

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

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

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

ORAL ARGUMENT REQUESTED

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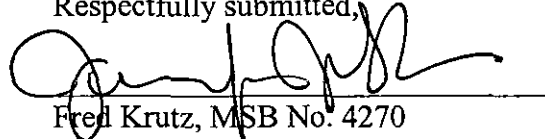
CERTIFICATE OF INTERESTED PERSONS

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, 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 Appellee
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 27th day of February, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Fred Krutz', is written over a horizontal line.

Fred Krutz, MSB No. 4270

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Clemco Industries Corp., and P. K. Lindsay Co.,
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STATEMENT OF THE ISSUES

- I. Does 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?
- II. Does the provision in Mississippi's savings statute allowing one year to refile apply to a second suit which differs from the original in both the identity of parties and the identity of claims?

STATEMENT OF THE CASE

This is a silica case wherein Ruby Kelley seeks damages for David T. Bozeman's injuries and subsequent death. Bozeman filed a personal injury suit on September 23, 2002, in Holmes County, Mississippi styled *Danny McBride, et al. v. Pulmosan Safety Equip. Corp., et al.* (R.79-126). While *McBride* was pending, Bozeman died on March 11, 2005. (R. 45; R.E. 2). The *McBride* case was dismissed a year later on March 10, 2006, without substituting parties or amending Bozeman's claims. (R. 261-272; R.E. 4). The *McBride* order recited that it was being dismissed under *Canadian National/Illinois Central Railroad Co. v. Smith*, 926 So. 2d 839 (Miss. 2006). (R. 273; R.E. 4). Within one year, on March 5, 2007 Kelley filed this action seeking both survival and wrongful death damages in connection with Bozeman's death. (R. 18-39; R.E. 2).

Clark Sand moved for summary judgment on June 29, 2007, seeking dismissal because Kelley, who had been Bozeman's girlfriend but not his wife or personal representative, did not have standing to bring either a survival or wrongful death claim on behalf of Bozeman. (R. 40-64; R.E. 3). At the August 16, 2007 hearing, the trial court took the motion under advisement. (T. 1-23; R.E. 11).

Clark Sand filed a second motion for summary judgment on June 18, 2008, seeking dismissal because the claims and the parties in Kelley's action were different from those in

McBride, such that Kelley's action failed to meet the statutory criteria to be a re-filed matter under the savings statute, and was therefore untimely. (R. 140-273; R.E. 5). At the July 31, 2008 hearing, the trial court took Clark Sand's second motion under advisement as well. (T. 24-44; R.E. 12).

On August 11, 2008, the trial court entered its order finding Kelley had standing to file this action because she was Bozeman's personal representative or an interested party. The trial court also held that the claim was filed within the applicable statute of limitations. (R. 714-719; R.E. 10). On August 22, 2008, Clark Sand petitioned for interlocutory review of the trial court's rulings, and this Court granted permission for an interlocutory appeal on September 18, 2008. (R. 725-726).

After Clark Sand filed its petition for interlocutory appeal, Kelley filed an action in Alabama Circuit Court on August 29, 2008, seeking a declaration that she was the common law wife of Bozeman. Kelley filed this action without notice to Clark Sand, and without an opportunity for Clark Sand to be heard. In this *ex parte* proceeding with Kelley as the only party, the Alabama court on October 23, 2008, found Kelley to be the common law wife of Bozeman. With this Alabama judgment in hand, Kelley then moved to dismiss Clark Sand's interlocutory appeal in this Court.

Clark Sand responded, contending that Kelley's motion should be denied because (1) the Alabama Court lacked jurisdiction; (2) Clark Sand had been given neither notice nor an opportunity to be heard; and (3) Clark Sand had moved to intervene and set aside the Alabama judgment because it was based on inaccurate, incomplete, and fraudulent evidence. Clark Sand also sought relief from the judgment in the Alabama Circuit Court. This Court denied Kelley's motion to dismiss. On February 10, 2009, the Alabama Circuit Court "vacated, set aside, and

held for naught” the October 23, 2008 judgment¹. Accordingly, the Alabama judgment is now moot.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Decedent David Bozeman was a resident of Choctaw County, Alabama, who died in Lowndes County, Mississippi. Bozeman was diagnosed by his litigation (not treating) doctors with a silica-related condition on June 2, 2002. (T. 35; R.E. 11). Prior to his death, Bozeman and 54 other plaintiffs sued 57 silica defendants on September 23, 2002 in a Holmes Count action styled *Danny McBride, et al. v. Pulmosan Equip. Corp., et al.*, Civil Action No. 2002-341. (R.79-126)

While *McBride* was pending, two things happened. First, Bozeman died on March 11, 2005. (R. 45; R.E. 3). Second, this Court decided *Canadian National/Illinois Central Railroad Co. v. Smith*, 926 So. 2d 839 (Miss. 2006), which instructed trial courts to dismiss improperly joined and improperly venued plaintiffs, and held that such dismissals were “as to form” for purposes of the savings statute. *Id.* at 845.

On March 10, 2006, a year after Bozeman died, Bozeman’s claims and the entire *McBride* action were dismissed under *Canadian National*. (R. 273; R.E. 5). During the twelve months between Bozeman’s death in 2005 and the dismissal of his complaint in 2006, there was no attempt to substitute parties or amend on account of his death. (R. 261-272; R.E. 5).

On March 5, 2007, Kelley commenced this action against nineteen defendants, including appellant Clark Sand, styled as “*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 v. Pangborn Corp., et al.*” (R.18-39; R.E. 2). Kelley’s complaint claimed that it was a refiled

¹ In addition to this order, the Alabama Court denied Clark Sand’s motion to intervene, and set for hearing Kelley’s complaint for declaratory judgment for April 2, 2009. Should further relevant events occur in Alabama, Clark Sand will advise this Court of the same.

action under *Canadian National*, and was therefore entitled to the one year grace period under the savings statute. (R.18; R.E. 2). However, Kelley's complaint involved different parties and different claims than those in *McBride*, and was therefore not protected by *Canadian National* and the savings statute. (R. 38; R.E. 2).

Clark Sand sought summary judgment dismissing Kelley's complaint because Kelley was neither a personal representative nor a wrongful death beneficiary of David Bozeman, and therefore had no standing to pursue the survival and wrongful death claims. Clark Sand demonstrated that Kelley was not a personal representative because, at the time of the commencement of this action, Kelley had not probated Bozeman's will nor been appointed executrix. (R. 678; R.E. 9). Indeed, only after Clark Sand filed its motion did Kelley petition an Alabama court for letters testamentary, and not until five months after Kelley's complaint was filed was Kelley appointed executrix by an Alabama probate court. (R. 678; R.E. 9). Because Kelley was not a properly appointed executrix at the filing of the complaint, she lacked standing to act as a personal representative under either the survival statute or wrongful death statute.

Clark Sand contended that Kelley was not a wrongful death beneficiary because she had merely been Bozeman's girlfriend, and not his wife. In this regard, Clark Sand demonstrated that Bozeman had testified that Kelley was his girlfriend, not his wife (R. 701-710; R.E. 9); that Kelley had testified that she and Bozeman had no joint bank accounts (R. 673; R.E. 8); that Kelley had testified that Bozeman had made no public declarations of marriage (R. 692-693; R.E. 9); that Bozeman's death certificate and medical records list him as widowed (R. 687, 694-700; R.E. 9); and that Kelley acknowledged herself to be Bozeman's girlfriend in authorizations signed in 2007. (R. 711-713; R.E. 9). Because she was only Bozeman's girlfriend, and not his wife, Kelley had no standing under the wrongful death statute to file a wrongful death claim. Bozeman's only statutory wrongful death beneficiaries were his sons, David C. Bozeman and

Joey Bozeman, neither of whom are parties to this action. Although this action proceeded to the eve of trial in the trial court, no proof had been offered regarding any claim by David or Joey Bozeman.

The trial court took Clark Sand's motion for summary judgment under advisement. (T. 1-28; R.E. 11). While waiting for a decision on its first motion for summary judgment, Clark Sand filed a second motion for summary judgment seeking dismissal of Kelley's action because it was not a proper secondary action filed under the grace of the savings statute, and, therefore, it was barred by the statute of limitations. (R. 140-273; R.E. 5). Specifically, Clark Sand contended that Kelley was a stranger to Bozeman's first action, that the survival and wrongful death claims asserted by Kelley were different from those asserted in *McBride*, that Kelley's case was not an equitable continuation of *McBride*, and that Kelley's case was therefore not protected by the savings statute. (R. 140-273; R.E. 5). The trial court took Clark Sand's second motion for summary judgment under advisement as well. (T. 24-65; R.E. 12).

On August 11, 2008, the trial court erroneously denied both of Clark Sand's motions. The trial court found that Kelley had standing either as a personal representative of Bozeman or as an interested party, and that her action was therefore not barred by Mississippi's statute of limitations. (R. 714-719; R.E. 10).

Clark Sand sought interlocutory review of the trial court's denial of its motions for summary judgment on August 22, 2008, and this Court granted permission to Clark Sand to pursue an interlocutory appeal on September 18, 2008. (R. 725-726).

After Clark Sand filed its petition for interlocutory appeal, Kelley filed an action in Alabama Circuit Court on August 29, 2008 seeking a declaration that she was the common law wife of Bozeman. Kelley filed this action without notice to Clark Sand, and without an opportunity for Clark Sand to be heard. In this *ex parte* proceeding with Kelley as the only

party, the Alabama court found Kelley to be the common law wife of Bozeman. With this Alabama judgment in hand, Kelley then moved to dismiss Clark Sand's interlocutory appeal in this Court.

Clark Sand responded, contending that Kelley's motion should be denied because: (1) the Alabama Court lacked jurisdiction; (2) Clark Sand had been given neither notice nor an opportunity to be heard; and (3) Clark Sand had moved to intervene and set aside the Alabama judgment because it was based on inaccurate, incomplete, and fraudulent evidence. Clark Sand also sought relief from the judgment in the Alabama Circuit Court. This Court denied Kelley's motion to dismiss. On February 10, 2009, the Alabama Circuit Court "vacated, set aside, and held for naught" the October 23, 2008 judgment. Accordingly, the Alabama judgment is now moot.

Kelley also designated as an additional issue for appeal the question of whether Clark Sand had waived its affirmative defenses. Kelley never contended in the trial court that Clark Sand had waived its affirmative defenses, and there is no ruling from which Kelley has appealed. Clark Sand moved to strike Kelley's additional issue, and this Court reserved ruling on this motion.

STANDARD OF REVIEW

The standard of review of a trial court's denial of a motion for summary judgment is *de novo*. *McMillan v. Rodriguez*, 823 So. 2d 1173, 1176 (Miss. 2002)(citing *Heigle v. Heigle*, 771 So. 2d 341, 345 (Miss. 2000)(additional citations omitted)).

SUMMARY OF THE ARGUMENT

Kelley had no standing to assert survival and wrongful death claims in connection with Bozeman's death because Kelley was neither a personal representative nor a wrongful death

beneficiary of Bozeman when this action was filed. Therefore, the trial court should have granted summary judgment for Clark Sand.

Kelley's complaint asserts survival and wrongful death claims in connection with the death of Bozeman. In order to have standing to assert those claims, Kelley must be either the personal representative or a wrongful death beneficiary of Bozeman as of the date Kelley filed her complaint. *Delta Health Group, Inc. v. Pope*, 995 So. 2d 123, 126 (Miss. 2008), *reh'g den.*, Dec. 11, 2008 ('standing is determined as of the commencement of suit.'), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992).

It is undisputed that at the time this action was filed, Bozeman's estate had not been probated. Neither Kelley nor anyone else had been appointed as Bozeman's personal representative, or authorized to prosecute a survival claim on Bozeman's behalf.

Similarly, for Kelley to have standing to prosecute a wrongful death claim, she would have had to have been Bozeman's personal representative at the time this action was commenced, or his statutory wrongful death beneficiary, namely, Bozeman's widow. As discussed above, Kelley was not Bozeman's personal representative when this action was filed. Likewise, the overwhelming evidence demonstrated that Kelley was Bozeman's girlfriend, not his wife. Indeed, Kelley could not and did not present the trial court with clear and convincing evidence that Kelley was Bozeman's common law wife. Finally, the eleventh-hour Alabama circuit court judgment which Kelley obtained ex parte on a fraudulent record has been "vacated, set aside and held for naught" by the Alabama court. Because Kelley lacked standing to prosecute the claims in her complaint, and because the statute of limitations has now passed, this Court should reverse and render, and dismiss Kelley's claims with prejudice.

Assuming *arguendo* that Kelley had standing to pursue the claims in the complaint, Mississippi's savings statute does not save this action because the parties and the claims in this action are not identical to those in *McBride*.

ARGUMENT

I. KELLEY HAD NO STANDING TO ASSERT SURVIVAL AND WRONGFUL DEATH CLAIMS BECAUSE KELLEY WAS NOT A DULY APPOINTED PERSONAL REPRESENTATIVE WHEN THIS ACTION WAS FILED.

For a court to exercise its power it must have jurisdiction, and standing is a jurisdictional issue. *Kirk v. Pope*, 973 So. 2d 981, 989 (Miss. 2007). A lack of standing “robs the court of jurisdiction to hear the case.” *Pruitt v. Hancock Med. Ctr.*, 942 So. 2d 797, 801 (Miss. 2006)(quoting *McNair v. United States Postal Service*, 768 F.2d 130, 737 (5th Cir. 1985)). Any ruling in a case in which the party is without standing is void *ab initio*. *Tolliver Ex Rel. Green v. Mlandineo*, 987 So. 2d 989, 995 (Miss. Ct. App. 2007).

To adjudge Kelley's standing this Court must take a snapshot view of Kelly's status as of on March 5, 2007, the date the action was filed, and not thereafter. *See, Lujan*, 504 U.S. at 571. In the style and body of the complaint, Kelley claims to be pursuing her claim as both the executrix of the estate of Bozeman and representative of the wrongful death beneficiaries. However, she had no standing as either.

Mississippi requires that survival claims be prosecuted by duly-appointed personal representatives. Miss. Code Ann. § 91-7-237 provides that when a party dies during the pendency of a lawsuit the executor or administrator may prosecute or defend the action. Miss. Code. Ann. § 91-7-233 provides that executors, administrators, and temporary administrators have the power to commence and prosecute any personal action which the decedent might have.

Mississippi law permits wrongful death claims to be prosecuted by duly-appointed personal representatives. Mississippi's wrongful death statute reads in pertinent part:

Whenever the death of any person . . . shall be caused by any real, wrongful or negligent act or omission . . . [t]he action for such damages may be brought in the name of the personal representative of the deceased person . . . for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband . . . or in the name of a child for the death of a parent . . . or all parties interested may join in the suit and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned . . .

Miss. Code Ann. § 11-7-13.

Kelley conceded that she was not appointed executrix of Bozeman's estate prior to filing her complaint. Because standing is dependent upon Kelley's status as personal representative, and because standing is determined as of the date the complaint is filed, Kelley as a matter of law lacked standing as a personal representative, and Clark Sand was therefore entitled to summary judgment.

Kelley attempted to avoid summary judgment on the basis that she was named as executrix in Bozeman's unprobated will, and because that will purported to bequeath to her proceeds from his silica lawsuit. (T. 12; R.E.11) Kelley further argued that the provision in the wrongful death statute allowing suit by the personal representative embraced an unprobated will's listing of who should be executrix. (T. 12-17; R.E. 11). Kelley is wrong. Only the chancery court in a proper venue has the authority to "[appoint] . . . the personal representative of the estate, whether executor, executrix, administrator or administratrix." *Long v. McKinney*, 897 So. 2d 160, 174 (Miss. 2004). "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." *Id.* In order for Kelley to have possessed standing as a personal representative under the wrongful death statute she had to be appointed. *See National Heritage Realty, Inc. v. Boles*, 947 So. 2d 238, 251 (Miss. 2006). The fact that she was later appointed executrix "does not change the undisputable fact that [she] lacked standing to commence the suit." *Pope*, 995 So. 2d at 126 (Miss. 2008)(rehearing denied December 11, 2008).

What was left to Kelley in Bozeman's will was any recovery received from the action he had already commenced, not a subsequent wrongful death claim.¹ However, Bozeman died while his case was still pending, and his case remained pending for nearly a year after his death before it was dismissed.

This Court very recently issued ruling in a matter in which a great-nephew of a decedent filed suit on behalf of a non-existent estate and as a wrongful death beneficiary. *Pope*, 995 So. 2d 123 (Miss. 2008)(rehearing denied December 11, 2008). Like Kelley, the great-nephew had not been authorized to proceed on behalf of the estate. Some eight months after suit was filed the great-nephew became the administrator. *Id.* at 125-126. In reversing the trial court's denial of the motion to dismiss for lack of standing this Court opined,

Were this Court to allow such a scenario, any person could commence an action, toll the statute of limitations, open an estate when convenient, and during the interim, keep the courthouse door open until a real party in interest, that is, one who has suffered injury and is entitled to remedy, appears before the bench and bar for relief. To allow a great-nephew without standing to commence the action is not only violative of the law long established by our Legislature, which determines who may bring a wrongful-death action, whether by kinship or through an estate, but also subverts our Rules of Civil Procedure. Accordingly, we find [the great-nephew], at the time of filing of the complaint, lacked *locus standi*.

¹ The wrongful death beneficiaries may not be circumvented to give recovery to Kelley as a devisee in the will since Bozeman could not bequeath what he did not have (i.e., a wrongful death claim). *Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646, 650 (Miss. 1979). "The wrongful death statute creates a new and independent cause of action in favor of those named in the statute. . . [and] is not a part of the estate of the deceased. . ." *Id.* (citing *Hasson Grocery Co. v. Cook*, 17 So. 2d 791 (1944)). Only if none of the wrongful death heirs named by statute survive does a recovery become an asset of an estate. *Id.* (citing *Smith v. Garrett*, 287 So. 2d 258, 261 (Miss. 1973)). "Because the claim accrues at death, it is impossible for the deceased to assign any interest in the [wrongful death] claim." *England v. England*, 846 So. 2d 1060, 1070 (Miss. Ct. App. 2003)(citing *Gillis v. Case*, 574 So. 2d 692, 694 (Miss. 1990)).

Moreover, under Alabama law (where Bozeman's estate was opened) Kelley will receive no proceeds from the wrongful death suit. In Alabama, a cause of action for wrongful death is not an asset of the decedent's estate. *Board of Trustees of Univ. of Alabama v. Harrell*, 188 So. 2d 555, 557 (Ala. 1965). Like Mississippi, Alabama recognizes that the cause of wrongful death cannot be owned by the decedent and, therefore, cannot be an asset of the estate. *Id.* "Simply, an action for wrongful death in Alabama does not benefit the estate of the deceased, the decedent's estate is not interested in the result, and any damages recovered are not subject to administration." *Id.*

Id. at 126. This Court should likewise hold Kelley had no standing to file this claim as a personal representative of Bozeman because Kelley had not been appointed as executrix prior to commencing this action.

II. KELLEY LACKED STANDING TO FILE A WRONGFUL DEATH CLAIM BECAUSE SHE WAS NOT A WRONGFUL DEATH BENEFICIARY UNDER MISS. CODE ANN. § 11-7-13.

Mississippi law permits wrongful death actions to be prosecuted by a “widow for the death of her husband.” Miss. Code Ann. § 11-7-13. However, Kelley was the girlfriend of the decedent, not his wife; therefore, Kelley had no standing under the wrongful death statute.

First, it is undisputed that there was no ceremonial marriage between Bozeman and Kelley. Moreover, the evidence presented by Clark Sand in support of its motion for summary judgment overwhelmingly demonstrated that there was no common law marriage between Bozeman and Kelley. (R. 682-713; R.E. 9). For example, Bozeman gave sworn deposition testimony on November 4, 2004, wherein he unequivocally disclaimed a marital relationship. Specifically, Bozeman repeatedly stated that he “don’t have a wife.” (R.702-704; R.E. 9). He further explained that Kelley had been his girlfriend for four years. (R. 707; R.E. 9). Bozeman testified that his last wife was deceased. (R. 704; R.E. 9). And when Bozeman had trouble remembering certain information he stated that he needed to ask his girlfriend and the following exchange ensued:

Q. Would that be your wife?
A. No, I don’t have a wife.

(R. 706; R.E. 9). Throughout the deposition both Bozeman and counsel referred to Kelley as Bozeman’s girlfriend. (R.701-710; R.E. 9). There was no claim of marriage by Bozeman.

On December 20, 2007, Kelley testified conclusorily that that Bozeman was her husband. However, Kelley further testified that she and Bozeman did not have a joint bank account. (R. 511; R. E. 8), and that Bozeman never said that she was his wife.

Q. Ms. Kelley, you discussed Mr. Bozeman and yourself holding yourself out as husband and wife . . .

Q. Did he actually say that out loud?

A. Yes ma'am.

Q. That you were his wife?

A. . . .He didn't say wife, he said better half.

(R. 693; R.E. 9).

Additionally, there is ample documentation proving a friendly relationship but not a familial one. Specifically, Bozeman's death certificate lists him as widowed, and Kelley was the informant. (R. 687; R.E. 9). Rush Hospital records show him living with a "friend," and Bozeman acknowledged that statement with his signature. (R. 698-700; R.E. 9). Likewise, Jeff Anderson Hospital records list his marital status as widowed, and show Ruby Kelley's relationship status to Bozeman as "unknown." (R. 694-697; R.E. 9).

Beyond testimony and documents from hospitals, Kelley admitted in writing to not being Bozeman's wife when she signed authorizations denoting herself as "girlfriend" on authorizations provided to defense counsel just prior to her deposition. (R. 711-713; R.E. 9).

Second, Kelley's contention that she was a common law wife of Bozeman appears to have been mainly an afterthought. Kelley's initial response to appellants' motion for summary judgment sought to confer standing as a wife by claiming that Bozeman and Kelley held themselves out to be husband and wife. (R.65; R.E. 4). However, in oral argument before the trial court Kelley tacitly admitted that if she was not a personal representative then she would have no standing by stating:

. . . to sum up the Plaintiff's argument . . . we believe Ms. Kelley is a personal representative as stated under the wrongful death statute . . . [but] there is a difference between who can bring a wrongful death claim and who benefits or collects under the wrongful death proceeds. Those are two different animals . . . a personal death representative . . . has standing to bring a wrongful death claim . . . this case is also named on behalf of the wrongful death beneficiaries . . . I represent the sons. If Your Honor believes that Ms. Kelley is not a person (sic) representative I should be allowed under Rule 17 to substitute the proper parties . .

(T. 14-15; R.E. 11).

Third, Kelley's attempt to sneak over to Alabama and obtain an *ex parte* judgment of common law marriage on a fraudulent record is to no avail. The Alabama judgment has now been "vacated, set aside and held for naught."

Under Mississippi law, Kelley must prove by clear and convincing evidence that she was indeed married to Bozeman. *Stuckey v. Warren*, 67 So. 2d 707 (Miss. 1953); *Enis v. State*, 408 So. 2d 486, 488 (Miss. 1981). "A claim of [common law marriage] is regarded with suspicion and will be closely scrutinized; the burden is on the one who asserts the claim, and all essential elements must be shown to exist." *Gaston v. Gaston*, 358 So. 2d 376, 378 (Miss. 1978). "[W]hen one of the parties is dead, the essential elements must be shown by clear, consistent and convincing evidence." *Id.*

Kelley did not produce evidence sufficient to meet her burden of proving her alleged marriage to Bozeman. Therefore, Clark Sand was entitled to summary judgment in the trial court, and this Court should reverse and render for Clark Sand.

III. KELLEY LACKED STANDING TO FILE A WRONGFUL DEATH CLAIM AS AN INTERESTED PARTY UNDER MISS. CODE ANN. § 11-7-13.

The trial court's order finds "that Ms. Kelley did have standing to file said lawsuit on March 5, 2007, if not legally in this state as the executrix of Mr. Bozeman's estate, then as the personal representative, or interested party by virtue of Mr. Bozeman's will." (R. 718; R.E. 10). The wrongful death statute allows only for interested parties to be joined in a suit, not to bring

the lawsuit. *Franklin v. Franklin*, 858 So. 2d 110, 115 (Miss. 2003); *see also* Miss. Code Ann. § 11-7-13. To allow Kelley to proceed as an “interested party” by virtue of being a devisee in an unprobated will circumvents the wrongful death statute and creates a new class of persons allowed to bring the statutory claim.

This Court has never allowed non-statutory beneficiaries to assert wrongful death claims. In *Nat'l Heritage Realty v. Estate of Boles*, 947 So. 2d 238 (Miss. 2006), Eva Boles' died leaving no living husband, children, parents or siblings. *Id.* at 245. Nonetheless, her cousin filed a wrongful death action. *Id.* at 241. Summary judgment based on standing was sought and denied. *Id.* at 242. On appeal, this Court found that because the cousin was not a statutory wrongful death beneficiary, she had no standing to file the complaint. *Id.* at 255. Furthermore, because the decedent's estate had been opened in the wrong jurisdiction, it was void *ab initio*, and the cousin had no standing to assert the claims on behalf of a non-existent estate. *Id.* at 253. Because the cousin was not a statutory beneficiary and because there was no valid estate open at the time of filing, this Court reversed the trial court's denial of summary judgment and rendered judgment in favor of the defendants. *Id.* Kelley, likewise, had no standing to bring the subject suit in any capacity as she was neither a wrongful death beneficiary nor a duly appointed executrix of Bozeman's estate when the complaint was filed. Kelley's complaint was void *ab initio* and this Court should render judgment for the appellants.

IV. BECAUSE KELLEY LACKED STANDING TO COMMENCE THIS ACTION, THE COMPLAINT IS VOID, AND THIS COURT SHOULD RENDER JUDGMENT FOR CLARK SAND BECAUSE THE STATUTE OF LIMITATIONS HAS EXPIRED.

The limitations period applicable to a wrongful death action is adopted from the statute of limitations that governs the tort that caused the death. *Jenkins v. Pensacola Health Trust, Inc.*, 933 So. 2d 923, 926 (Miss. 2006). This Court has specifically stated,

Wrongful death claims must be based on a claim of some wrongful conduct which led to the death. Each act of alleged wrongful conduct . . . has its own statute of limitations. . . . However, if the injured party dies as a result . . . the negligence suit is transformed into a suit for wrongful death. Nevertheless, the gravamen of the claim is the negligent act which led to the death.

Id. at 925. The Court re-emphasized its ruling by holding “that the statute of limitations on bringing a wrongful death claim is subject to, and limited by, the statute of limitations associated with the claims of specific wrongful acts which allegedly led to the wrongful death.” Herein, the underlying tort is a products liability and/or negligence claim related to exposure to silica and silica-related products. Such suits must be commenced within three years. Miss. Code Ann. § 15-1-49. Bozeman’s statutory clock began running when he was diagnosed by his litigation doctors with silicosis in 2002. Bozeman’s claims were dismissed in 2006 (a year after he had died), and no viable complaint was ever re-filed. Therefore, the statute of limitations has expired, and judgment should be rendered for the Clark Sand.

In sum, because there has been no valid claim for Bozeman’s survival claims or any wrongful death damages since the Holmes County case was dismissed in 2006 (or since Bozeman’s death in 2005) the statute of limitations has expired and no new suit may be filed. As such, this Court should reverse the trial court’s erroneous ruling and render judgment on behalf of the appellants.

V. MISSISSIPPI’S SAVINGS STATUTE DOES NOT SAVE THIS ACTION BECAUSE THE PARTIES AND THE CLAIMS IN THIS ACTION ARE NOT IDENTICAL TO THOSE IN *MCBRIDE*.

Thousands of mass tort plaintiffs faced an uncertain fate after clarification of Mississippi’s joinder rules in *Janssen Pharmaceutica v. Armond*, 866 So. 2d 1092 (Miss. 2004) and its progeny. Recognizing problems with severing and transferring thousands of plaintiffs, this Court was “forced to provide some procedural remedy to . . . plaintiffs facing severance.” *Canadian National*, 926 So. 2d at 843. This Court found “all misjoined plaintiffs who lack

proper venue in the forum court . . . [can] file a new complaint in an appropriate venue selected by that plaintiff.” *Id.* at 845. The procedure under the savings statute was explained as follows:

a dismissal of 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 Miss. Code Ann. Section 15-1-69, which provides that “**the plaintiff may commence a new action for the same cause**, at any time within one year. . . .”

Id. (emphasis added).

This savings statute does not apply to Kelley’s action. A survival action is a statutory action given to an estate. See Miss. Code Ann. § 91-7-237. A wrongful death claim is a statutory action given to the statutorily defined heirs. See Miss. Code Ann. § 11-7-13. By definition, neither a survival action nor a wrongful death action can be “the same cause” which was commenced by Bozeman. The instant action is different both in form, substance, plaintiffs, defendants, and claims from that originally filed by Bozeman and subsequently dismissed pursuant to *Canadian National*.

The requirement of identical parties and claims in a savings statute enjoys a long history in Mississippi:

It is regarded as an equitable continuation of the same action already commenced, in the name or right of the same plaintiffs. But it cannot be held to give the right of action to parties who are different both in form and substance from the original parties. For this would be warranted neither by the terms nor the equitable purpose of the statute.

Ross, Strong & Co. v. Sims, 27 Miss. 359, (1854).

Courts of other jurisdictions have likewise viewed their savings statutes to preserve only those claims originally dismissed. See *Murray v. Taylor* 206 S.E.2d 643 (Ga. Ct. App. 1974) (finding that the renewal statute did not apply in wrongful death actions where prior suit was brought by widow before she qualified as administratrix making the suit void); *Lucas v. Life Ins.*

Co., 42 N.E.2d 674 (Ohio App. 1942)(denying plaintiff's request to reinstitute an action for recovery on a contract of insurance); *Moss v. Keesler*, 60 Ga 44 (1878)(finding that the savings statute was a personal privilege in favor of a particular plaintiff in the original action and since the administrator was not a party to the original action he had no standing to renew the action).

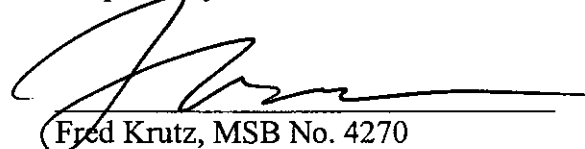
Because Kelley's suit failed to comport with the savings statute, the statute's one year window to refile is inapplicable. Therefore, the statute of limitation applicable to the underlying injury applies. *Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923 (Miss. 2006). Bozeman was diagnosed with a silica-related injury in 2002, and the time for filing an action for that injury had long passed when Kelley filed this action in 2007.

CONCLUSION

Because Kelley had no standing to file this action and because the survival statute does not apply, defendants were entitled to summary judgment. For these reasons, this Court should reverse and render judgment for Clark Sand.

This the 27th day of February, 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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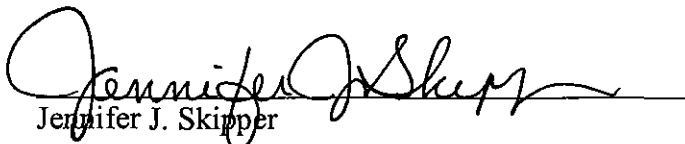
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