quick child, or in the name of a *child*, or in the name of a child for the death of a parent, or by a *brother* for the death of a sister...

Mississippi Code Annotated § 11-7-13 (emphasis added).

Further, *Tolliver* also differed from the case at bar in that in *Tolliver* there was a family member seeking the removal, not a third-party who was the defendant in the wrongful death suit. The simple fact is that in this case Wallace and the decedent's daughter, J'Bria Gilkey, both requested of the court that Mr. Wallace serve as Administrator for purposes of advancing the medical malpractice suit in this matter. No family member asserted any objections to Wallace serving as Administrator of the estate. Rather, the party objecting is the defendant in a malpractice suit filed by Wallace on behalf of the estate.

Additionally, in *Stribling v. Washington*, 204 Miss. 529, 37 So.2d 759 (Miss. 1948), the deceased's widow petitioned the court for removal of the daughter, who was appointed as Administrator. Removal was based on the statutory preference expressed in *Mississippi Code Annotated* § 91-7-63.

Wallace respectfully asserts that the Chancellor was in error in granting the Mohamed's motion to intervene and in removing Wallace as Administrator for the estate. As such, the court committed reversible error.

II. Whether the lower court erred in removing Louis M. Wallace as Administrator of the Estate of Cynthia Gilkey Wallace.

Mississippi Code Annotated § 91-7-61

The lower court erred in removing Wallace as Administrator of the estate of Cynthia Gilkey Wallace. Wallace petitioned the court to serve as Administrator per *Mississippi Code*

Annotated § 91-7-61, which provides that:

> If necessary, an administrator may be appointed to institute and conduct suits, whose power shall cease when the litigation is entirely closed and who shall only account for the proceeds of the suit.

Id. See also, *Jones v. The Estate of Jeffrey Richardson*, 695 So.2d 587, 588-589 (Miss. 1997) (stating that the personal representative of the decedent is expressly authorized by statute to commence a wrongful death action for the benefit of all heirs entitled to recover).

Contrary to *Mississippi Code Annotated* § 91-7-63, which provides:

> (1) Letters of administration shall be granted by the chancery court of the county in which the intestate had, at the time of his death, a fixed place of residence; but if the intestate did not have a fixed place of residence, then by the chancery court of the county where the intestate died, or that in which his personal property or some part of it may be. The court shall grant letters of administration to the relative who may apply, preferring first the husband or wife and then such others as may be next entitled to distribution if not disqualified, selecting amongst those who may stand in equal right the person or persons best calculated to manage the estate; or the court may select a stranger, a trust company organized under the laws of this state, or of a national bank doing business in this state, if the kindred be incompetent. If such person does not apply for administration within thirty (30) days from the death of an intestate, the court may grant administration to a creditor or to any other suitable person.

Id.

Thus, even if the lower court made it ruling in accordance with § 91-7-63, it also allows for a stranger to serve as Administrator. See, *Great Southern Box Co. of Miss. v. Barrett*, 231 Miss. 101, 94 So.2d 912 (Miss. 1957) (court may grant administration of decedent's estate to creditor or to *any other suitable person*).

Validity of Marriage Irrelevant as to the Appointment of an Administrator

Therefore, whether Wallace and the decedent were married legally is irrelevant as to the' appointment of Wallace as Administrator. Mr. Wallace, filed a petition for appointment pursuant to *Mississippi Code Annotated* § 91-7-61. [R. at 3] However, the lower court rules as

though Wallace filed the petition and then appointed as Administrator pursuant to *Mississippi Code Annotated* §91-7-63, which is a broader grant of authority and which establishes a hierarchy among a decedent's next of kin. Even if he is not the legal spouse of the decedent, Wallace still could serve as personal representative of the estate, which is obvious by the court's appointment of the Chancery Clerk in his stead.

Cynthia Gilkey Wallace's adult daughter, J'Bria Gilkey, joined in the petition requesting the appointment of Wallace to manage the lawsuit. Both Wallace and she already had retained counsel to explore a malpractice suit.

In fact Cynthia Gilkey Wallace and Wallace were in a relationship for fifteen (15) years, which is equivalent to a marriage. During that time they reared a child from Cynthia Gilkey Wallace's prior marriage and had a child of their own. Wallace cared for Cynthia Gilkey Wallace in her last days of life and grieved her death.

Wallace's legal standing vis-à-vis the decedent was irrelevant to his ability to serve as an Administrator solely for the purpose of pursuing the wrongful death action against the intervener. This issue was not addressed by the court in either the order granting the motion to intervene nor in the order on the motion for reconsideration. The trial court was quite simply in error to remove Mr. Wallace from a position in which he had functioned – apparently without complaint from any family member – for two years upon an individual who had no relationship to the decedent at all simply to advance Dr. Mohamed's desire to avoid responsibility in a malpractice case.

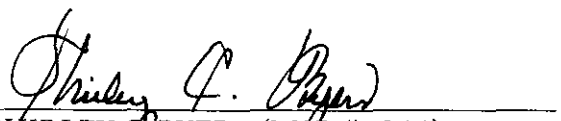
CONCLUSION

The Chancellor committed error in granting Mohamed's motion to intervene in the chancery matter, removing Louis M. Wallace as Administrator of the estate of Cynthia Gilkey Wallace, and appointing the Chancery Clerk as Administrator to the subject estate. Mohamed lacked standing to intervene in the matter, and the allegations related to the marriage Wallace and Cynthia Gilkey Wallace were irrelevant to the appointment of Wallace as Administrator of Cynthia Gilkey Wallace's estate.

The Appellate Court should reverse the decision of the trial court and vacate the order removing Wallace as Administrator of the Estate of Cynthia Gilkey Wallace.

Respectfully submitted,

LOUIS M. WALLACE,
Personal Representative of the Estate of
Cynthia Gilkey Wallace

By: 

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CERTIFICATE OF SERVICE

I, Shirley C. Byers, attorney for Louis M. Wallace, do hereby certify that I have this day served by United States Mail, postage prepaid, a true and correct copy of the Brief of the Appellant to the following:

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This 2nd day of April 2009.

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ADDENDUM

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ORAL ARGUMENT REQUESTED

C
West's Annotated Mississippi Code Currentness
Title 91. Trusts and Estates
Chapter 7. Executors and Administrators (Refs & Annos)
§ 91-7-61. Administrator for handling lawsuits

If necessary, an administrator may be appointed to institute and conduct suits, whose power shall cease when the litigation is entirely closed and who shall only account for the proceeds of the suit.

HISTORICAL AND STATUTORY NOTES

Derivation:

Code 1930, § 1628; Code 1942, § 524.

CROSS REFERENCES

Actions between two or more administrators, see § 91-7-247.
Actions or suits which accrue during administration, see § 91-7-231.
Administrator required to, unless licensed to practice law, retain solicitor, see MS Uniform Chancery Court Rule 6.01.
Foreign executors or administrators suits, see § 91-7-259.

LIBRARY REFERENCES

Executors and Administrators 22(2).
WESTLAW Topic No. 162.
C.J.S. Executors and Administrators § 1035.

RESEARCH REFERENCES

Treatises and Practice Aids

Wills and Administration of Estates in Mississippi § 2:6, Administrator Ad Litem.

JUDICIAL DECISIONS

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1. In general

Widow's failure to qualify as administratrix did not adversely affect right of husband's insurer to recover on items

covered by subrogation agreement and subrogation provisions of the policy inasmuch as insurer had right to apply for and receive letters of administration to conduct whatever suit it deemed necessary to enforce its right. Thornton v. Insurance Co. of North America (Miss. 1973) 287 So.2d 262. Insurance 3526(1)

Under Code 1906, § 2903, which provides that where either party to a personal action shall die before final judgment, his executor or administrator may prosecute or defend such action, and section 2019, which provides that an administrator may be appointed to institute and conduct suits, a railroad defendant in a pending suit for personal injuries instituted by the intestate has no such interest as to entitle it to move for revocation of letters of administration granted for the purpose of prosecuting such suit. Yazoo & M. V. R. Co. v. Jeffries (Miss. 1911) 99 Miss. 534, 55 So. 354. Executors And Administrators 32(2)

2. Wrongful death actions

Decree in proceeding for appointment of administratrix and contract with attorney on part of administratrix for prosecution of death action can have no effect on right of widow and children to institute and maintain suit (Code 1930, §§ 510, 1628). Mississippi Power & Light Co. v. Smith (Miss. 1934) 169 Miss. 447, 153 So. 376. Death 31(6)

3. Fraudulent conveyances

Alleged inability of settlor to attack conveyance to trustee during his lifetime did not preclude his administrator from attacking it as fraudulent against creditors. Deposit Guaranty Nat. Bank v. McBeath (Miss. 1967) 204 So.2d 863. Executors And Administrators 57

Miss. Code Ann. § **91-7-61**, MS ST § **91-7-61**

Current through End of the 2008 Regular Session and 1st Ex. Session

END OF DOCUMENT

C
West's Annotated Mississippi Code Currentness
Title 91. Trusts and Estates
Chapter 7. Executors and Administrators (Refs & Annos)
→ **§ 91-7-63. Letters of administration, issuance**

(1) Letters of administration shall be granted by the chancery court of the county in which the intestate had, at the time of his death, a fixed place of residence; but if the intestate did not have a fixed place of residence, then by the chancery court of the county where the intestate died, or that in which his personal property or some part of it may be. The court shall grant letters of administration to the relative who may apply, preferring first the husband or wife and then such others as may be next entitled to distribution if not disqualified, selecting amongst those who may stand in equal right the person or persons best calculated to manage the estate; or the court may select a stranger, a trust company organized under the laws of this state, or of a national bank doing business in this state, if the kindred be incompetent. If such person does not apply for administration within thirty (30) days from the death of an intestate, the court may grant administration to a creditor or to any other suitable person.

(2) In addition to the rights and duties of the administrator contained in this chapter, he shall also have those rights, powers and remedies as set forth in Section 91-9-9.

CREDIT(S)

Laws 1994, Ch. 589, § 4, eff. from and after passage (approved April 8, 1994). Reenacted and amended by Laws 1999, Ch. 374, § 2, eff. July 1, 1999; amended by Laws 2002, Ch. 612, § 2, eff. July 1, 2002; amended by Laws 2008, Ch. 452, § 2, eff. from and after passage (approved April 8, 2008).

HISTORICAL AND STATUTORY NOTES

The 1999 amendment designated the existing text as subsections (1) and (2), and added the repealer for subsection (2).

Laws 1994, Ch. 589, § 6, provided for the repeal of this section on July 1, 1999. Laws 1999, Ch. 374, § 6, effective July 1, 1999, repealed the repealer provision.

The 2002 amendment, in subsection (2), extended the repeal of the subsection from July 1, 2002 to July 1, 2008.

The 2008 amendment, in subsec. (2), deleted the second sentence which repealed the section effective July 1, 2008.

Derivation:

Code 1930, § 1629; Code 1942, § 525.

CROSS REFERENCES

Bank as administrator, see § 81-5-33.
Chancery clerk's power to grant letters of administration, see § 9-5-141 et seq.

Federal and state tax refunds due decedent paid without administration, see § 27-73-9.
Sheriff appointed as administrator, see § **91**-7-83.

LIBRARY REFERENCES

Executors and Administrators 17, 20(.5).
WESTLAW Topic No. 162.
C.J.S. Executors and Administrators §§ 31, 49.

RESEARCH REFERENCES

Encyclopedias

Encyclopedia of Mississippi Law § 77:5, Persons Authorized to Bring Action; First to Sue Rule.

Encyclopedia of Mississippi Law § 13:49, Real Parties in Interest Under Rule 17.

Encyclopedia of Mississippi Law § 33:15, Appointment of Administrator.

Encyclopedia of Mississippi Law § 13:243, Chancery Courts.

Forms

Am. Jur. Pl & Pr Forms Executors & Administrators § 61, Mississippi.

Treatises and Practice Aids

Mississippi Civil Procedure § 1:14, Jurisdictional Facts Exception.

Mississippi Real Estate Contracts and Closings § 3:45, Break in the Chain.

Wills and Administration of Estates in Mississippi § 2:1, Appointment of Administrator--Jurisdiction and Venue.

Wills and Administration of Estates in Mississippi § 2:2, Person Appointed Administrator.

Wills and Administration of Estates in Mississippi § 9:1, Appointment of Executor or Administrator c.t.a.

Wills and Administration of Estates in Mississippi § 2:33, Tort Claims Against Estate.

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1. Construction and application

Administratrix acts as fiduciary for all persons interested in estate. Matter of Estate of Johnson (Miss. 1996) 705 So.2d 819, rehearing denied, certiorari denied 118 S.Ct. 1037, 522 U.S. 1109, 140 L.Ed.2d 104. Executors And Administrators ⚷75

An executor or administrator, is subject to supervision and control of the court until estate is closed and he is finally discharged. Bailey v. Sayle (Miss. 1949) 206 Miss. 757, 40 So.2d 618. Executors And Administrators ⚷76

2. Purpose

Purpose of statute providing that court may grant administration of decedent's estate to creditor or to any other suitable person was to provide methods for one having claim against estate to see to prompt and proper administration of estate. Great Southern Box Co. of Miss. v. Barrett (Miss. 1957) 231 Miss. 101, 94 So.2d 912. Executors And Administrators ⚷17(6)

3. Necessity for appointment

When no administrator of an estate is appointed, and no necessity therefor exists, the personalty owned by decedent at his death descends directly to his heir and vests in him to the same extent as if it were real property, under Code 1906, § 1653. Hemingway's Code, § 1385. Richardson v. Neblett (Miss. 1920) 122 Miss. 723, 84 So. 695, 10 A.L.R. 272. Descent And Distribution ⚷76

In order that the heirs of a decedent may recover rent in a suit by them against a debtor to the decedent's estate, they must allege, and, if the allegation is denied, prove, that there is no local administrator of the estate, and that there exists no necessity for the appointment of one. Richardson v. Neblett (Miss. 1920) 122 Miss. 723, 84 So. 695, 10 A.L.R. 272. Descent And Distribution ⚷91(5)

Where an insurance policy on the life of deceased was the property of a daughter, and the money due thereon was expressly made payable to her alone, there was no occasion for the appointment of an administrator of deceased's estate to collect on the policy. Young v. Roach (Miss. 1913) 105 Miss. 6, 61 So. 984. Executors And Administrators 3(1)

4. Jurisdiction and venue

Additional evidence presented to chancery court, that decedent resided in another county at time of his death, warranted reconsideration by court of whether it had jurisdiction to handle matters of his estate, and court should not have cut hearing short and denied motion on ground that movant lacked standing to contest court's order or its jurisdiction. In re Estate of Hathorne, 2008, 987 So.2d 486. Executors And Administrators 435

Subsequent transfer of administration of estate of former patient of nursing home to correct county chancery court could not ratify actions of estate's administratrix in bringing wrongful death/medical malpractice action against nursing home and staff, when administration of estate was commenced in the wrong county, appointment of cousin as administratrix was void, and cousin was a first cousin once removed and therefore was not a statutory wrongful death beneficiary with individual capacity to bring suit; statute prescribing where an estate was to be filed was jurisdictional, opening of estate was thus void, administratrix of estate never had authority to bring wrongful death action, no actual or legitimate estate ever existed, and there was never a legitimate plaintiff in the wrongful death action. (Per Easley, J., with three justices concurring and three justices concurring in the result only.) National Heritage Realty, Inc. v. Estate of Boles (Miss. 2006) 947 So.2d 238, rehearing denied. Death 31(5); Executors And Administrators 426

Opening of estate for nursing home patient in county in which patient had formerly resided, rather than in county in which nursing home was located, was void ab initio rather than merely voidable, and thus chancery court of county in which patient had formerly resided had no jurisdiction to transfer administration of estate to nursing home's county, as statute prescribing where an estate was to be filed went to subject matter jurisdiction and not mere venue. (Per Easley, J., with three justices concurring and three justices concurring in the result only.) National Heritage Realty, Inc. v. Estate of Boles (Miss. 2006) 947 So.2d 238, rehearing denied. Executors And Administrators 10

Where Louisiana resident and Mississippi resident were killed in automobile collision in Mississippi, and heirs of Mississippi resident had cause of action under the statute for wrongful death of Mississippi resident, such heirs were creditors of estate of Louisiana resident and on their petition the Chancery Court of the county where the Louisiana resident died had jurisdiction to grant administration upon Louisiana resident's estate. Day v. Hart (Miss. 1958) 232 Miss. 516, 99 So.2d 656. Executors And Administrators 11

Where answer of truck owner and driver, in action brought for death of automobile passenger caused by collision of automobile and truck, affirmatively alleged that sole and proximate cause of collision was automobile driver's negligence, they could not claim, in motion to change venue from county of deceased automobile driver, that plaintiff's evidence showed conclusively that automobile driver had not been negligent and that sole purpose of joining administrator as defendant was to destroy venue rights of truck owner and driver, and that this constituted legal fraud. Code 1942, § 525. Great Southern Box Co. of Miss. v. Barrett (Miss. 1957) 231 Miss. 101, 94 So.2d 912. Venue 77

It was not improper for plaintiff's attorneys to assist in securing appointment and qualification of administrator of estate of automobile driver so that venue, in action for death of automobile passenger in collision of automobile and truck, would be in certain county and thus draw truck owner and driver into circuit court of that county, in absence of fraudulent or collusive scheme between plaintiff and administrator. Code 1942, § 525. Great Southern Box Co. of Miss. v. Barrett (Miss. 1957) 231 Miss. 101, 94 So.2d 912. Venue 45

Where executors were appointed for decedent's estate under a will subsequently set aside as not being will of decedent,

and petitioner's interest in the estate of decedent as one of the heirs at law named by the chancery court in a subsequent proceeding was not finally determined because of a pending appeal from such determination of heirship, chancery court did not abuse its discretion in denying petitioner's application for appointment as permanent administrator. In re Burnside's Estate (Miss. 1956) 227 Miss. 110, 85 So.2d 817. Executors And Administrators 37(4)

5. Application for grant of letters--In general

Attorneys for creditor of estate may actively participate in securing appointment and qualification of administrator of estate. Great Southern Box Co. of Miss. v. Barrett (Miss. 1957) 231 Miss. 101, 94 So.2d 912. Attorney And Client 32(7)

6. ---- Preferences, application for grant of letters

Residence of nursing home patient at time of patient's death was county in which nursing home was located, rather than county in which patient had been a lifelong resident, and thus cousin of patient failed to meet requirements necessary to open patient's estate in county patient had formerly resided, where patient had been a resident of nursing home for four years, patient had been receiving her mail and Medicaid/Medicare benefits at nursing home, patient had no real or personal assets except wrongful death/medical malpractice action that cousin as administratrix of patient's estate intended to bring against nursing home and staff, and alleged cause of action arose in nursing home's county. National Heritage Realty, Inc. v. Estate of Boles (Miss. 2006) 947 So.2d 238, rehearing denied. Executors And Administrators 10

Sole heir's guardian was preferred person to act as administratrix. Matter of Estate of Moreland (Miss. 1989) 537 So.2d 1337. Executors And Administrators 17(4)

While widow's lack of information as to necessity for administration of her deceased husband's estate does not necessarily prevent loss of her prior right to appointment as administratrix, chancellor has discretion to determine such question according to circumstances of each individual case, and exercise of such discretion is final, barring abuse thereof. Stribling v. Washington (Miss. 1948) 204 Miss. 529, 37 So.2d 759. Executors And Administrators 20(2); Executors And Administrators 20(10)

7. ---- Husband and wife, application for grant of letters

Widow's failure to qualify as administratrix did not adversely affect right of husband's insurer to recover on items covered by subrogation agreement and subrogation provisions of the policy inasmuch as insurer had right to apply for and receive letters of administration to conduct whatever suit it deemed necessary to enforce its right. Thornton v. Insurance Co. of North America (Miss. 1973) 287 So.2d 262. Insurance 3526(1)

The right of decedent's surviving spouse or distributee to appointment as administrator of his estate is legal one, unless incompetent, but appointment of another is within court's sound discretion. Stribling v. Washington (Miss. 1948) 204 Miss. 529, 37 So.2d 759. Executors And Administrators 17(1); Executors And Administrators 17(2); Executors And Administrators 17(3)

Contract between husband and wife in contemplation of divorce, whereby wife released all claims for alimony or property adjustment, held not to have affected rights of wife as widow where divorce was not granted before husband's death (Code 1930, §§ 1404, 1629). Kirby v. Kent (Miss. 1935) 172 Miss. 457, 160 So. 569, 99 A.L.R. 1303. Executors And Administrators 19

Appointment of one other than husband of deceased as administrator within 30-day period is not void, but appointee is

subject to removal on husband's application within 30 days, provided husband is fit person for appointment (Code 1930, § 1629). Kevey v. Johnson (Miss. 1933) 167 Miss. 775, 150 So. 532. Executors And Administrators 32(1)

8. ---- Creditors, application for grant of letters

Creditor of an estate has a right to obtain an administration, and holder of claim against an estate is a "creditor". State ex rel. Patterson for Use and Benefit of Adams County v. Warren (Miss. 1966) 254 Miss. 293, 182 So.2d 234. Executors And Administrators 20(3)

One who has cause of action which survives decedent's death is creditor entitled to administration. Great Southern Box Co. of Miss. v. Barrett (Miss. 1957) 231 Miss. 101, 94 So.2d 912. Executors And Administrators 17(6)

The receiver of an alleged creditor of a decedent could not request appointment of administrator for decedent's estate, unless it appeared that decedent died owing debt to alleged creditor. Thompson v. Carter's Estate (Miss. 1937) 180 Miss. 104, 177 So. 356. Executors And Administrators 17(6)

The possession and ownership of a decedent's note on which there was a balance due disclosed, prima facie, such a debt as entitled receiver of alleged creditor of decedent to request appointment of administrator for decedent's estate. Thompson v. Carter's Estate (Miss. 1937) 180 Miss. 104, 177 So. 356. Executors And Administrators 17(6)

9. ---- False allegations or misrepresentations, application for grant of letters

Evidence that both executrixes de son tort held themselves out as representatives of deceased musician's estate and took actions to chill interest of copyright purchasers in locating musician's rightful heirs waived three-year statutory bar to claim by musician's alleged illegitimate son; executrixes de son tort breached duty to act for rightful heirs of musician, rather than for themselves. Code 1972, § **91**-1-15(d)(ii). Matter of Estate of Johnson (Miss. 1996) 705 So.2d 819, rehearing denied, certiorari denied 118 S.Ct. 1037, 522 U.S. 1109, 140 L.Ed.2d 104. Descent And Distribution 71(2)

Deceased musician's half-sister became executrix de son tort of decedent's unprobated estate by entering agreement, in which she purported to be sister and only surviving heir of decedent, for assignment of decedent's works, photographs, and materials in exchange for share of royalties. Matter of Estate of Johnson (Miss. 1996) 705 So.2d 819, rehearing denied, certiorari denied 118 S.Ct. 1037, 522 U.S. 1109, 140 L.Ed.2d 104. Executors And Administrators 538

Where petition of decedent's daughter by first of his two marriages for appointment of stranger as administratrix of decedent's estate withheld from chancellor all information as to decedent's surviving second wife and falsely stated that he was survived only by petitioner and two other children, and widow knew nothing of proceedings until over 30 days after decedent's death and did not know that administration was necessary, chancellor exercised sound discretion in granting widow's motion to set aside such stranger's appointment as administratrix and directing issuance of letters of administration to widow. Stribling v. Washington (Miss. 1948) 204 Miss. 529, 37 So.2d 759. Executors And Administrators 32(2)

10. ---- Discretion of chancellor, application for grant of letters

Chancellor's selection of decedent's daughter-in-law, as the guardian of the sole, minor wrongful death heirs, as administrator of decedent's estate was within the chancellor's sound discretion; although former husband may have been entitled to distribution from estate if holographic instrument purporting to give one million dollars out of any proceeds of decedent's lawsuit against manufacturer of diabetes drug to former husband was a valid will which was not superceded by the right of recovery of grandchildren for decedent's wrongful death, former husband's right of distribu-

tion that had not been finally determined did not abridge chancellor's considerable discretion in selecting an administrator. In re Estate of England, 2003, 846 So.2d 1060. Executors And Administrators ⚷17(4)

Chancery court had discretion whether or not to appoint intestate's mother as administratrix. Matter of Estate of Moreland (Miss. 1989) 537 So.2d 1337. Executors And Administrators ⚷17(1)

A chancellor has large discretion in the selection of the person to be appointed administrator of an estate, except in cases made mandatory by statute. In re Burnside's Estate (Miss. 1956) 227 Miss. 110, 85 So.2d 817. Executors And Administrators ⚷17(1)

A chancellor has large measure of discretion, within limitations, as to appointment and revocation of appointment of administrator of decedent's estate. Stribling v. Washington (Miss. 1948) 204 Miss. 529, 37 So.2d 759. Executors And Administrators ⚷17(1); Executors And Administrators ⚷32(1)

11. ---- Time of application for grant of letters

Chancery court could waive guardian's compliance with 30-day period to be appointed as administratrix and could appoint sole heir's guardian as administratrix, even though her petition was filed 46 days after death of intestate; petition of intestate's mother to be appointed as administratrix stated that intestate left six heirs; and it lulled court into thinking that mother was heir. Matter of Estate of Moreland (Miss. 1989) 537 So.2d 1337. Executors And Administrators ⚷20(2)

The statutory provision that, if decedent's surviving spouse or person next entitled to distribution does not apply for letters of administration within 30 days after his death, court may grant administration to decedent's creditor or any other suitable person, is primarily for creditors' benefit, and 30-day period applies generally only secondarily for benefit of persons inferior in priority of right to administer. Stribling v. Washington (Miss. 1948) 204 Miss. 529, 37 So.2d 759. Executors And Administrators ⚷20(2)

A decedent's recalcitrant heirs will not be permitted to hamper his creditors to prejudice of their rights against his estate by failure promptly to institute administration thereof. Stribling v. Washington (Miss. 1948) 204 Miss. 529, 37 So.2d 759. Executors And Administrators ⚷20(2)

12. ---- Hearing, application for grant of letters

On application by receiver of bank, as holder of a decedent's note, for appointment of administrator for decedent's estate, decedent's heirs could not file claim for judgment against receiver for amount of bank deposit due decedent, exceeding amount of note. Thompson v. Carter's Estate (Miss. 1937) 180 Miss. 104, 177 So. 356. Executors And Administrators ⚷20(8)

13. Notice

Trial court was not required to give notice of ex parte proceeding held as part of action to determine whether joint bank accounts would be included in estate, since ex parte proceeding was not hearing. In re Estate of Huddleston, 1999, 755 So.2d 435, rehearing denied , certiorari denied. Executors And Administrators ⚷251

Notice to creditors that was signed by former administrator and was published on same date as his removal was valid, and creditor's claim that was filed two months after expiration of 90-day period from that notice was time barred. Estate of Myers v. Myers (Miss. 1986) 498 So.2d 376. Executors And Administrators ⚷225(1); Executors And Administrators ⚷226

Domestic will when probated and recorded in county in which testator resided at time of death constituted notice throughout state to subsequent mortgagee of land in Mississippi devised by will, without necessity of recording will in county wherein land was situated (Code 1930, §§ 1599, 1613, 1629, 2146, 2147). Federal Land Bank of New Orleans v. Newsom (Miss. 1935) 175 Miss. 114, 161 So. 864, affirmed 175 Miss. 114, 166 So. 345. Mortgages 154(4)

14. Objections to appointment

A decedent's heirs could not set up that amount of bank deposit due decedent exceeded amount of note held by receiver of bank, to prevent appointment of administrator for decedent's estate on application of receiver, but such issue could only be raised in course of administration, or in suit on note against administrator. Thompson v. Carter's Estate (Miss. 1937) 180 Miss. 104, 177 So. 356. Executors And Administrators 20(6)

15. Foreign representative

The payment to a foreign administrator of a debt due a decedent, the situs of which is in Mississippi, affords no protection to the debtor when sued therefor by the decedent's heirs. Richardson v. Neblett (Miss. 1920) 122 Miss. 723, 84 So. 695, 10 A.L.R. 272. Executors And Administrators 519(1)

Under Code 1906, § 1648 (Hemingway's Code, § 1380), a foreign administrator, though appointed at the domicile of the decedent, has no interest in decedent's personal property situated in Mississippi. Richardson v. Neblett (Miss. 1920) 122 Miss. 723, 84 So. 695, 10 A.L.R. 272. Executors And Administrators 519(1)

Although a debt due decedent may not be subject to the statute of descent and distribution of Mississippi, the payment thereof to a foreign administrator is no defense to debtor in a suit therefor by decedent's heirs, unless a certified copy of such administrator's appointment and qualification has been filed with the clerk of chancery court designated by Code 1906, § 2099 (Hemingway's Code, § 1767). Richardson v. Neblett (Miss. 1920) 122 Miss. 723, 84 So. 695, 10 A.L.R. 272. Executors And Administrators 519(1)

15.5. Executor de son tort

The position of "executrix de son tort" is defined as one who, without authority from the deceased or the court of probate, assumes, by interference with the estate of the deceased, to act as executor or administrator and performs such acts with respect to the personalty of that estate as can legally be done only by a properly appointed executor or administrator; as indicated by the term itself (which means executor in his own wrong) such an office is implied only for the purpose of intermeddler's being sued or made liable for the assets with which he has intermeddled. Tew v. Estate of Doe (Miss. 2003) 859 So.2d 347. Executors And Administrators 538

16. Removal of representative

Chancellor did not err in removing as administrator of decedent's estate individual who had been decedent's guardian and appointing in his place, on her application, decedent's daughter who was his sole heir at law and distributee where she was not disqualified and was fully competent to administer estate. Moore v. Roecker (Miss. 1960) 239 Miss. 606, 124 So.2d 473. Executors And Administrators 35(1)

17. Reopening of estate

Where one having unliquidated claim against estate of deceased for injuries sustained in automobile accident filed petition to reopen account of administratrix, who had closed estate, and petition alleged that estate had been closed so

that petitioner could not present claim, and petition showed that claim was not barred by limitations, Chancellor should have reappointed widow as administratrix if she desired to serve or should have appointed some other person to serve as administrator if she did not desire to serve. Powell v. Buchanan (Miss. 1962) 245 Miss. 4, 147 So.2d 110. Executors And Administrators 509(10)

18. Limitation of actions

Where executor, named in will and relieved thereby from making any account or report to court, took charge of and administered decedent's estate without filing any inventory, account or report, suit against him for legatee's share of estate and an accounting, commenced before executor had been discharged or estate closed, was not barred by limitations, though many years had elapsed since death of testatrix. Bailey v. Sayle (Miss. 1949) 206 Miss. 757, 40 So.2d 618. Executors And Administrators 314(5); Executors And Administrators 470; Limitation Of Actions 102(11)

19. Costs and expenses

Sister of deceased appointed as administratrix held entitled to have administration expenses fixed as charge on real property inherited by husband who did not apply for appointment as administrator within 30-day period (Code 1930, § 1629). Kevey v. Johnson (Miss. 1933) 167 Miss. 775, 150 So. 532. Executors And Administrators 32(2)

Allowances to an administrator for attorney's fees and court costs can be made only out of property belonging to the estate; and hence such fees and costs incurred in contesting a daughter's claim to the proceeds of an insurance policy, which was her own property, were not allowable therefrom, and an allowance of the costs of administration included only the costs of administration proper. Young v. Roach (Miss. 1913) 105 Miss. 6, 61 So. 984. Executors And Administrators 456(2)

Miss. Code Ann. § **91-7-63**, MS ST § **91-7-63**

Current through End of the 2008 Regular Session and 1st Ex. Session

END OF DOCUMENT

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. MRS. MARY JEFFRIES, ADMINISTRATRIX.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF MISSISSIPPI

99 Miss. 534; 55 So. 354; 1911 Miss. LEXIS 224

March, 1911, Decided

PRIOR HISTORY: [***1] APPEAL from the chancery court of Desoto county.

HON. J. T. BLOUNT, Chancellor.

Proceeding by the Yazoo & Mississippi Valley Railroad Company to revoke letters of administration of Mrs. Mary Jeffries on the estate of R. W. Jeffries, deceased. From a decree in favor of the administratrix, the railroad appeals.

The facts are sufficiently stated in the opinion of the court.

DISPOSITION: Affirmed.

HEADNOTES

EXECUTORS AND ADMINISTRATORS. *Letters revoked. Right to apply. Code* 1906, *sections* 2093 *and* 2019.

Under Code 1906, section 2093, which provides that "when either of the parties to any personal action shall die before final judgment, the executor or administrator of such deceased party may prosecute or defend such action;;" and section 2019, Code 1906, which provides that "an administrator may be appointed to institute and conduct suits, whose power shall cease when the litigation is entirely closed. A railroad, defendant, in a pending suit for personal injury brought by a plaintiff who dies while the suit is pending, has no such interest as will entitle it to move for revocation of letters of administration granted to a party for the purpose of prosecuting such suit.

COUNSEL: Mayes & Longstreet, for appellant.

Section 2091 of the Code of 1906, which is a practical rescript of section 1916 of the Code of 1892, provides that executors, administrators and temporary administrators may commence and prosecute any general action whatever, in law and at equity, which the testator, or intestate may have commenced and prosecuted. But this means, of course, where there is an administrator by appointment under the law in this state, or where the temporary trustee was appointed to preserve an estate of which some right of action was a part.

Section 2019 of the Code provides: "If necessary an administrator may be appointed to institute and conduct suit, whose power shall cease when the litigation is entirely closed, and who shall only account for the proceeds [***2] of the suit."

The sections above quoted constitute practically all the statutes bearing on the subject of consideration, and we have referred to them in close sequence, in order that we may understand clearly the proposition we now submit and offer as a reason why Mrs. Jeffries should not have been appointed administratrix to proceed with the suit against the defendant, and why the estate of R. W. Jeffries, after his death, possessed no property, no effects and no rights in action in Mississippi.

We now desire respectfully to assert that when R. W. Jeffries, a citizen and resident of the state of Tennessee, died in that state intestate, that all his rights to recover for any alleged libel or slander uttered against him in his lifetime, died, abated and ended with him and his decease.

Under the law of the state of Tennessee, the place of residence and domicile of Jeffries at the time of his death, it is provided by express statute, that rights of action for

libel and slander shall expire and die with the plaintiff in a pending suit founded thereon. The statute of Tennessee in question is section 4569 of Shannon's Code and is as follows:

"What actions survive.--No [***3] civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party but may be revived."

The statute has been completed and applied in the following decisions of that state: 3d Sneed, 128; 4th Heis, 201; 7th Heis, 231; 7th Box, 299; 11 Lea, 10-11.

The court will, therefore, perceive that if Jeffries possessed any right at all, it was a personal right vested in him and which was in him in the state of Tennessee. The suit at law which he had instituted in the circuit court of Desoto county was but the remedy, the channel through which he was attempting to effectuate his alleged right of action.

Of course, there is an essential difference between a remedy and a right, and we need not trespass on the time and attention of the court to discuss this proposition. The right was attached to, existed in and always accompanied the person of the possessor of the right. Therefore, when Jeffries died in the state of Tennessee, while a citizen of, and a resident in that state, the right died with him by the express statutory provisions of the law of the state of his domicile, at [***4] the time of his death.

So when any person after his death should apply for the grant letters of administratior thereof, alleging in the petition, as appears on the face of the record, the allegation and admission that Jeffries had no property or effects in the state of Mississippi subject to administration, and no right of any sort which could be considered a "property right," except the pending suit for damages for libel, then it appears that no letters of administration should have been granted, because no right in Jeffries or in his estate survived him, or could be represented by an administrator; therefore, the administrator represented nothing at the date of the filing of her application for appointment.

Robert L. Dabney, for appellee.

The brief filed by counsel for the appellant contains the most curious, but ingenious argument that it has ever been the fortune of this writer to see; counsel for appellant appears to admit that if Jeffries had not begun the suit in his lifetime, then, under section 2019 of the Code, a temporary administrator could have been appointed, provided, as he says, there was anything in Mississippi to be administered upon: That is, his objection [***5] is two-fold: first, that section 2019, while it permits the appointment of an administrator for the purpose of instituting suits, it does not authorize the appointment of an administrator to conduct to conclusion a suit begun by the intestate in his lifetime. I dismiss this proposition as being without merit, or being too deep for my comprehension. But says counsel, if mistaken in this, the statutes of Tennessee do not provide for the survivor of libel suits: To this we have two answers; first, this is not a suit for libel; and as that very question is one of the "fighting" questions in the circuit court suit; and second, if Jeffries had a right to commence his suit in the state of Mississippi, in case of his death pending such suit, the laws of Mississippi, and not those of Tennessee, control.

As I have not the record before me, I am not sure how much of the circuit court file is copied into it, but from the declaration, itself, it is very apparent that it is not a suit for libel. This is evidenced by the facts that no matter alleged to be libelous is copied into it, and many of the acts charged a violation of Jeffries' rights are alleged to have been committed much more than [***6] a year prior to the filing of the declaration. In fact, the question of whether the statute of limitation controlling in actions for libel apply in this case has been raised, and decided adversely to the defendant in the circuit court, appellant here. Hence, we respectfully submit that if the Tennessee statutes do not provide for the survivor of libel actions, the question of whether the Tennessee or Mississippi statutes are to control in the final determination of this case will not be decided in a collateral issue, when that very question; both whether this is a suit for libel, and whether the Tennessee statutes have application, are vital questions in the case in the circuit court. It would be a strange construction of our statutes if Jeffries having worked all his life (since boyhood) for the old Mississippi and Tennessee and later for the Yazoo & Mississippi Valley, both Mississippi corporations, and the wrong complained of having been done him while agent at Rosedale, in Bolivar county, Mississippi, and he having begun a suit for that injury in the courts of Mississippi, that these courts should loose jurisdiction by the operation of a Tennessee statute. But it is idle to multiply [***7] words, section 2019 of the Code of 1906 does or does not authorize the appointment of an administratrix to prosecute a suit begun in the lifetime of the original plaintiff; the language of the statute is, "to bring and prosecute suits," and on that statute we stand. We cannot conceive, in this day of liberal construction of remedial statutes, how a black-listing corporation can escape a trial in the circuit court in this case just because the plaintiff died pending the determination of the suit.

We respectfully submit that the action of the chancellor in dismissing the petition of the railroad, appellant, to revoke the letters of Mrs. Jeffries as temporary administratrix of her deceased husband, was eminently proper and the decree should be affirmed.

JUDGES: MAYES, C. J.

OPINION BY: MAYES

OPINION

[**355] [*538] MAYES, C. J., delivered the opinion of the court.

Some time in October, 1908, and in the lifetime of R. W. Jeffries, he instituted a suit against the Yazoo & Mississippi Valley Railroad Company in Desoto count, seeking to recover damages for certain injuries alleged to have been wrongfully sustained by him. For the purpose of deciding this case, we consider nothing except the [***8] fact that the petition for letters of administration discloses that such a suit is pending. Subsequently he moved to Memphis, and died while the suit was pending and untried, and after his death his wife, Mrs. Mary Jeffries, filed a petition in Desoto county praying for the [*539] grant to her of letters of administration. In the petition she states that R. W. Jeffries left no real or personal property, except the suit for damages against the appellant. The petition contains every requisite for a petition of this character, and there is no objection to it for want of form. Letters of administration were granted, and bond executed. After this was done the Yazoo & Mississippi Valley Railroad Company, against whom the suit is pending, moved the court to revoke the letters for causes set out in the motion. We do not give the grounds of this motion, because it is our judgment that the railroad company has no interest that would warrant any such motion on its part. If there is any merit in the grounds of the motion, it must be used as a defense to the pending suit, when the railroad has some interest involved. The railroad has no interest in the question of whether or not letters of [***9] administration are properly granted to Mrs. Jeffries, merely because it may give her a right to continue a suit against it.

Section 2093 of the Code of 1906 provides that "when either of the parties to any personal action shall die without final judgment, the executor or administrator of such deceased party may prosecute or defend such action," etc., and section 2019 of the Code of 1906, provides that "an administrator may be appointed to institute and conduct suits, whose power shall cease when the litigation is entirely closed," etc. Under these two sections of the Code express authority is given for the appointment of an administrator to institute or conduct suits, and it is expressly declared that the death of a party to any personal action shall not abate the suit.

Counsel for appellant raise many interesting questions, but none of them can be considered in this proceeding.

Affirmed.

1 of 100 DOCUMENTS

Stribling v. Washington

[NO NUMBER IN ORIGINAL]

Supreme Court of Mississippi

204 Miss. 529; 37 So. 2d 759; 1948 Miss. LEXIS 386

December 13, 1948, Decided

PRIOR HISTORY: [***1] Appeal from the chancery court of Lowndes County; J. H. Gillis, Chancellor.

DISPOSITION: Affirmed.

HEADNOTES

Executors and administrators -- appointment of preferred person on application made after thirty days -- discretion of the chancellor.

The provision in the statute, Section 525, Code 1942, to the effect that upon the failure of a person preferentially entitled to be appointed administrator to apply therefor "within thirty days from the death of an intestate, the court may grant administration to a creditor or any other suitable person" is primarily for the benefit of creditors, and where the interests of creditors have not been and would not be prejudiced, it is within the authority of the chancellor to appoint the widow of the intestate on her application although made after the elapse of the thirty day period, and to remove a stranger appointed within that period, the chancellor having a large measure of discretion in such a matter.

SYLLABUS

Mrs. Mary E. Stribling was appointed administratrix of the estate of George Washington, deceased, on the petition of one of his daughters. The petition did not disclose that the wife of the deceased survived him. Within a few days after [***2] the qualification of the appointed administratrix, but after the expiration of thirty days from the death of the intestate, Rebecca Washington, the widow, presented her petition for the removal of the appointed administratrix and for her appointment instead. Petition sustained and Mrs. Stribling appeals.

COUNSEL: H. T. Carter, for appellant.

While it is true that the law gives preference to the surviving husband or wife and such others as may be next entitled to distribution, if not disqualified to administer the estate, this right or privilege does not necessarily extend beyond the thirty (30) day period from the death of an intestate. George Washington died on or about the 14th day of May, 1947, and Mrs. Mary E. Stribling qualified as administratrix of his estate on a sworn petition of his daughter, Emma Washington Cunningham, who petitioned the court that Letters of Administration be granted to Mrs. Mary E. Stribling, and this was done on July 5, 1947, almost two months after George Washington died. Hence, we see that the alleged widow, if she is the widow, lost whatever right or preference given to her by law to be appointed administratrix of said estate.

It is the contention [***3] of appellant that since Rebecca Washington did not apply for letters of administration within the thirty day period granted to her by law, at the expiration of that time any of the heirs had a right to petition the court for letters of administration upon the estate of George Washington, deceased. In this case one of the daughters of George Washington presented her sworn petition and requested the court to appoint appellant, and it is the further contention that the court was without authority to remove appellant as administratrix, unless and until it has been shown by competent evidence that she was incapable, incompetent and unable to administer the estate or unless there is shown maladministration or other legal grounds which would authorize the court to remove her.

This court held in the case of *Kevey v. Johnson, 150 So. 532*, that this right or privilege created in favor of the husband or wife to be appointed administrator or admini-

stratrix of the deceased spouse's estate would be lost as statutory right by failure to apply within the thirty day period. We here quote the pertinent part of that decision for the court's information.

"The answer must be that the statute, in giving [***4] preference to the husband created a privilege in his favor which would be lost as a statutory right by his failure to apply for the letters within the thirty (30) day period. Muirhead v. Muirhead, 6 Smedes & Marshall 451, 454. The appointment of another within the stated period is not void, but the appointee is subject to removal, upon the husband's application within the thirty (30) days, provided, of course, the husband is a fit person for the appointment. *Giglio v. Woollard, 126 Miss. 6, 15, 88 So. 401, 14 A. L. R. 616*; *Ames v. Williams, 72 Miss. 760, 17 So. 762*, 11 R. C. L. 86; 23 C. J. 1033, *Fridley v. Farmers' and Mechanics' Savings Bank (Re Price), 136 Minn. 333, 162 N. W. 454*, L. R. A. 1917E, 544." The court further said in this same opinion:

"It is not necessary for us to express any opinion as to what would be the rights, if any, of the husband in an application by him for appointment after the elapse of thirty (30) days, another person having been theretofore appointed, for in this case the husband failed not only to apply within the thirty (30) days but in fact he did not seek to be substituted as administrator after the thirty (30) day period."

We respectfully submit [***5] that the children of George Washington, deceased, not knowing and not recognizing Rebecca Washington as their step-mother, nor as the alleged common-law wife of George Washington, their father, had a right under the law to petition the court to grant letters of administration to Mrs. Mary E. Stribling. The learned chancellor held in his opinion that the appointment of Mrs. Mary E. Stribling, as administratrix was legally taken by her in good faith, but sought to justify her removal on the grounds that Rebecca Washington did not know that it was necessary to administer deceased's estate.

If the lower court was correct in his opinion of removing the administratrix in this case and appointing the alleged widow, then the widow would have a right to ask the court to remove an administrator or an administratrix which some creditor of any deceased person had petitioned the court to appoint to pay his just obligations. In other words, appellant takes the position that after the expiration of thirty days any of the heirs of George Washington had a right to petition the court to appoint an administrator or administratrix and the privilege granted by statute to the surviving spouse was lost [***6] and the administrator or administratrix so appointed should not be removed except for some legal cause, and in the instant case no such charges or causes were made or proved.

D. A. Burgin, and **Wm. G. Burgin, Jr.,** for appellee.

As stated by the chancellor in his findings in this case, the public policy of the state gives preference to the widow of the deceased in the administration of the estate. We are here confronted with the situation where the appellee had no notice or knowledge of the necessity of an administration; where, therefore, she did not apply for letters on the estate of the deceased until after the expiration of the thirty day period provided for by Sec. 525 of the Mississippi Code of 1942. We make no contention that the appointment of Mrs. Mary E. Stribling as administratrix of this estate was not a valid and legal appointment, or that the said administratrix did not undertake the administration in good faith. We do, however, contend that her appointment, on the petition of Emma Washington Cunningham, without notice to or knowledge of such application or petition by the widow of the deceased, and without any mention of the widow of said deceased as an [***7] heir in said petition, clearly jeopardizes appellee's rights, and evidences the clear intention on the part of Emma Washington Cunningham of cutting appellee off, if possible, and of denying to appellee her legal rghts as the widow of the deceased; and that, therefore, it is necessary for the protection of appellee's rights and interests, that she, the appellee, be appointed administratrix in the place and stead of the appellant, who represented and favored Emma Washington Cunningham.

The correctness vel non of the chancellor in removing the appellant and substituting the appellee as administratrix in this case is one of first impression here. Appellant cites the case of *Kelvey v. Johnson, 167 Miss. 775, 150 So. 532*, as deciding this question in his favor, but a close consideration of the opinion in that case will show that the precise question presented here was left open by the court, which said: "It is not necessary for us to express any opinion as to what would be the rights, if any, of the husband in an application by him for appointment after the elapse of thirty (30) days, another person having been theretofore appointed." *150 So. at page 532.*

We have searched for a case [***8] deciding this question, but have failed to find one in point.

We submit that the chancellor was correct in his ruling that the law favors administration of estates by the surviving spouse of the deceased; that in removing the appellant the chancellor was within the valid exercise of his discretion in the premises, based on his personal contact

with the witnesses, and his understanding of the facts and situation presented by this particular case; and that it is clear that he was not clearly erroneous, or manifestly wrong in the matter, and that his ruling should be allowed to stand by this court.

JUDGES: In Banc. Smith, J.

OPINION BY: SMITH

OPINION

[*534] [**759] There is only one question in this case which we regard as entitled to discussion, and that is, does the mere lapse of thirty days from the death of an intestate inexorably debar the surving spouse from priority right to letters of administration upon the estate, such spouse failing to apply within such period? Here, it involves the widow of the intestate.

The litigation was had in the Chancery Court of Lowndes County. A colored man by the name of Washington departed this life intestate, being survived by three children [***9] of his first marriage -- his consort therein having predeceased him -- and by his second wife, whose union to him was by virtue of a common-law marriage. Much evidence, pro and con, as to the validity of [**760] the common-law marriage was heard by the Chancellor, who correctly decided it to be a valid marriage.

Shortly after the death of her father, and within the thirty-day period, one of the daughters of the decedent filed a petition in the Chancery Court, praying that appellant, [*535] a member of the white race, be granted letters of administration upon his estate. This petition contained this misleading averment: "That such deceased left surviving him Emma Washington Cunningham, daughter, an adult, Willie Mae Washington, aged 19 years, and George Washington, Jr., a minor, his children, as his heirs." It will be noted that all information as to the wife and widow was withheld from the Chancellor, although it is manifest from the evidence that the petitioner knew her, and of her. There is no intimation that Mrs. Stribling did, however. Letters were issued, Mrs. Stribling qualified, and published notice to creditors.

The widow knew absolutely nothing about these proceedings [***10] until she observed the notice to creditors in a newspaper, more than thirty days after the death of her husband. She had not known that administration was necessary, and here it may be said that such necessity appears to be very doubtful. She at once obtained an attorney, filed a motion to set aside the appointment of Mrs. Stribling as administratrix, and prayed that letters of administratrix thereupon be issued to her, as the widow of her intestate husband, by virtue of her prior right under the statute. The Chancellor granted her prayer, and entered decree accordingly. Mrs. Stribling having contested the matter, and feeling aggrieved by the adverse decision, appealed.

The pertinent part of the statute involved here is as follows: "And the court shall grant letters of administration to the relative who may apply, preferring first the husband or wife and then such others as may be next entitled to distribution, if not disqualified, selecting amongst those who may stand in equal right the person or persons best calculated to manage the estate; or the court may select a stranger, or a trust company organized under the laws of this state, or a national bank doing business in this [***11] state, if the kindred be incompetent. And if such person do not apply for administration within thirty days from the death of an intestate the court may [*536] grant administration to a creditor or to any other suitable person." Section 525, Code 1942. In this connection, we have proclaimed the care of the law for creditors of a decedent by declaring they have the first claim against the estate, and it is the paramount duty of the administrator to protect their interests. *Stone et al. v. Townsend, 190 Miss. 547, 549, 1 So. (2d) 237.*

Obviously, the provision of the statute, "and if such person do not apply for administration within thirty days from the death of an intestate the court may grant administration to a creditor or to any other suitable person," is primarily for the benefit of creditors. It seems to be the policy of the law that recalcitrant heirs will not be permitted to hamper creditors to the predjudice of creditors' rights against an estate by failure promptly to institute administration thereof. This view is supported by Section 533, Code of 1942, with direction to the county administrator to take over the administration if no application for letters testamentary [***12] or administration has been made within sixty days of the death of the decedent. Also, by Section 535, Code of 1942, which provides for the appointment of a county sheriff as administrator in certain cases where there was failure of a petition for letters before appointment of that official by the clerk.

So, it may be seen that the period of thirty days applies, generally, only secondarily for the benefit of persons inferior in priority to the right to administer, although failure of the surviving husband or wife, as the case may be, to qualify as administrators within the thirty-day period, of course, would open the door for those of subsequent degree of eligibility, as fixed by the statute, subject to revocation, in proper cases.

In addition, here the original petition by the daughter, as to whom the widow had prior right to administer her husband's estate, withholds from the Chancellor all information as to the widow, and positively stated that

the decedent was survived by three children, when, in [*537] truth, he was also [**761] survived by the widow. The widow knew nothing at all of these proceedings, as stated. She did not know an administration was necessary; and, [***13] while it may not always be said that such lack of information as to the necessity of administration will prevent loss of priority, still in logic and reason the chancellor should, and, as we believe, does have discretion in the matter to determine the question according to the circumstances of each individual case. The exercise of such discretion would be final, barring abuse thereof.

We deem the action of the chancellor in the case at bar to have been the exercise of a sound discretion, and was proper under the conditions in the record before us. Appointment and revocation, within the limits of the law, are both held to be in the discretion of the Court by the South Carolina Court. Thompson v. Hucket, 2 Hill's Law S. C., 347. However, without here measuring how far the discretion of the Chancellor extends in either category, we are of the opinion that he has a large measure of discretion, within limitations. For instance, we have held that the right of the husband, wife or distributees, is a legal one, unless incompetent. And, as regards others, the matter is within the sound discretion of the court. *Byrd v. Gibson, 1 How. 568.* The language of the statute itself reposes substantial [***14] discretionary powers in the Chancellor. In this State, the nearest approach to adjudication on this subject is the case of *Kevey v. Johnson, 167 Miss. 775, 150 So. 532.* In that case we held that the statutory right might be lost by a spouse who failed to apply for letters within the thirty days, but there the husband did apply within thirty days. However, the Court did not pass upon the matter of the Chancellor's discretion after the lapse of thirty days, the Court saying: "It is not necessary for us to express any opinion as to what would be the rights, if any, of the husband in an application by him for appointment after the elapse of 30 days, another person having been theretofore appointed, . . ."

[*538] We, therefore, pass upon that matter in this case in consideration of the circumstances of it, and affirm the decree of the chancery court in removing the appellant and directing letters of administration issue to appellee as widow of the deceased, George Washington, Sr.

Affirmed.

ANTHONY TOLLIVER, ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF SHIRLEY ANN TOLLIVER GREEN, APPELLANT/CROSS-APPELLEE v. JOHN MLADINEO, M.D. AND JOHN CHRISTOPHER HANCOCK, M.D., APPELLEES/CROSS-APPELLANTS

NO. 2005-CA-02326-COA

COURT OF APPEALS OF MISSISSIPPI

987 So. 2d 989; 2007 Miss. App. LEXIS 467

July 17, 2007, Decided

SUBSEQUENT HISTORY: Rehearing, en banc, denied by *Tolliver v. Mladineo, 2008 Miss. App. LEXIS 37 (Miss. Ct. App., Jan. 22, 2008)*

PRIOR HISTORY: [**1]

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT. DATE OF JUDGMENT: 4/21/2005. TRIAL JUDGE: HON. W. SWAN YERGER. TRIAL COURT DISPOSITION: CIRCUIT COURT DISMISSED CASE WITH PREJUDICE.

DISPOSITION: AFFIRMED ON APPEAL; REVERSED AND VACATED ON CROSS APPEAL.

COUNSEL: FOR APPELLANT: HIAWATHA NORTHINGTON II, ISAAC K. BYRD, JR.

FOR APPELLEE: WHITMAN B. JOHNSON, III, MARK P. CARAWAY, CORY L. RADICIONI, LORRAINE W. BOYKIN.

JUDGES: BEFORE MYERS, P.J., CHANDLER AND GRIFFIS, JJ. CHANDLER, GRIFFIS, ISHEE, ROBERTS, AND CARLTON, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, P.J. KING, C.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. BARNES, J., NOT PARTICIPATING.

OPINION BY: MYERS

OPINION

[*991] NATURE OF THE CASE: CIVIL - MEDICAL MALPRACTICE

MYERS, P.J., FOR THE COURT:

P1. This is an appeal from the trial court's order dismissing the appellant's, Anthony Tolliver's, complaint with prejudice for the failure of plaintiff's counsel to attend a special civil docket call. Doctors John Mladineo and John Christopher Hancock, the appellees, cross-appeal a separate matter, requesting this Court to consider whether the trial court erred during the litigation of this case in allowing the substitution of parties. Because we find that [**2] the trial court erred in allowing a substitution of the party plaintiff, we hold that the complaint was filed untimely and thus relief is barred by the applicable statute of limitations. Therefore, we uphold the dismissal of the appellant's case, but on different grounds than the trial court concluded.

FACTS AND PROCEDURAL HISTORY

P2. Shirley Ann Tolliver Green died as a result of complications arising during an abdominal hysterectomy on March 4, 2001. [*992] She was survived by her husband, children and brother. Green's brother, Michael Malone, first filed a wrongful death suit against Doctors John Mladineo and John Christopher Hancock in the Hinds County Circuit Court, First Judicial District, on December 16, 2002. The case was assigned to Circuit Judge W. Swan Yerger. Doctors Mladineo and Hancock filed a motion to dismiss and answered the December 16, 2002 complaint, asserting, among other defenses, lack of standing. Doctors Mladineo and Hancock initiated some discovery in the case, deposing Green's brother, Plaintiff

Michael Malone. Thereafter, Green's brother moved the trial court to allow his substitution by Green's son, Anthony Tolliver, as plaintiff in an amended complaint. The trial [**3] court allowed the substitution of Tolliver as plaintiff and the amended complaint reflecting the substituted plaintiff was filed by Tolliver on June 16, 2004. Shortly thereafter, plaintiff's counsel moved to withdraw from her representation and a motion was granted allowing Ottowa Carter to be substituted as counsel of record.

P3. Meanwhile, during the pendency of this litigation, the Hinds County Circuit Court became aware of a backlog of cases awaiting the scheduling of a trial setting. In response to this backlog of cases, on March 23, 2005, Judge Yerger issued an order for a mandatory special civil docket call to be held on April 21, 2005 for civil cases pending before him that were filed prior to January 1, 2003. Pursuant to the order, an attorney of record, or a designated attorney representative, was required to appear with full information regarding the status of these cases. Attendance was mandatory, as the court's notice contained the following statement in bold lettering: "Failure to attend will result in the dismissal with prejudice of cases and/or sanctions."

P4. Tolliver's case against Doctors Mladineo and Hancock fell within the category of cases that required attorney [**4] representation at the mandatory docket call before Judge Yerger. The mass docket call went forward as scheduled on April 21, 2005; however, when the docket was called, no attorney or designated attorney representative came forward to present the status of the case on behalf of the plaintiffs. [1] Thereafter, on April 27, 2005, the circuit court dismissed the medical malpractice claim against Doctors Mladineo and Hancock for failure to prosecute, pursuant to *Rule 41(b) of the Mississippi Rules of Civil Procedure.* On May 13, 2005, the plaintiff moved for a reinstatement of the case, but the motion was denied.

> 1 The appellant represents to this Court that an attorney was designated to appear on behalf of the attorney of record and was present at the April 21, 2004 docket call. However, due to a clerical mistake on the docket sheet, the appellant's former attorney was listed as the attorney of record. Thus, when the docket was called, the designated attorney did not appear and as a result, the case was dismissed with prejudice. We find this representation irrelevant, however, as the fact remains undisputed that no one appeared for the plaintiffs when the docket was called for the case.

P5. [**5] Tolliver, on behalf of the wrongful death beneficiaries of Shirley Ann Tolliver Green, now appeals the dismissal of the complaint, arguing that the trial court abused its discretion, seeking reinstatement of his claim. Doctors Mladineo and Hancock cross-appeal a separate matter, requesting this Court to consider whether the trial court erred in allowing the substitution of parties pursuant to *Rule 15(c) of the Mississippi Rules of Civil Procedure.* We address the issue on cross-appeal first in our discussion, as our decision in this issue is dispositive and relevant to our finding in the original issue on appeal.

[*993] I. CROSS APPEAL: WHETHER DISMISSAL OF TOLLIVER'S CLAIM SHOULD BE UPHELD BECAUSE THE CLAIM WAS FILED AFTER THE STATUTE OF LIMITATIONS EXPIRED.

P6. Michael Malone initially brought suit against Doctors Mladineo and Hancock for the wrongful death of his sister under *Mississippi Code Annotated section 11-7-13* (Rev. 2004), on behalf of the wrongful death beneficiaries and in his own individual name on December 16, 2002. The defendants answered the complaint and moved to dismiss the complaint based upon Malone's lack of standing to sue. They asserted that since the decedent, Shirley [**6] Ann Tolliver Green, died leaving a surviving spouse and children, the brother was not the proper party plaintiff and, therefore, the suit should be dismissed for lack of standing. Thereafter, Malone moved the trial court for leave to amend the complaint to substitute in his place the decedent's son, Anthony Tolliver, as party plaintiff for and on behalf of the wrongful death beneficiaries of the decedent. Malone, in his motion for leave to amend the complaint to substitute Tolliver in his place as plaintiff, stated that he encountered a conflict of interest whereby he could no longer effectively act on behalf of the wrongful death beneficiaries of Shirley Ann Tolliver Green. The circuit court granted Malone's motion on May 18, 2004, finding that pursuant to *Mississippi Rule of Civil Procedure 15*, Malone was entitled to substitute Tolliver as the plaintiff representative of the wrongful death beneficiaries. Tolliver thereafter filed his amended complaint on June 16, 2004.

P7. Doctors Mladineo and Hancock argue first that it was error for the circuit court to allow Tolliver to be substituted for Malone as plaintiff because (1) such a substitution is not allowed within the meaning of *Mississippi Rule of Civil Procedure 15* [**7] and (2) because such a substitution was not authorized, once Tolliver filed the amended complaint, the statute of limitations had already expired to bring the wrongful death claim. The doctors further argue that in addition to the untimeliness of the filing of the complaint, the complaint also failed to comply with the notice and pleading requirements of *Mississippi Code Annotated section 15-1-36* (Rev. 2003), so that the dismissal of the claim by the trial court was proper.

P8. Under *Mississippi Rule of Civil Procedure 15(a)*, leave to amend a complaint "shall be freely given when justice so requires." Such leave to amend is not granted automatically, but lies within the Court's discretion. *Pratt v. City of Greenville, 804 So. 2d 972, 976 (P9) (Miss. 2001)*. This discretion of the trial court to allow an amendment to a complaint is reviewed by this Court only for an abuse of discretion. *Id.* However, a proper analysis of whether a trial court had the authority to allow an amendment to a complaint begins in this case with determining whether the complainant lacked standing.

P9. Our wrongful death statutes read in pertinent part:

> Whenever the death of any person . . . shall be caused by any [**8] real, wrongful or negligent act or omission . . . [t]he action for such damages may be brought in the name of the personal representative of the deceased person . . . for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, *or by the husband for the death of the wife*, or by the parent for the death of a child or unborn quick child, or in the name of a child, *or in the name of a child for the death of a parent, or by a brother for the death of a sister*, or by a sister for the death of a brother, or by a sister for the death of a [*994] sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (l) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits.
>
> . . . .
>
> Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; *damages for the injury and death of a married woman shall be equally distributed to the husband and children*, and if she has no children all [**9] shall go to the husband; and if the deceased has no husband or wife, the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death.

Miss. Code Ann. § 11-7-13 (emphasis added).

P10. We note at the outset of our discussion that the originally named plaintiff, Malone, was among the class of individuals permitted to bring a wrongful death suit by virtue of his sibling relationship to the decedent. However, Malone's standing to bring the wrongful death suit was conditional upon the event that the decedent did not have a surviving spouse or children, who would have the exclusive right to bring the wrongful death action. While our wrongful death statute does not readily appear to assign a hierarchy classification to certain groups of listed beneficiaries that would create a first right to bring a wrongful death suit, Mississippi case law construed the statute to create such a system entitling certain groups priority in bringing such a cause of action. *See Briney v. United States Fid. & Guar. Co., 714 So. 2d 962, 968 (PP17-18) (Miss. 1998)* [**10] (discussing top and second tier echelons of beneficiaries under Mississippi's wrongful death statute). Particularly, the supreme court has encountered several situations similar to the one at issue in this case and has assigned hierarchies to the classes of beneficiaries under the wrongful death statute.

P11. In the case of *Partyka v. Yazoo Development Corp., 376 So. 2d 646, 648 (Miss. 1979)*, the supreme court held that a decedent's mother did not have standing to sue under the wrongful death statute because the decedent left a surviving wife who retained that right to maintain the action. In that case, a husband died, leaving his surviving wife (who died shortly after her husband in the same accident) and his mother. The deceased's mother sued for her son's wrongful death; however, the court found that only the wife or the wife's estate representative had standing to sue for his death. The court held that the wife was classified in the "first echelon" and had the exclusive right to bring an action under the wrongful death statute. The victim's mother lacked standing, as a surviving relative of the second degree. *See England v. England, 846 So. 2d 1060, 1066 (P18) (Miss. Ct. App. 2003)* [**11] (discussing the holding of *Partyka, 376 So. 2d 646*). The court stated that "suit *may be brought by one entitled to recover* for all entitled to recover, or by the estate's (Hall's) representative for those entitled to recover, and recovery shall be for all interested parties." *Partyka, 376 So. 2d at 648* (emphasis added).

P12. Similarly, in the case of *Logan v. Durham, 231 Miss. 232, 95 So. 2d 227 (1957)*, the wife died, leaving a surviving husband and minor child as a result of a car accident in which the decedent's husband [*995] was driving. The wife's father, mother, and sisters sued the surviving husband under the wrongful death statute for

the wife's death. However, the court found that the wife's parents and siblings did not have the right to sue under the wrongful death statute, because that exclusive right belonged only to the surviving husband and child. *Id. at 239, 95 So. 2d at 229.*

P13. In the opinion of *In re Estate of Moreland, 537 So. 2d 1337, 1344 (Miss. 1989)*, the supreme court removed a decedent's mother from serving as administratrix for the purposes of bringing a wrongful death action in another state, because the court found that the decedent was most properly represented [**12] by the guardian of his surviving son. In discussing the fact that the decedent's mother brought the first suit for his wrongful death, the court recognized that under Mississippi's wrongful death statute, the one who first brings the death action has the right to prosecute and maintain it to its conclusion. *Id.* However, the court found that in vacating the mother's authority to bring the wrongful death action, the "first in time, first in right" rule was not broken because the decedent's son was the proper person to bring the action. *Id.*

P14. Furthermore, a Mississippi federal district court has discussed the precise issue before us in a factually similar case. In *Fillingame v. Patterson, 704 F. Supp. 702 (S.D. Miss. 1988)*, a decedent's mother, sister, and brothers filed suit under Mississippi's wrongful death statute. However, the decedent was survived by minor children who had been adopted by his paternal aunt prior to the decedent's death. The court held, based on Mississippi precedent holding that a child's adoption does not preclude the child's rights to share in the proceeds to a wrongful death action, that the decedent's wrongful death suit could only be brought by his surviving [**13] children. *Id. at 705.* The district court found that "a fair reading of the [wrongful death] statute indicates that should a spouse or children survive the decedent only they may bring suit under the statute, to the exclusion of all other surviving relatives." *Id. at 704.* While we acknowledge that this case law is not binding on this Court, it is persuasive and we are inclined to agree with the district court's interpretation of Mississippi's wrongful death statute.

P15. Our review of Mississippi case law makes clear that a decedent's sibling is barred from bringing suit under the wrongful death statute when the decedent has left a surviving spouse or children. Thus, we find that Malone lacked standing to bring suit for the wrongful death of his sister because she was survived by her husband and children. In the case *sub judice*, recovery under the wrongful death statute is limited only to the decedent's surviving spouse and children, and thus the suit should have been brought in the name of one of the members of that representative class of the estate.

P16. Our finding that Malone lacked standing to bring suit for the wrongful death of his sister does not end our discussion of the issue. [**14] Although the decedent's brother, Malone, brought the wrongful death claim within the applicable statute of limitations, his complaint lacked standing. This lack of standing "'robs the court of jurisdiction to hear the case.'" *Pruitt v. Hancock Med. Ctr., 942 So. 2d 797, 801 (P14) (Miss. 2006)* (quoting *McNair v. United States Postal Service, 768 F.2d 730, 737 (5th Cir. 1985))*. Thus, any ruling on such a case is void *ab initio*. It follows, then, that an amended complaint filed in a case where the original complainant lacks standing cannot relate back to the filing of [*996] the original complaint, because a complaint cannot relate back to a nullity.

P17. The next issue is whether the amended complaint filed by the proper party plaintiff, Tolliver, was filed timely. Because an amended complaint cannot relate back to an original complaint if the original complaint is brought without standing, such an amended complaint substituting a party as plaintiff should be regarded as the initiation of a new action with regard to analysis pursuant to the statute of limitations. Thus, for the purposes of analyzing whether the amended complaint was brought within the applicable statute of limitations, we must [**15] look to the first instance in which suit was brought by the proper class representative for the wrongful death. The cause of action for wrongful death accrues at the time of death and is for the benefit of the statutory beneficiaries. *England, 846 So. 2d at 1066, 1070 (PP16, 32)*. The statute of limitations applicable to a wrongful death action is adopted from the statute of limitations that governs the tort that caused the death. *Lee v. Thompson, 859 So. 2d 981, 990 (P21) (Miss. 2003)*. Here, the underlying claim of tort against the doctors for the death of the decedent is medical malpractice, which carried a two year statute of limitations. *Miss. Code Ann. § 15-1-36(2)* (Rev. 2003). The time clock for filing such an action began on March 4, 2001, the date of Shirley Ann Tolliver Green's death. The surviving spouse or children then had two years from the date of death, until March 4, 2003, to file a complaint for wrongful death. However, no such complaint was filed until June 16, 2004, when her son, Anthony Tolliver filed the amended complaint. The applicable time period to bring an action for wrongful death had passed, and thus, the complaint against Doctors Mladineo and Hancock was [**16] time-barred. [2]

2 Furthermore, we note that dismissal of the amended complaint was warranted for failure to comply with the statutory guidelines of *Mississippi Code Annotated sections 11-1-58* (Supp. 2006) and *15-1-36(15)* (Rev. 2003). An amended complaint, improperly amended, will not relate

back to the original time of filing. *Bedford Health Props., LLC v. Estate of Williams, 946 So. 2d 335, 355 (PP 58, 60) (Miss. 2006)*. Thus, if the improperly amended complaint is filed after the statute of limitations has run, it does not relate back to the filing of the original complaint, and therefore, the statute of limitations bars the suit. *Curry v. Turner, 832 So. 2d 508, 512-513 (P11) (Miss. 2002)*.

P18. Mississippi statutory and case law is clear on the barring effect of the passing of a statute of limitations on an action. *Miss. Code Ann. § 15-1-3* (Rev. 2003) ("The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy."); *Univ. of Miss. Med. Ctr. v. Robinson, 876 So. 2d 337, 340 (P11) (Miss. 2004)*. "This bar is a vested right which cannot be revived." *Robinson, 876 So. 2d at 340* (P11). "The running of the statute of limitations [**17] is the point where one's right to pursue a remedy is extinguished and another's vested right in the bar rises." *Id.* We hold that since the amended complaint was filed after the statute of limitations had run, the cause of action brought by Tolliver, on behalf of the wrongful death beneficiaries of Shirley Ann Tolliver Green, against Doctors Mladineo and Hancock was filed untimely. Therefore, we ultimately find that dismissal of the wrongful death complaint by the trial judge was warranted, although the trial judge's dismissal was based on another premise. We sit as an appellate court and are most "interested in the result of the decision, and if it is correct we are not concerned with the route--straight path or detour--which the trial court took to get [*997] there." *Kirksey v. Dye, 564 So. 2d 1333, 1336-37 (Miss. 1990)*. It is for these reasons we affirm the dismissal by the trial court.

II. WHETHER THE CIRCUIT COURT ERRED IN DISMISSING THE CAUSE OF ACTION FOR AN ALLEGED FAILURE TO APPEAR AT DOCKET CALL

P19. Tolliver initially appealed the trial court's dismissal of his complaint for his failure to attend a mandatory docket call. He argues that his counsel's one instance of failing to appear [**18] at the docket call [3] did not amount to the requisite misconduct necessary for a trial court to dismiss a lawsuit pursuant to *Mississippi Rule of Civil Procedure 41(b)*.

3 *See supra* note 1.

P20. *Mississippi Rule of Civil Procedure 41(b)* provides for the dismissal of a stale lawsuit for the failure of the plaintiff to prosecute the case. However, we are mindful that "the law favors trial of issues on the merits, and dismissals for want of prosecution are therefore employed reluctantly." *AT&T v. Days Inn, 720 So. 2d 178, 180 (P12) (Miss. 1998)* (citing *Watson v. Lillard, 493 So. 2d 1277, 1278 (Miss. 1986)*). A trial court's order of "dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases." *Wallace, 572 So. 2d at 376*. We review a trial court's dismissal pursuant to *Rule 41(b)* for failure to prosecute for abuse of discretion. *AT&T, 720 So. 2d at 180 (P12)*; *Miss. Dep't of Human Servs. v. Guidry, 830 So. 2d 628, 632 (P13) (Miss. 2002)*.

P21. We cannot uphold a trial court's dismissal with prejudice based upon *Rule 41(b)* unless there is a "clear record of [**19] delay or contumacious conduct by the plaintiff . . . and where lesser sanctions would not serve the best interests of justice." *AT&T, 720 So. 2d at 181 (P13)* (ellipses omitted) (adopting the standard of dismissals with prejudice from the Fifth Circuit) (citing *Rogers v. Kroger Co., 669 F.2d 317, 320 (5th Cir. 1982)*); *Guidry, 830 So. 2d at 633* (P14). An affirmance of a dismissal with prejudice usually occurs when clear delay or contumacious conduct has been shown, and there is at least one other aggravating factor warranting the harshest of sanctions. *AT&T, 720 So. 2d at 181 (P13)* (citing *Rogers, 669 F.2d at 320*). Aggravating factors supportive of a dismissal with prejudice are (1) delay caused by the plaintiff personally, (2) delay causing prejudice to the defendant, and (3) delay resulting from intentional conduct. *Id.*

P22. Tolliver asserts that dismissal with prejudice of this case was inappropriate because there is no clear record of delay or contumacious conduct. He further argues that there exists no aggravating factors that could provide a basis for the dismissal with prejudice. Lastly, Tolliver asserts that the circuit court erred in failing to consider lesser sanctions before [**20] it dismissed his claim with prejudice.

P23. The circuit court dismissed Tolliver's case, holding that a delay in prosecution had clearly occurred. The order made a factual finding that the case was a 2002 case and was already three years old at the time of the docket call. Our review of the record, however, concludes that the trial court was in error in determining that the case was three years old. The original complaint was filed on December 16, 2002 and the docket call was held on April 21, 2005. Therefore, the elapsed time between [*998] the filing of the complaint and the dismissal amounted to approximately two years and five months. This error within the factual findings is unimportant, however, in the analysis of determining whether the plaintiff was dilatory in prosecuting this case. While "[t]here is no set time limit on the prosecution of an action once it has been filed," *AT&T, 720 So. 2d at 180* (P12), an action must, at some point in time, be prose-

cuted after its filing or dismissed. The significant question that must be asked in determining whether a plaintiff has engaged in dilatory behavior concerns the activity occurring in the case after it has been filed. After the complaint [**21] was first filed in December of 2002, and then amended to substitute the plaintiff on June 16, 2004, little activity occurred in the case until the order of dismissal was entered on April 27, 2005. The last activity occurring in the case was on September 1, 2004 when the Appellant's first attorney withdrew and attorney Carter was substituted as counsel. Then, on April 21, 2005, Tolliver's counsel failed to appear at the mandatory docket call despite being sent a notice of the call warning that "failure to attend will result in the dismissal with prejudice of cases and/or sanctions." The time between the change in counsel and the docket call amounted to seven months wherein activity on the case lay entirely dormant. We find that the record sufficiently shows a clear record of delay. [4]

4 We note that "the test for dismissal under *Rule 41(b)* does not require contumacious conduct." *Hine v. Anchor Lake Prop. Owners Ass'n, 911 So. 2d 1001, 1005 (P14) (Miss. Ct. App. 2005)*. "Rather, the test is whether there is a clear record of delay *or* contumacious conduct by the plaintiff." *Id.* (emphasis added). Contumacious conduct has been defined as "willfully stubborn and disobedient conduct, commonly [**22] punishable as contempt of court." BLACK'S LAW DICTIONARY 330 (6th ed. 1990). "[W]here a clear record of delay has been shown . . . there is no need for a showing of contumacious conduct." *Id.*

P24. For an appellate court to affirm a dismissal with prejudice based on a record of clear delay or contumacious conduct, an aggravating factor is usually present. Our supreme court has held that if the plaintiff personally contributed to the delay, that this action can warrant dismissal with prejudice of his case. In this case, we find that delay in this case was caused by the plaintiff(s) personally. Malone, the decedent's brother, first filed this suit without standing. Only after the defense filed motions to dismiss the suit for Malone's lack of standing, did the correct plaintiff, Tolliver, come forward to amend the complaint. However, as we found *supra*, by the time the amended complaint was filed by Tolliver, the statute of limitations had already run. We have held before that a plaintiff's "delay . . . caused by omission, not commission" warrants dismissal with prejudice. *Hine, 911 So. 2d at 1007* (P25). By failing to properly and timely bring the suit, Tolliver delayed the suit from going [**23] forward and thus personally contributed to delay.

P25. We understand the frustration that some trial judges experience in managing their increasing caseloads. Dismissals for failure to comply with a court's order and docket procedure is a sanction a trial court may impose in certain circumstances. However, we recognize that a dismissal of an action is a drastic remedy which should be used only in extreme situations. In this case, the trial court warned that sanctions and/or a dismissal with prejudice would occur for failure to attend the mandatory mass docket call. The court utilized this sanction to articulate the seriousness of failure to appear at a docket call. When considering the plaintiff's motion for reinstatement, the trial court considered the explanations provided by plaintiffs, [*999] found the absence to be inexcusable, and upheld its decision to dismiss the case for failure to prosecute. In this particular case, we find the trial court's decision understandable in an effort to rid its docket's accumulation of unprosecuted or stale cases. Therefore, we affirm the circuit court's dismissal with prejudice. However as a practical matter, our reversal of the circuit court's denial [**24] of the Doctors' motions to dismiss based on lack of standing alleviates our need for making this finding.

CONCLUSION

P26. While we affirm the trial court's dismissal of the complaint in the case with prejudice for counsel's failure to attend a special civil docket call, this finding is not dispositive of this appeal. Our review of the appellee's issue on cross-appeal concludes that dismissal of this case was warranted on another ground. The trial judge should not have allowed substitution of party plaintiffs in this case. Because the correct party did not initially file the lawsuit for the wrongful death of Shirley Ann Tolliver Green, the complaint was never properly filed. Once the proper party plaintiff, Tolliver, filed his amended complaint on behalf of the wrongful death beneficiaries, the statute of limitations had already expired. Thus, the claim was time-barred and dismissal of the complaint was warranted. For these reasons, the judgment of the circuit court dismissing the suit against Doctors Mladineo and Hancock is affirmed.

P27. THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF DISMISSAL WITH PREJUDICE IS AFFIRMED AND THE DENIAL OF APPELLEE/CROSS-APPELLANT'S MOTION TO DISMISS [25] IS REVERSED AND VACATED ON CROSS-APPEAL. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT/CROSS-APPELLEE.**

CHANDLER, GRIFFIS, ISHEE, ROBERTS, AND CARLTON, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION

JOINED BY LEE, P.J. KING, C.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. BARNES, J., NOT PARTICIPATING.

DISSENT BY: IRVING

DISSENT

IRVING, J., DISSENTING:

P28. The majority pretermits a discussion of the merits of the basis for the dismissal of this case by the trial judge and decides it on the basis of the cross-appeal. The trial court dismissed Tolliver's case because no one responded at the docket call when the case was called. The cross-appeal alleges that the trial court erred in allowing the amended complaint, because the plaintiff, at that time, had no standing to bring the initial action. In my judgment, under the unique facts of this case, the trial court erred when it dismissed the complaint because plaintiff's counsel failed to respond at the docket call. I also think the majority errs in affirming the trial court, albeit on a different ground. Therefore, I respectfully dissent.

P29. The wrongful death statute provides in pertinent part:

> The action for such damages may be brought [**26] in the name of the personal representative of the deceased person or unborn quick child for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child or unborn quick child, or in the name of a child, or in the name of a child for the death of a parent, or *by a brother for the death of a sister,* or by a sister for the death of a brother, or by a sister for the death of a [*1000] sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits.

Miss. Code Ann. § 11-7-13 (Rev. 2004) (emphasis added).

P30. This suit was initiated by Michael Malone, brother of the decedent, Shirley Ann Tolliver Green. While the stated code section, by its express terms, permits a brother to bring a wrongful death action for the death of his sister, subsequent case law makes it clear that if the sister leaves a spouse or child, the spouse or [**27] child is the proper person to bring the action, as they would be the sole wrongful death beneficiaries. *See In re Estate of Moreland, 537 So. 2d 1337, 1340 (Miss. 1989); Partyka v. Yazoo Dev. Corp., 376 So. 2d 646, 648 (Miss. 1979).*

P31. I do not believe it was necessary to file an amended complaint in this case. Malone should have been allowed to substitute Green's son, Anthony Tolliver, in his place under the authority of *Rule 17 of the Mississippi Rules of Civil Procedure* and thereby not implicate the statute of limitations. Therefore, I would find that the trial court reached the right result in allowing the substitution of Tolliver, but that the plaintiff, Malone, utilized the wrong vehicle in seeking the substitution.

P32. *Rule 17* provides in part:

> (a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his representative capacity without joining with him the party for whose benefit the action is brought. *No action shall be dismissed on the ground* [**28] *that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.*

M.R.C.P. 17(a) (emphasis added).

P33. Of special interest is the comment to this Rule:

> The second sentence of *Rule 17(a)* contains a specific enumeration of a number of persons who are real parties in interest; the purpose of this listing is to provide guidance in cases in which it might not be clear who the real party in interest is and to emphasize the fact that he might not be the person beneficially interested in the potential recovery. *Of*

> *course, the rule presumes that applicable substantive laws of Mississippi give the persons named in the rule the right to sue.*
> . . .

M.R.C.P. 17(a) cmt.

P34. *Rule 17* should be interpreted in light of *Rule 19*, which addresses the identity of persons needed for just adjudication:

> (a) Persons to Be Joined if Feasible. A person who is subject to the jurisdiction of the court [**29] shall be joined as a party in the action if:
>
> (1) in his absence complete relief cannot be accorded among those already parties, or
>
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical [*1001] matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.
>
> If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff.

M.R.C.P. 19.

P35. While I think that, in light of existing case law, Malone should never have brought this wrongful death action, I do not believe it was improper to allow the substitution of one of the real parties in interest, and I certainly do not believe that dismissing the case with prejudice was the correct result. Dismissal with prejudice is a draconian measure and should be employed only in rare circumstances. *See Dinet v. Gavagnie, 948 So. 2d 1281, 1285 (P12) (Miss. 2007).* [**30] This is not one of those circumstances. The complaint makes it clear that the action is brought for the benefit of the wrongful death beneficiaries, although those beneficiaries are not named. But for the running of the statute of limitations in this case, the defendants may very well have faced additional litigation from the real parties in interest, that is Green's wrongful death heirs, a fact alluded to in *Rule 19.*

P36. I turn briefly to why I think the trial judge erred in dismissing the complaint for failure of plaintiff's counsel to answer the case at docket call. The record reflects that an attorney from the office of the firm that was representing Tolliver was in fact at the docket call but did not respond because the docket calendar listed the name of the wrong attorney. The attorney who appeared at the docket call on behalf of the firm was relatively new in the firm and did not recognize the case because his firm's name was not attached to it on the docket calendar. Under these unique facts, I would find that the trial judge abused his discretion in dismissing the case with prejudice. Further, I am not persuaded that the trial judge's letter to the bar advising of the court's [**31] intention to dismiss cases with prejudice if no one appeared at the docket call with authority to speak on behalf of the listed attorney passes muster under *Rule 41 of the Mississippi Rules of Civil Procedure.* In the absence of the letter being approved by the Mississippi Supreme Court as a local rule or procedure, I believe the proper procedure for dismissing actions for failure to prosecute is set forth in *Rule 41.*

P37. I am aware of *Cucos, Inc. v. McDaniel, 938 So. 2d 238 (Miss. 2006)*, where the Mississippi Supreme Court seems to indicate that notwithstanding the requirements of *Rule 41*, a trial court has the inherent authority to control its own docket. *Id. at 243* (P14). However, in *Cucos*, the court noted that in such situations, two "competing policy considerations" must be balanced:

> The court must weigh the great social interest in provision of every litigant with his day in court and the attempt to not deprive the plaintiff of that opportunity for technical carelessness or unavoidable delay . . . [and the] achievement of the orderly expedition of justice and control by the trial court of its own docket.

Id. It can hardly be said that the plaintiff had abandoned prosecution of his [**32] case when there was a good faith effort to comply with the mandate of the court's letter but such compliance failed due to a mixup with the listing of the proper attorney for the plaintiff. I believe, on the [*1002] facts of this case, the first policy consideration outweighs the latter. In any event, there was no balancing of the policy considerations by the trial judge.

P38. For the reasons presented, I dissent. I would reverse and remand this case for a hearing on the merits.

LEE, P.J., JOINS THIS OPINION.

C

Supreme Court of Mississippi.
GREAT SOUTHERN BOX COMPANY, Inc., OF MISS. and W. D. Thompson,
v.
Mrs. Leona BARRETT, Administratrix of the Estate of Otis Barrett, Deceased.
No. 40484.

May 6, 1957.

Action for death of automobile passenger caused by highway collision of automobile and truck. The Circuit Court, Simpson County, Homer Currie, J., rendered judgment for plaintiff, and truck owner and driver appealed. The Supreme Court, Gillespie, J., held that it was not improper for plaintiff's attorneys to assist in securing appointment and qualification of administrator of estate of automobile driver so that venue would be in particular county and thus draw truck owner and truck driver to Circuit Court of that county, in absence of fraudulent or collusive scheme between plaintiff and administrator.

Affirmed.

West Headnotes

[1] Executors and Administrators 162 ⚿437(2)

162 Executors and Administrators
162X Actions
162k437 Time to Sue, and Limitations
162k437(2) k. Time Within Which Actions Against Executors or Administrators Are Prohibited. Most Cited Cases
Purpose of statute providing that an administrator shall not be sued until after expiration of six months from date of letters of administration is to allow time to administrator to examine and understand conditions of estate, to provide means of paying debts, if practicable, without suit by collection of assets, and to be advised of any demands against it which it may be necessary to defend. Code 1942, § 612.

[2] Executors and Administrators 162 ⚿437(2)

162 Executors and Administrators
162X Actions
162k437 Time to Sue, and Limitations
162k437(2) k. Time Within Which Actions Against Executors or Administrators Are Prohibited. Most Cited Cases
Where suit was brought against administrator of estate and two other defendants within four days after administrator was issued letters, but administrator did not object to suit being prematurely brought, codefendants of administrator had no right to object to suit on basis that suit was brought before expiration of six months from date of letters of administration. Code 1942, § 612.

[3] Executors and Administrators 162 ⚿17(6)

162 Executors and Administrators
162II Appointment, Qualification, and Tenure
162k17 Right to Appointment as Administrator
162k17(6) k. Creditors. Most Cited Cases
One who has cause of action which survives decedent's death is creditor entitled to administration. Code 1942, § 525.

[4] Executors and Administrators 162 ⚿17(6)

162 Executors and Administrators
162II Appointment, Qualification, and Tenure
162k17 Right to Appointment as Administrator
162k17(6) k. Creditors. Most Cited Cases
Purpose of statute providing that court may grant administration of decedent's estate to creditor or to any other suitable person was to provide methods for one having claim against estate to see to prompt and proper administration of estate. Code 1942, § 525.

[5] Attorney and Client 45 ⚿32(7)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General

45k32(7) k. Miscellaneous Particular Acts or Omissions. Most Cited Cases
(Formerly 45k32)
Attorneys for creditor of estate may actively participate in securing appointment and qualification of administrator of estate. Code 1942, § 525.

[6] Venue 401 ⚿45

401 Venue
401III Change of Venue or Place of Trial
401k45 k. Grounds for Change in General. Most Cited Cases
It was not improper for plaintiff's attorneys to assist in securing appointment and qualification of administrator of estate of automobile driver so that venue, in action for death of automobile passenger in collision of automobile and truck, would be in certain county and thus draw truck owner and driver into circuit court of that county, in absence of fraudulent or collusive scheme between plaintiff and administrator. Code 1942, § 525.

[7] Venue 401 ⚿77

401 Venue
401III Change of Venue or Place of Trial
401k77 k. Waiver of Change. Most Cited Cases
Where answer of truck owner and driver, in action brought for death of automobile passenger caused by collision of automobile and truck, affirmatively alleged that sole and proximate cause of collision was automobile driver's negligence, they could not claim, in motion to change venue from county of deceased automobile driver, that plaintiff's evidence showed conclusively that automobile driver had not been negligent and that sole purpose of joining administrator as defendant was to destroy venue rights of truck owner and driver, and that this constituted legal fraud. Code 1942, § 525.

[8] Estoppel 156 ⚿2

156 Estoppel
156I By Record
156k2 k. Judicial Records in General. Most Cited Cases
Judicial estoppel differs from equitable estoppel in that it is not necessary to show elements of reliance and injury, and judicial estoppel is based on principle that orderliness, regularity and expedition of litigation are essential to proper judicial inquiry.

[9] Automobiles 48A ⚿245(78)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(67) Contributory Negligence
48Ak245(78) k. Speed and Control. Most Cited Cases
In action for death of deceased automobile passenger caused by highway collision of automobile and truck, which was three or four feet over center line into lane in which automobile was traveling at time of collision, questions whether driver of automobile was guilty of contributory negligence in driving at excessive speed and in failing to keep his automobile under control were for jury.

[10] Evidence 157 ⚿574

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k574 k. Conflict with Other Evidence. Most Cited Cases
Testimony of eyewitnesses that automobile driver did not contribute to collision of automobile and truck and was driving in normal and careful manner was not binding, and facts testified to by witnesses controlled over such opinions.
****913 *103** Butler, Snow, O'Mara, Stevens & Cannada, Jackson, J. B. Sykes, J. W. Walker, Mendenhall, for appellants.

***104** Crisler, Crisler & Bowling, Jackson, Russell & Little, Magee, for appellee.

***106** GILLESPIE, Justice.

This appeal involves three questions of venue. Suit was brought in the Circuit Court of Simpson County by Mrs. Leona Barrett, administratrix of the estate of Otis Barrett, deceased, herein called plaintiff, against Great Southern Box Company, Inc. of Mississippi, a corporation domiciled in Rankin County, hereinafter called Box Company, and Box Company's servant, W.

D. Thompson, a resident citizen and householder of Lowndes *107 County, and A. W. McRaney, administrator of the estate of Sam Palmer, deceased, Palmer having died a resident citizen of Simpson County where letters of administration were granted to McRaney. The Accident out of which the action arose occurred in Hinds County. The suit proceeded until plaintiff rested, at which time all defendants announced that they had no evidence. The jury returned a verdict in favor of McRaney, administrator, and against Box Company and Thompson for $35,000. Plaintiff's deceased was riding in an automobile being driven by Sam Palmer, deceased, which vehicle was traveling west and which collided with a truck belonging to Box Company and being driven by Thompson which was traveling east. The truck cut to its left into the north lane of the highway. The vehicles collided. The point of impact was three or four feet north of the center line.

The suit was filed within six months after the appointment and qualification of McRaney, administrator. McRaney, administrator, did not raise the issue that he was prematurely sued. Box company and Thompson filed a motion for change of venue in which it was contended that neither could be sued in Simpson County because neither was served with process in **914 that county, the accident occurred in Hinds County, Box Company was domiciled in Rankin County, and Thompson was a resident householder of Lowndes County; that McRaney, administrator, the only resident defendant in Simpson County, was sued within four days after McRaney, administrator, was issued letters, and Section 612, Mississippi Code of 1942, provides that an administrator shall not be sued until after the expiration of six months from the date of letters of administration.

[1][2] The question raised by this motion is whether a codefendant of an administrator may rely on Code Section 612 on motion for change of venue when the administrator*108 did not object to the suit being prematurely brought. The purpose of Section 612 is to allow time to the administrator to examine and understand the condition of the estate, to provide the means of paying debts, if practicable, without suit by collection of the assets; and to be advised of any demands against it which it may be necessary to defend. Reedy v. Armistead, 31 Miss. 353. The administrator could have had the suit dismissed as to him if he had so moved, but he did not do so; therefore, the only party for whose benefit the statute was enacted waived the right to object to the suit being prematurely brought. 34 C.J.S. Executors and Administrators § 729, p. 730. Codefendants of the administrator are afforded no benefit or protection by the statute and have no right to raise it.

The second motion of Box Company and Thompson for change of venue was grounded on the allegation that McRaney, administrator, the local defendant, agreed to serve as administrator of the estate of Sam Palmer at the request of some of the attorneys representing plaintiff who prepared the papers in connection with the appointment and qualification of McRaney as such administrator; that no property has come into the hands of McRaney, administrator; that some of the attorneys representing plaintiff prepared the answer of McRaney, administrator, in this suit; that some of plaintiff's attorneys are representing McRaney as administrator in defending this case and in the administration proceeding. The motion charged that the joinder of McRaney, administrator, was a legal fraud on Box Company and Thompson in attempting to confer venue in Simpson County. After the evidence was heard on this motion the trial court made a lengthy finding of fact in which he found that none of the attorneys for plaintiff were representing McRaney in this suit or in the administration of the estate of Sam Palmer, deceased.

*109 We think Box Company and Thompson established that some of the attorneys for plaintiff arranged to have McRaney appointed as administrator of the estate of Sam Palmer, deceased, and that they did this at the instance of the mother of Sam Palmer, deceased; that there were no known assets belonging to the estate of Sam Palmer, deceased; that some of plaintiff's attorneys assisted in the preparation of the papers for the appointment and qualification of McRaney, administrator, and two of them signed McRaney's bond as administrator. The trial judge was justified in finding that none of plaintiff's attorneys thereafter represented McRaney in the administration of the Sam Palmer estate or this suit. McRaney dictated his answer in this suit in the office of plaintiff's attorneys, which was next to the office of McRaney, who is also an attorney, and who had no stenographer. Plaintiff's attorneys also gave McRaney some of the information used in preparing the answer.

[3] Appellants, Box Company and Thompson, rely on

such cases as Trolio v. Nichols, 160 Miss. 611, 132 So. 750, 133 So. 207, and Nicholson v. Gulf, Mobile and Northern R. Co., 177 Miss. 844, 172 So. 306, which involve situations where plaintiff fraudulently joined local defendants for the purpose of fixing venue. Those cases are not applicable here. Appellants' motion was properly overruled because**915 of the provisions of the last sentence of Section 525, Code of 1942, which is: 'And if such person do not apply for administration within thirty days from the death of an intestate the court may grant administration to a creditor or to any other suitable person.'One who has a cause of action against a decedent which survives the latter's death is a creditor entitled to administration.33 C.J.S. Executors and Administrators § 41, p. 938. Much more than thirty days had elapsed from the date of Sam Palmer's death before McRaney was appointed administrator

*110 [4][5] The purpose of Code Section 525 was to provide a method for one having a claim against an estate to see to the prompt and proper administration of the estate. A creditor has a proper interest in the administration of the estate. It follows that if a creditor may be appointed administrator of the estate of a deceased person, there is nothing improper in the attorneys for the creditor to actively participate in securing the appointment and qualification of another. If the creditor, or one who has a claim against the estate such as the plaintiff in this case, could not see to it that someone qualify as administrator, the plaintiff could not prosecute her claim.

[6] Now it should be said that if there had been a fraudulent agreement between plaintiff's attorneys and McRaney, administrator, such as, for instance, that plaintiff would not attempt to secure or collect the judgment against the estate, we would have another matter. But in this case there is no proof of any such fraudulent or collusive scheme. It is quite obvious that plaintiff's attorneys desired to have an administration so that the estate of Sam Palmer, deceased, could be sued in Simpson County and thus draw the Box Company and Thompson into the Circuit Court of Simpson County; but the right of the plaintiff to choose the venue of an action within the provisions of the venue statutes are just as valuable and important to her as are the venue rights of the defendants.

The Box Company and Thompson filed a third motion for change of venue at the conclusion of plaintiff's case. It was charged in this motion that plaintiff wholly failed to offer any evidence tending to prove any negligence on the part of Sam Palmer, deceased, but on the other hand, plaintiff's evidence showed conclusively that Sam Palmer, deceased, was guilty of no negligence proximately contributing to the collision involved in the suit. Movants*111 alleged that the sole and only purpose of joining McRaney, administrator, as a defendant in the suit was to destroy the venue rights of Box Company and Thompson, and that this constituted a legal fraud.

There are two reasons why this motion was properly overruled by the trial court. Either is sufficient without the other.

[7][8] First: In their answer to the declaration filed by plaintiff, Box Company and Thompson denied that either of them were guilty of any negligence which proximately contributed to the collision involved in the case. These defendants affirmatively alleged in their answer that the sole and only proximate cause of said collision was the carelessness and negligence of the driver of the car in which plaintiff's deceased was riding, that is to say, the negligence of Sam Palmer. The answer stated the facts which they alleged constituted negligence on the part of Sam Palmer, and this substantially agreed with the charges of negligence made against Palmer by plaintiff in her declaration. This position was never changed, the answer was not amended or withdrawn. The Box Company and Thompson, in their answer, based their defense on the factual assertion that the collision was caused solely by the negligence of Sam Palmer. May they withhold the evidence they had to establish that fact-that certainly had such evidence else they would not have made the allegation-and nullify the proceedings by obtaining a change of venue? We hold they cannot. Not that we hold they should have offered such proof, but that they cannot assume**916 an inconsistent position in the same proceeding. The Box Company and Thompson cannot be heard to say on the one hand that they were not liable because Palmer was solely responsible for one purpose of the suit, and, without withdrawing or amending that position, say in the same judicial proceeding, for another purpose, that not *112 Palmer but they were solely responsible for the collision. This is not estoppel in the strict sense of that term. It is denominated judicial estoppel which differs from equitable estoppel in that it is not necessary to show the elements of reliance and injury. It is based on

the principle that orderliness, regularity and expedition of litigation are essential to a proper judicial inquiry.31 C.J.S. Estoppel § 117, p. 378.

[9][10] Second: We cannot agree that plaintiff's proof failed to make a jury question as to whether Sam Palmer was guilty of negligence which proximately contributed to the collision. There were three eyewitnesses to the accident who testified for plaintiff. Their testimony was that Sam Palmer was driving between 55 and 60 miles an hour one-quarter of a mile inside the corporate limits of Clinton; that he skidded straight down his side of the highway 50 feet to the point of impact; the photographs and the testimony as to the side marks were sufficient to show that the car Palmer was driving knocked the Box Company truck over towards the south, then scratched up the ground and ran over a 30-mile speed limit sign; that there was ample room on the shoulder and the balance of the north half of the pavement not occupied by the truck for Palmer to have passed the truck without any collision. The jury would have been fully justified in finding that Palmer was guilty of the negligence charged against him by the plaintiff in her declaration and by the Box Company and Thompson in their answer, namely, excessive speed, and failure to keep his car under control. It is true that the eyewitnesses all stated that Palmer did nothing to contribute to the accident and was driving in a normal and careful manner; but such opinions and conclusions of a witness bind no one. The facts control over opinions such as given by these witnesses.

No other questions were raised.

***113** Affirmed.

All Justices concur, except KYLE, J., who took no part.
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