2008-IA-01584-SCTRe

IN THE SUPREME COURT OF MISSISSIPPI
CONSOLIDATED APPEALS NOS. 2008-IA-01572, 01584, 01599

TRANE US, INC. FORMERLY KNOWN AS AMERICAN STANDARD, INC. — APPELLANT

V. — CASE NO. 2008-IA-1584-SCT

MARY PITTMAN AS THE EXECUTRIX OF THE ESTATE OF LONNIE PITTMAN — APPELLEE

Consolidated with:

GARLOCK SEALING TECHNOLOGIES, LLC, SUCCESSOR BY MERGER TO GARLOCK, INC. — APPELLANT

V. — CASE NO. 2008-IA-1572-SCT

MARY PITTMAN AS THE EXECUTRIX OF THE ESTATE OF LONNIE PITTMAN, DECEASED — APPELLEE

Consolidated with:

GARDNER DENVER, INC., ET AL. — APPELLANT

V. — CASE NO. 2008-IA-1599-SCT

MARY PITTMAN AS THE EXECUTRIX OF THE ESTATE OF LONNIE PITTMAN, DECEASED — APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed parties 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 disqualifications or recusal.

1. Mary Pittman.

2. Timothy W. Porter, Patrick C. Malouf, and John T. Givens of Porter & Malouf, Jackson, Mississippi, Counsel of Record for Plaintiff, Mary C. Pittman.

3. Stacey Lea Sims of Morris, Sakalarios & Blackwell, PLLC in Hattiesburg, Mississippi, Counsel for Plaintiff Mary C. Pittman.

4. Robert M. Arentson, Jr. of Baker, Donelson, Bearman, Caldwell & Berkowitz, Jackson, Mississippi Counsel of Record for Rapid- American Corp.

5. Deborah D. Kuchler, Keith L. Gates, and Rhea Sheldon of Abbott, Simses & Kulcher, Jackson, Mississippi, Counsel of record for Keystone International, Inc. and Keystone Valve U.S., Inc.

6. Craig Brasfield, James G. House, T. Hunt Cole, Fred Krutz, Laurin McGuffee, Jason Clayton, and Richard Crump, of Forman, Perry, Watkins, Krutz & Tardy, Jackson, Mississippi, Counsel of record for Yuba Heat Transfer, General Electric Company, Gardner Denver, Inc. Gorman-Rupp Co., Dorr Oliver, Inc., Sulzer Pumps US, Inc., Warren Pumps, Inc., Warren-Rupp and Trane US, Inc. f/k/a American Standard, Inc.

7. Roy C. Williams, Karl R. Steinberger, and Brett K. Williams of Williams, Heidelberg, Steinberger & McElhaney, Pascagoula, Mississippi, Counsel of record for Mississippi Rubber & Specialty Co., Viacom, Inc. f/k/a CBS Corp, and Westinghouse Electric Corporation.

8. Jeffrey P. Hubbard of Wells, Moore, Simmons & Hubbard, P.L.L.C., Jackson, Mississippi, Counsel of record for FMC Corporation.

9. Claire Ketner, Christopher Shapley, Cheri D. Green, and Robert L. Gibbs of Brunini, Grantham, Grower & Hewes, P.L.L.C., Jackson, Mississippi, Counsel for Flowserve US, Inc., solely as successor to Rockwell Manufacturing Company.

10. Walter W. Dukes, Esq. of Dukes, Dukes, Keating & Faneca, P.A., Gulfport, Mississippi, Counsel of record for Sepco Corporation and Furon Company.

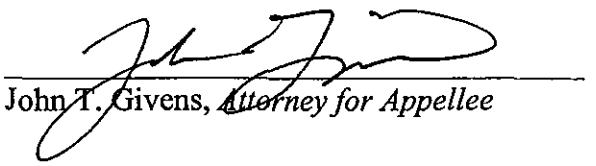
11. James H. Bolin, Meade W. Mitchell, and Mark W. Garriga of Butler, Snow, O'Mara, Stevens & Cannada, P.L.L.C., Jackson, Mississippi, Counsel of record for Armstrong International, Inc.

12. W. Buckley Stewart and Robert P. Thompson of Copeland Cook Taylor & Bush, Ridgeland, Mississippi, Counsel of record for Cooper Industries and Emerson Electric.

13. Thomas E. Vaughn of Vaughn, Bowden & Wooten, P.A., Gulfport, Mississippi, counsel of record for Foster Wheeler Corporation.

14. Mary C. Pittman, as the Executrix of the Estate of Lonnie Pittman.

This the 30th of November, 2009



John T. Givens, *Attorney for Appellee*

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STATEMENT OF THE CASE: FACTS AND PROCEEDINGS IN THE CIRCUIT COURT

The original lawsuit was filed on or about December 31, 2002. (RE Tab 1) (CR 1:73). Subsequently it was discovered that Lonnie Pittman was deceased at the time this lawsuit was filed. The only alleged flaw in the original complaint was that the Defendants were not on notice when the complaint was filed that Lonnie Pittman was deceased. Once it was discovered Lonnie Pittman was deceased, the Defendant 3M Company filed a Suggestion of Death on the record on or about April 16, 2004 which was served upon all Defendants in the case. (RE Tab 2) (CR 2:265).

In response to this Suggestion of Death, Plaintiff's counsel filed a Motion for Substitution of Parties. Plaintiff's counsel unintentionally represented that Lonnie Pittman had become deceased

since the filing of the complaint. It was clearly unintentional as the suggestion of death clearly stated that Lonnie Pittman had died on March 11, 2001. The Defendant Trane admits to receiving the Motion for Substitution on April 28, 2004. On April 28, 2004, Judge Tomie Green signed an order granting the substitution of Mary Pittman as the Executrix of the Estate of Lonnie Pittman as the plaintiff. (RE Tab 3) (CR 2:275). The Defendants failed to ever object to this order or seek relief from this order. In fact, to date, the Defendants have still not challenged this order.

In addition, shortly after the order allowing substitution, the Defendants entered into a scheduling order and an agreed order setting the case for trial. (RE Tab 4) (CR 1:33-34) (Supplemental CR at 91). Garlock has represented to this Court they were not aware of Lonnie Pittman being deceased until August 2004. This representation is in the face of being served with a Suggestion of Death, Motion for Substitution, an order allowing substitution, a scheduling order, and entering into an agreed order setting the case for trial. It should be very clear that all Defendants were aware by at least May of 2004 that Lonnie Pittman was deceased. After these orders were entered and the Defendants had knowledge that Lonnie Pittman was deceased at the time the complaint was filed, the Defendants substantially engaged in the litigation process by filing fact witness designations, expert designations, exhibit lists, and other documents while failing to overtly pursue the affirmative defense they are claiming now. (RE Tab 4) (CR 1:34-37, 39, 42-43, 48-49).

Garlock filed a Motion to Dismiss or to Sever the Action in August of 2004. (RE Tab 5) (CR 2:278). Part of the Motion to Dismiss was based on the fact that Lonnie Pittman was deceased prior to the filing of the *Nettles* complaint. Trane joined into this Motion. On or about November 23, 2004, Judge Green entered an order severing the action thereby granting the alternative relief requested by Garlock and Trane. (RE Tab 6) (CR 3:322) The Defendants never sought, nor received any relief on their Motion to Dismiss filed in August of 2004. There is no evidence that the

Defendants' Motion to Dismiss was ever overtly brought to the lower Court's attention.

Garlock then noticed for hearing a Motion to Dismiss, or in the Alternative, Motion for More Definite Statement. (RE Tab 7) (CR 3:323). Then the Defendants entered into **an agreed order** on June 22, 2005 to allow Plaintiff to file an amended complaint. (RE Tab 8) (CR 7:1008). Without any basis or evidence to support it, the Defendants state that the Circuit Court directed that the issue of the Motion to Dismiss would be reserved until such time as the severance and filing of the *Mangialardi* compliant pleading was completed. This appears no where in the record. Regardless, when the amended complaint was filed Garlock waited almost two full years to overtly bring it to the lower court's attention while actively engaging the litigation process.

On August 22, 2005, the Amended Complaint was filed in the Circuit Court of Hinds County. (RE Tab 9) (CR 3:325). This was one cause of action for both wrongful death and survival damages as required by Mississippi law. Certain Defendants filed a Motion to Dismiss on or about October 14, 2005. (RE Tab 10) (CR 3:452 and 4:453). Garlock proceeded to fully participate in the litigation of this case. Garlock filed designations of experts, fact witnesses, and exhibits on October 21, 2005. (RE Tab 4) (CR 1:61). On June 15, 2006, Garlock filed a Motion to Compel and Notice of Hearing. (RE Tab 4) (CR 1:64). On July 6, 2006, Garlock filed a Notice of Cancellation of Hearing. (RE Tab 4) (CR 1:64). It is clear that Garlock was actively participating in the litigation while failing to pursue or even file a Motion to Dismiss based on Lonnie Pittman being deceased at the time the original complaint was filed. Garlock did not file a Motion for Summary Judgment until June 6, 2007, which is over three years from when Garlock first learned that Lonnie Pittman was deceased when the original complaint was filed. (RE Tab 11) (CR 4:458).

This Motion to Dismiss filed by certain Defendants and Garlock's Motion for Summary Judgment was not overtly brought to the lower court's attention until August of 2007, which is over

three years from when the Defendants first learned that Lonnie Pittman was deceased when the original complaint was filed. Judge Kidd ultimately denied the Motion to Dismiss and Motion for Summary Judgment on or about October 23, 2007. (RE Tab 12) (CR 5:649 and 5:650). The Defendant Garlock filed a Motion for Reconsideration. The Plaintiff filed a response to this Motion for Reconsideration. (RE Tab 13) (CR 5:669-679). The Motion for Reconsideration was also denied. The Defendants were not successful in seeking interlocutory review of this order.

After these Motions were denied and interlocutory review was denied, the Defendant Trane discovered that the Estate of Lonnie Pittman had been dismissed for want of prosecution. This was not known to Mary Pittman nor Plaintiff's counsel. Once this information was discovered, Plaintiff's counsel had the estate reinstated. Based on this information, the Defendants, Trane and Garlock filed additional Motions for Summary Judgment. (RE Tab 14) (CR 5:681 to CR 6:810). The Plaintiff filed a response to these Motions for Summary Judgment. (RE Tab 15) (CR 8:1080-1156) The Motions were ultimately denied by the Honorable Winston Kidd. (RE Tab 16) (CR 9:1304-08). This order was successfully appealed to this Court.

STANDARD OF REVIEW

This Court's standard of review for the grant or denial of summary judgment is *de novo. Slatery v. North Miss. Contract Procurement,* 747 So.2d 257, 259 (¶4) (Miss. 1999). "Considered in the light most favorable to the nonmoving party, if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate." *Grimes v. Warrington,* 982 So.2d 365, 367 (¶8) (Miss. 2008); citing Miss. R. Civ. P. 56(c); *Jones v. Flour Daniel Servs. Corp.,* 959 So.2d 1044, 1046 (Miss. 2007); *Russell v. Orr,* 700 So.2d 619, 622 (Miss. 1997). Therefore, "the lower court's decision is [affirmed] . . . if it appears that triable issues of fact remain when the facts are viewed in the light most favorable to the nonmoving party."

Slatery, 747 So.2d at (¶4); quoting *Robinson v. Singing River Hosp. Sys.*, 732 So.2d 204, 207 (¶12) (Miss. 1999); citing *Box v. State Farm Mut. Auto. Ins. Co.,* 692 So.2d 54, 56 (Miss. 1997). Since the Defendants sought relief in the form of summary judgment, the Plaintiff would respectfully submit that this Court should only review the record to determine whether genuine issues of material facts exist, not questions of law.

SUMMARY OF ARGUMENT

The Plaintiff contends that the claims of Lonnie Pittman have been proper since the filing of the original complaint on December 31, 2002, and that since April 2004, there has always been a real party in interest litigating on behalf of Lonnie Pittman. Since April 2004, Mary Pittman has acted on behalf of the estate pursuing the survival action of Lonnie Pittman. In addition since April 2004, Mary Pittman has been pursuing wrongful death claims on behalf of all wrongful death beneficiaries since she was the widow of the deceased.

With that in mind, the primary issue presented on this appeal is whether a Defendant can waive the affirmative defense of the statute of limitations. The Defendants attempt to muddy this issue by claiming that the statute of limitations is jurisdictional, and therefore, it can not be waived. This is simply not so. The Statute of Limitations is an affirmative defense that can be waived if not timely pursued. It is clear from the lower court record that the Defendants have been aware since at least April of 2004 that Lonnie Pittman was deceased at the time the original complaint was filed in his name. Therefore, it was at this time that the Defendants were aware that they possibly had an affirmative defense that the statute of limitations had run on Lonnie Pittman's claims. The Defendants did not overtly pursue this affirmative defense, but instead, the Defendants actively participated in the litigation of the case. The Defendants did not overtly bring this affirmative defense to the lower court's attention until over **three (3) years** from first learning that Lonnie

Pittman was deceased at the time the original complaint was field. The Defendants can offer no reasonable justification for this delay since the facts of the case have not changed since April of 2004. Therefore, the Plaintiff respectfully submits that the Defendants waived this affirmative defense. *See MS Credit Center, Inc. v. Horton,* 926 So.2d 167, 180 (¶44) (Miss. 2006); *Grimes v. Warrington* 982 So.2d 365, 370 (¶26) (Miss. 2008).

Further, the Order of Substitution was entered on the docket on May 3, 2004. The Defendants never objected to this order or appealed this order. Pursuant to Rule 60 of the Mississippi Rules of Civil Procedure, the Defendants' time for seeking relief from this order has long since expired. Since this order was not challenged in the lower court, the order of substitution is not an issue before this Court at this time. *See Anglin v. Gulf Guar. Life Ins. Co.,* 956 So.2d 853, 864 (Miss. 2007). Therefore, the Plaintiff would respectfully submit that this Court has to consider the Order of Substitution to be a valid order since it stands as entered on May 3, 2004. If the Order of Substitution is valid, then the lower court's decisions should be affirmed, and the Defendants' requested relief denied.

Even if this Court is to find that the original complaint was void ab initio and that Mary Pittman was not formally the Executrix of the Estate of Lonnie Pittman, the Plaintiff would respectfully submit that this Court should find that a viable wrongful death action remains. No estate is required to pursue a wrongful death action. *See* Miss. Code Ann. § 11-7-13. Mary Pittman, as the widow of Lonnie Pittman, is the proper beneficiary to bring the wrongful death action pursuant to Miss. Code Ann. § 11-7-13. Therefore, even if the estate was never a proper party, Mary Pittman as a wrongful death beneficiary was a proper party and had standing to bring this action. While the Defendants argue that the statute of limitations had run for Mary Pittman to pursue a wrongful death action in April of 2004, this Court should find the Defendants waived their affirmative defense of

statute of limitations. Therefore, at a minimum, this Court should find that a wrongful death action can proceed in the lower court.

The original complaint filed is not a nullity and not void ab initio due to Lonnie Pittman being deceased when the complaint was filed. This issue has not been directly addressed by this Court since the adoption of the Mississippi Rules of Civil Procedure. The Tenth Circuit Court of Appeals has allowed a case to proceed even though it was filed in the name of a deceased plaintiff. *See Esposito v. United States,* 368 F.3d 1271, 1277 (10th Cir. 2004). The Defendants rely heavily upon *Necasise v. Sacks,* 841 So.2d 1098 (Miss. 2003) which only holds that litigation can not be carried on by or against a dead person. This is not what the Plaintiff is attempting to do in this case. The real parties in interest have been joined into the case so that it can proceed to finality of judgment. In addition, Rule 17(a) of the Mississippi Rules of Civil Procedure allows for the real party in interest to be joined and/or substituted before the case is dismissed. This Court has allowed a non existent party at the time a complaint was filed to be joined into a cause of action long after the statute of limitations would have run. *See Methodist Hosp. of Hattiesburg, Inc. v. Richardson,* 909 So.2d 1066 (Miss. 2005). The Plaintiff would respectfully request that this Court allow the joinder and/or substitution of Mary Pittman as the Executrix of the Estate of Lonnie Pittman and as a wrongful death beneficiary to stand, especially since the Defendants failed to ever object to the order of substitution.

The Defendants argue that Mary Pittman did not have standing or capacity to sue on behalf of the estate. It should not be disputed that by order of the Rankin County Chancery Court Mary Pittman was appointed as the Executrix of the Estate of Lonnie Pittman. The Defendants argue that since Letters Testamentary were not formally issued and Mary Pittman did not take the oath, that she was never officially the Executrix of the Estate. The Defendants cite no case law that supports their

position. The Plaintiff has cited case law from other jurisdictions that hold when letters testamentary are formally issued the letters relate back to the date of death of the decedent and ratify all proper acts taken by the Executrix in the meantime. It should be clear that when the order of substitution was entered by the lower court on May 3, 2004, Mary Pittman was the Executrix of the Estate of Lonnie Pittman. Subsequently, due to no error on the part of the Plaintiff, the Estate of Lonnie Pittman was dismissed for want of prosecution. Once this was discovered, counsel for Plaintiff had the estate reinstated by order of the Rankin County Chancery Court. This order specifically stated that the reinstatement would be as if the estate had never been dismissed. Therefore, the Plaintiff would respectfully submit that this Court should find that Mary Pittman has had standing and capacity to sue on behalf of the Estate of Lonnie Pittman. Further, the Plaintiff would respectfully ask this Court to find that Mary Pittman had capacity and standing to pursue a wrongful death action.

Finally, the Defendants attempt to blur the lines between capacity to sue and subject matter jurisdiction. The Defendants argue that subject matter jurisdiction can not be waived and can be raised at any time. While this may be a correct statement of the law, the Defendants are really arguing that capacity to sue has been lacking at all times since inception of this lawsuit, even after the substitution order was entered on May 3, 2004. The Circuit Court of Hinds County has at all times had subject matter jurisdiction over this cause of action as it is a civil action with an amount in controversy that confers subject matter jurisdiction to the Circuit Court. On the other hand, capacity to sue is not jurisdictional and it can be waived if not properly pled or pursued in a timely manner. The Defendants failed to plead the affirmative defense of capacity to sue by specific negative averment in their answers as required by Miss. R. Civ. P. 9(a). Further, the Defendants failed to timely pursue this defense. Therefore, the Plaintiff would respectfully submit that the Defendants have waived their defense of lack of capacity to sue and should be barred from pursuing

it in the lower court or here on appeal.

ARGUMENT

I. WHETHER THE APPELLANTS WAIVED THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS.

The arguments of the Defendants' if concisely stated boils down to the statute of limitations had run on the claims of Lonnie Pittman and/or Mary Pittman, as the Executrix of the Estate of Lonnie Pittman and wrongful death beneficiary. Therefore, the claims of the Plaintiff are time barred. As will be demonstrated, the Defendants failed to timely raise this defense, and therefore, the Plaintiff would respectfully submit that this Court should find the affirmative defense was waived.

"The statute of limitations is an affirmative defense." *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 147 (¶12) (Miss. 1998). Rule 8(c) of the Mississippi Rules of Civil Procedure entitled "Affirmative Defenses" states "In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . ." Therefore, the issue before this Court is whether the Defendants waived the affirmative defense of statute of limitations by their failing to timely bring the issue to the trial court's attention while actively participating in the litigation process.

This Court has made it abundantly clear that it is not enough for a Defendant to place an affirmative defense within their answer. This Court has held "[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." (Emphasis added) *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180 (¶44) (Miss. 2006). This Court has subsequently affirmed this holding on numerous occasions.

This Court has most recently addressed the waiver of affirmative defenses in *Stuart v. University of Mississippi Medical Center,* No. 2007-CT-864-SCT (Miss. 2009). This Court specifically held that:

> The notice requirements in the MTCA are substantive requirements, which are no more or less important **than a statute of limitations.** The notice requirements in the MTCA are not jurisdictional, and we now hold them to be nonjurisdictional and, therefore, waivable.

(Emphasis added) *Stuart* at (¶11). This holding makes clear that the statute of limitations is an affirmative defense that is waivable.

The Plaintiff in *Grimes v. Warrington* argued that Dr. Warrington waived his affirmative defense afforded under the MTCA due to an unreasonable delay. 982 So.2d 365, 369 (¶21) (Miss. 2008). Relying upon *Horton,* this Court stated that "to pursue an affirmative defense meant to **plead it, bring it to the court's attention, and request a hearing.**" (Emphasis added) *Grimes,* 982 So.2d at 370 (¶23); citing *MS Credit Ctr., Inc. v. Horton,* 926 So.2d 167, 181 (Miss. 2006). This Court found that Dr. Warrington had no justifiable reason for his unreasonable delay in seeking summary judgment based on immunity under the MTCA. *Id.* at 370 (¶26). The trial had been set on three separate occasions, experts designated and deposed, and Dr. Warrington had even filed a motion in limine. *Id.* Dr. Warrington "proceeded substantially to engage the litigation process by consenting to a scheduling order, participating in written discovery, and conducting depositions." *Id.* at (¶27). This Court found this to be an "unecessary and execessive" waste of the trial court's resources if immunity was available to Dr. Warrington from the moment the complaint was filed. *Id.* at (¶26). This Court found the affirmative defense to be waived. *Id.* As is the case here, the arguments and defenses asserted by the Defendants have been available since the filing of the original complaint in January of 2003. Yet, the Defendants waited until August of 2007 to bring it to the trial court's

attention. A delay of over four (4) years should be found to be unreasonable, and the Defendants' affirmative defenses that are at issue in this appeal should be found to be waived.

This Court has also held that the defenses of insufficiency of process and insufficiency of service of process could be waived. *East Mississippi State Hosp. v. Adams,* 947 So.2d 887, 891 (¶11) (Miss. 2007). In that case the "defendants participated fully in the litigation of the merits for over two years without actively contesting jurisdiction in any way." *Id.* The Defendants "participated fully in discovery, filed and opposed various motions." *Id.* This Court stated that "[W]hile the defendants may have literally complied with Rule 12(h), they did not comply with the spirit of the rule." *Id.* Therefore, "[O]n this record we conclude the defendants waived the defenses . . . ." *Id.*

In this case, the Defendants through their own inaction consented to the substitution of Mary Pittman as a wrongful death beneficiary and as Executrix of the Estate of Lonnie Pittman as party plaintiffs. After the Suggestion of Death was filed, an agreed scheduling order was entered on May 20, 2004. (RE Tab 4) (CR 1:33) (Supplemental CR at 91). An order setting the case for trial was entered on the same day. (RE Tab 4) (CR 1:34). The Defendants filed exhibit lists, designations of expert and fact witnesses, and motions. (RE Tab 4) (CR 1:34-37, 39, 42-43, 48-49). Therefore, the record is clear that pleadings were filed, discovery conducted, and hearings were held all after the death was suggested on the record. In other words, the Defendants were substantially participating in the litigation while failing to pursue their affirmative defenses.

Garlock filed a Motion to Dismiss in August 2004 arguing that Lonnie Pittman was deceased at the time the original complaint was filed. (RE Tab 5) (CR 2:278). This motion was never overtly brought to the lower court's attention. Garlock filed another Motion to Dismiss, or in the Alternative, Motion for More Definite Statement sometime in 2005. (CR 1:57). This Motion to

Dismiss made no mention of Lonnie Pittman being deceased when the original complaint was filed. This motion was noticed for hearing. (RE Tab 7) (CR 3:323). **Thomas Tyner, one of Garlock's attorneys,** entered into an agreed order on or about June 22, 2005 allowing the Plaintiff to file an amended complaint. (RE Tab 8) (CR 7:1008). At this point, Garlock had been aware for over a year that Lonnie Pittman was deceased when the original complaint was filed. In light of this knowledge, Garlock agreed to allow the Plaintiff to file an amended complaint. Garlock has not and can not offer any justifiable reason why they did not seek the dismissal of the claims at that time, **and further, Garlock allowed the Plaintiff to pursue them with an agreed order.**

The amended complaint was filed on August 22, 2005. (RE Tab 9) (CR 3:325). All the Defendants answered the amended complaint. Subsequently, Garlock filed designations of experts, fact witnesses, and exhibits on October 21, 2005. (RE Tab 4) (CR 1:61). On June 15, 2006, Garlock filed a Motion to Compel and Notice of Hearing. (RE Tab 4) (CR 1:64). On July 6, 2006, Garlock filed a Notice of Cancellation of Hearing. (RE Tab 4) (CR 1:64). It is clear that Garlock was actively participating in the litigation while failing to pursue it's affirmative defenses. During this active participation and since at least April 2004, Garlock was fully aware that at the time the original complaint was filed, Lonnie Pittman was deceased . Yet, Garlock and other Defendants did not *overtly* bring this affirmative defense to the trial court's attention until the August of 2007. This constitutes a waiver of the Defendants' affirmative defenses, including but not limited to, statute of limitations.

Pursuant to the agreed order entered into between the Defendants and Plaintiff, the amended complaint was filed on August 22, 2005. The Defendants then waited until approximately June of 2007 to file their Motions to Dismiss and for Summary Judgment. The Defendants waited until

August of 2007 to **overtly bring the Motions to the lower court's attention.** The Defendants are not able to offer any reason for actively participating in the litigation while failing to overtly bring their affirmative defenses to the lower Court's attention **for over three years.** The only logical reason is the Defendants were negligent in failing to timely and overtly pursue their affirmative defenses. As such, any affirmative defenses should be deemed waived. The Plaintiff respectfully submits that the actions of the Defendants in unreasonably and unjustifiably waiting years to bring these issues to the trial court's attention would constitute a waiver of the statute of limitations defense and any other affirmative defense. Therefore, the trial court's decision should be affirmed by this Court.

The Defendants cite several authorities in their Briefs for the proposition that extinguishment of a claim by the statute of limitations is a "vested right which can not be revived." *Tolliver, ex rel. Wrongful Death Beneficiaries of Green v. Mladineo,* 987 So.2d 989 (Miss. Ct. App. 2007). The Defendants also state that the expiration of the period of limitation for bringing a claim "shall defeat and extinguish the right as well as the remedy." Miss. Code Ann. § 15-1-3. The Defendants rely upon *University of Mississippi Med. Center v. Robinson,* 876 So.2d 337 (Miss. 2004) to support this. That case is easily distinguishable from this case. In *Robinson,* this Court held that the legislature could not amend a statute, and thereby revive a right to sue that otherwise would not be available. 876 So.2d at 340-41. *Robinson* did not hold that once the statute of limitations runs the claims would cease to exist and could never be pursued. This is not an accurate statement of the law.

While the running of the statute of limitations may normally extinguish the rights of a Plaintiff, the statute of limitations is an affirmative defense that must be pled and overtly pursued as discussed *Supra,* otherwise it can be waived. Here, even if the Defendants had an affirmative defense that the statute of limitations had run, the Defendants waived this defense by failing to bring

it overtly to the lower court's attention coupled with their active participation in the litigation.

II. THE APPELLANTS FAILED TO OBJECT OR OTHERWISE CHALLENGE THE SUBSTITUTION ORDER ENTERED ON MAY 3, 2004 AND THE TIME TO DO SO HAS EXPIRED.

Assuming *arguendo*, that this Court finds the original complaint was void *ab initio,* the Defendants have waived their objections to the substitution of Mary Pittman as the proper party plaintiff through the failure to bring their objections overtly to the lower court's attention coupled with their active participation in the litigation. The order substituting Mary Pittman as the proper party plaintiff was entered on May 3, 2004. (RE Tab 3) (CR 3:275). Pursuant to Miss. R. Civ. P. 60(b), the Defendants had either six (6) months or a reasonable amount of time after the order was entered to seek relief in the form of a motion. The Defendants failed to object to the order and also failed to appeal this order. The only action Garlock took was the filing of a Motion to Dismiss approximately three months after the order was entered. The other Defendants did not even file a Motion to Dismiss. The Defendants never challenged this order and should be barred from doing so now.

This Court has previously held that a fundamental rule of appellate procedure is that issues raised for the first time on appeal will not be considered. *See e.g., Anglin v. Gulf Guar. Life Ins. Co.,* 956 So.2d 853, 864 (Miss. 2007) (quoting *Alexander v. Daniel,* 904 So.2d 172, 183 (Miss.2005)). It is the responsibility of the Defendants to obtain a ruling from the lower court on a particular issue, and if the party fails to obtain a ruling it is thereby waived. *Barnett v. Barnett,* 908 So. 2d 833, 846 (¶33) (Miss. Ct. App. 2005); *Minor v. State*, 396 So. 2d 1031,1033 (Miss. 1981). The Defendants never challenged the order substituting Mary Pittman as a wrongful death beneficiary and Executrix of the Estate of Lonnie Pittman. Judge Kidd pointed this out when he stated at the August 16, 2007 hearing "if an order [of substitution] was entered in 2004 then obviously you had some objections

to it, and they should have been raised at that time." (RE Tab 18) (CR 8:1192). Therefore, this Court should find that the order of substitution stands as entered. Further, the Defendants were aware at the time of their affirmative defense that the statute of limitations had run. The Defendants failed to pursue this affirmative defense for over three (3) years, and the Defendants should be barred from doing so now. Therefore, the Plaintiff respectfully asks this Court to allow the order of substitution to stand as entered and to affirm the trial court's orders denying summary judgment.

III. WHETHER THIS COURT SHOULD FIND THAT MARY PITTMAN IS ABLE TO PROCEED WITH THIS ACTION AS THE WRONGFUL DEATH BENEFICIARY OF LONNIE PITTMAN.

Assuming *arguendo*, that this Court finds that the original complaint filed is void *ab initio* and that Mary Pittman was never the executrix of the Estate of Lonnie Pittman, the Plaintiff would respectfully submit that this Court should hold that Mary Pittman be allowed to proceed in the lower court on behalf of the wrongful death beneficiaries of Lonnie Pittman.

Mississippi is a notice pleading jurisdiction. *Bedford Health Properties, LLC v. Estate of Williams ex rel. Hawthorne,* 946 So.2d 335, 350 (¶41) (Miss. 2006); citing *Estate of Stevens v. Wetzel,* 762 So.2d 293, 295 (Miss. 2000). The Court in applying Rule 8 of the Mississippi Rules of Civil Procedure has stated "it is only necessary that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief which is sought." *Bedford Health Properties,* 946 So.2d at 350; quoting *Wetzel,* 762 So.2d at 295. Rule 8 (a)(1) and (2) of the Mississippi Rules of Civil Procedure only requires a "short and plain statement of the claim" and "a demand for judgment for the relief." This has clearly been satisfied here

The amended complaint filed on August 22, 2005 provides sufficient notice that a wrongful death claim is being pursued. (RE Tab 9) (CR 3:325-364). In addition, the Defendants have been on notice for some time that Lonnie Pittman died from mesothelioma. The Complaint states in

Paragraph 37 that exposure to asbestos causes mesothelioma and death. (RE Tab 9) (CR 3:343). Paragraph 40 (i) of the complaint states that as a direct and proximate cause of exposure to asbestos the decedent suffered death. (RE Tab 9) (CR 3:344-45). The Plaintiff would respectfully submit this is sufficient to put the Defendants on notice that the complaint is one for wrongful death.

A similar issue has been addressed by the Mississippi Supreme Court before. This Court "determined that although the survival statute was not specifically pleaded in the complaint, the pleadings did set out two separate causes of actions." *Methodist Hosp. of Hattiesburg, Inc. v. Richardson,* 909 So.2d 1066, 1068 (¶2) (Miss. 2005). Therefore, this Court found a survival action to exist in a complaint even though it was not specifically pled. In this case, the Court does not need to find that the wrongful death claim is implied. The wrongful death and survival actions are stated explicitly in the original complaint filed December 31, 2002 in Paragraph 69 as follows: "In addition, the Plaintiffs allege they are entitled to all remedies and damages provided by the Mississippi Wrongful Death or Survival laws." (RE Tab 1) (CR 1:73-118, 116). The Defendants have been on notice since being served with the original complaint that both survival and wrongful death claims were being pursued. In addition, the current claims "arose out of the conduct . . . set forth . . . in the original pleading," and therefore, "relates back to the date of the original pleading." Miss. R. Civ. P. 15(c). The wrongful death claims have existed since December 31, 2002. Therefore, the wrongful death claims are not barred by the Statute of Limitations. Even if this Court was to find that the wrongful death claims should have been barred by the Statute of Limitations, the Plaintiff would respectfully submit that this affirmative defense has been waived by the Defendants as discussed *Supra.*

The wrongful death statute does not require any specific pleadings or even that the case be brought on behalf of all wrongful death beneficiaries. Mississippi Code Annotated Section 11-7-13

states in relevant portion:

> 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**.

(Emphasis added). The Wrongful Death Statute is clear that the action can be brought solely by the widow **or** by all interested parties. Further, Miss. Code Ann. § 11-7-13 places no requirement that the heading of the complaint be entitled "on behalf of all wrongful death beneficiaries" or something similar. The Mississippi Rules of Civil Procedure only require that notice be given a wrongful death claim is being pursued. This was satisfied here as discussed *Supra*. The case was brought by Mary Pittman, the widow of Lonnie Pittman. Further, the Wrongful Death Statute is clear that an estate does not need to be open for a wrongful death claim to be pursued. Therefore, the Plaintiff respectfully submits that in the event the Court finds the estate has not been a proper party, there remains viable wrongful death claims that can be pursued by Mary Pittman.

The Defendants try to make issue with a statement by Plaintiff's counsel in one of the hearings conducted before the Honorable Judge Kidd. The Defendants fail to acknowledge other statements made by counsel at the same hearing that clearly demonstrated wrongful death claims were being pursued. Counsel for Plaintiff has never stated in a formal pleading that wrongful death claims were not being pursued.

In a hearing conducted on August 16, 2007, counsel for Plaintiff did state "There are no wrongful death damages here . . . ." During the same hearing, counsel for Plaintiff stated "We pled the survival action and the wrongful death action in our initial complaint." (RE Tab 18) (CR 8:1185). Later during the same hearing in discussing the statute of limitations, counsel stated "but

as your Honor knows the wrongful death or the death of a plaintiff is based on the underlying law . . . ." (RE Tab 18) (CR 8:1195). It is clear that counsel for Plaintiff clearly mis-spoke at one point in the hearing. The Plaintiff has at all times been pursuing wrongful death claims.

IV. THE ORIGINAL COMPLAINT IS NOT A NULLITY AND IS NOT VOID AB INITIO.

The Defendants rely upon *Necaise v. Sacks,* 841 So.2d 1098 (Miss. 2003) for the proposition that litigation is not to be carried on by or against a dead person. This is not what the Plaintiff is trying to do as there has been a proper substitution and/or joinder of the real parties in interest in this case. It is of note that in *Necaise,* this Court stated "[T]here must be revivors in such suits or else further proceedings therein amount to nothing." 841 So.2d at 1105 (¶16); quoting *Griffith's Mississippi Chancery Practice,* Section 591. Therefore, this Court held that in an action involving a deceased person, there should be an opportunity to revive the action through substituting a proper party before it is dismissed. *Id.* In *Necaise,* this Court reversed the trial court's grant of defendants' motion to dismiss. This Court found that Necaise was able to continue the suit as executrix of her father's estate. *Id.* at 1106 (¶¶ 19, 20). In the present case, the action was properly revived by substituting in Mary Pittman as a wrongful death beneficiary and as the Executrix of the Estate of Lonnie Pittman, so the litigation could be carried on in the name of the real party in interest, not the deceased.

The Defendants state that many jurisdictions recognize the nullity theory. The Tenth Circuit distinguished the most often cited case for the "nullity" theory, *Banakus v. United Aircraft Corp.,* 290 F.Supp. 259 (S.D.N.Y. 1968). The Tenth Circuit stated that the "decedent's original complaint in *Banakus* was for personal injury only and did not include a cause of action for wrongful death." *Esposito v. United States,* 368 F.3d 1271, 1277 (10th Cir. 2004); citing *Banakus,* 290 F.Supp. at 260.

Unlike *Banakus*, in this case the original complaint contained a cause of action for wrongful death and a survival action. *See Supra.* The Tenth Circuit further held:

> The essential point of *Banakus* is that the administratrix should not have attempted to revive an expired lawsuit for personal injures by injecting a new wrongful death claim; instead, she should have filed her claim as a separate action . . . and [*Banakus*] did not address the forfeiture avoidance principles of Rule 17(a), [therefore] we do not find it persuasive on the substitution issue . . . .

Id. The Tenth Circuit then addressed *Mizukami v. Buras,* 419 F.2d 1319 (5th Cir. 1969) as not being on point. *Id.* They stated "that case dealt with an attempt to substitute heirs of a defendant pursuant to Fed.R.Civ.P. 25, rather than the heirs of a plaintiff under Rule 17(a). The same is true of *Moul v. Pace,* 261 F.Supp. 616 (D.Md. 1966). "We find none of these cases persuasive on the issue confronting us here." *Id.* As is the case here, Plaintiff's counsel substituted in heirs for the Plaintiff, not the defendants. The Plaintiff would respectfully request this Court find that the original complaint was not a nullity and not void ab initio.

V. RULE 17(A) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE ALLOWS FOR THE REAL PARTY IN INTEREST TO BE JOINED AND/OR SUBSTITUTED BEFORE DISMISSING THE CASE.

After the Mississippi Rules of Civil Procedure were enacted, this Court has decided a case that is close to being on point with these facts. *Methodist Hosp. of Hattiesburg, Inc. v. Richardson,* 909 So.2d 1066 (Miss. 2005). Linda Richardson had filed an action for her deceased mother, Vivian Wheeless, styled as a wrongful death claim against Methodist Hospital. *Richardson II,* 909 So.2d at 1067 (¶2). **An estate did not exist at the time the original action was filed,** nor was a claim asserted on behalf of the estate. *Id.* Summary judgment was granted and affirmed on appeal as to the issue of wrongful death. *Id.* at 1068 (¶2). The supreme court found that although not specifically pled as a separate cause of action, the complaint implied a survival action for the estate of Vivian Wheeless. *Id.* In the present case, the wrongful death and survival actions do not have to be implied

because they are stated explicitly in the original complaint filed December 31, 2002 in Paragraph 69 as follows: "In addition, the Plaintiffs allege they are entitled to all remedies and damages provided by the Mississippi Wrongful Death or Survival laws." (RE Tab 1) (CR 1:73-118, 116).

On remand, the trial court granted the hospital's *Motion to Dismiss or for Summary Judgment* because the real party in interest, Vivian Wheeless's Estate, was not a party to the action. *Richardson II,* 909 So. 2d at 1068 (¶3). Richardson then opened an estate for Vivian Wheeless and filed an amended complaint with the estate named and actually existing for the first time. *Id.* at ¶4. Ultimately, this Court allowed the Estate of Wheeless to remain in the suit although it did not exist at the time the original complaint was filed. The original complaint in *Richardson II* implicitly pled a survival action, **but it was on behalf of a non-existent party.** *Id.* Therefore, this Court has allowed a case to proceed even though the original complaint pled a cause of action on behalf of a non-existent plaintiff, such as the case here.

In *Richardson II,* the Mississippi Supreme Court also had to address the issue of Timely Joinder/Substitution. *Id.* at 1072. The supreme court relied upon Miss. R. Civ. P. 17 (a) which states in relevant portion:

> **No 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.

(Emphasis added) Id. at (¶15). The Mississippi Supreme Court in *Richardson II* stated "[T]his rule allows for a reasonable time upon objection for joinder of the real party in interest." *Id.*

On the present facts, the Defendants first objected on or about April 14, 2004. By May 3, 2004, the real party in interest, Mary C. Pittman as an heir of Lonnie Pittman, was substituted into the suit. Nineteen (19) days is very reasonable according to the above case law. Also, pursuant to

Rule 17(a) this substitution "shall have the same effect as if the action had been commenced in the name of the real party in interest." Therefore, it is clear that the original suit as it pertains to Lonnie Pittman is not a nullity and is not void *ab initio*. If Rule 17(a) is applied to these facts, it is clear that the Plaintiff is allowed a chance to correct the alleged procedural defect, and that the statute of limitations is tolled while the suit is pending. The wrongful death and survival actions were pled in the original complaint, so pursuant to Rule 15 and 17 of the Mississippi Rules of Civil Procedure, the statute of limitations is tolled because the amended complaint relates back to the original complaint.

Rule 17 and its purpose have been discussed extensively in *Wright & Miller's Federal Practice and Procedure*. The purpose of this provision is to allow the court to avoid forfeiture and injustice when a technical mistake has been made in naming the real party in interest. 6A Wright & Miller, § 1555 at 412-13. "The Purpose of this rule [17(a)] is to enable the defendant to present his defenses against the proper persons, to avoid subsequent suits, and to proceed to finality of judgment." 6A Wright & Miller, §1541. The Ninth Circuit has stated "[T]he basic purpose of the rule requiring that every action be prosecuted by the real party in interest is to protect a defendant from subsequent similar actions by one not a party to the initial action." *Pacific Coast Agr. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1208 (9th Cir. 1975). This purpose has been fulfilled here as the Estate of Lonnie Pittman and Mary Pittman on behalf of the wrongful death beneficiaries are the real parties in interest, and this allows the Defendants to proceed to finality of judgment.

Concerning Rule 17's application, the Second Circuit has held that "The complaint's only pertinent flaw was the identity of the party pursuing those claims . . . . " *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir.1997). The Second Circuit ruled that leave to amend the complaint, substituting the individual shareholders as plaintiffs to pursue their own

claims, should have been granted under Rule 17(a). *Advanced Magnetics,* 106 F.3d at 21. As is the case here, the only flaw in the initial complaint was the identity of the party. The Complaint should be found to be valid as Mississippi is a notice pleading jurisdiction. Miss. R. Civ. P. 8. Since the filing of the original complaint, the Defendants have been on notice that Lonnie Pittman was exposed to their asbestos products. The only thing that has changed is the real party in interest has been identified. The substance of the claims have not changed since 2003.

The Tenth Circuit has also discussed Rule 17(a) in deciding the same issue presented to this Court. The Tenth Circuit stated in regards to Rule 17(a):

> We do, however, find support in the federal rules for permitting substitution notwithstanding Mr. Esposito's lack of capacity at the time the suit was filed. As the district court pointed out, **nothing in Rule 17(a) requires that the original plaintiff have capacity to sue.** The fact is, Rule 17(a) does more than merely provide a relation back principle. It provides that substitution "shall have the *same effect as if* the action had been commenced in the name of the real party in interest." Fed.R.Civ.P. 17(a) (emphasis added). **Rule 17(a) is designed to prevent forfeitures,** and as such must be given broad application. *See* Fed.R.Civ.P. 17 advisory committee's notes (1966 Amendment) (stating Rule 17(a) is "intended to insure against forfeiture and injustice" by codifying "in broad terms" prior law ***permitting substitution notwithstanding running of limitations statute*). We conclude that Mr. Esposito's lack of capacity at the time the suit was filed does not prevent the substitution from relating back to the date the suit was filed under Rule 17(a).**

(Emphasis added). *Esposito,* 368 F.3d at 1277-78. As the Tenth Circuit stated clearly, the original plaintiff is not required to have capacity to sue. Even if Lonnie Pittman did not have capacity to sue, Rule 17(a) allows substitution to have the same effect as if the real party in interest had commenced the suit. *See also Shetterly v. Raymark Industries, Inc.,* 117 F.3d 776, 784 -785 (4th Cir (Md.)1997) (holding under Rule 17(a) Plaintiff should have time to cure defect in naming proper party after objection by judge); *Lavean v. Cowels,* 835 F.Supp. 375, 388-389 (W.D.Mich.1993) (holding where plaintiff not qualified as personal representative at time of trial, the plaintiff should be given time

to cure defect and proper party being substituted relates back to original filing); *See also* Comments to Miss. R. Civ. P. 17. The Mississippi Court of Appeals has recently held "[T]he only reason to dismiss, then, would be because the estate [which is not real party in interest] is the named plaintiff. Rule 17(a) states that no suit is to be dismissed for the absence of the real party in interest. **Affirming this dismissal would be ignoring the plain language of the rule**." (Emphasis added) *Tolbert v. Southgate Timber Co.*, 943 So.2d 90, 102 (¶42) (Miss. Ct. App. 2006).

The Petitioner relies upon different authorities to state that "[Lonnie Pittman] was not a legal entity, i.e., he had no legal existence, and as a result, he was not a proper party to the *Nettles* action." First, it should be noted that the majority of the authority relied upon by the Petitioner is from other jurisdictions and is not binding on this Court, whereas the Plaintiff has cited and relied upon *Richardson II* which is exactly on point with this case. The Petitioner relies upon *Humphreys and Coleman, Administrators of Perry W. Humphreys v. Irvine,* 14 Miss. 205 (1846) which is distinguishable due to the fact it was decided before the enactment of Rule 17 of the Mississippi Rules of Civil Procedure.

Another case relied upon by the Petitioner is *Adelsberger v. The United States,* 58 Fed. Cl. 616 (US. Cl. Dec. 2. 2003) that held a party must have capacity to sue. The Petitioner failed to point out that the Plaintiff in that case had not even opened an estate at the time of the court's decision. "Nothing in the pleadings before the court allows us to conclude that Ms. Morris-Stiles has been appointed personal representative for the deceased. Amendment, in short, would not accomplish the intended result." *Adelsberger*, 58 Fed. Cl. at 619. In fact in Footnote 3, the court stated "[T]he dismissal, although with prejudice to the present 'Stiles' claim, would not preclude a new action by the personal representative, assuming the claim survives, and assuming proof of appointment." *Id.* at FN3. Here, the personal representative of the estate was appointed and the suit was revived.

Adelsberger is therefore not applicable to these facts. Tthe Plaintiff would respectfully request this Court find that the real party in interest was properly joined pursuant to Rule 17 of the Mississippi Rules of Civil Procedure, and therefore, the case should not be dismissed.

VI. MARY PITTMAN HAS AT ALL TIMES HAD STANDING AND CAPACITY TO SUE ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES AND ESTATE OF LONNIE PITTMAN.

Lonnie Pittman died on March 11, 2001. A Petition to Admit Will to Probate was filed in the Chancery Court of Rankin County, Mississippi. The will was admitted to probate by the Chancery Court on March 18, 2003. (RE Tab 14) (CR 6:781-83). By operation of the will being admitted to probate, Mary Pittman was appointed Executrix of the Estate of Lonnie Pittman. In his Last Will and Testament, Lonnie Pittman stated "I do hereby name and appoint my wife, Mary C. Pittman, as Executrix of my estate." (RE Tab 14) (CR 6:779). This Court should not ignore the wishes of the deceased. It was clearly Mr. Pittman's intent for Mary Pittman to be the Executrix of his estate.

Mary Pittman was appointed the Executrix of the Estate of Lonnie Pittman, and therefore, Mary Pittman has standing and capacity to bring this lawsuit not only as the Executrix of the Estate of Lonnie Pittman but also as a wrongful death beneficiary of Lonnie Pittman. While the Estate of Lonnie Pittman was dismissed temporarily, the Chancery Court of Rankin County entered an *Order Reinstating Cause Number 50286 Estate Matter of Lonnie L. Pittman* dated February 29, 2008. (RE Tab 15) (CR 8:1090-91). The order states in Paragraph I that the Petitioner, Mary Pittman "was just made aware that [the Estate proceedings] were dismissed, and said case should be reinstated by the Court." The Chancellor ordered and adjudged that "the matter 'In the Matter of the Last Will and Testament of Lonnie L. Pittman, Deceased' Cause number 50286 is reinstated as if said cause had not been dismissed." *Id.* The Chancellor re-instated the matter, and the reinstatement related back

to the dismissal. Therefore, it was as if the estate had never been dismissed. The Defendants never challenged this order in Chancery Court.

The Letters Testamentary entered on March 6, 2008 state "did make and publish his Last Will and Testament, and thereby constituted and appointed the said Mary C. Pittman Executrix thereof." (RE Tab 15) (CR 8:1092-93). The Letters Testamentary make clear that Mary C. Pittman **was** appointed Executrix at the time the will was published. Therefore, Mary C. Pittman has been Executrix since the will was first admitted to probate in 2003. The Plaintiff would respectfully submit that this Court should give deference to the orders and rulings of the Chancery Court of Rankin County. The Defendants have not challenged the estate proceedings in Rankin County Chancery Court to this date. Therefore, they are barred from challenging the estate proceedings here on appeal. Mary Pittman has taken the oath of office as required by law. Letters Testamentary have been issued. Therefore, any ruling that has allowed Mary Pittman to proceed is **not** void ab initio as alleged by the Defendants.

The action was dismissed without Mary Pittman's knowledge and without Porter & Malouf's knowledge. The attorneys at Porter & Malouf were not notified of the dismissal of the estate proceedings until Trane filed its "Motion to Dismiss for Lack of Subject Matter Jurisdiction and Statute of Limitations" on February 21, 2008. Within seven (7) days of receiving this information, the Plaintiff had the estate proceedings re-instated as if never dismissed. Within fourteen (14) days, the Plaintiff had letters testamentary issued.

The Defendants cite and rely upon Miss. Code Ann. § 91-7-41 "Fiduciary with will, oath; bond" which states in relevant portion "[E]very executor or administrator with the will annexed, at or prior to the time of obtaining letters testamentary or of administration, shall take and subscribe

the following oath, viz: . . . ." The Defendants incorrectly interpret this statute. "When interpreting a statute that is not ambiguous, this Court will apply the plain meaning of the statute." *Pitalo v. GPCH-GP, Inc.*, 933 So.2d 927, 929 (¶5) (Miss. 2006); citing *Claypool v. Mladineo,* 724 So.2d 373, 382 (Miss.1998). This statute is not ambiguous. First, the statute states "every executor or administrator . . . ." Therefore, the plain reading of the statute is clear, one can be the executor or administrator before taking the required oath. In fact, the statute presupposes that one has been appointed the executor or administrator before taking the oath. **The oath can not be executed prior to the order admitting the will to probate since the executrix is supposed to be signing the oath in her representative capacity rather than her individual capacity.** In addition, the statute does **not** state that an executor or administrator must take the oath before instituting a personal injury action on behalf of the estate. The statute only requires the Oath and the Letters Testamentary to be issued for the estate to be finally administered and the accounting to be had, none of which involve the prosecution of this cause of action. Therefore, the Defendants' reliance upon this statute is misplaced and does not support their position that Mary Pittman lacked standing or capacity. In addition, Mary Pittman has now taken the oath, and this issue is moot.

Next, the Defendants cite and rely upon Miss. Code Ann. § 91-7-47 which states in relevant portion "Every executor or administrator with the will annexed, who has qualified, shall have the right to the possession of all the personal estate of the deceased . . . ." This statute does not state that the executor or administrator must take an oath or have letters testamentary issued to be "qualified" or before instituting a personal injury action on behalf of the estate. This statute only addresses the fiduciary duty of the executor or administrator. The Plaintiff would submit that this statute is only applicable once any settlement proceeds are received on behalf of the estate or an accounting of the

estate is required. This is further supported by the Letters Testamentary. The Letters state in relevant portion:

> . . .Letters Testamentary authorizing and empowering the said Mary C. Pittman to make inventory of the Estate of said Testatrix, Deceased, and return the same into our said Court as by law required; to pay first the debts of said Testatrix, and then the legacies contained in said Will so far as the goods, chattels, and credits will extend and the law shall charge the said Mary C. Pittman to execute and perform the said Last Will and Testament according to the true intent and meaning thereof; and lastly to render a just and true accounting of her actions and doings herein, when thereto required by this Court.

(RE Tab 15) (CR 8:1092-93). Mary Pittman has at all times been qualified to be the Executrix of the Estate of Lonnie Pittman. It is clear that the oath and the Letters Testamentary relate only to the accounting of the estate, not the prosecution of a products liability action. Letters Testamentary are only evidence that the executrix is authorized to act on behalf of the estate in a representative capacity. In other words, they are only the proof of the authorization, not the actual authorization. The order admitting will to probate is the authorization which was clearly done in this case. (RE Tab 14) (CR 6:781-783).

The Alabama Supreme Court has addressed the exact situation here where the plaintiff was not issued letters testamentary until after the cause of action was filed. *Ogle v. Gordon,* 706 So.2d 707, 707 (Ala. 1997). The Alabama Supreme Court held "The doctrine of relation back with respect to the powers of a personal representative has been in existence for approximately 500 years, and this Court first recognized it in *Blackwell v. Blackwell,* 33 Ala. 57 (1858)." *Ogle,* 706 So.2d at 709. The Alabama Supreme Court stated:

> [I]t is a rule of practically universal recognition that:
> 'When letters testamentary or of administration are issued, they relate back so as to vest the property in the representative as of the time of death and validate the acts of the representative done in the interim; but such validation or ratification applies only

> to acts which might properly have been done by a personal representative . . . .' 23 Corp. Jur. 1180, § 400.

Id. at 709; quoting *McAleer v. Crawthon,* 215 Ala. 674, 675-76, 112 So. 251 (1927). In *Griffin v. Workman,* 73 So.2d 844 (Fla. 1954), the Florida Supreme Court relied upon *McAleer* in holding that when letters testamentary are issued they relate back to the death of the decedent. Therefore, the Plaintiff would respectfully submit that this Court should find that the letters testamentary issued in March 2008 relate back to the death of the decedent. There is no evidence in the record that Mary Pittman has done any improper acts on behalf of the estate. Therefore, when the letters testamentary were issued, they ratified all proper acts taken by Mary Pittman, which would necessarily include the prosecution of this action.

Finally, the Defendants rely upon Miss. Code Ann. § 91-7-233 which states in relevant portion "Executors . . . may commence and prosecute any personal injury action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted." The Defendants state that only an "executor" may commence or prosecute a survival action. The Defendants' reliance upon this statute is misplaced for two reasons. First, as stated *Supra,* Mary Pittman has at all times been the Executrix of the Estate of Lonnie Pittman. Though the estate proceedings were temporarily dismissed, they were reinstated as if never dismissed. (RE Tab 14) (CR 8:1090-91). Therefore, this action has been prosecuted by an executrix since approximately April of 2004.

Second, the statute states that "executors . . . may . . . ." The operative word here is "may." When construing a statute, "shall is mandatory, while may is discretionary." *Pitalo v. GPCH-GP, Inc.,* 933 So.2d 927, 929 (Miss. 2006). This Court has stated that "chancery approval is required for the appointment of the personal representative of the estate . . . ." *Long v. McKinney,* 897 So.2d 160, 174(¶60) (Miss. 2004). This Court further stated "There is no general requirement under law that

the personal representative obtain chancery approval to pursue the claims of the estate in the litigation." *Long,* 897 So.2d at (¶61). Mary Pittman sought chancery approval to be appointed Executrix of the Estate of Lonnie Pittman and was given chancery approval even when she was not required to do so.

Mary Pittman has at all times been a duly authorized personal representative able to prosecute this action. The Estate of Lonnie Pittman was "opened and administered through the chancery court." *Id.* at (¶60). The supreme court in *Long v. McKinney* did not state that the personal representative must take an oath or have letters testamentary issued before proceeding with an action on behalf of the estate. Besides the Defendants' misplaced reliance upon the above referenced statutes, they do not offer one piece of authority that if letters testamentary are not issued or the oath is not taken then one is not the Executrix. The Plaintiff has offered opinions from two separate jurisdictions that say when the letters testamentary are finally issued they relate back to the death of the decedent. Based on the foregoing, the Plaintiff would respectfully ask this Court to affirm the lower court's orders denying the Defendants' Motions.

VII. CAPACITY TO SUE AND SUBJECT MATTER JURISDICTION ARE TWO SEPARATE AND DISTINCT DOCTRINES.

The Defendants continually confuse the terms subject matter jurisdiction and capacity to sue. These are two separate and distinct legal doctrines. "Subject matter jurisdiction and capacity are different legal doctrines." *Ashton Properties, LTD. v. A.L. Overton,* 107 P.3d 1014, 1017 (Colo. App. 2003). "In contrast to subject matter jurisdiction, which concerns the court's ability to consider a question ... capacity to sue concerns a party's right to maintain any action." *Ashton Properties,* 107 P.2d at 1017; quoting *Cochrane v. Tudor Oaks Condo. Project,* 529 N.W.2d 429, 433

(Minn.Ct.App.1995). "The two doctrines are independent of each other, and a party's capacity to sue or lack thereof does not affect the jurisdiction of the court." *Id.*; citing *Funk v. Funk,* 76 Colo. 45, 230 P. 611 (1924). "**Capacity to sue is not jurisdictional**, and unlike subject matter jurisdiction, **an objection to it may be waived if not timely asserted.**" (Emphasis added) *Id.*; citing *Thomason v. McAlister,* 748 P.2d 798, 799 (Colo.App.1987); 4 James William Moore, Moore's Federal Practice § 17.20[4] (3d ed.2003). "Although the issue addressed by the division in *Black Canyon Citizens Coalition, Inc. v. Bd. of Co. Comm. Of Montrose Co.,* 80 P.2d 932, 935 (Colo. App. 2003) was different than the issues before us, to the extent that opinion may be read to suggest a court lacks subject matter jurisdiction if the plaintiff lacks capacity to sue, we decline to follow it." *Id.* The Colorado Court of Appeals continued with and re-affirmed this rationale in *SMLL, L.L.C. v. Peak National Bank,* 111 P.3d 563, 567-68 (Colo. App. 2005).

It should be clear that subject matter jurisdiction and capacity to sue are independent of each other. The lower court clearly has subject matter jurisdiction pursuant to Mississippi statutory authority and the Mississippi Constitution as this matter involves a civil action with damages well in excess of the jurisdictional limits. Therefore, the Defendants are in reality arguing the Plaintiff did not have capacity to sue and that statute of limitations had run.

In regards to capacity to sue, the Plaintiff would submit that the Defendants failed to plead this in their answers, and therefore, the Defendants have not preserved this defense. Rule 9(a) of the Mississippi Rules of Civil Procedure states "[T]he capacity in which one sues or is sued must be stated in one's initial pleading." The comments to Rule 9(a) states "[A] party desiring to raise an issue as to the legal existence, **capacity, or authority** of a party will be required to do so by **specific negative averment**. This is consistent with past procedure which held that affirmative defenses

cannot be relied upon unless specifically pleaded." *See also National Heritage Realty, Inc. v. Estate of Boles,* 947 So.2d 238, 246 (¶23) (Miss. 2006).

In *Estate of Boles,* the Supreme Court found that "[T]he record reflects that the Defendants challenged Price's authority and capacity to maintain the lawsuit in each of their answers. Therefore, the Defendants preserved their challenge to capacity in the Leflore County Circuit Court action." 947 So.2d at 246 (¶24). Here, the Defendants did not challenge Mary Pittman's capacity to sue in their answers. (RE Tab 17) (CR 9::1244-1303). A careful review of the Defendants' answers demonstrates that no **specific negative averment** as to Mary Pittman's capacity was made. Since the defense of capacity to sue was not specifically pled, the Defendants can not be rely upon the defense. "Capacity to sue is not jurisdictional, and unlike subject matter jurisdiction, an objection to it may be waived if not timely asserted." *Ashton Properties,* 107 P.2d at 1017; citing *Thomason v. McAlister,* 748 P.2d 798, 799 (Colo.App.1987); 4 James William Moore, Moore's Federal Practice § 17.20[4] (3d ed.2003).

The Plaintiff would respectfully submit that the issue of capacity to sue was not pled by the Defendants by specific negative averment and further was not timely brought to the lower court's attention. The Plaintiff would respectfully submit that the Defendants have waived their rights to object to any previous alléged incapacity to sue as it occurred over four (4) years ago. Mary Pittman has capacity to sue on behalf of the estate of Lonnie Pittman and the wrongful death beneficiaries. The Plaintiff would also respectfully submit that any Statute of Limitations argument has been waived as discussed *Supra.* Therefore, the Plaintiff would respectfully ask this Court to affirm the trial court's orders denying Defendants' requested relief.

In an attempt to bypass the waiver issue, the Defendants try to distinguish their arguments as one for lack of subject matter jurisdiction due to the Plaintiff not having standing. The Defendants attempt to argue that Mary Pittman does not have standing to bring suit, and therefore, the lower Court does not have subject matter jurisdiction. These arguments must also fail. The Defendants can not legitimately dispute that Mary Pittman, as Executrix of the Estate of Lonnie Pittman, and a wrongful death beneficiary has standing to bring suit in this matter. The Defendant admitted Mary Pittman had standing in the December 20, 2007 hearing held before Judge Kidd. (RE Tab 19) (CR 10:47). The Defendants attempted to qualify this statement by saying Mary Pittman's standing expired. As discussed *Supra*, the Defendants' arguments are better classified as a statute of limitations argument, which is an affirmative defense.

One's standing does not normally expire. One's right to bring a claim may expire due to the statute of limitations. Therefore, it should be clear the Defendants' arguments are that the statute of limitations has run, which is an affirmative defense. This Court should not be confused by Defendants mis-classification of their arguments. All of Defendants' standing and subject matter jurisdiction arguments ceased at the time of the substitution of Mary Pittman on April 28, 2004. At this point in the litigation process, the clock started ticking on Defendants' statute of limitations arguments. The Defendants **then waited over three years** to overtly bring this affirmative defense to the lower Court's attention while actively engaging the litigation process. Therefore, once again the Plaintiff would respectfully submit that the affirmative defense of statute of limitations should be deemed waived.

CONCLUSION

The original complaint filed in this matter was not void ab initio due to Lonnie Pittman being deceased at the time of filing. Pursuant to Rule 17 of the Mississippi Rules of Civil Procedure, the Plaintiff should be allowed to join the real party in interest prior to the case being dismissed. This was clearly done here by Order of Substitution entered on May 3, 2004. It is of significant note that the Defendants have never objected to or otherwise challenged this Order of Substitution. The Order of Substitution is not a proper issue on appeal, and therefore, this Court should give deference to the Order as it stands. On the other hand, even if this Court is to find that original complaint was void ab initio, the Defendants' defense would be that the statute of limitations had run on Lonnie Pittman's claims. Plaintiff would respectfully submit that it should be clear through the Defendants' negligence in failing to overtly bring an affirmative defense to the lower court's attention while actively participating in the litigation has resulted in waiver of the Defendants affirmative defenses, including but not limited to the affirmative defense of statute of limitations. Therefore, the Plaintiff respectfully requests this Court to affirm the lower court's rulings denying the Defendants' Motions to Dismiss and Motions for Summary Judgment.

DATED, this the 30th day of November, 2009.

Respectfully Submitted,

MARY PITTMAN, AS THE EXECUTRIX OF THE ESTATE OF LONNIE PITTMAN, DECEASED

By: _____
John T. Givens, MS Bar No [redacted]

CERTIFICATE OF SERVICE

I, John T. Givens, attorney for the Respondent, certify that I have this day served a copy of this *Respondent's Answer in Opposition* by United States mail with postage prepaid on the following persons at these addresses:

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I, John T. Givens, further certify that the above foregoing document was electronically mailed to all other counsel of record.

DATED, this the 30th day of November, 2009.

JOHN T. GIVENS