IN THE SUPREME COURT OF MISSISSIPPI

CLARK SAND CO. INC., ET AL. **APPELLANT**

VS. **NO. 2008-IA-01437-SCT**

RUBY C. KELLEY, EXECUTRIX OF THE ESTATE OF DAVID C. BOZEMAN, DECEASED AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF DAVID C. BOZEMAN, DECEASED **APPELLEE**

BRIEF OF APPELLEE RUBY C. KELLEY

On Interlocutory Appeal from the
Circuit Court of Warren County (Cause No. 07, 0076-CI)

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), 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:

1. Ruby Kelley, *Appellee*
2. Wrongful death beneficiaries of Mr. David Bozeman
3. Clark Sand Co., Inc., *Appellant*
4. Clemco Industries Corp., *Appellant*
5. P.K. Lindsay Co., Inc., *Appellant*
6. E.D. Bullard Corp., *pending Defendant in the Trial Court*
7. The Honorable Isadore W. Patrick, *Warren County Circuit Court Judge*
8. Fred Krutz, *Counsel for Appellants*
9. Edwin S. Gault, Jr., *Counsel for Appellants*
10. Jennifer J. Skipper, *Counsel for Appellants*
11. Steve Bryant, *Counsel for pending co-Defendant*
12. R. Allen Smith, Jr., *Lead Counsel for Appellee*
13. David Neil McCarty, *Counsel for Appellee*

So CERTIFIED, this the 1 day of June, 2009.

Respectfully submitted,

David Neil McCarty, MSB No. 101620
Attorney for Appellee Ruby C. Kelley

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Statement of the Issues

There are only three issues on appeal before this Court, although they involve multiple subtle issues between them. First, did the Appellant Silica Companies waive their affirmative defenses of lack of standing and statutes of limitation by engaging in heavy and protracted litigation?

Second, does an executrix of an estate have standing to pursue a wrongful death claim before the estate is opened or probated?

Third, must Mississippi's savings statute be interpreted remedially and liberally, as to allow misjoined cases to be refiled?

Statement of the Case

This case involves the executrix of a decedent's estate attempting to file suit for wrongful death. The decedent previously had a lawsuit for damages against a number of companies for physical harm suffered as a result of exposure to silica. Not long after the death of the plaintiff, the case was dismissed as misjoined. The executrix of his estate filed a new suit, resuming the prior suit, and adding in claims of wrongful death.

The defendant companies objected, and filed a motion for summary judgment based primarily upon the theories that the executrix had no standing, and that the newly-filed case was outside the statute of limitations. The trial court did not agree, and denied the motion, finding that the executrix did have standing and that the statutes of limitation had not yet run. The defendant companies then sought interlocutory appeal from this Court, which was granted.

The background facts and procedural history of this case are as follows.

Background

For the purpose of this appeal, the facts of this case are uncontested. No one disputes that David Bozeman served in the Armed Forces for the better part of a decade. R. at 704. In

this appeal, no one disputes that at the jobs he worked he used products with silica in them, and that he used breathing gear that failed to stop the miniscule grains of silica from entering his lungs. R. at 704. No one disputes that he had lung cancer. R. at 45. No one disputes that lung cancer killed him only six months after he was diagnosed, at the age of 63, lying in a hospital bed in Meridian. R. at 45. In this appeal, no one disputes that it was the exposure to crystalline silica which resulted in Mr. Bozeman developing the advanced lung cancer which killed him. R. at 293.

No one disputes that Warren County, where Mr. Bozeman worked on and off through his life as a welder, is where this case is properly situated. R. at 301. And no one disputes that Mr. Bozeman's original lawsuit was properly filed and situated at the time it was commenced.

The only issues on appeal are a clutch of procedural quirks grounded on a statute as old as our state, and whether Mr. Bozeman's family should ever be able to recover for their loved one's death by cancer.

Procedural History and Relevant Facts

The procedural history is also uncontested by the parties, and involves complex and heavy litigation over a period of six years. The relevant facts for this appeal are all contained in the procedural history of this case.

In June of 2002, Mr. Bozeman was diagnosed with silicosis. Along with a group of other Plaintiffs, he commenced a suit in September of 2002 in Holmes County, titled *Danny McBride v. Pulmosan Safety Equipment*. Not quite three years later, Mr. Bozeman died of lung cancer.

A few months afterwards, this Court required in *Canadian National* that all suits previously filed en masse for claims of silicosis damage should be severed as misjoined and then refiled individually in a more proper venue. Mr. Bozeman's suit was dismissed almost exactly a year after his death, in March of 2006. R. at 273. On March 7, 2007, his widow, Ms. Ruby

Kelley, resumed his suit in Warren County, filing suit on behalf of all beneficiaries as his executrix. R. at 292. She had previously been named as his executrix in Mr. Bozeman's will. R. at 292.

Each of the three Silica Companies who have appealed to this Court—Clark Sand Co., Inc., P.K. Lindsay Company, and Clemco Industries Company—raised the defense of statutes of limitation in their Answers. Record Excerpts at 1; R.E. at 2; R.E. at 3.[1] Indeed, each of the three Silica Companies asserted *identical* affirmative defenses; there are *sixty-five* separate defenses in total, spanning twelve pages. R.E. at 1, pages 5-17 (Clark Sand); R.E. at 2, pages 5-17 (P.K. Lindsay); R.E. at 3, pages 5-17 (Clemco). These defenses range from the mundane (like number 11, statutes of limitation) to the esoteric (number 61 involves something called the "Noerr-Pennington Doctrine"). *See, e.g.*, R.E. at 1, pages 6-7, 16.

However, *none* of the Silica Companies ever asserted the affirmative defense of standing regarding Ruby Kelley, or that she had no right to bring the suit as an executrix or personal representative. This argument was raised for the first time in a motion for summary judgment on July 2, 2007. R. at 40.

In the meantime, the Silica Companies had served written discovery on Ms. Kelley, requesting answers to interrogatories, and formulated requests for production and requests for admissions. R. at 4; R.E. at 4. Just the interrogatories and requests for production span 22 pages. There were 53 interrogatories asked of Ms. Kelley; several of the 53 had multiple subparts. R.E. at 5, Exhibit A. The questions ranged from the disturbingly personal (such as number 14, asking whether Ms. Kelley had ever used heroin or PCP) to the bureaucratically oppressive (number 28 asks for a signed release of 11 different documents, which were attached, spanning Social Security Records to psychotherapy notes to federal tax records and military

[1] All references to the Record Excerpts of the Appellee Ruby Kelley are to the tab within the bound excerpt.

records) to the mundane world of litigation (number 52 asks for information regarding expert testimony).

There are even more requests for production, with 64 total. R.E. at 5, Exhibit A, page 14. They ask for everything from all information about every place Ms. Kelley had worked, including the names of all her previous co-workers over her entire work history (numbers 9 and 62) to a copy of all state and federal tax returns for the past 10 years (number 44). The hundreds of interrogatories, sub-parts, and requests for production were served on April 24, 2007. When the dozens of pages of discovery was not responded to within 30 days, counsel for the Silica Companies sent a letter to counsel for Ms. Kelley requesting a response to the discovery. R.E. at 5, Exhibit B.

Roughly one week later the Silica Companies filed a motion to compel answers to the hundreds of questions of written discovery, intent on setting a hearing for the motion later in June. R.E. at 5. Importantly, on May 16, the Silica Companies also agreed to a trial date in September and October of 2008. R.E. at 6. This heavy litigation and overwhelming invocation of the discovery process all occurred *before* the motion for summary judgment on standing was filed.

The Silica Companies also actively engaged in taking depositions. Ms. Kelley was deposed by the Silica Companies on December 20, 2007. R. at 510. A co-worker of Mr. Bozeman, Mr. Bill Dykes, was deposed by the Silica Companies on April 21, 2008. R.E. at 7. Another deposition, of a doctor, was scheduled but ultimately cancelled. R.E. at 8.

The docket also demonstrates that the Silica Companies filed and opposed many motions before the second motion for summary judgment, based on an allegedly lapsed statute of limitation, was filed. An agreed scheduling order between all parties was entered by the Court on July 24, 2007, which was e-mailed to counsel for the parties on that date. R. at 5. Even after

Clark Sand and P.K. Lindsay even designated portions of two different deposition transcripts to be used at trial. R. at 16, R.E. at 14, 15. After all, the trial was set for the week of September 29—just a few days away. The Silica Companies also joined a motion to delay the trial on September 15, 2008. R.E. at 16.

Ultimately, the Warren County Circuit Court denied both motions for summary judgment regarding standing and the statute of limitations. R. at 715-19. The trial court found that under Mississippi law the cause of action for wrongful death had not run. Further, the trial court found that Ms. Kelley had standing to file suit against the Silica Companies as she was Mr. Bozeman's administratrix. R. at 718. Even foregoing that she was a personal representative under the statute, the Court found that she was an "interested party" under the wrongful death statute, and that because there could only be one action under the wrongful death statute, the suit was proper. R. at 5.

Roughly contemporaneous with the trial court matter, Ms. Kelley had proceeded in the Circuit Court of Choctaw, Alabama, to be named Mr. Bozeman's common-law wife. The Alabama trial court ultimately ruled that it would abate its decision pending the outcome of this appeal. R.E. at 17. Aggrieved by the Warren County Circuit Court's denial of its motions for summary judgment, the Silica Companies appealed to this Court for interlocutory relief.

Standards of Review

For the general issue of summary judgment, the "Court employs a *de novo* standard of review of a lower court's grant or denial of a summary judgment and examines all the evidentiary matters before it—admissions in pleadings, answers to interrogatories, depositions, affidavits, etc.," as well as reviewing the record. *McMillan v. Rodriguez*, 823 So.2d 1173, 1176-77 (Miss. 2002).

In terms of addressing the construction of the wrongful death and savings statutes, "[w]hen the language used by the legislature is plain and unambiguous . . . and where the statute conveys a clear and definite meaning . . . the Court will have no occasion to resort to the rules of statutory interpretation." *National Union Fire Ins. Co. v. Mississippi Ins. Guar. Ass'n*, 990 So.2d 174, 180 (Miss. 2008) (internal quotations and citation omitted).

For the statute of limitations issue, "[t]his Court reviews . . . under a de novo standard." *Champluvier v. Beck*, 909 So.2d 1061, 1063 (Miss. 2004).

Summary of the Argument

Ruby Kelley and the family of David Bozeman have one primary issue in this interlocutory appeal. Under recent Mississippi case law, the Silica Companies' active and heavy litigation after this suit was filed in Warren County mandate that they have waived any argument regarding Ms. Kelley's standing or the statutes of limitation. The affirmative defense of standing was explicitly waived, as none of the Silica Companies raised it in their Answers.

In response to the Silica Companies' two issues on appeal, Mississippi statutory and common law explicitly allow for an executrix to pursue a cause of action for wrongful death, even if an estate is not yet opened. In regards to the common-law marriage between Mr. Bozeman and Ms. Kelley, only a jury may make the factual determination if they were married. Further, recent case law makes clear that the statute of limitation regarding wrongful death does not begin to run until death. Third, the law is clear that a pending suit tolls the statute of limitations for the duration the suit is filed.

Last, the savings statute has saved actions just like this for almost a century, and to apply it in the same fashion as 1854 would work injustice on individuals and businesses alike. There are also other remedies available that could cure any deficiencies, such as the substitution of new parties, that are far less draconian than dismissal.

Argument

I. The Silica Companies Have Waived Any Claims Regarding Standing or Statutes of Limitation by Engaging in Active and Heavy Litigation and by Failing to Raise an Affirmative Defense.

Because the Silica Companies have engaged in active and heavy litigation in the case at hand, they have waived any claims that Ruby Kelley does not have standing to pursue this claim, or that the statute of limitations bars recovery. Further, the Silica Companies cannot even make the claim that Ruby Kelley does not have standing, because this affirmative defense was never asserted in their respective answers, therefore waiving the defense.

A. The Silica Companies Waived the Affirmative Defense of Standing.

The Silica Companies have waived their affirmative defense of standing by failing to assert it in their Answers. Mississippi Rule of Civil Procedure 8(c) requires that in filing an Answer, "a party *shall* set forth affirmatively" its defenses, a laundry list of which is provided by the rule, as well as "*any other matter* constituting an avoidance or affirmative defense." (emphases added). The list is therefore not exhaustive, but adamant that all affirmative defenses must be listed. Failure to raise an affirmative defense results in its waiver. *Pass Termite and Pest Control, Inc. v. Walker*, 904 So.2d 1030, 1033 (Miss. 2004).

In that case, now-Presiding Justice Carlson noted that "[t]he general rule is that affirmative defenses must be raised *in a party's answer*," and provided a further list of defenses which were at risk of waiver if not affirmatively raised: statute of frauds, contracts unenforceable under public policy, *res judicata*, and so forth. *Id.* at 1033 (emphasis added). The Court ultimately held that the omitted affirmative defense in that case, one to invoke arbitration, was waived. *Id.* at 1035.

The general rule is that "a defense . . . is waived if not timely and adequately pleaded." *Hertz Commercial Leasing Div. v. Morrison*, 567 So.2d 832, 834 (Miss. 1990). "The reason for

the rule is familiar and goes to the point of fairness," for if a party is going to assert a defense, "he should be required to tell his plaintiff so that his plaintiff would have fair opportunity to study the matter and try persuading the trial court the defense ought not prevail." *Id.* at 834. "If a matter is an affirmative defense, the defendant bears the burden of production and the risk of non-persuasion." *Id.*

In their Statement of Issues on Appeal, the Silica Companies asked "[d]oes a decedent's girlfriend—without court approval or authorization—have standing to file an action under the survival statute and/or the wrongful death statute?"[2] No such defense was asserted anywhere in the Answers of any of the three Silica Companies, the bloated pleadings which span multiple pages with 65 separate defenses. That Ruby Kelley could not file suit on behalf of Mr. Bozeman under the wrongful death statute appears nowhere in the elaborate and identical lists of dozens of affirmative defenses. Nor did the Silica Companies "tender[] an amendment, which [it might] have done even after judgment," to add in the omitted affirmative defense. *Hertz*, 567 So.2d at 834. Nor was Ms. Kelley's standing as Mr. Bozeman's common law wife challenged until well over a year later, on August 6, 2008.

Standing is an affirmative defense that must be raised in the Answer or waived. While there is no Mississippi case on point, 12 state and federal courts from Florida to Wisconsin, Texas to New York all agree: raise it or waive it.[3]

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[2] We ignore, for the moment, the characterization of Ms. Kelley as a "girlfriend," since it is undisputed that she is the executrix of Mr. Bozeman's estate.

[3] *See Glynn v. First Union Nat. Bank*, 912 So.2d 357, 358 (Fla.App. 4 Dist. 2005) ("There is no question that lack of standing is an affirmative defense that must be raised by the defendant and that the failure to raise it generally results in waiver") (internal quotation and citation omitted); *Greer v. Illinois Housing Development Authority*, 524 N.E.2d 561, 582 (Ill. 1988) ("lack of standing in a civil case is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court"); *20th Century Fiberglass v. Indiana State Bd. of Tax Com'rs*, 683 N.E.2d 1376, 1377 (Ind.Tax Ct. 1997) ("a challenge to standing is an affirmative defense"); *Frank Coluccio Const. Co. v. City of Springfield*, 779 S.W.2d 550, 552 (Mo. 1989) (parties cautioned not to "overlook[] the rule that standing is an affirmative defense for the [defendant] to raise and prove"); *Dougherty v. City of Rye*, 473 N.E.2d 249, 250-51 (N.Y. 1984) ("arguments that plaintiffs lack standing to raise any issue . . . were not asserted in the . . . answer . . . and

The great wealth of the law is clear. The defense of lack of standing is an affirmative defense that must be asserted in an Answer or waived. The Silica Companies never presented it in their Answers, nor did they seek to amend their Answers to include such a defense. Like the affirmative defenses in *Walker* and *Hertz*, it is therefore waived, as is any argument on appeal.

B. The Silica Companies Failed to Timely and Reasonably Raise and Pursue the Enforcement of the Defenses of Standing and Statutes of Limitation.

The Silica Companies' attempts to claim that the statute of limitations and standing barred the claims are also waived. In Mississippi, "[a] defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180 (Miss. 2006).[4] The Court has enumerated three factors to be considered: first, where "there is a substantial and unreasonable delay in pursuing the right;" second, when that delay is "coupled with active participation in the litigation process;" and last, "prejudice to the party resisting [the motion to dismiss or arbitrate] is a factor to be considered."

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have thus been waived"); *Contrail Leasing Partners, Ltd. v. Executive Service Corp.*, 688 P.2d 765, 767 n.2 (Nev. 1984) (standing defense was waived, as the defendant "failed to plead any such affirmative defense in its answer to [the] cross-claim and failure to so plead constitutes waiver"); *Merrick v. Peterson*, 548 S.E.2d 171, 173 (N.C.App. 2001) (in dicta, noting that standing was an "affirmative defense" presented in the lower court); *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 438 (Ohio App. 1986) ("Standing is an affirmative defense"); *Faulkner v. Bost*, 137 S.W.3d 254, 259 (Tex.App.-Tyler Div. 2004) ("Lack of standing is an affirmative defense"); *Coty v. Ramsey Associates, Inc.*, 546 A.2d 196, 208 (Vt. 1988) (issue of standing would not be considered on appeal because "it constitutes an affirmative defense which was not raised specifically and in a timely manner"); *In re Jaynes*, 377 B.R. 880, 886 (Bkrtcy.W.D.Wis. 2007) (citing to Wisconsin state law for the proposition that "lack of standing is an affirmative defense"); *LINC Finance Corp. v. Onwuteaka*, 129 F.3d 917, 922 (7th Cir. 1997) (where party "attempted to raise" an issue regarding standing "for the first time in his opposition to summary judgment," it would be disregarded, as "[s]uch an affirmative defense must be raised in the answer or it is waived"); 61A Am. Jur. 2d *Pleading* § 316 ("A challenge to standing is an affirmative defense, and is generally waived if not raised at the trial court level"). *But see Hubbard v. Department of Transp.*, 568 S.E.2d 559, 568 (Ga.App. 2002) (where standing was not considered an affirmative defense, it was because Georgia statute specifically enumerates the list of affirmative defenses which can be plead or waived, and standing is not among them).

[4] While *Horton* involved the waiver of an arbitration contract, the Court was careful to add that its "holding today is not limited to assertion of the right to compel arbitration," but extended to all other civil litigation as well. *Horton*, 926 So.2d at 180.

Id. at 180, 180 n. 7; *see also Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 724 (Miss. 2002) (internal citations and quotations omitted) ("to establish a waiver, the objector . . . must establish "that a party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party").

When these three factors are present, the Court "will not hesitate to find a waiver" of the issue. *Horton*, 926 So.2d at 180; *see also East Miss. State Hosp. v. Adams*, 947 So.2d 887, 891 (Miss. 2007) (finding waiver when a defendant "participated fully in discovery, filed and opposed various motions," and that participation took place "for over two years"). There is a compelling reason such a result is warranted: the threat of waiver conserves judicial resources and the resources of the litigating parties. To do otherwise would be to encourage needless and duplicative litigation that stretched over years—benefitting no one but the parties defending the litigation and those paid to defend it.

Each factor relating to waiver will be examined in turn.

1. The Silica Companies Unreasonably Delayed Pursuing their Affirmative Defenses.

While some of the defendants in this case immediately sought summary judgment or motions to dismiss based upon their affirmative defenses, the Silica Companies failed to pursue their arguments, which resulted in waiving them.

As noted extensively in Section I-A above, the Silica Companies never raised the affirmative defense of standing in their Answer, resulting in the waiver of that defense. Contrary to the affirmative defense of standing, each of the three Silica Companies did assert in one of their sixty-five defenses that the statute of limitations had run.

Yet it took well over a year since the Complaint was filed for the Silica Companies to pursue their defense that the statute of limitations had run, dragging their feet while engaging in complex and heavy litigation until June 18, 2008. It took roughly 430 days from the time the

Silica Companies Answered until they decided to assert their affirmative defense, and only *after* already filing one motion for summary judgment, and engaging in active and heavy litigation for well over a year.

This is in contrast to their earlier actions in filing a motion for summary judgment on an unraised affirmative defense, and in the actions of a defendant not a party to this appeal. The day Defendant Schramm, Inc., served its Answer, it also filed a motion for summary judgment. R. at 3. Yet the Silica Companies perpetrated a substantial and unreasonable delay in pursuing their affirmative defense of statutes of limitation, which could have been immediately invoked, as Schramm did with its immediate pursuit of an affirmative defense.

In the 430 days between asserting the affirmative defense and filing a motion for summary judgment, the Silica Companies engaged in heavy written discovery (as set out in Section I-A, supra), filed a motion for summary judgment based upon an unraised affirmative defense, deposed the Plaintiff, Ruby Kelley, as well as a second fact witness, and filed numerous other pleadings.

Like the defendant in *Horton* who attempted to untimely raise an affirmative defense, this substantial and unreasonable delay has resulted in a waiver of the defense of statute of limitations.

2. The Silica Companies Actively Participated in the Litigation Process.

The ample trial docket makes the case: the Silica Companies actively engaged in the litigation process for the better part of two years.

In *Horton*, waiver was found when the "defendants proceeded to substantially engage the litigation process by consenting to a scheduling order, engaging in written discovery, and conducting [the plaintiff's] deposition." *Id.* at 180. In its close cousin, *East Mississippi State Hospital v. Adams*, waiver was found when a defendant "participated fully in discovery, filed

and opposed various motions," and that participation took place "for over two years." 947 So.2d at 891. At the state Court of Appeals, waiver was found where a party "engaged in written discovery and in settlement negotiations and noticed [the plaintiff's] deposition" over a two-year period. *Whitten v. Whitten*, 956 So.2d 1093, 1099 (Miss. Ct. App. 2007).

Like *Horton*, *Adams*, and *Whitten*, this case involved heavy litigation over an extended period of time. In the case at hand, the docket—which runs to fifteen pages, at 3-17 of the Record—is stuffed full of litigation by all three Silica Companies, which traversed one year and six months, or well over 500 days.[5] Those three cases look at five components of litigation: first, whether the party participated in discovery; whether a scheduling order setting the course of litigation was consented to; whether motions were filed and opposed; if depositions were taken; and the time involved in the litigation. In the case at hand, all five of those instances are present.

As set out on the docket and the Procedural History above, the Silica Companies all participated in written discovery, as in *Horton*, *Adams*, and *Whitten*. On April 27, 2007, Clemco and P.K. Lindsay filed a notice that they had sent interrogatories, requests for productions, and requests for admissions to Ms. Kelley. These massive pleadings demanded that Ms. Kelley answer well over a hundred interrogatories, plus sub-parts, which were loaded with personal questions, many of which had little or no relevance to the proceedings.[6] Later, Clemco and Clark Sand separately made a "notice of filing" regarding discovery, responded to Ms. Kelley's

[5] This case would have inarguably taken longer if the majority of it had not been litigated in the four years Mr. Bozeman's previous case was on file in Holmes County.

[6] Mississippi Rule of Civil Procedure 33(a) requires that interrogatories are "not to exceed thirty in number," and that "[e]ach interrogatory shall consist of a single question." In one case, where a party propounded interrogatories that, counting the subparts, totaled over 130 questions, the Mississippi Supreme Court found that such discovery was "in fact, grossly excessive in number, unduly burdensome, oppressive, confusing as drafted, and fail[ed] to comply with the above stated rules of civil procedure." *Miss. Farm Bureau Mut. Ins. Co. v. Parker*, 921 So.2d 260, 261, 266 (Miss. 2005). In the case at hand, counting subparts, the interrogatories contain well over 130 questions, spiraling towards 170.

request for admissions, again filed a notice of service regarding their answers to written discovery, and motioned to compel discovery.

This participation in written discovery all occurs *before* the Silica Companies motioned the court for summary judgment based upon the statute of limitations, in June of 2008. Later, the Silica Companies would also file a motion to compel Ms. Kelley's answers to various requests for admission, a motion filed in August of 2008.

Further like *Horton*, *Adams*, and *Whitten*, there was also an agreed scheduling order between all parties, and even after the trial court denied summary judgment, there was a amended *agreed* scheduling order, consented to by both Ms. Kelley and the Silica Companies. All parties stipulated to an Agreed Order Setting Trial, which was to occur by consent of all parties between September 29, 2008, and October 8, 2008.

Like the three waiver cases, the Silica Companies also filed motions and opposed them, engaging in active litigation. The Silica Companies filed two motions to compel, and Clark Sand filed a separate motion for summary judgment based on the plaintiff's theories of breach of warranty (an issue wholly separate from this appeal) after the trial court had denied summary judgment as to standing and statutes of limitation. On August 15, 2008, the Silica Companies also joined in a motion to disclose confidential settlements with other defendants, as several had previously settled their disputes with Ms. Kelley. Additionally, the Silica Companies also sought two separate subpoenas *duces tecum* for the production of documents from non-parties, one for the Godwin Group, an advertising agency in Jackson, and another for the Mansville Trust of Virginia.

Perhaps most damning, all three Silica Companies jointly filed a "Motion for Jury Questionnaire and Selection Process," which requested that the jury pool fill out a prepared questionnaire in advance of trial, alleging that "[a] substantial portion of the jury pool in Warren

County has potential bias in occupational duty cases." Clark Sand and P.K. Lindsay even designated portions of two different deposition transcripts to be used at trial. After all, the trial was set for the week of September 29—just a few days away. The Silica Companies also joined a motion to delay the trial.

The Silica Companies also actively engaged in taking depositions, just as in *Horton* and the other waiver cases. Ms. Kelley was deposed by the Silica Companies, as was a co-worker of Mr. Bozeman, Mr. Bill Dykes. All of this active and heavy litigation was stuffed into a year and a half—abbreviated, no doubt, because of the work done in the previous litigation.

Neither do the two cases which did not find waiver apply in this situation. In *Chimento v. Fuller*, the Court declined to hold a waiver against a party which never had the ability "to respond and allege his affirmative defenses," and where waiver was claimed by a party who had "never filed any pleadings in the case, nor [sought] to intervene in the case." 965 So.2d 668, 677 (Miss. 2007). In the case at hand, each of the Silica Companies have filed multiple pleadings in the case, and have had ample time to respond and allege their affirmative defenses. The unusual case of *Chimento* does not apply in this instance.

Nor does a recent Court of Appeals decision provide the Silica Companies with respite. When there was "only minimal participation in the litigation," the Court of Appeals held there was no waiver. *Lucas v. Baptist Memorial Hosp.-North Miss., Inc.*, 997 So.2d 226, 233 (Miss. Ct. App. 2008). There, the defendant hospital had only "filed an acknowledgment of receipt of summons and complaint, answered the complaint . . . filed a motion to dismiss for improper venue," and responded to one motion and issued a handful of subpoenas. *Id.* at 233. Ultimately, the Court of Appeals found *Lucas* "distinguishable from both *East Mississippi State Hospital* and *Whitten,* cases in which the defendants participated in lengthy and extensive discovery," pointing out that "unlike the defendants in *Whitten,*" the defendant "did not participate in any

settlement negotiations or depositions." *Id.* at 233. In this case, that situation is more akin to the Schramm company, who immediately pursued their affirmative defenses via motion for summary judgment.

Ultimately, the docket and ample pleadings demonstrate that the Silica Companies actively participated in litigation for over a year and a half, which results in a waiver of their affirmative defenses.

3. The Silica Companies' Untimely Pursuit of Waived Defenses Resulted in Prejudice to Ms. Kelley.

Ms. Kelley was substantially prejudiced by the untimely presentation of the Silica Companies' affirmative defenses. Mr. Bozeman's case was originally filed on September 23 of 2002. In May of 2007, the Silica Companies had agreed that the trial would occur in September and October of 2008—almost exactly six years to the date from filing, and over three years since Mr. Bozeman passed away. Even as the Silica Companies glutted the docket with trial preparation, filing motions, and pushing for more discovery from Ms. Kelley, as well as taking multiple depositions, they formulated a last-ditch effort to again delay the case. At the same time, counsel for Ms. Kelley was diligently preparing for a multi-day trial in Warren County.

Three years since her husband's death from lung cancer, and six years since he first filed suit, Ruby Kelley was eleven days from trial when this Honorable Court granted permission for this interlocutory appeal. The very essence of prejudice is losing an agreed-upon trial date that is just days away, after litigation that has gone on for six years.

Just like the defendants in *Horton*, *Adams*, and *Whitten*, the Silica Companies engaged in protracted and heavy litigation without pursuing their affirmative defenses. Like *Walker*, they cannot even raise standing as an issue, as it was never presented as an affirmative defense. For these reasons, this Honorable Court should find that the issues presented on interlocutory appeal

by the Silica Companies are waived, dismiss this appeal, and remand back to the Warren County Circuit Court for an immediate trial upon the merits.

II. Ms. Kelley Has Standing to File Suit under the Wrongful Death Statute.

Under recent case law, as the executrix of the estate, Ruby Kelley is explicitly granted the right to pursue a cause of action for the wrongful death of Mr. Bozeman. The Mississippi Supreme Court has been crystal clear that there is no requirement that an estate must be opened or probated for proper standing. Further, recent case law also makes clear that the Wrongful Death statute does not begin running until the time of death. Last, the common-law marriage of Mr. Bozeman and Ms. Kelley further cements her standing to pursue a wrongful death lawsuit as a beneficiary.

A. Ms. Kelley Is a Personal Representative of the Estate of Dave Bozeman, and under the Wrongful Death Statute and *Long* An Executrix Has Standing Even If The Estate Is Not Yet Opened.

The Mississippi Wrongful Death statute and binding precedent is crystal clear that there is no requirement for chancery court approval to pursue a wrongful death claim. Oddly, the Silica Companies' main argument regarding standing rests on an assumption that there must be chancery court approval first.

The language of the Wrongful Death statute *explicitly states* that there is no requirement to open the estate first. In relevant part, it reads:

> In an action brought pursuant to the provisions of this section by the widow, husband, child, father, mother, sister or brother of the deceased or unborn quick child, or by all interested parties, such party or parties may recover as damages property damages and funeral, medical or other related expenses incurred by or for the deceased as a result of such wrongful or negligent act or omission or breach of warranty, *whether an estate has been opened or not.*

Miss. Code Ann. § 11-7-13 (emphasis added); *see also Wilks v. American Tobacco Co.*, 680 So.2d 839, 843 (Miss. 1996) ("This language allows the heirs to bring a wrongful death suit without regard to administration of the estate").

In support of their argument, the Silica Companies avoid the plain language of the statute and cherrypick out one line from Justice Dickinson's extensive history of wrongful death law in Mississippi and Great Britain, that "[a]s is true in all estates administered through the chancery court, chancery approval is required for the appointment of the personal representative of the estate, whether executor, executrix, administrator or administratrix." *Long v. McKinney*, 897 So.2d 160, 174 (Miss. 2004). The Silica Companies then move on to proclaim that there is no standing.

Yet the *very next line* of the unanimously-decided case notes that "[t]here is no general requirement under law that the personal representative obtain chancery approval to pursue the claims of the estate in the litigation." *Id.* "Nor is there a general requirement that counsel representing the personal representative and the estate in the litigation obtain prior chancery approval of such representation or the agreement for compensation of counsel," noted the Court, although it did suggest that "obtaining such prior approval is a widely accepted and wise practice," as it could reduce the future complexity of the case. *Id.*[7] As the Court put it most succinctly at the beginning of *Long*, implicitly recognizing the plain language of the statute: "There is no requirement of chancery court approval in order to pursue a wrongful death claim." *Id.* at 166 n.4.[8]

There is simply no issue here. *Long* is utterly in line with the clear and plain binding language of the Wrongful Death statute. It is true; Ruby Kelley did not open the estate of which she was executrix before filing suit in Warren County. Under Mississippi statute, and under the

[7] It must be noted that the main issue in *Long* was the inherent conflicts of interest between dueling lawsuits; both the executrix of an estate and the decedent's family had filed separate suits, resulting in the appeal. *Long*, 897 So. 2d at 165-67. There is no such conflict in the case at hand.

[8] For pre-*Long* cases where an administratrix was allowed to bring suit as a "personal representative" under the previous Wrongful Death Statutes, *see J.J. Newman Lumber Co. v. Scipp*, 128 Miss. 322, 91 So. 11, 11, (Miss. 1922); *Mississippi Power & Light Co. v. Smith*, 169 Miss. 447, 380, 153 So. 376 (Miss. 1934); *see generally Miss. Law of Damages* § 36:2 (3d ed.) (where Professor Johnny Parker, writing pre-*Long*, notes that "[g]enerally, the first person to file an action, whether it is the *personal representative of the estate* or a beneficiary, is entitled to recover for all damages due in the one action") (emphasis added).

clear mandate of *Long*, this simply does not matter. Had the Silica Companies read the Wrongful Death statute, or one more sentence past their cherrypicked phrase, this issue would not be before the Court.

Further, as the plain face of the wrongful death statute reads, "[t]he action for such damages may be brought in the name of the personal representative of the deceased person . . . ." Miss. Code Ann. § 11-7-13. As it later sets out, "the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover." Miss. Code Ann. § 11-7-13. It was this "personal representative" language that was implicitly recognized in *Long*, as well as the more explicit parts of the statute that do not require an estate to be opened.

At part III of their Brief, the Silica Companies argue that Ms. Kelley has no standing as she is not a "personal representative" of the estate. This argument has no basis in fact or law. As this Court noted many moons ago, "[a]n executor derives his authority from the will," and so "his interest is completely vested at the testator's death." *Ricks v. Johnson*, 134 Miss. 676, 99 So. 142, 146 (Miss. 1924) (internal quotations and citations omitted); *accord In re Estate of Carter*, 912 So.2d 138, 144 (Miss. 2005) ("The will is the source and measure of the power of the executor") (citing *Ricks*).

By virtue of the legal power invested in her by the will—which no party contests—as executrix, Ruby Kelley *is* the "personal representative" who can file suit under the wrongful death statute.

As now-Presiding Justice Graves once noted for the Court, "[t]he ancient maxim of '*expressio unius est exclusio alterius*' . . . acknowledges the inference that items not mentioned are excluded by deliberate choice, not inadvertence." *USF&G Ins. Co. of Miss. v. Walls*, 911 So.2d 463, 466 (Miss. 2005). It is the same with our Wrongful Death statute—the Legislature consciously and deliberately stated that a wrongful death case could be pursued "whether an

estate has been opened or not," as well as it chose the words "personal representative," not "executrix who has been duly appointed by a chancery court." It has long been understood that the personal representative referred to the administrator, administratrix, executor, or executrix of the will. The wrongful death statute does not read that only a "personal representative *who has been duly appointed by a chancery court*" may file suit; instead, it specifically uses broad language allowing a suit to proceed by a "personal representative" whether there is an estate or not.[9]

Further, the Mississippi Supreme Court has announced time and again it "is fully committed to the deference due the legislature in creating the laws of this state," and that it "possess[es] no power or authority to legislate, which includes the power to create and amend substantive law," including rewriting statutes. *Long*, 897 So. 2d at 183 (Appendix B).

Nor does the a recent wrongful death case involving a grand-nephew aid the Silica Companies. Last year, a divided court affirmed that a grand-nephew did not have standing to open an estate. *See Delta Health Group, Inc. v. Estate of Pope ex rel. Payne*, 995 So.2d 123, 125-26 (Miss. 2008). In that case, the grand-nephew had fraudulently filed a complaint stating that he was the nephew of the decedent; he later fraudulently obtained letters testamentary under the same guise. *Id.* at 124. Yet he later testified he was actually the decedent's grand-nephew. *Id.*

Citing explicitly to *Long v. McKinney*, the Court found that the grand-nephew did not have standing, as there was no will for him to benefit under, and thus he could have not have had standing at the time the suit was filed. *Id.*

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[9] Additionally, as Justice Dickinson noted in *Long*, some states actually require "that *only* the personal representative may file a wrongful death suit." 897 So. 2d at 178 n.20 (emphasis added). *See* M.G.L.A. 229 § 1 (stating that in Massachusetts, wrongful death suits are "an action of tort commenced within two years after the injury causing the death by the executor or administrator of the deceased person"); N.C.G.S.A. § 28A-18-2 (setting out that in North Carolina "an action for damages [is] to be brought by the personal representative or collector of the decedent").

B. Only a Jury May Decide Whether Ms. Kelley and Mr. Bozeman Were Married.

Under clear precedent established by Alabama law, a jury must resolve the factual issue of whether Ms. Kelley was the common-law wife of Mr. Bozeman at the time of his death, a status which would give her automatic standing under the Wrongful Death Statute. Indeed, because no jury has passed on this question yet, this component of the appeal is not yet ripe.

According to a April 2, 2009 order of the Circuit Court of Choctaw County, the State of Alabama has abated its decision regarding the existence of a common-law marriage between the couple for the Mississippi trial court.[10] While the Silica Companies spill much ink fretting over how Mississippi courts have addressed common law marriage; the answer is much less complicated. It is not a Mississippi marriage—we do not recognize such a marriage for our citizens[11]—but rather, one stemming from a relationship in Alabama, where this type of marriage is still allowed in the modern day, and where Mr. Bozeman and Ms. Kelley lived together as husband and wife. *See generally Arnold v. Arnold*, 977 So.2d 501, 508 (Ala.Civ.App. 2007) (addressing the three elements of common law marriage in Alabama). [12]

In Alabama, whether a couple had a common-law marriage is a "question of fact" to be resolved by a jury. *See Gray v. Bush*, 835 So.2d 192, 194 (Ala.Civ.App. 2001); *Mickle v. State*, 21 So. 66, 67 (Ala. 1896) (the intricacies of whether divorced couple was later married under the common law "were questions for the jury"). Citation is scarcely needed for the rule that "on questions of fact, the jury resolves those questions . . . ." *Middleton v. Evers*, 515 So.2d 940,

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[10] A previous order of that trial court, which is referenced in the Silica Companies' brief, was indeed vacated. It was vacated because the trial judge wished to hear the thoughts of Mr. Bozeman's children; they have not contested the matter, recognizing Ms. Kelley as their father's wife.

[11] Mississippi rid herself of common law marriage in 1956. *See Gaston v. Gaston*, 358 So.2d 376, 378 (Miss. 1978). In that case, this Honorable Court unanimously found that the wife had "met the burden of proof which was squarely placed on her," and agreed with the trial court that she and her husband had been married, and had been recognized as married since the wedding they had on her parent's porch one morning in 1925, when she was fourteen, on the day her intended gave the preacher two bucks to perform the ceremony. *Id.* at 378-79.

[12] Indeed, in our sister state to the East, one may even seek a divorce from such a marriage. *See Cochran v. Chapman*, -- So. 2d --, 2008 WL 5424075, *1 (Ala.Civ.App. Dec. 31, 2008).

945 (Miss. 1987). Accordingly, a jury in Warren County should properly resolve the question of whether the couple was married under the common law.

The Silica Companies are correct to the extent they state that the *Gaston* case states "[a] claim of [common law] marriage is regarded with suspicion and will be closely scrutinized," but that case was about a Mississippi common law marriage, brought decades after our Legislature abolished the concept. 358 So.2d at 378. In the case at hand, there is no "claim" to a common law marriage brought in a State which no longer recognizes it, but rather a jury question under the law of a state which continues to allow and recognize common-law marriage.

Accordingly, whether Ruby Kelley and Dave Bozeman had a common-law marriage is a question of fact for the jury in the trial court below, and this Honorable Court must allow the trial court to first address this matter. As a marriage between the two would dispose of a major component, if not all, of this appeal, it is critically important that this issue is resolved by the trial court. Until such time, any appeal on this issue is not yet ripe.

C. Ms. Kelley Is an "Interested Party" under the Wrongful Death Statute.

The Wrongful Death Statute also has a broadly-written catchall provision. After specifically enumerating that the personal representative and certain family members may file a suit, the statutes sets forth that "all parties interested may join in the suit." Miss. Code Ann. § 11-7-13. In denying the motion for summary judgment, the trial court explicitly ruled that even if Ms. Kelley were no the "personal representative of Mr. Bozeman . . . she certainly would be an interested party, and therefore did have standing to file this cause . . . ." R. at 718.

The statute—old and unwieldy, with language that continues to baffle courts and litigants alike—must yet be given deference. "The primary rule of construction is to ascertain the intent of the legislature from the statute as a whole and from the language used therein." *National Union Fire Ins. Co. v. Mississippi Ins. Guar. Ass'n*, 990 So.2d 174, 181 (Miss. 2008) (internal

quotations and citation omitted). The Legislature clearly drew in a catchall to pad out its complicated Wrongful Death Statute. It must be given the full effect of the rest of the statute.

Here, as the trial court held, Ms. Kelley is clearly an "interested party" in this case. It is without contest that she is the executrix of Mr. Bozeman's estate, and while it is a jury question whether they were married at the common law, she was his avowed life mate and caretaker, present at the hospital throughout his illness and at his death. The Legislature drew a catchall, and it was meant for situations like this one.

Ms. Kelley therefore has standing to file suit as an "interested party."

III. The Statutes of Limitations Have Not Run on Any of the Claims in This Suit.

There are several statutes of limitation in the case at hand—those which began running while Mr. Bozeman was alive and those which began upon his untimely death—and none have expired. Further, Mississippi case law holds that a statute of limitation remains tolled during a previously-filed lawsuit.

A. The Wrongful Death Statute Does Not Begin Running Until Death.

This Court has recently underscored a long-understood fact: that the statute of limitations does not begin until the death of the victim.

In Section IV of its brief, the Silica Companies argues that clock started running on any wrongful death claims at the time of Mr. Bozeman's diagnosis with silicosis in 2002. In support of this brief section, they cite one case, and one only, for the premise that "the gravamen of the [wrongful death] claim is the negligent act which led to the death," and that any "claims occurring more than three years prior to the filing of the wrongful death lawsuit should be dismissed." Brief at 14. The case is *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923, 925, 927 (Miss. 2006).

Yet like the cherrypicking of phrases in *Long*, the Silica Companies stop reading when the law stops saying what they want. *Jenkins* caused a surprising disruption among the trial bar, with attorneys for plaintiffs saying it destroyed causes of action, and attorneys for defendants saying that—well, it destroyed causes of action. More precisely, rather shallow arguments were made that the statute of limitations on *all* components of a wrongful death claim started the moment any negligence occurred—even if the person claiming negligence was not yet dead.

As the Court later took pains to note, this is not the case. Instead, *Jenkins* followed in a long line of cases holding that "[i]n a suit under the wrongful-death statute, there may be *several* different kinds of claims, and each kind of claim is subject to its *own* statute of limitations." *Univ. of Miss. Medical Cntr. v. McGee*, 999 So.2d 837, 840 (Miss. 2008) (emphases added). Simply put, "[t]he limitation period begins to run on the earliest date *all of the elements of a tort are present.*" *Id.* (emphasis added); *accord Caves v. Yarbrough*, 991 So.2d 142, 149 (Miss. 2008) ("The statute of limitations on estate claims does not begin to run until all of the elements of an estate claim are present").

As the Court further explained, in many cases the statute of limitations does not even *begin to run* until death, such as "where the plaintiff brings a claim that the death resulted in a loss of society and companionship, the statute of limitations begins to run on the date of the death, when the element of damages accrues." *Id.* at 840 n.1. When examining the statute of limitations for wrongful death, the most logical and obvious answer is correct: "the tort is not complete until the final element of the tort manifests and the cause of action is known," which "[a]t the *earliest* . . . is the date of death." *Id.* at 841 (emphasis added).[13]

[13] The Silica Companies' lower court filings make clearer their position is the legally untenable argument that wrongful death claims begin *even before the person has died. See* their *Motion for Summary Judgment*, in Record at page 42 (Arguing that because "Bozeman was allegedly diagnosed with silicosis on June 2, 2002 . . . the statute of limitations on a wrongful death claim began to run as of that date," even though Mr. Bozeman did not pass away until years later). This is not the law.

If the Court did follow the Silica Companies' view of *Jenkins* and wrongful death, it would create a contrary result to that intended by the law. As recounted by this Court in *Long*, the British judge Lord Ellenborough gutted England's common law regarding wrongful death in a case called *Baker v. Bolton* in 1808. 897 So.2d at 179-80. This had the perverse "result was that it was more profitable for the defendant *to kill the plaintiff than to scratch him*, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy." *Id.* at 180 n.27 (quoting *Prosser and Keeton on the Law of Torts*, §§ 125, 127 (5th ed. 1984) (emphasis added). *Jenkins* and its progeny in no way equivalent to "Lord Ellenborough's blunder in *Baker*," nor should this Court recognize any attempt to write such a perversion into our wrongful death statute. *Id.* at 180.

In the case at hand, no wrongful death action or corollary claim for death even existed until March 11, 2005, when Mr. Bozeman died; at the point, his representative and beneficiaries had three years in which to sue. Suit was filed in Warren County on March 7, 2007, not quite two years into the three year statute. The statute of limitations for wrongful death has not elapsed in this case, and it cannot begin to run until a person has actually died.

B. Causes of Action Are Tolled During Previously-Filed Suits.

In addition to the wrongful death cause of action falling within the statute of limitations, Mr. Bozeman's previous claims are likewise protected from the time bar—as they were previously filed within a matter of months of discovery of the silicosis. Mr. Bozeman's previous suit therefore tolls the statute of limitations.

Jenkins and *McGee* took pains to be precise, and examined each cause of action and its statute of limitation. The Silica Companies seem to argue that Mr. Bozeman's allegations of negligent exposure to silica—which have not been contested in this appeal—were lost upon his death. This is a fundamental misunderstanding of the tolling nature of previously-filed cases, a

factor not at issue in *Jenkins* and *McGee*.

As the Supreme Court has noted, "the filing of a complaint tolls the statute of limitations" to preexisting claims. *Owens v. Mai*, 891 So.2d 220, 223 (Miss. 2005); *see also Holmes v. Coast Transit Authority*, 815 So.2d 1183, 1185 (Miss. 2002) ("Filing a complaint tolls the applicable statute of limitations" for the purpose of service, "but if the plaintiff fails to serve process . . . the statute of limitations automatically begins to run again when that period expires").

It is also well-established that "[t]he statute of limitations is tolled while a misjoined plaintiff's case is pending." *Canadian Nat./Illinois Cent. R. Co. v. Smith*, 926 So.2d 839, 845 (Miss. 2006) (citing to G. Gaggini, *Laches and Limitations, in* 5 *Ency. of Miss. Law* § 44:22 (J. Jackson & M. Miller eds. 2008) ("[a]fter the defendant is served, the limitation period stops running, but begins to run again if the case is dismissed"); see also *Deposit Guar. Nat. Bank v. Roberts*, 483 So.2d 348, 352 (Miss. 1986) ("when the suit to renew was dismissed," the "statute commenced to run again"); and more recently, *Marshall v. Kansas City Southern Railways Co.*, -- So. 2d --, 2009 WL 541331, *3 (Miss. March 5, 2009) (rehearing denied May 7, 2009).

In other words, the filing of a lawsuit immediately stops a statute of limitation from running. When and if a lawsuit is dismissed, the statute begins to run again.[14]

One recent unreported federal case correctly understood and applied this procedure. Judge Pepper, citing *Owens*, examined a case where a woman had filed a claim, dismissed it, and then filed another. *Gray v. Mariner Health Cent., Inc.*, 2006 WL 2632211, *2, 2006 U.S. Dist. LEXIS 65725 (N.D.Miss. Sept. 3, 2006). The defendant nursing home in the case plead that the statute of limitations had run, and filed a motion for summary judgment. *Id.* The Court acknowledged "that 'the filing of a complaint tolls the statute of limitations,'" and noted that

[14] Subject in some cases to the Savings Statute, which will be discussed below.

"the clock stopped" when a plaintiff filed her first complaint. *Id.* "It resumed ticking when the court dismissed the first action without prejudice," and ran again until the filing of the second suit. *Id.* As a result of the tolling period, the federal district court denied the motion for summary judgment. *Id.*

The case at hand is very similar. As the Silica Companies laid out in a brief at the lower court, Mr. Bozeman was diagnosed with silicosis on June 2, 2002. R. at 42. The parties agree that the time period for this action is three years from the date of discovery, or 1,095 days. On September 23, 2002, Mr. McBride filed his original causes of action against the Silica Companies. Between those two dates only 93 days elapsed, leaving 1,002 days left on the statute of limitations for Mr. Bozeman's pre-wrongful death claims.[15] As noted above, this tolls all claims for the pendency of the filed lawsuit.[16] Mr. Bozeman's original case was dismissed, without prejudice, on March 10, 2006, around three years after his original case was filed. At that moment, as noted in *Canadian National Railroad, Roberts*, and the *Encyclopedia of Mississippi Law*, the statute immediately began running again.

A little under a calendar year later, on March 5, 2007, Ruby Kelley filed the instant action. 360 days had elapsed between the previous dismissal in Holmes County and the refiling in Warren County.

Accordingly, there were still 642 days left on the statutes of limitation for Mr. Bozeman's underlying, pre-wrongful death claims. There was ample time, well over a year, left in which to file the suit.

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[15] The Court may find an automatic date calculator, such as http://www.timeanddate.com/date/duration.html, useful in examining these issues.

[16] None of the Silica Companies has asserted in this appeal that they were not properly served by the Complaint; Clark Sand was filed later than Clemco and P.K. Lindsay with permission of the trial court.

More simply:

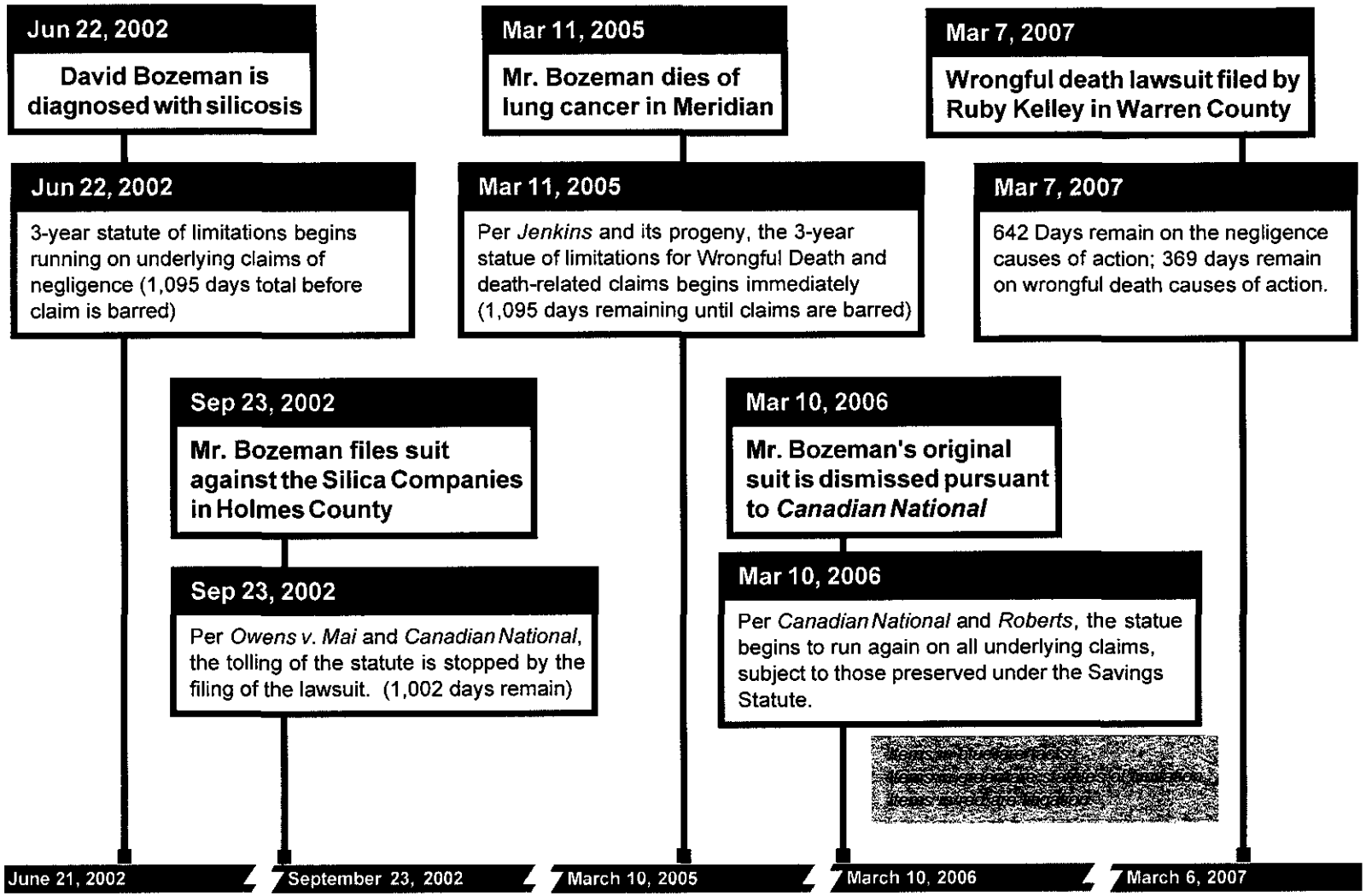
06.22.02 Bozeman diagnosed with silicosis	1,095 Days Remaining on negligence causes of action
09.23.02 Bozeman files original suit	1,022 Days Remaining on negligence causes of action
03.11.05 Bozeman dies of lung cancer	1,095 Days Remaining on wrongful death causes of action
03.10.06 Original Suit is Dismissed	Statute Resumes Running on negligence causes of action
03.07.07 Second Suit Filed By Ruby Kelley	642 Days Remaining on negligence causes of action; 369 days remaining on wrongful death causes of action

See Timeline Chart, *next page following.*

Under Mississippi law, the filing of a complaint tolls the statute of limitations. If a case is dismissed, the statute begins again. In the case at hand, there were still 642 days remaining until the three-year statute for negligence ran out on Mr. Bozeman's underlying claims when Ms. Kelley filed the wrongful death suit. Further, there were 369 days remaining on the wrongful death suit and all related causes of action for that tort.

Because there was ample time remaining, the statute of limitations has not run on the claims asserted by Ms. Kelley on behalf of Mr. Bozeman's estate and his wrongful death beneficiaries, and the instant suit was properly filed. This Honorable Court should reject the contention that the claims are time barred, and remand this case back to Warren County for a full trial on all issues.

Bozeman and Kelley Litigation against the Silica Companies



IV. The Savings Statute Has Saved Actions Like This One for Almost a Century.

The Mississippi Savings Statute was devised to "save" actions that were originally filed incorrectly, and it applies in this case. Even if the statute of limitations had run as to the filing of the second suit, the Savings Statute would still provide one year in which it could be filed.

In relevant part, the statute states that "[i]f any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or *for any matter of form* . . . the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit." Miss. Code Ann. § 15-1-69 (emphasis added). Often the focus of litigation is on the phrase "matter of form," and what types of dismissal are for "matter of form." This case is different: based upon an opinion from 1854, the Silica Companies argue that a second claim is barred when the identity of the parties is different, or when a newly-arisen claim is added.

In this case, the Holmes County Circuit Court ordered Mr. Bozeman's original suit was dismissed pursuant to *Canadian National Railroad*, which is cited in that memorandum. R. at 273. The Supreme Court made clear in that case that a "dismissal of a plaintiff's 'duly commenced' case based solely on misjoinder and improper venue would constitute dismissal for a matter of form, bringing into play the provisions" of the Savings Statute. *Canadian Nat./Illinois Cent. R. Co.*, 926 So.2d at 845. Accordingly, this case fits snugly under the protection of the Savings Statute, as it was originally dismissed pursuant to *Canadian National Railroad*, and the action is "saved." From 1915 to 2009, this Court has liberally construed the statute to "save" cases like Ms. Kelley's. The Savings Statute should continue to be interpreted in this manner.

The Court most recently interpreted the Savings Statute around three months ago, in *Marshall v. Kansas City Southern Railways Co.*, -- So. 2d. --, 2009 WL 541331 (Miss. March 5,

2009) (rehearing denied May 7, 2009). There a unanimous Court reinforced two major historical components of the Savings Statute: first, that "the statute is highly remedial and ought to be liberally construed." *Id.* at *4 (internal quotations and citations omitted). Second, that "[g]ood faith in the institution of the action dismissed is an element in determining the right to invoke the statute," as "good faith is an element to consider in determining the right to invoke the savings statute." *Id.* at **4, 6 (internal quotations and citations omitted). Two months after the decision, this Court declined to rehear the case.

Marshall drew heavily on a past Mississippi opinion named *Hawkins v. Scottish Union & National Ins. Co.*, 110 Miss. 23, 69 So. 710 (Miss. 1915). In that case this Court, culling the words of a 1903 West Virginia opinion, first noted that our Savings Statute was "a highly remedial statute and ought to be liberally construed for the accomplishment of the purpose for which it was designed, namely, to save one who has brought his suit within the time limited by law from loss of his right of action by reason of accident or inadvertence." *Id.* at 712. The Court went on to hold that "it would be a narrow construction of that statute to say that because, if plaintiff had, by mistake, attempted to assert his right in a court having no jurisdiction, he is not entitled to the benefit of it." *Id. Hawkins* also adopted the U.S. Supreme Court's test that "good faith in the institution of the action dismissed is an element in determining the right to invoke the statute." *Id.*

Specifically, and of paramount importance to this case, the *Hawkins* court stated: "we think one of the designs of the statute . . . is to protect parties who have mistaken the forum in which their causes should be tried, who have simply entered the temple of justice by the door on the left, when they should have entered by the door on the right." *Id.* at 712; *see also Ryan v. Wardlaw*, 382 So. 2d 1078, 1080 (Miss. 1980) (quoting *Hawkins*). This case, and the meaning of the Savings Statute, was reapproved just March 5, 2009, by this Honorable Court.

Mr. Bozeman's claim was originally filed in good faith in Holmes County; Ms. Kelley's later suit, filed in good faith compliance with the Holmes County Circuit Court's Order in accordance with *Canadian National Railroad,* was filed in Warren County. She should not be punished for complying fully with statutory and common law, as well as the Order of the Holmes County trial court, and the claims in the second suit should not be dismissed for nothing save a name change. Nor does it matter that newly-arisen claims were added to the action, as *Jenkins* and *McGee* make clear that those claims are not ripe until death, and are required to be brought in one suit. *See* Section III-B, supra.

Despite the fact that *Canadian National Railroad* explicitly states that the Savings Statute applies, and that this case was dismissed pursuant to that case, the Silica Companies posture that the statute is inapplicable. Their fuel is a case decided over sixty years before the recently-reapproved law of *Hawkins*, a pre-Civil War case decided just 37 years after Mississippi became a state, while our Supreme Court was still called the High Court of Errors and Appeals of Mississippi, and 126 years before we adopted our Rules of Civil Procedure. *Ross v. Sims*, 27 Miss. 359, 1854 WL 3547 (Miss.Err.App. 1854). In that case, a partnership named Ross, Strong & Ross sued to recover under a promissory note. *Id.* at *1. Yet they had previously sued on the same theory under the name Ross, Strong & Hart, in a case that had been dismissed. *Id.* at *2. The defendant objected to the second suit, and the Ross Company claimed the Savings Statute. *Id.* at *1. However, the High Court of Errors and Appeals held that the Savings Statute did not "give the right of action to parties who are different both in form and substance from the original parties," and held that—because there was a name change—the action was barred. *Id.* at *2.

In his brief, the attorney for the Ross Company had strenuously argued against such a

narrow reading of the Savings Statute.[17] For "[t]wo of the plaintiffs here are the same as in the former suit, and the note the very same one previously sued on," and the lawyer argued that:

> [B]y giving the [Savings Statute] a fair construction, the replication should be held good; otherwise, in all cases of a mistake or misjoinder, or non-joinder of parties, the plaintiff or creditor would be wholly deprived of the benefit of said section of the act, which was passed, it is believed, to cover and include precisely such cases as the present one.

Id. at *1 (brief of the Appellants). The lawyer for the Ross Company had argued for a broad, remedial construction of the Savings Statute, but the Court would not comply until sixty years later, in *Hawkins*, and that case's re-adoption in 1980's *Ryan* and 2009's *Marshall.*

The Court should not suddenly revert to an interpretation of the Savings Statute used one time in 1854, which has never been cited by any Mississippi court for its proposition that the identity of the parties must be identical in all superficial respects.[18] While not explicitly overruled by *Hawkins'* shift to a "highly remedial" and "liberally construed" construction of the statute in 1915, the Court has clearly abandoned the reasoning of *Ross*, and that case immediately ceased being good law.

In support of the argument that the *exact* same plaintiff must re-file the *exact* same case—one not reached by Mississippi courts from *Hawkins* in 1815 to *Ryan* in 1980—the Silica Companies can only point to *Ross* and a batch of Georgia and Ohio law, applying different statutes. Such a course of action would immediately destroy any wrongful death action that, out of necessity, was commenced after an original action in the name of the decedent—in other words, any case like the one at hand. In such cases there are necessarily name changes or party substitutions, and newly-arisen claims are only then appropriately added. This harsh interpretation of the Savings Statute would give body and weight to Dean Prosser's warning, that

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[17] In the earliest cases, the (remarkably brief!) arguments of the parties were replicated at the beginning of the reported case.

[18] *Ross* has been cited by the Eighth Circuit for that proposition, interpreting an Oklahoma savings statute in 1924. *See Midland Oil Co. v. Moore*, 2 F.2d 34, 35 (8th Cir. 1924).

such an interpretation would create the perverse "result was that it was more profitable for the defendant to kill the plaintiff than to scratch him." *Jenkins*, supra.

Not only is there the danger that any wrongful death action might be "tricked" out of existence, if the plaintiff had the sheer misfortune to die after having filed suit, but the application of the antebellum *Ross* in modern society would be destructive to our business community as well. Let us say that Clark Sand had been owed money by a former client in Holmes County, and filed suit to recover the debt there. The defendant successfully had the suit dismissed, without prejudice, on grounds that it was filed in the wrong venue. In the meantime, Clark Sand has purchased the stock and good will of P.K. Lindsay, and is now conducting business as Clark & Lindsay, Inc.

Under the antiquated *Ross* rule of 1854, that company would be barred from attempting to recover the debt in the proper venue of Warren County, simply because of a name change and a minor difference in corporate holdings. Such a rule would be devastating in the digital world of the 21st century, where Phillip Morris becomes Altria over time, where pieces of Monsanto become Pfizer, where a desperate economy results in banks shifting name and form at a record rate. For under the *Ross* rule one of the greatest assets of business—accounts receivable and potential recoveries through litigation—would be considered null and void, as a mere name change would destroy the right of recovery.[19]

The simplistic rule of *Ross* does not have application in the 21st century, even as it was implicitly rejected by the more equitable applications of the Savings Statute of *Hawkins* in 1915,

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[19] Indeed, in 1834 Mississippi did not even *have* one of the most popular corporate forms of today, the limited liability company, or LLC. It was not adopted by the Legislature until 1994, 150 years after *Ross*. *See* Miss. Code Ann. § 79-29-104; Laws 1994, Ch. 402, § 4. The Mississippi Business Corporations Act is only seven years older, effective beginning in 1988. Miss. Code Ann. § 79-4-1.01. Under our modern business laws, companies may transact in a name other than their proper name, with "doing business as" a commonly seen bit of legal minutiae. While it might be formally correct for a company to file suit under its registered name or its DBA, under *Ross* such a move would be a fatal error.

and *Ryan* in 1980. *Ross* is bad law, old law, and this Honorable Court should instead follow the path trod since 1915, and find that the Savings Statute should be construed liberally, and highly remedially, to save the original cause of action from a tolling of the statute of limitations. Mr. Bozeman entered the temple of justice on the door on the left, as was proper at the time; Ms. Kelley used the door on the right, as was also proper. Their claims should not be barred from the temple of justice simply due to a change in name.

V. There Are Other Remedies Than Dismissal of the Action.

Ruby Kelley and the beneficiaries of Dave Bozeman should not be punished for mere procedural defects or a complicated procedural history. The Silica Companies seek the total dismissal, *with prejudice*, of this action. No one disputes that the original action, filed by Mr. Bozeman in Holmes County, was valid at the time; no one disputes he died of lung cancer in a hospital bed in Meridian.

There are other remedies; for instance, Mississippi Rule of Civil Procedure 17 allows that another party can be substituted into the action. It plainly mandates that "*[n]o action shall be dismissed* on the ground 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). In this instance, even if a jury did not determine that Ruby Kelley was the common law wife of Mr. Bozeman, and this Court overrules *Long*'s explanation of the standing of a personal representative, and ignores the Legislature's catchall provision, the sons of Mr. Bozeman could be substituted into the case.

There is also the safe harbor of Rule 19, whose Comment allows that its purpose "is to permit a court to balance the rights of all persons whose interests are involved in an action." Again, this could be allowed to bring in the sons of Dave Bozeman.

Outside of our Rules, the Savings Statute is itself an equitable "fix" crafted by the Legislature in order that the temple of justice would not be barred if a litigant chanced upon the wrong door.

To dismiss this case with prejudice would wreak that perverse result warned of by Dean Prosser, the one Lord Ellenborough helped blunder into existence: that killing Dave Bozeman would be more profitable for the Silica Companies than to scratch him.

Conclusion

Ruby Kelley's lawsuit is valid. First, the Silica Companies waived the affirmative defense of standing by failing to raise it in their Answers. Second, because they failed to timely and reasonably raise and pursue their affirmative defenses of standing and statutes of limitations, Mississippi law considers them waived. The Silica Companies' active and heavy litigation in this case, coupled with the prejudice to Ms. Kelley, further underscores their waiver.

Second, the wrongful death statute and Mississippi case law both allow Ms. Kelley to proceed with a wrongful death lawsuit as the executrix of Mr. Bozeman's estate and as another interested person under the statute. Importantly, only a jury can determine if Ms. Kelley was the common-law wife of Mr. Bozeman. It is further clear that the statute of limitations for wrongful death does not begin running until the decedent actually passes away. It is also bedrock law in Mississippi that all statutes of limitation are tolled while a lawsuit is pending.

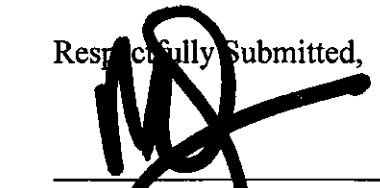
Third, the Savings Statute of Mississippi has been interpreted since 1915 to save actions just like the one at hand. This Honorable Court has explicitly approved that interpretation in

1980 and again just weeks ago, in March of 2009. This Court also has the power to fashion other remedies than dismissal.

For these reasons, we respectfully urge this Honorable Court to dismiss the appeal of the Silica Companies, finding that they have waived their defenses, or in the alternative, finding that Ms. Kelley has standing as a proper plaintiff, that no statutes of limitation have run, and that the Savings Statute applies. We further request this Honorable Court immediately remand any and all claims for a final determination on the merits at trial before the Warren County Circuit Court.

Filed this the 1 day of June, 2009.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, or via hand delivery, a true and correct copy of the above and foregoing document, to the following persons at these addresses:

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THIS, the 1 day of June, 2009.

DAVID NEIL MCCARTY