

**IN THE SUPREME COURT OF MISSISSIPPI**

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

**APPELLANTS**

**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**

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**REPLY BRIEF OF APPELLANTS CLARK SAND CO., INC.,  
CLEMCO INDUSTRIES CORP., AND P.K. LINDSAY CO., INC.**

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

***ORAL ARGUMENT REQUESTED***

FORMAN PERRY WATKINS KRUTZ & TARDY, LLP.  
Fred Krutz  
Edwin S. Gault, Jr.  
Jennifer J. Skipper  
200 South Lamar St.  
Ste. 100  
Jackson, MS 39201  
Telephone: 601-960-8600

**COUNSEL FOR APPELLANTS**

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**APPELLEE**

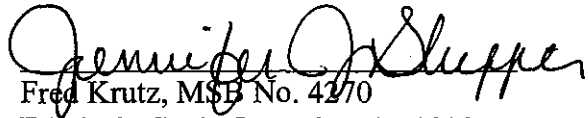
**CERTIFICATE OF INTERESTED PERSONS**

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, Apellee
2. Clark Sand Co., Inc., Appellant
3. Clemco Industries Corp., Appellant
4. P.K. Lindsay Co., Inc., Appellant
5. E. D. Bullard Corp., pending defendant
6. R. Allen, Smith, Jr., Counsel for Apellee
7. Fred Krutz, Counsel for Appellants
8. Edwin S. Gault, Jr., Counsel for Appellants
9. Jennifer J. Skipper, Counsel for Appellants
10. Steve Bryant, Counsel for pending co-defendant

So CERTIFIED, this the 16<sup>th</sup> day of June, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jennifer J. Skipper". The signature is written in a cursive style with a large initial "J".

Fred Krutz, MSB No. 4270

Edwin S. Gault, Jr., MSB No. 10187

Jennifer J. Skipper, MSB No. 100808

Attorneys for Appellants Clark Sand Co., Inc.,  
Clemco Industries Corp., and P. K. Lindsay Co.,  
Inc.

## TABLE OF CONTENTS

TITLE	PAGES
CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
INTRODUCTION .....	1
ARGUMENT .....	1
<b>I.    Standing Is A Jurisdictional Issue Which Cannot Be Waived           And Can Be Raised At Any Time By Any Party .....</b>	1
<b>II.   There Can Be No Executrix Without An Estate, And Only A           Court Can Open And Administer An Estate .....</b>	3
<b>III.  Kelley's Interpretation Of Alabama Law Is Wrong .....</b>	5
<b>IV.   Interested Parties May Not Bring A Wrongful Death Suit .....</b>	7
<b>V.    Because This Suit Is A Nullity The Statute of Limitations           Has Passed .....</b>	8
<b>VI.   Although The Savings Statute Is Meant To Be Remedial, It           Cannot Save this Action .....</b>	8
<b>VII.  Conclusion .....</b>	9
CERTIFICATE OF SERVICE .....	11

## TABLE OF AUTHORITIES

### CASES

<i>Aetna Casualty &amp; Surety Co. v. Hillman</i> , 796 F. 2d 770, 775 (5 <sup>th</sup> Cir. 1986) .....	9
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 254 (1986) .....	7
<i>Bailey v. Sayle</i> , 40 So. 2d 618, 771 (Miss. 1949) .....	4
<i>Baker v. Townsend</i> , 484 So. 2d 1097 (Ala. 1986) .....	6
<i>Bishop v. Bishop</i> , 330 So. 2d 443 (Ala. 1976) .....	6
<i>Canadian Nat'l/Illinois Cent. R. R. Co. v. Smith</i> , 926 So. 2d 839 (Miss. 2006) .....	8
<i>Causey v. Sanders</i> , 998 So.2d 393, 404 (Miss.2008) .....	8
<i>City of Madison v. Bryan</i> , 763 So. 2d 162, 166 (Miss. 2000) .....	2
<i>Crawford Comm. Constructors, Inc. v. Marine Indus. Residential Insulations, Inc.</i> , 437 So. 2d 15, 16 (Miss. 1983) .....	1
<i>Creel v. Creel</i> , 763 So. 2d 943 (Ala. 2000) .....	6
<i>Delta Health Group, Inc. v. Pope</i> , 995 So.2d 123, 126 (Miss. 2008) .....	1, 9
<i>Fed. Sav. &amp; Loan Ins. Corp. v. Hogan</i> , 476 F.2d 1182, 1187 (7 <sup>th</sup> Cir. 1973) .....	2
<i>Gaston v. Gaston</i> , 358 So. 2d 376, 378 (Miss. 1978) .....	7
<i>Griffith v. Gulf Ref. Co.</i> , 61 So. 2d 306, 307 (Miss. 1952) .....	2
<i>In re Estate of Carter</i> , 912 So. 2d 138, 144 (Miss. 2005) .....	5
<i>Jones v. Miles</i> , 656 F.2d 103, 108 (5 <sup>th</sup> Cir. 1981) .....	2
<i>Kirk v. Pope</i> , 973 So. 2d 981, 989 (Miss. 2007) .....	2
<i>Long v. McKinney</i> , 897 So. 2d 160, 174 (Miss. 2004) .....	5
<i>Paz v. Brush Engineered Materials, Inc.</i> 949 So. 2d 1 (Miss. 2007) .....	2
<i>Radio Corp. of America v. Radio Station KYFM, Inc.</i> , 424 F.2d 14, 17 (10 <sup>th</sup> Cir. 1970) .....	2

<i>Ricks v. Johnson</i> , 99 So. 142, 146 (Miss. 1924) .....	5
<i>Roman Catholic Diocese of Jackson v. Morrison</i> , 905 So. 2d 1213, 1221 (Miss. 2005) .....	7
<i>Stringer v. Stringer</i> , 689 So. 2d 194 (Ala. 1997) .....	6
<i>Tolliver v. Mladineo</i> , 987 So. 2d 989, 995-996 (Miss. Ct. App. 2007) .....	9
<i>Towner v. Moore</i> , 604 So. 2d 1093, 1098 (Miss. 1992) .....	7
<i>United American Ins. Co. v. Merrill</i> , 978 So. 2d 613, 631 (Miss. 2007) .....	8
<i>Williams v. Stevens</i> , 390 So. 2d 1012, 1014 (Miss. 1980) .....	2
<i>Willing v. Benz</i> , 958 So. 2d 1240, 1256 (Miss. Ct. App. 2007) .....	5

## **CONSTITUTION & STATUTES**

Miss. Const. Art. 6 § 159 .....	3
Miss. Code Ann. § 11-7-13 .....	4
Miss. Code Ann. § 91-7-35 .....	4
Miss. Code Ann. § 91-7-63 .....	3
Miss. Code Ann. § 91-7-233 .....	1
Miss. Code Ann. § 97-7-63 .....	1

## **OTHER**

2A Moore's Federal Practice P 8.27(3) (2d Ed. 1981) .....	2
29A Am. Jur. 2d Evidence § 784 .....	9
31 Am. Jur. 2d Executors and Administrators § 7 .....	4
31 Am. Jur. 2d Executors and Administrators § 157 .....	5
33 C.J.S., Executors and Administrators § 147, p. 1105 .....	4

## **INTRODUCTION**

When this suit was filed, Ruby Kelley (“Kelley”) had no legal authority to institute any action for any claims of David T. Bozeman (“Bozeman”). No estate had been opened for Bozeman, and Kelley was not Bozeman’s wrongful death beneficiary, because she was not his wife. Without standing, the jurisdiction of the trial court was not invoked. Thus, Kelley’s complaint has no legal force or effect and the statute has now run. The trial court erred when it allowed Kelley to proceed with the litigation “if not legally in this state as the executrix . . . then as the personal representative, or interested party by virtue of Mr. Bozeman’s will.” (R. 718). The trial court’s ruling should be overturned, and because the statute of limitation has expired, the case should be dismissed with prejudice.

## **ARGUMENT**

### **I. STANDING IS A JURISDICTIONAL ISSUE WHICH CANNOT BE WAIVED AND CAN BE RAISED AT ANY TIME BY ANY PARTY.**

Mississippi law requires that at the time suit is filed, the plaintiff must have standing to pursue the action. *Delta Health Group, Inc. v. Pope*, 995 So.2d 123, 126 (Miss. 2008); see also, *Crawford Comm. Constructors, Inc. v. Marine Indus. Residential Insulations, Inc.*, 437 So. 2d 15, 16 (Miss. 1983). It is undisputed that when this suit was filed, no estate had been opened for Bozeman and no person had been appointed by any court to represent the estate. Only the Chancery Court in the appropriate venue has the authority to appoint a representative of an estate. See, Miss. Code Ann. §§97-7-63 and 91-7-233. Therefore, the subject matter jurisdiction of the trial court was not invoked, and the complaint is a nullity.

Kelley spends eight pages of her brief trying to divert the court’s attention from the facts of this case by arguing that defendants waived standing. Plaintiff has two waiver arguments: (1) that defendants did not plead standing as an affirmative defense; and (2) that defendants engaged

in “active and heavy litigation.” But Kelley’s waiver arguments fail because this Court has stated very clearly that “standing is a ‘jurisdictional issue which may be raised by any party or the Court *at any time.*’ *Kirk v. Pope*, 973 So. 2d 981, 989 (Miss. 2007) (quoting *City of Madison v. Bryan*, 763 So. 2d 162, 166 (Miss. 2000)(emphasis added); see also *Williams v. Stevens*, 390 So. 2d 1012, 1014 (Miss. 1980).

Kelley concedes in her brief that there is no Mississippi case upholding the proposition that standing is an affirmative defense that must be pled in answer to the complaint. Finding no help in Mississippi law, Kelley cites a litany of other jurisdictions’ cases.<sup>1</sup> But she fails to cite to the Court any of the corollary decisions in these jurisdictions holding that affirmative defenses are not waived to the extent that a party who should have pled the defense introduces evidence in support thereof without objection by the adverse party. *Fed. Sav. & Loan Ins. Corp. v. Hogan*, 476 F.2d 1182, 1187 (7<sup>th</sup> Cir. 1973); *Radio Corp. of America v. Radio Station KYFM, Inc.*, 424 F.2d 14, 17 (10<sup>th</sup> Cir. 1970); see also 2A Moore’s Federal Practice P 8.27(3) (2d Ed. 1981). “Neglect to affirmatively plead the defense is simply noncompliance with a technicality and does not constitute a waiver where there is no claim of surprise.” *Jones v. Miles*, 656 F.2d 103, 108 fn 7 (5<sup>th</sup> Cir. 1981). Kelley never objected in the trial court that standing was not pled in defendants’ answers. In fact, although Kelley filed three separate written responses and argued against the motion, waiver was never mentioned. (R. 65-71; 521-532; 738). Therefore, even if standing were an affirmative defense (which it is not under Mississippi law), then there still is no waiver because Kelley did not object in the trial court.

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<sup>1</sup> The cases cited by plaintiff are not binding, controlling, or even persuasive. *Paz v. Brush Engineered Materials, Inc.* 949 So. 2d 1 (Miss. 2007)(citing *Griffith v. Gulf Ref. Co.*, 61 So. 2d 306, 307 (Miss. 1952)(holding the Mississippi Supreme Court is not bound by the decisions of other courts of other jurisdictions on similar questions.)



Moreover, defendants timely and affirmatively raised a lack of standing in their motion for summary judgment. As set forth in that motion, defendants' discovery uncovered the fact that there was no estate in either Alabama or Mississippi. Confirmation that there was no estate in either state was complete on June 22, 2007. (R. 46). Defendants promptly served their motion for summary judgment on June 29, 2007. (R.40-44). Defendants thereafter had their motion heard on August 16, 2007. (T.1). The trial court reserved ruling on the issue, and did not issue its ruling until August 11, 2008 (after defendants had the issue re-heard and after defendants requested and were denied a stay of the case). See, (R. 714-719; T. 62). See Appendix A for a full time line.

Kelley is simply wrong in her assertion that defendants waived any claim of standing, and she is wrong in her representation to this Court that standing was not challenged until a year into the case, or August 6, 2008. Response, p. 9. Defendants' objection to standing was both timely and appropriate and should have been granted by the trial court.

## **II. THERE CAN BE NO EXECUTRIX WITHOUT AN ESTATE, AND ONLY A COURT CAN OPEN AND ADMINISTER AN ESTATE.**

Kelley's statement that there is no requirement for "chancery court approval to pursue a wrongful death claim" is correct but irrelevant in this case. Response, p. 17. Defendants are not arguing whether Kelley had to seek approval to file a claim. This appeal questions whether Kelley had to be appointed executrix before filing suit on behalf of Bozeman's estate.

Binding precedent mandates that to file a wrongful death claim as an executrix there must, of course, be an estate opened and administered. The Chancery Court has the exclusive jurisdiction in matters testamentary. Miss. Const. Art. 6 § 159; see also Miss. Code Ann. § 91-7-63. An individual cannot create an estate just by filing suit, and an individual cannot unilaterally appoint herself the executrix or personal representative without an estate opened. The Chancery

Court, by statute, is instructed to issue letters testamentary to the named executor if that person is not legally disqualified. Miss. Code Ann. § 91-7-35. So while a person may be named in a will as executor, the Chancery Court must pass on the person's qualifications and issue letters testamentary before they are recognized in an official capacity. "An executor or administrator is frequently regarded as a creature or office of the court. He is subject to the direction, supervision and control of the court until the estate is closed and he is finally discharged." *Bailey v. Sayle*, 40 So. 2d 618, 771 (Miss. 1949)(quoting 33 C.J.S., Executors and Administrators § 147, p. 1105).

Kelley's attempt to use the wrongful death statute to support her position that no estate need be opened before filing a wrongful death claim is futile. Response, p. 17. As Kelley's counsel stated in the trial court, there is a difference under the statute as to who may bring suit and who may recover from the suit. (T. 14-15). The paragraph Kelley cites addresses recovery of damages. Included in those damages are funeral, medical, and other related expenses, which would be recoverable to the estate. See, Miss. Code Ann. § 11-7-13. It is without regard to whether the estate has been opened or not that those damages may be recovered. The statute does not sanction an executrix filing a claim without an underlying estate.

Kelley's other futile attempt to shoehorn herself into the wrongful death statute is to claim that she is the personal representative by virtue of an unprobated will. See, Response, p. 19. "The commonly accepted definition of 'personal representative' includes an executor ...." 31 Am. Jur. 2d Executors and Administrators § 7.

A person must be appointed personal representative to have the power to administer an estate. . . . Even the liberal Uniform Probate Code prescribes that in order to acquire the powers and undertake the duties and liabilities of a personal representative, one must be appointed, qualify and be issued letters. The Code also provides that administration is commenced by issuance of letters.

31 Am. Jur. 2d Executors and Administrators § 157. While Kelley argues now that it was upon signing of the will that her privilege and duty as executor arose, the argument at the trial court was totally different.

**The Court:** My point is, at what point does a person become a personal representative by law?

\*\*\*

**The Court:** . . . maybe you understand what I'm trying to say, and that is until it is probated it makes no - - it is just like writing on a sheet of paper. He could have 5 or 6 people as his, writing on a sheet of paper as that was who he wanted as his representative. And until a court of law probates it then it has no legal effect. You would agree with me on that?

**Mr. Smith:** I would agree with that.

(T. 17).

Kelley's counsel conceded in the trial court what must be, and is, the law.

In the event the litigants wish to pursue a claim on behalf of the estate of the deceased, such estate must, of course, be opened and administered through the chancery court. As 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 language in *Long* comports with the language of the Uniform Probate Code and hornbook law that to pursue or act on behalf of an estate, the estate must be opened and a court of competent jurisdiction must approve the appointment of the personal representative.<sup>2</sup> See also, *Willing v. Benz*, 958 So. 2d 1240, 1256 (Miss. Ct. App. 2007)(instructing that the representative beneficiary in a wrongful death suit has a duty to notify "the personal representative of the decedent if one has been appointed.")

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<sup>2</sup> Kelley cites two cases to support that an executor derives his sole authority from the will, *Ricks v. Johnson*, 99 So. 142, 146 (Miss. 1924) and *In re Estate of Carter*, 912 So. 2d 138, 144 (Miss. 2005). In *Ricks*, the executor had been issued letters testamentary and was so appointed. 99 So. at 147. Further, the sentence before the quote in Kelley's brief from the *Carter* case states, "The duly appointed executor shall carry out all of the provisions of the will that may be lawful." 912 So. 2d at 144. Kelley has no authority for her untenable position.

In sum, there can be no executrix to file a claim without an estate to file it on behalf of.

### III. KELLEY'S INTERPRETATION OF ALABAMA LAW IS WRONG.

Kelley filed suit in Mississippi as the executrix of the estate. Subsequently, she then went to Alabama and opened an estate after defendants filed their motion. Then in response to defendants' motion, Kelley claimed she and Bozeman held themselves out to be husband and wife. (R. 65). However, no proof of a marriage was put on by Kelley at the hearing. (T. 1-23). In Kelley's supplemental response, filed over a year after defendants filed their original motion, she argued that her alleged marriage was a fact question. (R. 359).

But Kelley's own actions belie her position that common law marriage is a question of fact for a jury. (R. 741). Kelley filed a declaratory judgment in the Circuit Court of Choctaw County, Alabama seeking to be declared Bozeman's common law wife. There was no jury. The reason there was no jury is that although whether there is a marriage may involve a fact question, that fact is decided by the trial court. *Stringer v. Stringer*, 689 So. 2d 194 (Ala. 1997)(trial court entered finding of no common-law marriage after *ore tenus* proceedings and was affirmed); *Bishop v. Bishop*, 330 So. 2d 443 (Ala. 1976)(Circuit Court of Morgan County found common-law marriage to exist); *Creel v. Creel*, 763 So. 2d 943 (Ala. 2000)(motion for declaratory judgment of common-law marriage in Chilton Circuit Court); and *Baker v. Townsend*, 484 So. 2d 1097 (Ala. 1986)(declaratory judgment action for common-law marriage in Circuit Court of Winston County).

Further, the trial court in Warren County rejected the proposition that Kelley was the common law wife of the decedent. Judge Patrick's order states "[t]hat Ruby Kelley (Ms. Kelley) **a friend of Mr. Bozeman** filed the present action in this court as the executrix...." (R. 715). The Court had to make this decision, as it was part of the standing question before it. Trial

courts are authorized to make these kind of factual determinations when subject matter jurisdiction is involved. See, *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1221 (Miss. 2005)(finding attacks to subject matter jurisdiction are either facial or factual and a “factual attack requires resolution by the trial court of one or more factual disputes in order to determine subject matter jurisdiction.”).

The burden of proof to establish a common law marriage in either Alabama or Mississippi is clear and convincing. *Gaston v. Gaston*, 358 So. 2d 376, 378 (Miss. 1978). Defendants’ motion for summary judgment goes to the heart of if there is a factual issue. This Court has stated that:

When determining if a genuine factual issue . . . exists . . . a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under . . . [the clear and convincing standard]. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find . . . [the disputed fact] by clear and convincing evidence.

*Towner v. Moore*, 604 So. 2d 1093, 1098 (Miss. 1992)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)). Kelley did not meet her burden of proof in the trial court, and she makes no attempt to do so here. In fact, Kelley puts forth no proof at all to this Court that she was Bozeman’s wife.<sup>3</sup>

Kelley’s question of marriage goes to the heart of standing in this case, and it was proper for the Warren County Court to decide Kelley was merely a friend, not a wife, in determining subject matter jurisdiction.

#### **IV. INTERESTED PARTIES MAY NOT BRING A WRONGFUL DEATH SUIT.**

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<sup>3</sup> Kelley’s brief states that the reason the Alabama trial court vacated the order was that he “wished to hear the thoughts of Mr. Bozeman’s children; they have not contested the matter, recognizing Ms. Kelley as their father’s wife.” Response, p. 22. The Alabama court vacated the order because Kelley did not give notice to Bozeman’s children or any other interested party of her *ex parte* hearing. Kelley’s Mississippi counsel was not present at the last hearing, and it is disingenuous, at best, to say that Bozeman’s children recognize Ms. Kelley as their father’s wife.

Kelley's final attempt to establish standing is to claim that she is an interested party under the wrongful death statute. Plaintiff cites no case law under this section and therefore, this Court does not have to consider this unsupported argument. *Causey v. Sanders*, 998 So.2d 393, 404 (Miss.2008); *United American Ins. Co. v. Merrill*, 978 So. 2d 613, 631 (Miss. 2007).

**V. BECAUSE THIS SUIT IS A NULLITY THE STATUTE OF LIMITATIONS HAS PASSED.**

Because Kelley has no standing, this lawsuit is a nullity. Bozeman died on March 11, 2005. Assuming, *arguendo*, that none of the statute of limitations began running until his death, there has been no viable complaint filed which would invoke the subject matter jurisdiction of the trial court. Therefore, all claims are now time barred and should be dismissed with prejudice.

**VI. ALTHOUGH THE SAVINGS STATUTE IS MEANT TO BE REMEDIAL, IT CANNOT SAVE THIS ACTION.**

Kelley argues that because the savings statute is highly remedial, this case should not be dismissed "simply due to a change in name." Response, p. 36. To be clear, this case is not one of mere name change. Bozeman died on March 11, 2005, and there was no attempt to open an estate. There was no substitution of parties. There was no amendment of the action to include wrongful death claims. There was no action on behalf of Bozeman until March 10, 2006, when his case was dismissed under *Canadian Nat'l/Illinois Cent. R. R. Co. v. Smith*, 926 So. 2d 839 (Miss. 2006). (R. 261-272). Had there been a substitution of parties prior to dismissal, there would be no argument. But there was no substitution.

There is no case in Mississippi which interprets the savings statute to allow a different plaintiff with a different claim against different parties than those originally sued to come within the purview of the savings statute. To allow such would be unequitable. Furthermore, Kelley's counsel repeatedly disavowed any protection from the savings statute in the trial court. (T. 37,

38). Plaintiff's counsel stated that "it doesn't apply here." (T. 37, 38), and that "[t]his is a wrongful death claim that has been properly filed under the Statute of Limitations for a wrongful death claim..." (T. 37). Therefore, Kelley's counsel has judicially admitted that the savings statute does not apply to this case. See, 29A Am. Jur. 2d Evidence § 784 ("An admission in open court is a judicial admission.")

## VII. CONCLUSION.

Ruby Kelley is the only party before this Court for the claims of David Bozeman. Although plaintiff's brief continually references herself and "the beneficiaries of Dave Bozeman" no other party has ever been joined in this action, and no one but Kelley has appeared in this action for Bozeman or his estate.

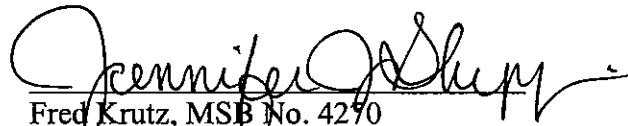
Kelley has asked this Court to allow substitution of Bozeman's sons or for their joinder if this Court agrees with defendants' arguments. The fatal flaw in both of these requests is that no substitution or joinder can be had in a case that is a nullity. See, *Tolliver v. Mladineo*, 987 So. 2d 989, 995-996 (Miss. Ct. App. 2007)("[A]n amended complaint filed in a case where the original complainant lacks standing cannot relate back to the filing of the original complaint, because a complaint cannot relate back to a nullity."); *Delta Health Group, Inc. v. Pope*, 995 So. 2d 123, 126 (Miss. 2008)(finding a lack of *locus standi* at the commence of the suit which could not be "fixed" by Rule 17 substitution). Further, Rule 17 cannot retroactively create subject matter jurisdiction where none previously existed. *Aetna Casualty & Surety Co. v. Hillman*, 796 F. 2d 770, 775 (5<sup>th</sup> Cir. 1986).

The trial court erred when it denied defendants' motion for summary judgment, and all claims should be dismissed with prejudice. Kelley was a mere beneficiary in an unprobated will at the time she filed this complaint and she had no actionable interest in the claims she asserted.

She had no legal authority to do so, and no colorable interest under the law to file the instant action because: (1) she was not one of Bozeman's wrongful death beneficiaries; (2) she had no authority vested upon her by an appropriate court to represent the interests of Bozeman's estate (although her complaint appeared to cloak her with such); and (3) no estate had been opened at the time this complaint was filed. Only after defendants learned of Kelley's true status and filed their motion for summary judgment did Kelley take any action to cure her defective complaint. However, there is nothing that can cure the jurisdictional defects in this case because the subject matter jurisdiction of the trial court was never invoked. The ruling of the trial court should be reversed and all claims herein dismissed with prejudice.

This the 16<sup>th</sup> day of June, 2009.

Respectfully submitted,



Fred Krutz, MSB No. 4270

Edwin S. Gault, Jr., MSB No. 10187

Jennifer J. Skipper, MSB No. 100808

Attorneys for Appellants Clark Sand Company,  
Inc., Clemco Industries Corporation, and P. K.  
Lindsay Company

OF COUNSEL:

FORMAN PERRY WATKINS KRUTZ & TARDY LLP

200 South Lamar St. 100

Jackson, Mississippi 39201

Post Office Box 22608

Jackson, Mississippi 39225-2608

Phone: (601) 960-8600

Facsimile: (601) 960-8613



**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:

R. Allen Smith, Jr. (*Hand Delivery*)  
The Smith Law Firm, PLLC  
681 Town Center Blvd. Ste. B  
Ridgeland, MS 39157

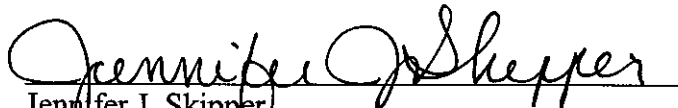
Steve Bryant (*Via U.S. Mail*)  
Steve Bryant & Associates, LLP  
3618 Mt. Vernon Street  
Houston, Texas 77006

Ms. Betty Sephton, Clerk (*Via Hand Delivery original w/ 3 copies*)  
Mississippi Supreme Court  
Post Office Box 117  
Jackson, Mississippi 39205

Ms. Shelley Ashley-Palmertree, Clerk (*Via U.S. Mail*)  
Warren County Circuit Clerk  
P.O. Box 351  
Vicksburg, MS 39181

Honorable Isadore W. Patrick (*Via U.S. Mail*)  
Warren County Circuit Court  
P.O. Box 351  
Vicksburg, MS 39181

THIS, the 16<sup>th</sup> day of June, 2009.

  
Jennifer J. Skipper

## APPENDIX A

March 5, 2007	Complaint Filed
April 9, 2007	P.K. Lindsay Answers Complaint
April 10, 2007	Clemco Industries Answers Complaint
April 24, 2007	P.K. Lindsay and Clemco propound discovery.
May 18, 2007	Agreed Order of Trial Setting entered.
June 5, 2007	Letter from Choctaw County, Alabama received stating no estate was opened for David Bozeman.
June 6, 2007	P.K. Lindsay and Clemco file a Motion to Compel answers to discovery.
June 21, 2007	Plaintiff moves to use P.K. Lindsay and Clemco's discovery as the Master Set of Discovery in the case.
June 22, 2007	Letter received from Twelfth Chancery District of Mississippi stating there was no estate opened for David Bozeman.
July 2, 2007	Defendants' Motion for Summary Judgment on Kelley's standing is filed.
July 2, 2007	Defendants notice the motion for August 1, 2007.
July 18, 2007	Kelley files a Petition for Probate of Will of David Bozeman in Choctaw County, Alabama.
July 20, 2007	Plaintiff's Response to Defendants' Motion for Summary Judgment is filed.
July 26, 2007	Plaintiff's counsel asks that the hearing be moved from August 1, 2007 to August 30, 2007.
July 30, 2007	Notice of Cancellation of hearing filed.
August 7, 2007	Re-Notice of Hearing for August 16, 2007 filed.
August 7, 2007	Order entered admitting will to probate and granting letters testamentary.
August 16, 2007	Hearing on defendants' motion for summary judgment. The Court takes the motion under advisement.
August 29-31, 2007	Petition and Issuance of Letters Rogatory with a Rule 30(b)(6)
November 20, 2007	Subpoena issued, only activity in case.
November 21, 2007	Clark Sand Answer to Complaint filed.
November 30, 2007	Defendants Motion to Compel discovery responses filed.
December 3, 2007	Plaintiff responses to discovery.
December 20, 2007	Deposition of Ruby Kelley.
June 18, 2008	Defendants file motion for summary judgment based on the savings statute.
July 30, 2008	Plaintiff's Supplemental Response to Defendants' motion for summary judgment filed.
July 31, 2008	Hearing on defendants Motion for Summary Judgment based on the savings statute. Defendants request stay until rulings.
July 31, 2008	Joinder by defendants in co-defendant's Motion for Summary Judgment based on standing, or in the alternative, the inapplicability of the savings statute filed.
August 1, 2008	Plaintiff's response to defendant's motion for summary judgment based on the savings statute, or in the alternative the inapplicability

August 6, 2008	of the savings statute filed.
August 12, 2008	Defendants reply in support of joinder filed.
August 22, 2008	Order denying defendants' motions filed.
August 29, 2008	Petition for Interlocutory Appeal.
	Kelley petitions Choctaw County, Alabama Circuit Court for
	Declaratory Judgment of common law marriage.
September 18, 2008	Order granting Interlocutory Appeal.
October 16, 2008	Choctaw County, Alabama Circuit Court holds <i>ex parte</i> hearing on
	complaint for declaratory judgment.
October 23, 2008	Choctaw County, Alabama Circuit Court Judge enters order declaring
	Kelley common law wife of decedent.
November 3, 2008	Plaintiff files Second Supplemental Response to defendants' motions
	for summary judgment
February 13, 2009	Choctaw County, Alabama Circuit Court Judge enters order setting
	aside and vacating the October 23, 2008 order.
February 27, 2009	Defendants file brief.
April 24, 2009	Choctaw County, Alabama Circuit Court Judge enters order staying
	case pending resolution of Mississippi Supreme Court.
June 1, 2009	Plaintiff files brief.