2008-IA-1584-SCTR+2

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

TRANE US INC., FORMERLY KNOWN AS AMERICAN STANDARD INC. — **DEFENDANTS-APPELLANTS**

V.

MARY C. PITTMAN, EXECUTRIX — **PLAINTIFF-APPELLEE**

AND

GARDNER DENVER, INC., ET AL. — **DEFENDANTS-APPELLANTS**

V.

MARY C. PITTMAN, EXECUTRIX — **PLAINTIFF-APPELLEE**

CONSOLIDATED WITH

GARLOCK SEALING TECHNOLOGIES, LLC SUCCESSOR BY MERGER TO GARLOCK, INC., ET AL. — **DEFENDANTS-APPELLANTS**

V.

MARY C. PITTMAN, EXECUTRIX — **PLAINTIFF-APPELLEE**

On Interlocutory Appeal from the Circuit Court of the First Judicial District of Hinds County; CA No. 251-03-26CIV

COMBINED REPLY BRIEF OF DEFENDANTS-APPELLANTS TRANE US, INC. IN NO. 2008-1A-01584 AND GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, THE GORMAN-RUPP COMPANY, DORR-OLIVER, INC., KEELER/DORR-OLIVER, SULZER PUMPS (US) INC., WARREN PUMPS, INC., WARREN-RUPP, INC., AND YUBA HEAT TRANSFER LLC IN NO. 2008-1A-01599

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The failure of an appellee to address an issue raised by appellant on appeal is "tantamount to a concession that appellant's position is correct." *Trammel v. State*, 622 So. 2d 1257, 1261 (Miss. 1993). In this appeal, the Brief of Appellee Mary Pittman does not confront, and effectively concedes, substantially all of the threshold jurisdictional points and arguments that defendants submitted for interlocutory review and that are dispositive of this case.

- The Appellee's brief effectively concedes the argument that the initial filing in Lonnie Pittman's name--deceased twenty-one months at the time of filing--was *void ab initio* and a jurisdictional nullity under both Mississippi precedents and those of other states, see Combined Brief of Defendants-Appellants Trane, et al., at pp 12-16. In a 35-page brief, Pittman can only devote one meager page (p.18) to this defining jurisdictional principle, claiming that somehow *Necaise v. Sacks*, 841 So 2d 1098 (Miss. 2008) supports substitution for the "deceased." The plaintiff's attempted spin on *Necaise* is simply wrong. *Necaise* in fact reiterates the controlling rule that a suit filed in the name of a deceased is an "impossibility," 841 So 2d at 1105, but on its facts *Necaise* was concerned with the substitution of parties where there is a plaintiff who dies during the course of the litigation. 841 So 2d at 1106. Plaintiff's brief does not mention or cite, much less confront, *Illinois Central Railroad Co. v. Broussard*, 2008 WL 4405166 (Miss. App. 2008), which recently applied the rule that filings in the name of a deceased are void and frivolous, nor does the brief contest any of the other numerous cases recognizing that such filings are jurisdictional nullities from the onset.

- As the cases make clear, this central (and fatal) jurisdictional defect directly impacts every other subsequent aspect of the proceedings, and did so here. Because a filing in the name

of a deceased is a complete nullity and void from the onset, there is not only a lack of standing--that is, a plaintiff without the requisite injury or interest--but the even more extreme situation of no live party "plaintiff" at all, and there was not a duly commenced "action" regarding any claims of Lonnie Pittman. The legion of cases uniformly hold that without a viable, live, party-plaintiff and a duly commenced "action," there is no one to "substitute" for and nothing to "amend." The only cure for this type of complete jurisdictional nullity--for the claimant's counsel to discover the defect and to file an original complaint with original process, by a properly qualified representative of the deceased, in a timely manner--was never attempted and did not occur in this matter.

- Perhaps understandably, Pittman's brief contains no discussion to explain or contradict the anomalous and improper factual circumstances under which an order to "substitute" Mary Pittman was obtained--by a motion which did not accurately represent the true facts, and by an improper order presented by plaintiff's counsel to Judge Green *ex parte*, without notice, without hearing, four business days after the motion. See Combined Brief of Defendants-Appellants Trane, et al. at pp. 4, 17-18; TRE Tabs B and C. However, instead of explaining to the Court how this situation occurred in the first place, or why the motion was not duly noticed for hearing and resolution, Pittman's counsel now seeks to misdirect the Court's attention from the void nature of the order of "substitution" by claiming that actually defendants are at fault and somehow committed a "wavier" by not immediately "objecting" to the order after it had already been entered. Brief at 14-15. Putting aside the principle that one lacking clean hands is in no real position to invoke equitable principles, this argument is patently without foundation and unsupported by citation to any authority. On this contention, as pointed out in detail at pp. 15-

16 below, defendants were under no requirement under the rules to immediately "object" to the already-entered order of substitution at all. In addition to the jurisdictional defect in the void order, which can be raised at any time, the order of "substitution" was not a final judgment to which Rule 60(b) and its time limitations would apply, nor was it a final judgment which could be appealed as a right to the Supreme Court under M.R.A.P. Rule 4. Moreover, M.R.C.P. Rule 46 expressly provides that "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him." In addition, the order was not itself a "pleading" under M.R.C.P. Rule 7(a) to which further or immediate pleading under M.R.C.P. Rule 8(c) was authorized or required.

- Pittman's brief does not address in any way the argument in the Combined Brief of Defendants-Appellants Trane et al., at pp. 17-20 that the limitations recognized in M.R.C.P. Rule 25(a)(1) prohibit "substitution" in the circumstance where a filing is made in the name of one already deceased and is accordingly a nullity with no party "plaintiff" to "substitute" for. Similarly, Pittman does not respond in any way to the argument that it would be completely anomalous under fundamental principles of interpretation to ignore the specific rule, which does not permit or authorize substitution under the circumstances here, in favor of more general rules which do not address this situation. Rule 25(a)(1) is not cited at all in the Pittman's brief.

- Plaintiff does not contest, and could not contest, the fundamental principle that issues that directly relate to the subject matter jurisdiction of the court to render a valid judgment, such as filings which are deemed *void ab initio* or lack a plaintiff with standing, may be raised at any time and may be noticed *sua sponte* and even on appeal, *City of Madison v. Bryan*, 763 So 2d 162, 166 (Miss. 2000).

- Moreover, with regard to the alternative and coincidental statute of limitations issue here, Pittman's brief does not respond to the argument--directly posed as an alternative issue--that tolling of limitations cannot occur where a filing is completely void and a jurisdictional nullity, exemplified by cases such as *Tolliver v. Mladineo*, 987 So. 2d 989, 999 (Miss. App. 2007) and the other cases cited, see Combined Brief of Trane, et al., at pp. 25-29. *Tolliver* is cited only once in Pittman's brief and is not discussed at all.

- With regard to the alternative limitations issue, Pittman's brief does not contest the basic time line of filings that took place here, nor does it explain in any way the extreme nature of the time lag that occurred--how a suit was filed directly in Pittman's name on December 31, 2002, almost two years after his date of death, how over three years expired from that date before any motion to "substitute" was even made, or how Lonnie Pittman's name was ever joined in the first place in *Nettles*' unrelated suit. Nettles' discrete claim was actively pursued by his counsel and litigated until it was severed on venue grounds on November 23, 2004, and sent to Pike County.[1] The brief of Pittman inaccurately suggests at pp. 2 and 11 that a scheduling order entered on May 20, 2004, pertained to Pittman's claim; in fact, all activity and the scheduling order pertained to Nettles' claim, as plaintiff's counsel had filed on September 23, 2003, a motion for an expedited trial date for Nettles because he had been diagnosed with mesothelioma and so he would "have his day in Court prior to his death."

* * *

The net result of these various concessions and attempted deflections is that the Brief of

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[1]The Court can take judicial notice of the fact that thousands of misjoined asbestos claims were filed in 2002 to "beat" the effective date of provisions of the Tort Reform Act, which came into effect on January 1, 2003.

Appellee does not confront the material and dispositive issues posed by the Defendants-Appellants and upon which this court granted interlocutory review, see Combined Brief of Defendants-Appellants at pp. 1-2 (Statement of Issues).[2]

In failing to respond directly to the plain and fatal jurisdictional deficiencies here and also to the coincidental and substantive limitations problems that also characterize this particular case, Pittman's counsel instead resorts to the same *ad hoc* collection of arguments and accusations that were put forward to oppose the defendants' petition for interlocutory relief, which was granted by the Court, and that also were implicitly rejected by the Circuit Court when it denied Pittman's motion to "strike" the defendants' arguments and thus deprive them of any hearing to reconsider the merits of their jurisdictional arguments. TRE Tabs A, L, M, and N. It is respectfully submitted that none of these various "hail Mary" arguments stand up under scrutiny, or more importantly, can create subject matter jurisdiction from filings that are void and nullities.

I. NO "WAVIER" OF AFFIRMATIVE DEFENSE OF LIMITATIONS

It is telling that, instead of explaining how a void filing was somehow not void so that jurisdiction existed for the proceedings, or how such jurisdictional matters could not be asserted at any time pursuant to case law and Rule 12(h)(3), Pittman's brief chooses to claim defendants were "negligent" in raising and "overtly" pushing the alternative affirmative defense of limitations. It should be pointed out that the limitations issue was a coincidental and an alternative point which arose only because of the *void ab initio* nature of the initial filing,

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[2]Pittman's brief does argue that M.R.C.P. Rule 17(a) authorized Mary Pittman to be "substituted" as plaintiff in this case. Brief at pp. 19-23. This argument was addressed in the Combined Brief of Trane, et al. at pp. 20-23, and is again rebutted below at pp. 18-21.

combined with the lack of tolling under *Tolliver* and similar cases and the extreme time line of events which in fact occurred. As for the jurisdictional defects, they could be raised at any time, *City of Madison v. Bryan*, 763 So. 2d 162 (Miss. 2000); moreover, there was no scheduling order setting deadlines for dispositive motions regarding Pittman, and under the Rule 2.04 of the Uniform Rules for Circuit Courts, filed pretrial motions that are not immediately noticed for hearing are not deemed abandoned unless they are not pursued "before trial," and even then the court has discretion to consider same after commencement of the trial.

There was no "waiver" of any point or affirmative defense by defendants in this matter. Pittman's brief at pp. 9-15, ignores or distorts the time line of the defendants' pleadings and numerous motions that in fact were lodged in this matter. See Combined Brief at pp. 3-6 and Brief of Garlock. There was no "three year" delay. More fundamentally, Pittman's brief pushes the fact-specific cases of this Court far beyond their intended purview and seeks to cast aside the language and interpretations of M.R.C.P. Rule 8(c) and "waiver" which have been long accepted by this Court, federal courts, and treatises. It essentially asks the Court to open a Pandora's box of uncertainty, confusion, and impracticality in general litigation cases where Rule 8(c) affirmative defenses like assumption of risk, contributory negligence, statute of limitations, and others may be at issue.

First, putting aside the fatal jurisdictional defects that stemmed from the void nature of the initial filing, plaintiff's counsel misinterprets the time line and what had to be asserted when under the Rules of Civil Procedure with regard to Rule 8(c) affirmative defenses.

Under Rule 8(c), an affirmative defense, including limitations, is only required to be "set forth" in "[p]leading to a previous pleading." Under Rule 7(a), a "pleading" is specifically

defined as a "complaint," and also various answers. Again, putting aside jurisdictional issues, the first and only "pleading" filed by Mary Pittman, for which a responsive pleading was required and was subject to the bar of limitations, was the "amended complaint" filed on August 22, 2005--which at that point was lodged four and a half years after the date of death. In pleading in response to that previous pleading, Trane answered on September 22, 2005, asserting *inter alia,* the statue of limitations, as well as subject matter jurisdiction, as defenses, and Garlock did likewise on or about September 23, 2005. Similarly, Sulzer Pumps and Yuba answered the amended complaint on September 23, 2005, asserting limitations and subject matter jurisdiction, as did Gorman-Rupp, Warren Pumps, and Warren Rupp in their answers on October 12, 2005, and all of this latter group of defendants joined Gardner Denver, General Electric, Dorr-Oliver, and Keeler Dorr Oliver in the explicit motion to dismiss the "amended complaint" filed on October 14, 2005, which asserted alternatively that the matter was void and was barred by the three year limitations period and that there was no tolling. As discussed at p. 8 below, and as pointed out in the comment to Rule 8, "as with the statement of claims, notice of the defense raised by the defendant . . . is all that is required." Based on the pleadings, and continuous motions filed in the lower court, Pittman's counsel was on notice--and had been on notice--of the jurisdictional defects and limitations issues in this matter. Moreover, as discussed further below, at pp 15-16, Pittman's counsel's efforts to distort the time line to make the void and improper *ex parte* order of "substitution" some kind of benchmark event for a "waiver" argument, is completely misplaced. There is no rule requiring an immediate "objection" to an interlocutory order already entered. There was no "three year" delay as now claimed by Pittman's counsel in asserting or obtaining an initial resolution of an affirmative limitations bar

caused by any defendant in this matter, and this is particularly true in light of the fact that the limitations bar that ultimately arose in this matter was intertwined with subject matter jurisdictional issues which could not be "waived" and had been, and could be, raised at any time.

These defendants do not believe that Pittman's counsel should be able, as occurred here, to obtain an improper *ex parte* order of "substitution" without notice--thus avoiding any hearing at which defendants would have an opportunity to oppose substitution--and then seek to prejudice defendants by claiming defendants somehow "waived" affirmative defenses because they were not heard "soon enough."

Even more fundamentally, the "waiver" argument at pp. 9-15 is based upon Pittman's counsel's efforts to cause a *de facto* amendment to rules of civil procedure and upon decisions which, on inspection, must properly be viewed as fact-specific. This argument stands Rule 8(c) on its head and would effectively abolish the long understanding of the way and time frame in which affirmative defenses may be raised, tried, and determined, both under general litigation decisions of this Court, and by federal courts in dealing with identical rule language and the circumstances upon which "waiver" does, and does not, occur. It is well settled that federal interpretations of the Federal Rules of Civil Procedure, upon which the Mississippi Rules of Civil Procedure are based, are persuasive authority when interpreting our rules. *Hartford Cas. Ins. Co. v Halliburton Co.*, 826 So. 2d 1206, 1215 (Miss.2001). Under the bright line standard, an affirmative defense under Rule 8(c), such as contributory negligence, statute of limitations, release, etc., which are "neither pleaded nor tried by consent are deemed waived." *Wholey v Cal-Maine Foods, Inc.*, 530 So. 2d 136, 138-139 (Miss. 1988); *Alexander v. Womack*, 857 So. 2d 59, 62 (Miss. 2003)("Rule 8(c) and our cases hold that affirmative defenses are waived if not pleaded

or tried by consent"); *Lucas v. United States*, 807 F. 2d 414, 417 (5th Cir. 1986)(Rule 8(c) requires that affirmative defenses be set forth in a defendants' responsive pleading, and a failure to comply "usually results in a waiver"); 5 *Wright and Miller, Federal Practice and Procedure* § 1278 (same, stating the general rule). In addition, Rule 8(c) affirmative defenses may--but are not required to be--asserted by motion, *Smith v. Sanders*, 485 So. 2d 1051, 1053-1055 (Miss. 1986)(affirmative defenses like statute of limitations can present question for jury trial, be a subject for pretrial motion, for a peremptory instruction, or for a directed verdict); 5 *Wright and Miller* at § 1277 (noting that affirmative defenses under Rule 8(c) are permitted to be made by motion but that the "failure to raise an affirmative defense by motion will not result in a waiver as long as it is interposed in the answer").

Pittman ignores these standards and claims that affirmative defenses are waived by failing to "timely bring the issue to the trial court's attention" while "actively participating in the litigation process" and that defendants were "negligent" and did not "overtly" pursue their affirmative defenses.[3] Brief at pp. 9-13. Pittman argues for a vague standard that, in the context of this case, pushes the fact-specific cases relied upon beyond their intended purview.

Mississippi Credit Center Inc. v. Horton, 926 So. 2d 167 (Miss. 2006), the main case relied upon by Pittman, is the exception which proves the rule, and the result on the facts there is directly supported by the result in similar federal cases and by clear considerations of prejudice and unfair surprise. In *Horton*, the facts involved an affirmative arbitration defense, a non-judicial remedy which if successful would have taken the matter completely out of the judicial

[3]As pointed out above, these defendants completely disagree with this conclusory and distorted characterization of what occurred in this matter.

system, by appeal or otherwise; instead of bringing this arbitration cause forward at a relatively early point in the litigation, the defendant litigated the case and waited to complain. 926 So 2d at 180. The waiver result in *Horton* in the specific context of arbitration defenses is recognized in other cases and supported in federal case law on waiver in cases such as *Dempsey & Associates, Inc. v. S. S. Sea Star*, 461 F 2d 1009 (2nd Cir. 1972), where the Second Circuit specifically held that an arbitration defense merely asserted did not avoid a waiver:

> Merely answering on the merits, asserting a counterclaim (or cross claim), participating in discovery, without more, will not necessarily constitute a waiver. We have found no cases, however, where arbitration has been allowed after a party has answered on the merits, asserted a cross-claim that was answered on the merits, participated in discovery, failed to move for a stay, and gone to trial on the merits.

461 F. 2d at 1018. The instant case does not involve an arbitration clause and the considerations present when an arbitration clause is at issue, and *Horton* is not directly on point.

Similarly, it is submitted that Pittman's effort to carve an extreme and over broad rule of waiver of Rule 8(c) affirmative defenses for this case out of *East Mississippi State Hospital v. Adams*, 947 So. 2d 887 (Miss. 2007) is similarly misplaced. *Adams* did not directly involve the waiver of substantive affirmative defenses under Rule 8(c), such as contributory negligence, statute of limitations, accord and satisfaction, etc., but instead the discrete and specific issue of service of process on a defendant. Such discrete issues of effective process and personal jurisdiction over a defendant, which may be made by motion under Rule 12(b)(2), (4), and (5), are subject to the explicit waiver and preservation standards set forth in Rule 12(b)(h)(1). More importantly, it has been long recognized in this particular context that participation in proceedings on the merits is germane to an important issue in such service of process and

personal jurisdiction cases--whether a named defendant has constructively made an "appearance" in a case on its merits without obtaining a ruling, which would be inconsistent with a lack of process. See *Isom v. Jernigan*, 840 So. 2d 104, 107 (Miss. 2003). By the same token, Pittman cannot reasonably springboard *Grimes v. Warrington*, 982 So. 2d 365 (Miss. 2008), also cited, into a over broad formulation of "waiver" proposed here. *Grimes* was decided under the particular statutory considerations that are important for threshold immunity defenses under the Mississippi Torts Claims Act, involving governmental defendants; it was not a general personal injury case expressly involving the application of numerous Rule 8(c) defenses such as contributory negligence, statute of limitations, assumption of risks, etc., nor did it purport to overrule "bright line" past precedent or to deconstruct the rules of civil procedure in the manner argued for by Pittman. As pointed out above, the cases relied on in *Grimes* involved an arbitration defense and service of process issues, both of which present special considerations.

It is respectfully submitted that Pittman's formulation of "waiver" ignores key considerations regarding affirmative defenses under Rule 8(c) in general litigation cases, and taken to its extreme undermines a defendant's right to trial by jury of affirmative defenses.

First, Pittman ignores the basic purpose behind Rule 8(c). The central reason why affirmative defenses must be set forth in the answer is to give the opposing party advance notice of the affirmative defense and an opportunity to develop arguments and factual evidence in opposition to the defense. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350, 91 S.Ct. 1434 (1971). The purpose of Rule 8(c) is to "put opposing parties on notice of affirmative defenses and afford them the opportunity to respond to the defenses." *Dangerfield Island Protective Soc. v. Babbett*, 40 F 3d 442 (D.C. Cir. 1995).

It is not, as Pittman implies, to require defendant to "overtly" bring a multitude of affirmative defenses to the court's attention, but to prevent defendant from "lying behind the log" and unfairly surprising and ambushing plaintiff in the ability to respond to the defense by argument or evidence. See *Perez v. United States*, 830 F. 2d 54, 57 (5th Cir. 1987); *Allied Chem. Corp. v. MacKay*, 695 F 2d 854, 855-856 (5th Cir. 1983). There is no claim by Pittman's counsel, nor could there be, that he was somehow prejudiced or "unfairly surprised" by the limitations problems raised by defendants and the plain circumstances of what had occurred.

Second, Pittman's standard for "waiver" ignores the incontrovertible fact that affirmative defenses historically were, and still are, subjects for trial. See, e.g., *Smith v. Sanders*, 485 So. 2d 1051, 1053-1055 (Miss. 1986)(observing that affirmative defense of statute of limitation may variously present a question for trial, for a motion, for a directed verdict, or peremptory instruction); *Philley v Toler*, 123 So. 2d 223, 228 (Miss. 1960)(trial of affirmative defenses of statute of limitations and payment). Indeed, the bright line standard for waiver of affirmative defenses recognizes that such a defense is not "waived" if it is "tried by consent," *Alexander*, 857 So. 2d at 62; *Clark v. Martinez*, 295 F. 3d 809, 815 (8th Cir. 2002)(an affirmative defense not asserted in responsive pleading is generally waived, but there is no waiver if evidence to support the defense is "introduced at trial without objection" and is tried by implied consent). The "statute of limitations defense can be raised at trial so long as it was properly asserted in the answer and was not therefore affirmatively waived." *Long v. Howard University*, 550 F. 3d 21, 24 (D.C. Cir. 2008). Accordingly, in the context of pled Rule 8(c) affirmative defenses, Pittman's assertion that "participation in the proceedings" should be a key factor in determining waiver does not hold up. Obviously, a case, and any pled affirmative defenses, cannot be tried

without first "participating" in the proceedings. To hold otherwise would directly impact a defendant's right to trial by jury.

Third, and by the same token, because the presentation of the various Rule 8(c) affirmative defenses, fairly pled, for resolution at trial remains an ultimate option, see *Smith*, 485 So. 2d at 1053, there is no requirement that such defenses also be lodged by pretrial motion at all. *Wright & Miller* at § 1277 ("the failure to raise an affirmative defense by motion will not result in a waiver as long as it is interposed in the answer"); *Long*, 550 F. 3d at 24; *Dangerfield*, 40 F. 3d at 445; *Kulzer v. Pittsburgh-Corning Corp.*, 942 F. 2d 122, 125 (2nd Cir. 1991), cert. denied, 503 U.S. 939 (1992); *Greenberg v. United States Dept. of Treasury*, 10 F. Supp. 2d 3, 23 (D. D.C. 1998)("the Court is aware of no authority which requires a party to raise an affirmative defense pled in its answer in its first motion for summary judgment in order to avoid waving the defense"). In addition, if a Rule 8(c) affirmative defense may at the pleader's option be appropriate for raising by a Rule 56 motion, Pittman's factors for "waiver" based on alleged "delay," not "overtly" bringing the defense to the court's attention, and "participation" in the proceedings, are off base. A Rule 56 motion may be brought "at any time" under the language of Rule 56(b) unless there exists a scheduling order deadline for dispositive motions, which did not exist regarding Pittman's amended complaint. Moreover, many summary judgment motions based on affirmative defenses require at least some discovery, or at least the expiration of the discovery period, before they may be brought; again, "participation" in the proceedings as proposed by Pittman is not an appropriate or logical factor for a "waiver" standard.

Finally, it is respectfully submitted that the standard argued for by Pittman for determining a "waiver" of affirmative defenses is not practical and does not reflect the realities

of litigation practice. Many general litigation cases present factual patterns where several possible affirmative defenses may be implicated. This was particularly true in the context of multiple plaintiff asbestos personal injury litigation in Mississippi, with scores of thousands of plaintiffs, and where multiple potential affirmative defenses such as contributory negligence, assumption of risk, statute of limitations, release, etc., may be available in each case. If a defendant has, for example, ten colorable affirmative defenses, it would be completely counterproductive to the court and the parties to essentially require defendants, on pain of a potential "waiver," to file premature motions on such defenses, based on some vague and undefined notion of "delay." As pointed out by one court, "it would make little sense to require defendants with multiple potential time bar defenses, some of which may be subject to resolution on a motion and some of which may be subject to resolution on a motion and some of which may not, to raise all of those defenses at the very onset of the proceedings." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F. 3d 764, 789 (9th Cir. 2000). With roughly 100,000 asbestos plaintiffs in Mississippi in the 2004-2006 time frame, this could not have been accomplished.

It cannot be contested that matters which go to the very core of a court's subject matter jurisdiction to entertain a filing or enter a valid judgment, as with the void initial filing and subsequent void order of "substitution" and "amended complaint" here, may be raised or noticed at any time. With respect to the coincidental and alternative time bar defense, however, Pittman seeks in this case to open what can only be a general Pandora's box of confusion regarding Rule 8(c) affirmative defenses and what will, and will not, constitute a "waiver." Having waited over three years after death to lodge a motion to "substitute," obtained in improper fashion in an *ex*

parte order, and having delayed four and a half years before filing an "amended" complaint by the purported representative, Pittman's counsel simply seeks a "bailout" based on an overly broad formulation of "waiver." Upon inspection, that formulation is not supported by the fact specific cases and could not be workable in general litigation cases regarding multiple Rule 8(c) defenses, which need the bright line standard. Otherwise, the right to trial by jury of affirmative defenses is impacted. In response to the "amended complaint" all defendants filed answers raising the Rule 8(c) defenses and all filed or timely joined motions, which were continuously filed, explicitly putting Pittman on notice of the limitations problems well prior to any trial, which has not yet been set, and on which several hearings were held below.

There was no "waiver" by defendants, and it is submitted that Pittman's formula for "waiver" asks the Court to make bad law in this case on an alternative point which would only create uncertainty and confusion for members of the Bar and unfairly prejudice defendants here.

II. THERE WAS NO TIME LIMITATION ON ANY "OBJECTION" TO THE ORDER OF SUBSTITUTION AS IT WAS VOID, WAS NOT A FINAL JUDGMENT, COULD BE RECONSIDERED AT ANY TIME, AND WAS OBTAINED *EX PARTE*.

Having obtained a void order of "substitution" that was jurisdictionally a nullity Pittman nevertheless claims at pp. 14-15 of the brief that defendants somehow "waived" any challenge to the April 28, 2004, order by not overtly "objecting" to the order. This cursory argument is completely misplaced. There is no requirement by rule or in law that defendants immediately "object" or seek reconsideration of an interlocutory order that has already been entered. Instead, as pointed out at p. 7 above, defendants responded by motions and answers when the "amended complaint" was filed on August 22, 2005.

First, the order of "substitution" was "void" and lacking in jurisdiction–and therefore could be attacked at any time.

Moreover, the order was interlocutory in nature and not a final judgment which was subject to a Rule 60(b) motion for relief, or to the time limitations in that rule. Rule 60(b) only applies to relief from final judgment on the merits of a case--it does not apply to other orders entered during the course of a case. Rule 60(b) "specifies certain limited grounds upon which final judgments may be attacked, even after the normal proceeding of motion for new trial and appeal are no longer available." Comment, M.R.C.P. Rule 60(b)(emphasis added). By the same token, the order of substitution was not a final judgment which could then be appealed as of right under M.R.C.P. Rule 4. Similarly, there is no requirement that a party seek reconsideration of an adverse order already entered,[4] although a party has discretion to request, and a lower court always has discretion to entertain at any time, prior to final judgment, a request to reconsider or change a prior ruling. "Any order signed during the course of the proceedings is not final and can be changed during the course of the action and prior to a final judgment." *Franklin v. Franklin ex rel Phillips*, 858 So. 2d 110, 120 (Miss. 2003); see also *Mullen v. Green Tree Financial Corp.-Mississippi*, 730 So. 2d 9, 12-13 (Miss. 1996).

Second, the April 28, 2004 order of "substitution" was not a "pleading" which would require defendants under Rule 8(c) to immediately respond by answer or motion. As discussed at p. 7 above, when a pleading by the "substituted" representative was finally filed on August 22,

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[4]As pointed out in the Combined Brief of Defendants-Appellants at pp. 5-6, Pittman sought before the Circuit Court to bar and strike defendants' efforts to obtain reconsideration of and to claim that defendants had "waived" any objection. The Circuit Court, however, denied Pittman's motion to strike and reconsidered defendants' arguments on the merits. TRE Tabs A, L, and M.

2005, all defendants responded by answers and motions, and continuously objected to the proceedings all the way to this Court's grant of interlocutory appeal on December 15, 2008.

Third, contrary to Pittman's suggestion, a party is not obligated to "object" to an order that has already been entered on an *ex parte* basis, as here. M.R.C.P. Rule 46 abolished "exceptions," and expressly provides that "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him." (Emphasis supplied.)

Pittman's argument is patently without foundation.

III. THERE IS NO BASIS TO FIND THAT MARY PITTMAN "SHOULD BE ABLE TO PROCEED" WITH THIS ACTION ON BEHALF OF WRONGFUL DEATH BENEFICIARIES.

Pittman's counsel claims at pp. 15-17 that "the Court should hold that Mary Pittman be allowed to proceed in the lower court on behalf of the wrongful death beneficiaries." This contention is unclear and unsupported.

If, as Pittman posits, the initial filing was "*void ab initio*," it necessarily follows, for the reasons and based on the legion of cases cited in the Combined Brief of Defendants-Appellants Trane, et al., at p. 12, that all subsequent efforts at "substitution" and "amendment" for the new "plaintiff" are improper and jurisdictional nullities, and it makes no difference whether the "substituted" plaintiff seeks relief as a wrongful death beneficiary, executrix, or both. In fact, Mary Pittman was not qualified as executrix when the "amended complaint" was filed, and her counsel concededly represented to the Court in argument that she was not pursuing a "wrongful death" claim--but these points are dwarfed by the fact that subsequent proceedings were nullities and lacking in jurisdiction and that no timely original complaint with original process was ever duly commenced by Mary Pittman.

As pointed out by the multitude of cases addressing void filings in the name of a deceased, "you can't substitute something for nothing," and this principle applies regardless of the maneuvering of plaintiff's counsel to try to change the basis of any claim. Moreover, under the circumstances here, there was nothing for any claim to "relate back" to. Standing cannot be retroactively created, and where an initial filing is jurisdictionally deficient because the plaintiff lacks standing to sue, a later amended complaint cannot "relate back" to that filing. *City of Madison, supra*; *Tolliver v Mladineo*, 987 So. 2d 989 (Miss. App. 2007). That principle applies with even more force here, where the initial filing was not only deficient in terms of standing--that is, that the plaintiff lacked the particular injury or statutory interest necessary to sue--but there was no live "plaintiff" and no viable "action" at all.

Methodist Hospital of Hattiesburg, Inc. v. Richardson, 909 So. 2d 1066, 1068 (Miss. 2005), the only case cited by Pittman, is inapposite and distinguishable. That case did not involve a situation where, as here, an initial filling was made in the name of a deceased and was *void ab initio*, see *Illinois Central Railroad Co. v. Broussard*, 2008 WL 4405166 (Miss. App. 2008) so that any "substitution" was accordingly improper. A live plaintiff, but the wrong plaintiff, initially brought the case.

IV. THE INITIAL FILING WAS *VOID AB INITIO.*

Pittman asserts at pp. 18-19 that the original filing in the name of the deceased Lonnie Pittman was not *void ab initio*. For the reasons and based on the numerous cases set forth in detail at pp. 12-17, in the Combined Brief of Defendants-Appellants, the filing in the name of Pittman was indeed *void ab initio* and a jurisdictional nullity from the onset; there was no party "plaintiff" and no duly commenced "action."

As discussed above at p.1, *Necaise v. Sacks*, 841 So. 2d 1098 (Miss. 2003) does not in any way support Pittman's conclusory argument. *Necaise* involved substitution for a party who dies during the pendency of his action, not a matter where a filing was made in the name of a person already deceased. 841 So. 2d at 1106.

V. RULE 17(a) CANNOT TRUMP OR OVERRIDE RULE 25(a)(1) OR SUBSTANTIVE JURISDICTIONAL PRINCIPLES TO PERMIT "SUBSTITUTION" WHERE AN INITIAL FILING IS *VOID AB INITIO*.

Pittman claims at pp. 19-24 that Rule 17(a), which provides generally that "every action shall be prosecuted in the name of the real party in interest," including an executor or administrator, authorizes the "substitution" of Mary Pittman. This false argument has been addressed by Defendants-Appellants in detail in the Combined Brief at pp. 17-20, pointing out that any "substitution" and "amendment" are void and unauthorized where the original filing is made in the name of a deceased, and at pp. 20-23, pointing out that the general provisions of Rule 17(a) could not trump or override the limitations on "substitution" recognized by M.R.C.P. Rule 25(a)(1). It is respectfully submitted that those arguments and cases are well reasoned and controlling, and they will not be reiterated on this Reply Brief.

Pittman's brief does not cite any case which directly holds that the case law relied upon by Defendants-Appellants is wrongly decided, nor does it cite or discuss Rule 25(a)(1) at all. Instead, Pittman relies on cases that are factually distinguishable and purported principles that are inapposite or that are simply wrong.

For example, the brief claims at p. 23 that *Humphreys v. Irvine*, 14 Miss. 205, 1846 WL 2909 (Miss. Err. & App. 1846) does not count because "it was decided before the enactment of Rule 17 of the Mississippi Rules of Civil Procedure." There can be no question, however, that

Humphreys represents precedent for this Court, see *Broussard, supra,* nor can there be any question that *Humphreys* sets forth a jurisdictional obstacle which "goes to the right of the Court to proceed" where an initial filing is made in the name of a deceased. Accordingly, Pittman's suggestion that *Humphreys* is irrelevant because it was decided "prior to" the adoption of Rule 17 is just wrong on several levels. Among other things, M.R.C.P. Rule 82 explicitly provides that the rules of civil procedure "shall not be construed to extend or limit the jurisdiction of the Courts of Mississippi." The adoption of procedural Rule 17(a) did not and could not overrule *Humphreys*.

Second, as pointed out directly above, Pittman's reliance on *Methodist Hospital of Hattiesburg, Inc. v. Richardson*, 909 So. 2d 1066, 1068 (Miss. 2005) is similarly misplaced. *Richardson* is factually inapposite. In *Richardson*, an action was filed by a live person (Linda Martin), not in the name of a person already deceased at the time of filing, and it in no way can be read to authorize a court to utilize Rule 17(a) to effectuate a "substitution" under the circumstances of this matter.

None of the other routine "real party in interest" cases cited by Pittman involve circumstances in which the initial filing was made in the name of a deceased, save one. In *Esposito v. United States*, 368 F. 3d 1271 (10th Cir. 2004), the Tenth Circuit permitted Rule 17(a) to serve as the stated ground for a substitution where an initial filing was made by a deceased. *Esposito* is a poorly reasoned outlier decision--contrary to the numerous federal and state cases cited at pp. 12-20 of the Combined Brief of the Defendants-Appellants Trane, et al.--and the result in that case is based on at least two fundamental errors or flaws. First, the Court in *Esposito* "rejected the [defendant's] argument that the attempted suit was a nullity." 386 F. 3d

at 1272; see also 368 F. 3d at 1277.[5] This, of course, is directly contrary to the controlling principle in Mississippi and the legion of cases from other jurisdictions that such filings are jurisdictional nullities. *Illinois Central Railroad Co. v. Broussard*, 2008 WL 4405166 (Miss. App. 2008); *Humphreys v. Irvine*, 14 Miss. 205, 1846 WL 2909 (Miss. Err. & App. 1846); *Owen v. Abraham*, 233 Miss. 558, 102 So. 2d 372 (Miss. 1958). Second, in permitting procedural Rule 17(a) to serve as the basis for substitution, the decision in *Esposito* simply ignores the implication of Rule 25(a)(1) dealing with substitution for cases of death and does not discuss that more specific Rule at all. Accordingly, *Esposito* does not consider, and does not account for, the limitation on substitution recognized in M.R.C.P. Rule 25(a)(1) comment or the basic principle of interpretation that the more specific rule governs the more general provision. Rule 25(a)(1):

> presupposes that substitution is for someone who was already a party to a pending action; substitution is not possible if one who was named a party in fact died before the commencement of the action,

comment, M.R.C.P. Rule 25(a)(1). As discussed in the Combined Brief, it would be anomalous, and also contrary to substantive jurisdictional principles, to permit the general procedures of Rule

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[5]The *Esposito* decision further illustrates flawed reasoning by attempting to distinguish the Fifth Circuit's holding in *Mizukami v. Buras*, 419 F. 2d (5th Cir. 1969), that substitution is not available where the named person predeceased the filing of the action, on the ground that *Mizukami* factually involved an attempt to substitute the heirs "of a deceased defendant," 368 F. 3d at 1277 (emphasis in original). That the decision in *Esposito* seeks to distinguish or ignore the general holding in *Mizukami* on this ground borders on the unbelievable: both federal and state cases have uniformly read, and relied upon, *Mizukami* to apply to complaints filed in the name of plaintiffs who are already deceased. Eg., *Hanberry v. United States*, 204 Ct. Cl. 811, 1974 WL 5597 (1974)(because plaintiff died prior to filing, substitution is not possible, citing *Mizukami*); *Bridges v. Enterprise Products Co., Inc.*, 551 F. Supp. 2d 549, 562 (S.D. Miss. 2008)(no substitution for deceased person who was never a plaintiff in case, citing *Mizukami*); *Gregory v. Dicenzo*, 713 A. 2d 772 (R.I. 1988) (filing of complaint by deceased person was a nullity and substitution not possible, citing *Mizukami*).

17(a) to authorize "substitution" where the initial filing is in the name of the deceased and void. The *Esposito* decision is outside the common understanding of the courts, and it is neither precedent nor persuasive.

VI. AT THE TIME OF THE "AMENDED" COMPLAINT, MARY PITTMAN WAS NOT THE QUALIFIED EXECUTRIX OF THE ESTATE OF LONNIE PITTMAN.

Because the initial filing in the name of Lonnie Pittman was *void ab initio* and a jurisdictional nullity, meaning there was no party "plaintiff" and no duly commenced "action," any "substitution" and "amended" complaint based on that purported substitution were similarly void and improper; moreover, the "amended complaint" made in the name of "Mary Pittman as the Executrix of the Estate of Lonnie Pittman" was not filed until four and a half years after the date of death. No original action with valid original process was, or ever has been, timely and duly commenced regarding any alleged claims directly or derivatively related to the death of Lonnie Pittman. These principles are dispositive of this appeal.

It was further pointed out in addition by Trane in the lower court that Mary Pittman was in fact not the duly qualified "executrix" of the Estate of Lonnie Pittman, TRE Tab J and 5 CP 681-686 and exhibits. The Brief of Appellant Garlock Sealing Technologies at pp. 15-20 and footnote 3 accurately sets forth in detail the facts demonstrating the failure of Pittman to qualify as executrix and the controlling probate law and her lack of standing on this alternative ground. The Circuit Court did not rule on this point.

On appeal Pittman now claims at pp. 24-29 that she really was the qualified executrix, because, having failed to take any of the necessary and proper steps, after Trane filed its supplemental motion her counsel went to Rankin County Chancery Court on February 29, 2008, and got an order reinstating the Estate proceedings, and that Pittman has now taken the oath, etc.

The fact remains that Pittman was not the duly qualified executrix either when the *ex parte* order of "substitution" was obtained or when the "amended complaint" was filed over a year later. The controlling principle of law is that standing to sue is determined at the time of filing and that it may not be created retroactively, in the after-the-fact manner argued for by Pittman here. *Bryan, supra*; *Tolliver v Mladineo*, 987 So. 2d 989 (Miss. App. 2007).

Even if Pittman were correct, however, and she was deemed retroactively to be the duly qualified executrix at the time the amended complaint was filed, it would not change the outcome of this appeal or alter the dispositive rules to be applied. If, as the cases hold, the initial filing was *void ab initio*, and the subsequent "substitution" and "amended complaint" were accordingly void and improper, it makes no difference whether the person is the properly qualified personal representative or not--the substitution and any amended complaint by that person cannot proceed because of the initial jurisdictional defects. In virtually every case relied upon by these Defendants-Appellants, the person seeking to replace the deceased has in fact been an appropriate personal representative. Moreover, the dispute over whether Mary Pittman was a duly qualified personal representative cannot change the alternative ground that the "amended complaint" was not filed until August 22, 2005, over four and a half years after the date of death, and that limitations ran unabated, see *Tolliver, supra.*

VII. THE DEFECTS IN THE PROCEEDINGS BELOW WENT TO THE CORE OF THE SUBJECT MATTER JURISDICTION OF THE CIRCUIT COURT.

Pittman claims at pp. 29-32 that any problems below were simply matters of "capacity to sue" and not related to the subject matter jurisdiction of the court. Therefore, says Pittman, defendants did not raise the lack of "capacity" by "specific negative averment" in their pleadings and waived any objection.

With due respect, this contention borders on the frivolous. Among other things, the "amended complaint" filed by Mary Pittman on August 22, 2005, was responded to by motion to dismiss filed on October 14, 2005, and other motions by Trane and Garlock which set forth precisely the void nature of the initial filing and the "substitution." TRE Tabs F and J. More to the point, it is absolutely clear in Mississippi law that defects in filing which are *void ab initio*, nullities, or lacking in standing go directly to the subject matter jurisdiction of the court.

To reiterate, in *Humphreys*, the Court plainly held that a filing in the name of a person already deceased was a nullity and that the objection "rises above the mere technical rules of pleading," and instead "goes to the right of the court to proceed." 1846 WL 2909; *Broussard, supra.* See *City of Madison v. Bryan*, 763 So. 2d 162, 166 (Miss. 2000)(standing "is a jurisdictional issue which may be raised by any party or the Court at any time"); *Kirk v. Pope*, 973 So. 2d 981, 990 (Miss. 2001)(noting that standing "is an aspect of subject matter jurisdiction"); *Pruitt v. Hancock Medical Center*, 942 So. 2d 797, 801 (Miss. 2006)(lack of standing "robs the court of jurisdiction to hear the case"); *Sanford v. Board of Supervisors of Covington County*, 421 So. 2d 488, 490 (Miss. 1982)(court of its own motion should consider a juridicitional issue "even though not assigned by the parties"); M.R.C.P. Rule 12(h)(3)(matters of subject matter jurisdiction not waived). The suggestion by Pittman that the jurisdictional defects below were somehow governed by technical rules of pleading capacity to sue and were "waived" is unsupported and contrary to Mississippi law.

CONCLUSION

For the reasons set forth in the Combined Brief of Defendants-Appellants Trane, et al., and in this Combined Reply Brief, it is respectfully submitted that the Court should reverse and render, and order that the proceedings below be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. Hunt Cole, Jr., one of the counsel for Defendants-Appellants in this appeal, hereby certify that I have this day caused to be mailed, via U. S. mail first class postage prepaid, a copy of Reply Brief of Defendants-Appellants to the following counsel for Plaintiff-Appellee who have noticed their appearance in this appeal in this Court,

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This the 19 day of January, 2010.

T. HUNT COLE, JR.