

2008-IA-01584-SCTT2

An Interlocutory Appeal of the Hinds County Circuit Court's September 2, 2008
Order Denying Garlock Sealing Technologies, LLC's Motion for
Summary Judgment with Incorporated Memorandum

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**IN THE SUPREME COURT
FOR THE STATE OF MISSISSIPPI**

**TRANE US, INC. FORMERLY KNOWN
AS AMERICAN STANDARD INC.**

APPELLANT

V.

CIVIL ACTION 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.

CIVIL ACTION NO.: 2008-IA-1572-SCT

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

APPELLEE

Consolidated with:

GARDNER DENVER, INC., ET AL.

APPELLANT

V.

CIVIL ACTION NO.: 2008-IA-1599-SCT

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

APPELLEE

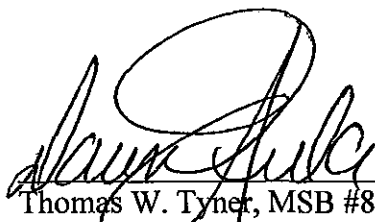
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

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

This the 17th day of July, 2009.

A handwritten signature in black ink, appearing to read "Thomas W. Tyner", written over a horizontal line.

Thomas W. Tyner, MSB #8172

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BY MERGER TO GARLOCK, INC

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**STATEMENT OF THE ISSUES TO BE PRESENTED ON APPEAL BY GARLOCK
SEALING TECHNOLOGIES, LCC, SUCCESSOR BY MERGER TO GARLOCK, INC**

1. Whether the trial court had subject matter jurisdiction in an action filed in the name of a party who was deceased at the time of filing.
 - a. Whether a Complaint filed in the name of an individual who predeceased the filing of said Complaint is null and void.
 - b. Whether a deceased person's lack of standing deprives the trial court of subject matter jurisdiction thereby rendering the action filed in his name null and void.
2. Whether the defense of lack of subject matter jurisdiction can be waived.
3. Whether the filing of a lawsuit in a deceased person's name tolls the statute of limitations.
4. Whether the substitution of a living person is proper when the original action was filed in the name of an individual who predeceased the filing of the original complaint.
5. Whether the improper substitution of a living person for one who was deceased, and in whose name the action was originally filed, constitutes a new action for purposes of the applicable statute of limitations.
6. Whether the circuit court erred in denying Garlock Sealing Technologies, LLC, successor by merger to Garlock, Inc.'s Motion for Summary Judgment.

REQUEST FOR ORAL ARGUMENT

The Appellant, Garlock Sealing Technologies, LLC, successor by merger to Garlock, Inc (hereinafter "Garlock") hereby requests that this Court allow oral argument

in this matter. This case presents complex issues relating to questions of law. Therefore, Garlock urges this Court to allow oral arguments by the parties relating to those issues.

STATEMENT OF THE CASE

The Appellant, Garlock Sealing Technologies, LLC, successor by merger to Garlock Inc (hereinafter “Garlock”) filed a Motion for Summary Judgment with the Circuit Court of Hinds County, First Judicial District, Mississippi asserting that issues relating to standing, subject matter jurisdiction, and the statute of limitations warranted the dismissal of the claims of Mary Pittman, Executrix of the Estate of Lonnie Pittman, deceased. (See, Garlock Sealing Technologies, LLC’s Motion for Summary Judgment at Record Excerpt Bates No. (hereinafter “RE” 5:701-750, 6:751-900, 7:901-962 and at Clerk’s Record Excerpt No. (hereinafter “CR”) 6:813-905, 7:906-1056, & 8:1057-1074). Oral arguments on Garlock’s Motion were scheduled to be heard on August 21, 2008; however, on that date, the Honorable Winston Kidd denied Garlock’s Motion without allowing counsel to present any arguments. Thereafter, on September 2, 2008, the Order denying Garlock’s Motion for Summary Judgment was entered on the record. (See, Order at RE 7:981-982; CR 9:1304-1305; *see also*, August 21, 2008 Transcript of Hearing (hereinafter “T”) before the Honorable Winston L. Kidd at RE 5:700; T 10:71).

Lonnie Pittman was as a plaintiff in the consolidated case, *Robin C. Nettles and Lonnie Pittman, et al., v. Minnesota Mining and Manufacturing Co., et al.*, filed before the Circuit Court of Hinds County, First Judicial District, Mississippi in Cause No.: 251-03-26CIV on December 31, 2002. Pittman sought damages for his alleged asbestos-related injury. (See, December 31, 2002 Complaint at RE 1:74-100; CR 1:73-99). The original Complaint was amended twice, first on January 30, 2003 and again on April 24, 2003. (See, January 30, 2003 Amended Complaint at RE 1:101-150, 2:151-155; CR 1:100-150, 2:151-154 and April 24, 2003 Second Amended

Complaint at RE 2:159-199; CR 2:155-195). The Amended Complaints reflected that a claim was being prosecuted in the name of Lonnie Pittman. (*Id.*)

Garlock was made a party when it was served with the April 24, 2003 Second Amended Complaint. (*See*, April 24, 2003 Second Amended Complaint at RE 2:159-199; CR 2:155-195). Garlock filed its Answer to the Second Amended Complaint on June 6, 2003, asserting numerous affirmative defenses, including, the defense of lack of subject matter jurisdiction and that the claims of the plaintiffs were barred by the applicable statute of limitations. (*See*, Separate Answer of Defendant, Garlock Sealing Technologies, LLC, Successor by Merger to Garlock, Inc to the Second Amended Complaint at RE 2:200-217; CR 2:248-264).

The fact that Lonnie Pittman predeceased the initiation of the December 31, 2002 litigation was not discovered until approximately one year and four months after the Complaint was filed when co-defendant Minnesota Mining & Manufacturing Company filed a Suggestion of Death with the Court. (*See*, Suggestion of Death at RE 2:218-227; CR 2:265-274). In fact, Lonnie Pittman died on March 11, 2001, one year and nine months prior to the filing of the *Nettles Complaint*. (*See*, Certificate of Death at RE 2:228; CR 4:473). This fact is not contested. (*See*, August 16, 2007 Transcript of Hearing before Honorable Winston L. Kidd at RE 4:517-551; T 10:3-37).

Three (3) years following the death of Lonnie Pittman, on April 27, 2004, Plaintiff filed a Motion to Substitute. (*See*, Motion for Substitution of Parties at RE 2:229-231; Supplemental Record per June 2, 2009 Order of Mississippi Supreme Court (hereinafter "SR") at 1:41-43). The Motion to Substitute was factually erroneous in that it stated "Since the filing and service of the Complaint, one Plaintiffs (sic) has become deceased." (*Id.*) No notice was provided to Defendants for a hearing on Plaintiff's Motion to Substitute. On April 28, 2004, one day following the filing of the Motion to Substitute, the Circuit Court of Hinds County entered the

Order allowing the substitution of “the surviving heir of Plaintiff Lonnie Pittman, deceased: Mary C. Pittman”. (See, Order Substituting Parties at RE 2:232; CR 2:275).

On July 2, 2004, Hinds County Circuit Court Judge Tommie Green entered an Order recusing herself from this case and on that same day an Order was entered by Hinds County Circuit Court Judge W. Swan Yerger re-assigning the case to Hinds County Circuit Court Judge Winston L. Kidd. (See, Recusal Order at RE 2:233; CR 2:276 and Order of Re-Assignment at RE 2:234; CR 2:277).

On August 13, 2004, Garlock filed a Motion to Dismiss, or in the alternative, to Sever Claims of Lonnie Pittman requesting dismissal of Lonnie Pittman’s cause of action on the basis that he predeceased the filing of the original Complaint. (See, Motion to Dismiss, or in the alternative, to Sever the Claims of Lonnie Pittman at RE 2:235-278; CR 2:278-301, 3:302-321). On November 24, 2004, before Garlock’s Motion was argued, the Circuit Court entered an Order severing the claims of Robin Nettles and Lonnie Pittman into separate actions. (See, Agreed Order of Severance of Robin C. Nettles at R.E. 2:279; CR 3:322). On June 22, 2005, the Circuit Court entered an Order requiring Mary C. Pittman to file an amended complaint in compliance with the Mississippi Supreme Court’s ruling in *Harold’s Auto Parts, Inc. v. Mangialardi*, 889 So.2d 493 (Miss. 2004). (See, Agreed Order at RE 2:280-281; SR 1:70-71). Although Plaintiff disputes this fact, Defendants recall that the Circuit Court verbally directed that the issues relating to Mary C. Pittman on behalf of Lonnie Pittman contained in Garlock’s Motion to Dismiss would be reserved until such time as the severance and filing of the *Mangialardi* compliant pleading was completed.¹

¹ There is a general rule that a court reporter is not present in the courtroom in Hinds County Circuit Court unless her presence is requested in advance of the hearing date. Not being aware of this requirement prior to the hearing, no request for a court reporter was made by the Defendants. Thus, there is no transcript available for this proceeding.

On August 22, 2005, an Amended Complaint styled *Mary Pittman, Executrix of the Estate of Lonnie Pittman v. Minnesota Mining & Manufacturing Co., et al.*, was filed in the Circuit Court of Hinds County, Mississippi, Civil Action No. 251-03-26CIV. (See, August 22, 2005 Amended Complaint Jury Trial Requested at RE 2:282-300, 3:301-326; CR 3:325-369). The 2005 Amended Complaint does not assert claims for relief pursuant to the wrongful death statute. (*Id.*) In addition, counsel for the Plaintiff has stipulated that no wrongful death claims are being pursued in this action. (*Id.*; See, August 16, 2007 Transcript of Hearing before the Honorable Winston L. Kidd at RE 4:517-551; T 10:3-37).

On September 23, 2005, Garlock filed its Answer to the Amended Complaint adopting and realleging therein the Answer and Affirmative Defenses previously filed in this action on June 6, 2003. (See, Separate Answer of Defendant, Garlock Sealing Technologies, LLC, successor by merger to Garlock, Inc to the Amended Complaint at RE 3:327-328; CR 3:433-434).

On June 5, 2007, Garlock filed a Motion for Summary Judgment with a Memorandum in Support of Motion asserting that the December 31, 2002 Complaint filed in the name of Lonnie Pittman was a nullity as he was deceased at the time that Complaint was filed; that Lonnie Pittman lacked standing to pursue his personal injury claim, and that the Hinds County Circuit Court lacked subject matter jurisdiction over this action. (See, Garlock Sealing Technologies, LLC, successor by merger to Garlock, Inc's Motion for Summary Judgment at RE 3:329-513; CR 4:458-603, 5:604-642). Garlock further argued that the December 31, 2002 filing failed to toll the statute of limitations thereby barring any other legal claims sought to be asserted on Lonnie Pittman's behalf after March 11, 2004. (*Id.*) The Hinds County Circuit Court denied Garlock's Motion for Summary Judgment. (See, Order Denying Defendant Garlock Sealing Technologies, LLC, successor by merger to Garlock Inc's Motion for Summary Judgment at RE

4:552; CR 5:649). On November 5, 2007, Garlock filed a Motion for Reconsideration arguing that Lonnie Pittman lacked standing to initiate an action in his name after he was deceased; that this lack of standing robbed the Hinds County Circuit Court of subject matter jurisdiction, and that any other legal claims, whether for wrongful death or survival, sought to be asserted by Mary Pittman on Lonnie Pittman's behalf were barred by the applicable statutes of limitation. (See, Motion for Reconsideration at RE 4:553-566; CR 5:651-664). Garlock further urged that, contrary to the ruling of the Hinds County Circuit Court, these issues raised questions of law, not fact. (*Id.*) This Motion was also denied. (See, Order Denying Defendant Garlock Sealing Technologies, LLC's Motion for Reconsideration at RE 4:567; CR 5:680). Following the denial of its Motion for Reconsideration, Garlock filed a Petition for Interlocutory Appeal which resulted in the Circuit Court staying the case during the pendency of the Petition for Permission to Appeal Interlocutory Order.²

After Garlock's Motion for Summary Judgment and Motion for Reconsideration were decided, it was discovered by Trane US Inc. f/k/a American Standard, Inc. (hereinafter "Trane") that even through the Third Amended Complaint was filed in the name of Mary Pittman, Executrix of the Estate of Lonnie Pittman, deceased, Mary Pittman was not the Executrix of Lonnie Pittman's estate. On August 22, 2001, a Petition to Admit Will to Probate was filed in the Chancery Court of Rankin County, Mississippi. (See, August 22, 2001 Petition to Admit Will to Probate a RE 7:963-968; CR 6:775-780). Subsequently, the Rankin County Chancery

² Garlock's Petition for Permission to Appeal Interlocutory Order was subsequently denied based on a determination that it had been untimely filed. The determination that Garlock's Petition was untimely was preceded by this Court first ordering the Hinds County Circuit Clerk to file an affidavit clarifying when the Order denying Garlock's Motion for Reconsideration was filed on the Clerk's docket and thereafter sanctioning the Hinds County Circuit Clerk for failing to properly enter the order on the docket and for "backdating" the entry of said Order. The record of these actions can be found at *Garlock Sealing Technologies, LLC, successor by merger to Garlock, Inc v. Mary Pittman, as Executrix of the Estate of Lonnie Pittman, dec.*, in Cause No. 2008-M-00177-SCT.

Clerk, on October 22, 2002, issued a Rule 41(d) “Notice of Clerk’s Motion to Dismiss” for Mary Pittman’s failure to take any steps to qualify as Executrix of Lonnie Pittman’s estate.³ (See, October 2, 2002 Clerk’s Notice of Clerk’s Motion to Dismiss at RE 1:1; CR 6:791). Thereafter, on October 23, 2002, Mary Pittman filed an Amended Petition for Probate of Will and for Letters Testamentary. (See, October 23, 2002 Amended Petition for Probate of Will and for Letters Testamentary at RE 7:969-980; CR 6:792-803). The Chancery Court on March 18, 2003, entered an Order Admitting Will to Probate directing the Chancery Clerk of Rankin County, Mississippi to issue the Petitioner, Mary C. Pittman, Letters Testamentary **“conditioned upon her taking the oath of office as required by law, bond having been waived; . . .”**. (See, Order Admitting Will to Probate at RE 1:156-158; CR 6:781-783). (Emphasis added). On June 28, 2007, the Chancery Clerk of Rankin County, Mississippi issued a second Notice of Clerk’s Motion to Dismiss. (See, June 28, 2007 Notice of Clerk’s Motion to Dismiss at RE 4:514; CR 6:807). Thereafter, on July 30, 2007 the Chancery Clerk of Rankin County filed a Motion to Dismiss the Estate Action for Want of Prosecution. (See, July 30, 2007 Clerk’s Motion to Dismiss for Want of Prosecution at RE 4:515; CR 6:808). The Rankin County Chancery Court dismissed the estate proceedings on July 31, 2007. (See, July 31, 2007 Order of Dismissal Without Prejudice at RE 4:516; CR 6:809). Based on this information, Trane filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Statute of Limitations on February 28, 2008. (See, Trane US Inc., f/k/a American Standard Inc.’s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Statute of Limitations at RE 4:568-600, 5:601-697; CR 5:681-754,

³ The initial Petition to Admit Will to Probate was filed on August 22, 2001, and thereafter, on October 2, 2002 the Rankin County Chancery Clerk issued a Notice of the Clerk’s Motion to Dismiss. Subsequently, an Amended Petition to Admit Will to Probate was filed on October 23, 2002. An Order Admitting Will to Probate was entered on March 18, 2003. The Rankin County Chancery Clerk issued a second Notice of the Clerk’s Motion to Dismiss on June 28, 2007.

6:755-810). Garlock filed a Joinder to Trane's Motion to Dismiss on March 3, 2008. (*See*, Joinder of Garlock Sealing Technologies, LLC, successor by merger to Garlock Inc to Trane US Inc., f/k/a American Standard Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Statute of Limitations at RE 5:698-699; CR 6:811-812).

Before Trane's Motion to Dismiss was argued, the Court of Appeals dismissed the writ of certiorari in *Tolliver v. Mladineo*, 987 So.2d 989 (Miss. App. 2007), *cert. dismissed* 979 So.2d 691 (Miss. 2008). The *Tolliver* opinion provided clarification on several of the same issues presented in Garlock's prior Motion for Summary Judgment regarding standing, subject matter jurisdiction, and the statute of limitations.

The discovery of the information regarding the dismissal of Lonnie Pittman's estate and the denial of the writ of certiorari in *Tolliver v. Mladineo* provided additional support for Garlock's position that this cause of action should be dismissed. On July 18, 2008, Garlock filed a Motion for Summary Judgment incorporating the new information in its arguments that no party who had appeared in this action had standing to pursue the claims asserted; that the Hinds County Circuit Court never obtained subject matter jurisdiction over these claims, and that the statute of limitations barred the pursuit of any survival or wrongful death claims on behalf of Lonnie Pittman. (*See*, Garlock Sealing Technologies, LLC's Motion for Summary Judgment with Incorporated Memorandum in Support at RE 5:701-7502, 6:751-900, 7:901-962; CR 6:813-905, 7:906-1056, and 8:1057-1074). Hinds County Circuit Court Judge Winston L. Kidd refused to hear oral arguments on Garlock and Trane's Motions, and on September 2, 2008, the Order denying Garlock's Motion was entered on the record resulting in the filing of this appeal. (*See*, September 2, 2008 Order at RE 7:981-982; CR 9:1304-1305).

SUMMARY OF THE ARGUMENT

Garlock respectfully submits that the Hinds County Circuit Court, First Judicial District, erred in refusing to grant its Motion for Summary Judgment and dismiss the pending action on the grounds that no plaintiff with standing ever appeared in this action thereby depriving the Court of subject matter jurisdiction, and further, that the statute of limitations barred the pursuit of any survival or wrongful death claims on Lonnie Pittman's behalf.

The current action was originally commenced in the name of Lonnie Pittman. At the time of filing, Pittman was deceased. This Court has long held that a lawsuit commenced in the "name of a deceased individual amounts to a nullity." *Illinois Central Railroad Company v. Broussard*, --- So.2d ---, 2008 WL 4405166 at ¶12 (Miss. App. 2008); citing, *Humphreys v. Irvine*, 14 Miss. 205, 207 (1846). The basis for such a holding is that a court cannot obtain "jurisdiction over the dead." *Gerault v. Anderson*, 1 Miss. 30 *2 (Miss. 1818); see also, *Necaise v. Sacks*, 841 So.2d 1098, 1105 at ¶16 (Miss. 2003), citing, Griffith's Mississippi Chancery Practice, Section 591; and *Humphreys v. Irvine*, 14 Miss. 205 *2 (Miss. 1846). Since Lonnie Pittman died on March 11, 2001, he had no standing to initiate the December 31, 2002 action, thus rendering his suit null and void. See, *Gulf City Fisheries, Inc. v. Bobby Kitchens, Inc.*, 518 So.2d 661, 663 (Miss. 1988); and *Tolliver v. Mladineo*, 987 So.2d 989 at ¶16 (Miss. App. 2007), cert. dismissed 979 So.2d 691 (Miss. 2008). The Circuit Court did not obtain subject matter jurisdiction over Lonnie Pittman's claim and the statute of limitations continued to run. See, *Tolliver v. Mladineo*, 987 So.2d at 995-996 at ¶17; *McNair v. U.S. Postal Serv.*, 768 F.2d 730, 737 (5th Cir. 1985).

On April 28, 2004, the Hinds County Circuit Court entered an Order allowing Mary Pittman to be substituted as the surviving heir of Lonnie Pittman. (See, Order Substituting Parties at RE 2:232; CR 2:275). In entering the Order, the Court acted in reliance on the Motion

to Substitute filed by Mary Pittman which represented to the Court that “Since the filing and service of the Complaint, one Plaintiffs (sic) has become deceased”. (See, Motion for Substituting Parties at RE 2:229-231; SR 1:41-43). However, contrary to the assertions in Plaintiff’s Motion to Substitute, Lonnie Pittman died more than one year prior to the action initiated in his name. The original action being null and void, no substitution could be granted.

Lonnie Pittman predeceased the filing of the *Nettles Complaint*. As one being deceased, he was never a party to that action and the statute of limitations continued to run. Any survival action that could have been pursued by Mary Pittman, as the Executrix of Lonnie Pittman’s estate should have been filed with the Court before March 11, 2002. See, Mississippi Code Annotated §91-7-233 (1972, as amended). No such action was initiated within the stated time period. As a result, Mary Pittman was precluded from bringing a survival action on his behalf. Further, even if Mary Pittman had initiated an action prior to the expiration of the March 11, 2002 statutory period, Mary Pittman, as Executrix of the Estate of Lonnie Pittman, lacked standing to proceed with any survival action on Lonnie Pittman’s behalf because she never qualified as the executrix of the estate of Lonnie Pittman, and never had any power to act on behalf of the estate.

The only other potential claim that could have been asserted on behalf of Lonnie Pittman, deceased, was a wrongful death claim. The 2005 Amended Complaint filed by Mary Pittman, as Executrix of the Estate of Lonnie Pittman does not assert any claim for relief pursuant to the wrongful death statute, and the fact that no such claim was intended was confirmed by Mary Pittman’s counsel when he stated “[t]here are no wrongful death damages here, so that the claim has remained the same from 2002 until the present. (See, August 22, 2005 Amended Complaint Jury Trial Requested at RE 2:282-300, 3:301-326; CR 3:325-369 and the August 16, 2007 Transcript of Hearing before the Honorable Winston L. Kidd at RE 4:517-551; T 10:3-37).

Regardless of whether Mary Pittman intended to initiate a wrongful death action, the three year statute of limitations applicable to a wrongful death claim based on Mr. Pittman's alleged exposure to asbestos expired on March 11, 2004, over one month prior to the Court's April 28, 2004 substitution of Mary Pittman and one year and five months prior to the filing of an Amended Complaint by Mary Pittman. *See, Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 706 (Miss. 1990)(holding that asbestos disease is a latent disease governed by the three year statute of limitations in Mississippi Code Annotated §15-1-49).

From the time of Lonnie Pittman's death until well after the expiration of the statute of limitations no party with standing ever filed a cognizable claim for relief in this matter. The Hinds County Circuit Court never obtained subject matter jurisdiction over these claims, the statute of limitations continued to run, and any claims for relief which could have been asserted regarding Lonnie Pittman's alleged asbestos-related disease were time barred. With the expiration of the statute of limitations, Garlock obtained a vested right in the statute of limitations bar which cannot be revived. *See, Tolliver v. Mladineo*, 987 So.2d at 996 at ¶18 (*cert. dismissed 7/31/08*); *citing*, Miss. Code Anno. §15-1-3 and *University of Mississippi Medical Center v. Robinson*, 876 So.2d 337, 340 at ¶11 (Miss. 2004).

For the reasons stated hereinabove, Garlock's Motion for Summary Judgment should have been granted by the Circuit Court of Hinds County and this action should be dismissed in its entirety.

ARGUMENT

Standard of Review

Garlock appeals the denial of a Motion for Summary Judgment by the Hinds County Circuit Court, First Judicial District, Mississippi. This Court has held that the standard of review applicable to the granting or denial of a motion for summary judgment is *de novo*. *Armistead v.*

Minor, 815 So.2d 1189, 1191 at ¶4 (Miss. 2002), *citing*, *Hudson v. Courtesy Motors, Inc.*, 794 So.2d 999, 1002 at ¶7 (Miss. 2001); *Jenkins v. Ohio Cas. Ins. Co.*, 794 So.2d 228, 232 at ¶16 (Miss. 2001); and *Heigle v. Heigle*, 771 So.2d 341, 345 at ¶8 (Miss. 2000). The appellate standard of review for a denial of a motion for summary judgment is the same as that assigned to the trial court pursuant to Rule 56 (c) of the Mississippi Rules of Civil Procedure which provides that “the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *See*, Miss. R. Civ Pro. 56(c); *see also*, *Armistead v. Minor*, 815 So.2d at 1192 at ¶4 (Miss. 2002).

1. The trial court did not have subject matter jurisdiction over an action filed in the name of a party who was deceased at the time of filing.

In order to initiate a court action, a party must have standing, more clearly defined as the “right to make a legal claim or seek judicial enforcement of a duty or right.” Black’s Law Dictionary (1136) (7th Ed. 2000). No Plaintiff appearing in this action has had standing to pursue a claim for Lonnie Pittman’s alleged asbestos-related disease. Without standing, subject matter jurisdiction over the claims presented is not conferred upon the Court. *Tolliver v. Mladineo*, 987 So.2d 989, 995 at ¶16 (Miss. App. 2007), *cert. dismissed* 979 So.2d 691 (Miss. 2008)(lack of standing robs court of jurisdiction to hear the case), *citing*, *Pruitt v. Hancock Medical Ctr.*, 942 So.2d 797, 801 at ¶14 (Miss. 2006) and *McNair v. United States Postal Service*, 768 F.2d 730, 737 (5th Cir. 1985); *see also*, *Community Hosp. of Jackson v. Goodlett, ex. rel.*, 968 So.2d 391, 397 (Miss. 2007)(a lack of standing robs the court of jurisdiction and lack of subject matter jurisdiction cannot be waived), *dissent* at ¶18, *citing*, *Pruitt v. Hancock Medical Ctr.*, 942 So.2d

at 801 at ¶14, *McNair v. United States Postal Service*, 768 F.2d at 737, and *Bullock v. Roadway Express, Inc.*, 548 So.2d 1306, 1308 (Miss. 1989).

Lonnie Pittman died on March 11, 2001, over one year and nine months before a personal injury suit was filed in his name. The law is clear that a deceased person does not have standing to pursue a legal action since a person who dies prior to the filing of a lawsuit is no longer considered a legal entity entitled to seek judicial enforcement of a duty or right. *See, Pasos v. Eastern S.S. Co.*, 9 F.R.D. 279 (D. Del. 1949) (person who dies prior to filing suit is not a legal entity); and *Adelsberger v. The United States*, 58 Fed. Cl. 616, 618 (U.S. Fed. Cl. 2003). When Mary Pittman appeared as the Executrix of the Estate of Lonnie Pittman, deceased, she was not the duly qualified Executrix of the estate and had not been authorized to act in that capacity; therefore, she did not have standing to pursue any legal action on the Estate's behalf. Since no party with standing ever appeared in this action to prosecute a legal action for alleged asbestos-related claims of Lonnie Pittman, the Hinds County Circuit Court never obtained subject matter jurisdiction over these claims and this action should be dismissed in its entirety.

a. A Complaint filed in the name of an individual who predeceased the filing of said Complaint is void.

In Mississippi it is well established that "litigation is not to be carried on by or against any deceased person." *Necaise v. Sacks*, 841 So.2d 1098, 1105 at ¶16 (Miss. 2003); *citing*, Griffith's Mississippi Chancery Practice, Section 591; *see also*, *Owen v. Abraham*, 102 So.2d 372, 373 (Miss. 1958)(recognizing the impossibility of an action brought by or against a deceased person). This state has also recognized that the filing of a lawsuit in the name of a deceased individual is a nullity and constitutes grounds for a dismissal of the action. *Humphreys v. Irvine*, 14 Miss. 205, 1846 WL 2909 (Miss. Err. & App. 1846), *see also*, *Illinois Central Railroad Company v. Broussard*, --- So.2d ---, 2008 WL 4405166 at ¶12 (Miss. App. 2008); and

Adelsberger v. United States, 58 Fed. Cl. 616, 618 (U.S. Fed. Cl. 2003). Numerous jurisdictions agree that “a person who dies prior to filing suit is not a legal entity” and has no right to assert a cause of action, thereby rendering any action filed in the deceased person’s name a nullity. *See, Adelsberger v. The United States*, 58 Fed. Cl. at 618; *citing, Mizukami v. Buras*, 419 F.2d 1319 (5th Cir. 1969) (defendant’s death extinguishes claim); *see also, Banakus, Administratrix of Estate of Anthony Banakus v. United Aircraft Corp.*, 290 F. Supp. 259 (S.D.N.Y. 1968)(suit is a nullity where plaintiff, unbeknownst to counsel, died prior to filing of suit); *Moul v. Pace*, 261 F. Supp. 616 (D. Md. 1966)(wrongful death suit brought after defendant died dismissed); *Chorney v. Callahan*, 135 F. Supp. 35 (D. Mass. 1955)(purported action a nullity because a dead man cannot be named defendant in an action); *Pasos v. Eastern S.S. Co.*, 9 F.R.D. 279 (D. Del. 1949)(person who dies prior to filing suit is not a legal entity); and, *Owen v. Abraham*, 102 So.2d at 373 (Miss. 1958)(death of defendant prior to decision of court rendered decree and subsequent proceedings a nullity). Thus, the Complaint filed in the name of Lonnie Pittman constituted a nullity, i.e., an act void of legal effect, rendering his personal injury action “void at its inception”. *Banakas, Administratrix of Estate of Anthony Banakus v. United Aircraft Corp.*, 290 F. Supp. 259 (D.C.N.Y. 1968)(suit filed after plaintiff was deceased was void at its inception).

The facts in this case are clear. On December 31, 2002 when the Complaint identifying his claims was filed with the Circuit Court of Hinds County, Lonnie Pittman did not legally exist. He died on March 11, 2001, approximately one year and nine months before his individual claim was filed before the Circuit Court of Hinds County, Mississippi, in the matter of *Robin C. Nettles and Lonnie Pittman, et al. v. Minnesota Mining & Manufacturing Co., et al.*, Cause No.: 251-03-26CIV. (*See, Certificate of Death at RE 2:228; CR 4:473 and December 31, 2002 Complaint at RE 1:74-100; CR 1:73-99*). Neither the original Complaint, nor the subsequent Amended Complaints filed on January 30, 2003 and April 24, 2003, made any reference to the fact that

Lonnie Pittman was deceased. (See, December 31, 2002 Complaint at RE 1:74-100; CR 1:73-199; January 30, 2003 Amended Complaint at RE 1:1:101-150, 2:151-155; CR 1:100 -150; 2:151-154; and April 24, 2003 Second Amended Complaint at RE 2:159-199; CR 2:155-195). In fact, they specifically stated that “Plaintiffs are adult resident citizens of the State of Mississippi and various locations.” (*Id.*) In addition, no substitution was made on behalf of Lonnie Pittman in any of these Complaints. (*Id.*) Thus, the action initiated and carried forward by Lonnie Pittman was a nullity because he was deceased at the time the original complaint was filed, and any claims asserted in the Complaint were rendered null and void. When faced with this situation, the courts of this state have long held that the proper remedy is to dismiss the action. See, *Humphreys v. Irvine*, 14 Miss. 205 (Miss. Err. & App. 1846)(dismissal is appropriate remedy when suit is wrongly brought in the name of a deceased person at its inception). Therefore, the Hinds County Circuit Court erred in refusing to dismiss this action on the basis that the action initiated in Lonnie Pittman’s name was a nullity.

b. A deceased person’s lack of standing deprives the trial court of subject matter jurisdiction thereby rendering the action filed in the deceased’s name null and void.

A party’s standing to bring a cause of action may be challenged at any time, even *sua sponte* by the court. *Benedict v. City of Hattiesburg*, 693 So.2d 377, 381 (Miss. 1997). Once a challenge is made, whether a party has standing is to be determined based upon the status of the parties at the commencement of the lawsuit. *Delta Health Group, Inc. v. Estate of Pope*, 995 So.2d 123, 126 at ¶13 (Miss. 2008), citing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (U.S. 1992). When standing is challenged, the Court’s attention is to be focused on the status of the party “seeking to get his complaint before [the] ... court and not on the issues he wishes to

have adjudicated”. *Kirk v. Pope*, 973 So.2d 981, 997 (Miss. 2007), *partial concurrence and dissent* at ¶61; *citing, Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1952, 20 L.Ed.2d 947 (1968). Since the Plaintiff predeceased the filing of the action, the Plaintiff was no longer considered a legal entity with the right to assert a legal claim. *See, Gerault v. Anderson*, 1 Miss. 30 (Miss. 1818). Thus, after his death on March 11, 2001, Lonnie Pittman no longer existed and had no standing to bring a suit based upon his alleged personal injury claims. Accordingly, his lack of standing to initiate any action rendered the legal action filed in his name a nullity – void *ab initio*. *See, Gulf City Fisheries, Inc. v. Bobby Kitchens, Inc.*, 518 So.2d 661, 663 (Miss. 1988)(a lawsuit filed by one who has no legal standing or authority to file said lawsuit is a nullity – void *ab initio*).

This Court has long recognized the fact that not only does the standing of a person cease to exist upon the death of that individual, but the jurisdiction of the court ceases to exist as well. *Gerault v. Anderson*, 1 Miss. 30 (Miss. 1818). In effect, the Plaintiff’s “lack of standing robs the court of subject matter jurisdiction”. *Tolliver v. Mladineo*, 987 So.2d at 995 at ¶16; *citing, McNair v. U.S. Postal Service*, 768 F.2d 730, 737 (5th Cir. 1985); *see also, Community Hosp. of Jackson v. Goodlett, ex. rel.*, 968 So.2d 391, 397 at ¶12 (Miss. 2007)(a lack of standing robs the court of jurisdiction); and *City of Madison v. Bryan*, 763 So.2d 162, 166, at ¶20 (Miss. 2000)(standing is a jurisdictional issue). The Hinds County Circuit Court never obtained subject matter jurisdiction over the claims of Lonnie Pittman, individually.

The appearance of Mary Pittman, as the executrix of the Estate of Lonnie Pittman, deceased, on August 22, 2005 also fails to confer subject matter jurisdiction on the Circuit Court of Hinds County. This is due to the fact that at the time she filed her Amended Complaint, Mary Pittman lacked standing to bring any action on behalf of Lonnie Pittman’s estate. In fact, it was recently discovered by a co-defendant, Trane, that when Mary Pittman filed her August 22, 2005

Amended Complaint as the executrix of the estate of Lonnie Pittman, deceased, she was not in fact the duly qualified executrix of his estate. Consequently, the filing of the August 22, 2005 Amended Complaint by Mary Pittman was invalid because she was not authorized to act on behalf of the estate. Since she was not authorized to act on behalf of Lonnie Pittman's estate, logic dictates that she had no standing to file an amended complaint on the estate's behalf.

This Court has stated that when "litigants wish to pursue a claim on behalf of the estate of the deceased, such estate must, of course be opened and administered through the chancery court. As is true in all estates administered through the chancery court, chancery approval is required for the appointment of the personal representative of the estate, whether executor, executrix, administrator or administratrix." *Long v. McKinney*, 897 So.2d 160, 174 at ¶60 (Miss. 2004), *reh'ng denied*. Mary Pittman was given two opportunities to qualify as the executrix of Lonnie Pittman's estate and thereby obtain authority to administer his estate. On both occasions she failed to comply with the Order Admitting Will to Probate entered by the Chancery Court of Rankin County, Mississippi by **failing to take "the oath of office as required by law, bond having been waived; ..."**⁴ (*See*, Order Admitting Will to Probate at RE 2:156-158; CR 6:781-

⁴ On August 22, 2001, Mary C. Pittman filed a Petition to Admit Will to Probate before the Chancery Court of Rankin County, Mississippi seeking to be appointed the executrix of the estate of Lonnie Pittman, deceased. (*See*, Petition to Admit Will to Probate at RE 7:963-968; CR 6:775-780). Mary Pittman took no further action in the Chancery Court estate action until she received a Notice of Clerk's Motion to Dismiss on October 2, 2002. (*See*, Notice of Clerk's Motion to Dismiss at RE 1:1; CR 6:791). Following the receipt of this Notice, on October 23, 2002, Mary Pittman filed an Amended Petition for Probate of Will and for Letters Testamentary seeking again to be appointed the executrix of the Estate of Lonnie Pittman, deceased. (*See*, Amended Petition for Probate of Will and for Letters Testamentary at RE 7:969-980; CR 6:792-803). Thereafter, on March 18, 2003, the Chancery Court entered an Order Admitting Will to Probate directing the Clerk of the Chancery Court to issue Letters Testamentary to Mary C. Pittman "conditioned upon her taking the oath of office as required by law, ..." (*See*, Order Admitting Will to Probate at RE 2:156-158; CR 781-783). Mary Pittman did not take any other action of record in the estate action. (*See*, Docket of Rankin County Chancery Court at RE 7:983; CR 6:784). Thereafter, on June 28, 2007, Mary Pittman was again notified that her failure to take any action in the estate action would result in the dismissal of the action unless appropriate steps were taken.

783) (Emphasis added.) The mere filing of a petition before the Chancery Court requesting that a will be probated does not authorize an individual to act on behalf of an estate. Instead, the procedure to be followed by an individual seeking to obtain authority to act on behalf of an estate is clearly set forth by statute. Mississippi Code Annotated §91-7-41 mandates that “Every executor or administrator with the will annexed, **at or prior to obtaining letters testamentary or of administration shall take and subscribe the following oath, viz: ...**” (Emphasis added.)⁵ As a condition precedent to becoming the duly qualified executrix of Lonnie Pittman’s estate, and being empowered to act on the estate’s behalf, Mary Pittman was required to take the oath prescribed by Mississippi Code Annotated §91-7-41. Although required by law, Mary Pittman never took this oath prior to filing the August 22, 2005 Amended Complaint, and Letters Testamentary were never issued in her name. (See, Docket of Rankin County Chancery Court at RE 7:983; CR 6:784). In fact, the probate of Lonnie Pittman’s will was abandoned by Mary Pittman and the estate action was dismissed pursuant to Rule 41(d) of the Mississippi Rules of Civil Procedure in 2007. (See, Order of Dismissal Without Prejudice at RE 4:516; CR 6:809).

Mississippi Code Annotated §91-9-47 provides that “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 ...” (Emphasis added.) According to the statute, Mary Pittman’s authority to do anything on behalf of Lonnie Pittman’s estate was conditioned upon her first

(See, Notice of Clerk’s Motion to Dismiss at RE 4:514; CR 6:807). Still, Mary Pittman did nothing. The Rankin County Chancery Clerk proceeded to the next step and filed a Motion to Dismiss for Want of Prosecution requesting dismissal of the Estate of Lonnie Pittman, Cause No. 50286 file. (See, Clerk’s Motion to Dismiss for Want of Prosecution at RE 4:515; CR 6:808). Thereafter, on July 31, 2007, the Chancery Court of Rankin County dismissed the Estate of Lonnie Pittman action pursuant to Rule 41(d) of the Mississippi Rules of Civil Procedure. (See, Order of Dismissal Without Prejudice at RE 4:516; CR 6:809).

⁵ See, *Pitalo v. GPCH-GP, Inc.*, 933 So.2d 927, 929 (Miss. 2006)(When construing a statute, “shall is mandatory, while may is discretionary.”).

qualifying as the executrix of the same. Without meeting this condition precedent, Mary Pittman had no standing or any authority to pursue any legal action on behalf of the Estate of Lonnie Pittman, deceased.

Finally, Mississippi Code Annotated §91-7-233 states “Executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted.” In interpreting this statute, this Court has held that actions brought under Mississippi Code Annotated §91-7-233 **must** be brought by the personal representative of the estate. *See, Thornton v. Insurance Company of North America*, 287 So.2d 262 (Miss. 1973); *Berryhill v. Nichols*, 171 Miss. 769 (Miss. 1935), and *Madison v. Vintage Petroleum, Inc.*, 872 F. Supp. 340 (S.D. Miss. 1994). Consequently, the filing of the Amended Complaint by Mary Pittman, as Executrix of the Estate of Lonnie Pittman was invalid because, at the time it was filed, Mary Pittman was not the duly qualified executrix of Lonnie Pittman’s estate. As a result, Mary Pittman did not have standing to prosecute a cause of action seeking recovery for Lonnie Pittman’s alleged asbestos-related injuries on behalf of the estate.

A necessary prerequisite for the filing of any lawsuit is that the plaintiff must have standing to assert the claims contained in the complaint. Since Lonnie Pittman died on March 11, 2001, he lacked standing to pursue the personal injury claim initiated in his name on December 31, 2002. Therefore, subject matter jurisdiction over the December 31, 2002 dispute was never conferred on the Hinds County Circuit Court and the action filed in Lonnie Pittman’s name was null and void. Further, at the time Mary Pittman filed her Amended Complaint in 2005 as the Executrix of the Estate of Lonnie Pittman she was not the duly qualified executrix of his estate. As a result, she did not have standing to pursue a personal injury action on behalf of Lonnie Pittman’s estate. Therefore, the Circuit Court of Hinds County did not have subject

matter jurisdiction over the claims presented by the filing of the August 22, 2005 Amended Complaint and the action filed by Mary Pittman is null and void.

The law is clear that when a court does not have subject matter jurisdiction, the proper remedy is to dismiss the action. *Bullock v. Roadway Express, Inc.*, 548 So.2d 1306, 1308 (Miss. 1989); *see also, Adoption of R.M.P.C., a Minor Child*, 512 So.2d 702 (Miss. 1987); and Miss. R. Civ. P. 12(h)(3) (“whenever it appears ... that the court lacks jurisdiction of the subject matter, the court shall dismiss the action...”). Accordingly, the Hinds County Circuit Court erred in refusing to grant Garlock’s Motion for Summary Judgment and dismiss this action based upon the lack of the Court’s subject matter jurisdiction over the pending claims.

2. Whether the defense of lack of subject matter jurisdiction can be waived.

Plaintiff has previously urged that defendants waived their right to challenge the subject matter jurisdiction of the Circuit Court over the claims asserted initially by Lonnie Pittman and later by Mary Pittman, as the Executrix of the Estate of Lonnie Pittman. (See, Plaintiff’s Response to Defendants’ Motion for Reconsideration at RE 7:984-994; CR 5:669-679; Plaintiff’s Response to Trane’s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Statute of Limitations at RE 7:995-1071; CR 8:1080-1156). In direct contradiction of Plaintiff’s position, this Court has repeatedly recognized that the “question of jurisdiction may be raised at any stage of the proceedings, and even by the Court of its own motion.” *Home Ins. Co. v. Watts*, 93 So.2d 848 (Miss. 1957); *citing, Waits v. Black Bayou Drainage District*, 185 So. 577 (Miss. 1939). In fact, as early as 1846, it was recognized that an objection to the Court based upon the fact that the plaintiff predeceased the filing of the Complaint is an objection that “rises above the mere technical rules of pleading, and goes to the right of the court to proceed. It stops the cause at whatever stage it may be, whenever made known to the Court.” *Humphreys v. Irvine*, 14 Miss. 205 (Miss. Err. & App. 1846) (Emphasis added.).

No defendant had knowledge of the fact that Lonnie Pittman predeceased the filing of the December 31, 2002 Complaint until almost one and one half years after the action was commenced. (*See*, Suggestion of Death at RE 2:218-227; CR 4:473). However, although the April 24, 2003 Complaint contained only minimal information regarding the Plaintiffs, Garlock did assert in its Answer to Plaintiff's Second Amended Complaint the defenses of lack of subject matter jurisdiction and that the statute of limitations barred the claims of these Plaintiffs. (*See*, Separate Answer of Defendant, Garlock Sealing Technologies, LLC, successor by merger to Garlock, Inc to the Second Amended Complaint at RE 2:200-217; CR 2:248-264). Garlock began seeking the dismissal of this action shortly after defendants independently discovered the date on which Lonnie Pittman died. (*See*, Motion to Dismiss, or in the alternative, to Sever Claims of Lonnie Pittman at RE 2:235-278; CR 2:278-301, 3:302-321). Plaintiff was put on notice as early as August 13, 2004 that Garlock was seeking dismissal of Lonnie Pittman's claim based on the fact that he predeceased the filing of the original Complaint. (*Id.*) The record clearly establishes that since the date of filing its first Motion, Garlock, and other defendants, have repeatedly sought dismissal of this action on the grounds that no party with standing ever appeared before the Court seeking to prosecute the pending claims and that, as a result, the Hinds County Circuit Court never obtained subject matter jurisdiction over these pending claims. (*Id.*; *see also*, Garlock Sealing Technologies, LLC, Successor by merger to Garlock Inc's Motion for Summary Judgment with attached Memorandum in Support of Motion for Summary Judgment at RE 3:329-450, 4:451-513; CR 4:458-603 & 5:604-642; Motion for Reconsideration at RE 4:553-566; CR 5:651-664; and Garlock Sealing Technologies, LLC's Motion for Summary Judgment with Incorporated Memorandum in Support at RE 5:701-750, 6:751-900, 7:901-968; CR 6:813-905, 7:906-1056, 8:1057-1074). Plaintiff's argument that Garlock waived its right to object to

the subject matter jurisdiction of the Hinds County Circuit Court over Lonnie Pittman's claims is specious and not supported by any jurisprudence.

Garlock has not waived its lack of subject matter jurisdiction defense relating to the filing of the 2005 Amended Complaint by Mary Pittman as the executrix of the Estate of Lonnie Pittman. Through independent investigation, Trane discovered that Mary Pittman was not the duly qualified executrix of the Estate of Lonnie Pittman. Based on this information, Trane filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Statute of Limitations. (*See*, Trane US Inc., f/k/a American Standard Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Statute of Limitations are RE 4:568-600, 5:601-697; CR 5:681-754, 6:755-810). Garlock joined that Motion on March 3, 2008. (*See*, Joinder of Garlock Sealing Technologies, LLC at RE 6:698-699; CR 6:811-812). Shortly thereafter, based on the new information regarding the dismissal of Lonnie Pittman's estate and the denial of the writ of certiorari in *Tolliver v. Mladineo*, 987 So.2d 989 (Miss. App. 2007), *cert. dismissed* 979 So.2d 691 (Miss 2008), Garlock filed another Motion for Summary Judgment arguing therein numerous grounds justifying dismissal of the action, including that Mary Pittman lacked standing to appear on behalf of the estate of Lonnie Pittman. (*See*, Garlock Sealing Technologies, LLC, successor by merger to Garlock Sealing Technologies, LLC's Motion for Summary Judgment with Incorporated Memorandum in Support at RE 5:701-750, 6:751-900, 7:901-962; CR 6:813-905, 7:906-1056, 8:1057-1074). As soon as the court's lack of subject matter jurisdiction over the claims being prosecuted by Mary Pittman, as executrix was discovered by defendants, notice was quickly provided to the court.

Regardless of when the issue was brought to the attention of the Court, this Court has stated that once the issue of whether a lack of standing affects subject matter jurisdiction is raised the court's focus should not be on the timeliness of the assertion; instead the focus should be on

whether the court has the power and authority to entertain and proceed with the case. *Bullock v. Roadway Express, Inc.*, 548 So.2d 1306, 1308 (Miss. 1989); Miss. R. Civ. P. 12(h)(3) (“whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action or transfer the action to the court of proper jurisdiction.”). Requiring a court to focus on whether it has the power and authority to proceed with the case takes away the unnecessary burden of determining whether the issue of subject matter jurisdiction was timely raised since this Court has unequivocally held that a “lack of subject matter jurisdiction is a defense that cannot be waived.” *Id.* at 1307.

Plaintiff’s argument that Garlock waived its right to assert that the Circuit Court of Hinds County, Mississippi lacked subject matter jurisdiction over the claims pursued in this action must fail as Garlock has aggressively pursued the dismissal of this action on those grounds since the lack of the same was discovered.

3. Whether the filing of a lawsuit in a deceased person’s name tolls the statute of limitations.

As previously stated, Lonnie Pittman lacked standing to file a personal injury claim before the Hinds County Circuit Court on December 31, 2002. In fact, the law provides that the filing of a lawsuit in the name of one who lacks standing renders that lawsuit a nullity – void *ab initio*. *Gulf City Fisheries, Inc. v. Bobby Kitchens, Inc.*, 518 So.2d 661 (Miss. 1988). The Mississippi Court of Appeals has established that the filing of such a void complaint will not toll the statute of limitations. *Tolliver v. Mladineo*, 987 So.2d at 995 at ¶17. The running of the statute of limitations commenced on March 11, 2001 when Lonnie Pittman died and the limitations period would have continued to run until a proper party with standing filed either the appropriate survival or wrongful death action on Lonnie Pittman’s behalf.

Section 91-7-233 of the Mississippi Code Annotated provides that to pursue a survival action on behalf of a deceased person, the executor or administrator of the deceased's estate has "one year after the death" of the decedent to file the legal action or the claim will be barred. *See*, Mississippi Code Annotated §91-7-233 (1972, as amended). Therefore, the statute of limitations for any survival action would have expired on March 11, 2002. Mary Pittman first appeared as the executrix of Lonnie Pittman's estate on August 22, 2005, well outside the one year statute of limitations applicable to a survival action. (*See*, August 22, 2005 Amended Complaint Jury Trial Requested at RE 2:282-300, 3:301-326; CR 3:325-369). As a result, any survival claims sought to be asserted by her on Lonnie Pittman's behalf are barred.

This Court has decided that asbestos-related illnesses are considered latent injuries subject to the three year statute of limitations contained in Mississippi Code Annotated §15-1-49 (1972, as amended). *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 706 (Miss. 1990). Therefore, the statute of limitations on any wrongful death claims on behalf of Lonnie Pittman would have expired on March 11, 2004. Mary Pittman first appeared in this case on April 28, 2004 when the Circuit Court of Hinds County entered an Order substituting her as the Plaintiff in the stead of Lonnie Pittman. (*See*, Order Substituting Parties at RE 2:232; CR 2:276). This appearance was made over one month after the statute of limitations had expired, thereby barring the pursuit of any wrongful death claims on Lonnie Pittman's behalf.

Because the statute of limitations had expired barring the pursuit of any claims on behalf of Lonnie Pittman, the Circuit Court of Hinds County erred in not dismissing the pending action in its entirety.

- 4. Whether the substitution of a living person is proper when the original action was filed in the name of an individual who predeceased the filing of the original complaint.**

Lonnie Pittman was deceased at the time the original action was filed. The action could not “be given life by substituting parties and amending the complaint.” *Banakus, Administratrix of Estate of Anthony Banakus v. United Aircraft Corp.*, 290 F. Supp. 259, 260 (U.S.D.C. S.D. NY 1968); *see also, Illinois Central Railroad Company v. Broussard*, --- So.2d ---, 2008 WL 4405166 at ¶12 (the commencement of a suit in the name of a deceased individual amounts to a nullity); *Tolliver v. Mladineo*, 987 So.2d at 996 at ¶17 (an amended complaint filed by substituted party cannot relate back to original filing if original complaint is brought without standing, it is treated as the commencement of a new action). In the *Banakus* case, the decedent expired approximately 35 minutes before the Complaint was filed in his name and the Court held that such an action was “void at its inception” and therefore, there was no claim capable of substitution or amendment. *Banakus, Administratrix of Estate of Anthony Banakus v. United Aircraft Corp.*, 290 F. Supp. at 260. Numerous other jurisdictions agree. *See, Mizukami v. Buras*, 419 F.2d 1319 (5th Cir. 1969)(substitution for a deceased party was not available to the plaintiff when Mr. Buras predeceased the filing of the action); *Black Canyon Citizens Coalition, Inc. v. Bd. of Co. Comm. of Montrose Co.*, 80 P.3d 932, 935 (Colo. App. 2003)(complaint filed by deceased is a nullity and, since no action was commenced, no jurisdiction was conferred upon the court and any attempt to cure the defect failed.); *Browning v. Ferris Industries, Inc., et al. v. U.S.*, 75 Fed. Cl. 591 (Fed. Cl. 2007)(court cannot cure a jurisdictional defect through substitution of parties under Rule 17 or 25, substitution cannot be employed to waive the lack of a properly filed ...claim); *Gregory v. DiCenzo*, 713 A.2d 772 (R.I. 1998)(rules relating to the “amendment and substitution of parties in actions that were properly commenced in the name of a living party had no applicability in circumstances in which a complaint is brought in the name of a deceased person”); *Levering v. Riverside Methodist Hosp.* 441 N.E. 2d 290, 292 (Ohio Ct. App. 1981)(“A dead person cannot be a party, either plaintiff or defendant. Since there was no

party-plaintiff from the inception, Civ. R. 25 [regarding substitution] does not apply.”); and *Matthews v. Cleveland*, 284 S.E.2d 634, 636 (Ga. App. 1981)(action commenced in name of deceased plaintiff is a nullity and it was error to allow executor of plaintiff’s estate to be substituted as party plaintiff.)

The substitution of Mary Pittman, as the surviving heir of Lonnie Pittman, was sought pursuant to Rule 25(a) of the Mississippi Rules of Civil Procedure. (*See*, Motion for Substitution of Parties at 2:229-231; SR 1:41-43). Rule 25(a) of the Mississippi Rules of Civil Procedure **allows for a substitution of the proper parties if a party dies.** (Emphasis added.). However, “Rule 25 presupposes that substitution is for someone who was already a party to the pending action; **substitution is not possible if one who was named as a party in fact died before the commencement of the action.**” Miss. R. Civ. Pro. 25, comment at ¶ 4. (Emphasis added.) The Motion for Substitution of Party filed by counsel for Mary Pittman erroneously represented to the Court that there was a valid claim for which substitution would be proper by stating “Since the filing and service of the Complaint, one Plaintiffs (sic) has become deceased.” (*See*, Motion for Substitution of Party at RE 2:229-231; SR 1:41-43). Contrary to this assertion, there existed no valid action into which Mary Pittman could have been substituted.

After recognizing that a Rule 25 substitution was impossible in these circumstances, counsel for Mary Pittman then claimed substitution was intended via Rule 17(a) of the Mississippi Rules of Civil Procedure. (*See*, August 16, 2007 Transcript of hearing before Honorable Winston L. Kidd at RE 4:517-551; T 10:3-37). Rule 17 deals with substituting the real party in interest within a reasonable time after an objection is made that the real party in interest is not prosecuting the action. *See*, Miss. R. Civ. P. 17. However, the Complaint filed in the name of Lonnie Pittman on December 31, 2002 was a nullity. *See, Humphreys v. Irvine*, 14 Miss. 205. The initiation of such an action is not a procedural defect that can be cured – it goes

to the jurisdiction and power of the court to proceed with the litigation. *Id.* No matter how it is pled, one cannot escape the fact that Lonnie Pittman, individually, lacked standing to pursue a personal injury claim after his death. Thus, even if one assumes that the substitution of Mary Pittman was intended to be pursuant to Rule 17(a), but for error, that substitution must also fail as there was no valid complaint in existence at the time substitution was sought from the Court. *See, Browning Ferris Industries, Inc., et al. v. U.S.*, 75 Fed. Cl. 591, 597 (Fed. Cl. 2007)(a jurisdictional defect cannot be cured through substitution of parties when Court did not have subject matter jurisdiction over the original action); *Gregory v. DiCenzo*, 713 A.2d 772 (R.I. 1998)(stating rules relating to the amendment and substitution of parties in an action that was properly commenced in the name of a living person had no applicability in circumstances in which a complaint is brought in the name of a deceased person); *Ark-Homa Foods v. Claude C. Ward, Jr.*, 473 S.W.2d 910 (Ark. 1971); and *Davenport v. Lee*, 72 S.W.3d 85 (Ark. 2002).

Although there are no Mississippi cases specifically on point, this Court, in *Tolliver v. Mladineo*, 987 So.2d at 996 at ¶17, affirmed the trial court's granting of a motion to dismiss where it was determined that the plaintiffs lacked standing to commence the lawsuit, and the Court further held that the plaintiffs could not thereafter substitute the proper plaintiff to remedy the "standing" error. *See also, Delta Health Group, Inc. v. Estate of Pope, ex rel., Pope*, 995 So.2d 123 at ¶13 (standing is to be determined as of the commencement of the suit and fact that plaintiff with standing is subsequently substituted does not change the fact that plaintiff lacked standing to commence suit).

Because the suit in the name of Lonnie Pittman was void, substitution was not possible. To hold otherwise would render the doctrines of standing and subject matter jurisdiction meaningless. Thus, whether the substitution of Mary Pittman was intended under Rule 25 or

Rule 17 of the Mississippi rules of Civil Procedure, such a substitution was improper under the laws and rules of this state.

5. Whether the substitution of a living person for one who was deceased, and in whose name the action was originally filed, constitutes a new action for purposes of the statute of limitations.

The Mississippi Court of Appeals recently held that “[b]ecause an amended complaint cannot relate back to an original complaint if the original complaint is brought without standing, such an amended complaint substituting a party as plaintiff should be regarded as the initiation of a new action with regard to analysis pursuant to the statute of limitations.” *Tolliver v. Mladineo*, 987 So.2d 989, 996 at ¶17 (Miss. App. 2007), *cert. dismissed*, 979 So.2d 691 (Miss. 2008). Other jurisdictions agree. *See, Estate of Byrd v. Tiner*, 101 S.W. 3d 887, 889 (Ark. App. 2003)(where an action is brought in the name of a nonexistent plaintiff, any amendment of the complaint by substituting the proper party to the action as plaintiff institutes a new action). This means that a determination of whether the statute of limitations has expired requires one to look at the first filing of a suit by a party with standing. *Tolliver v. Mladineo*, 987 So.2d at 996 at ¶17.

The earliest appearance in this action by Mary Pittman was on April 28, 2004 when the Circuit Court of Hinds County entered an Order allowing her to be substituted in Lonnie Pittman’s stead. (*See*, Order Substituting Parties at RE 2:232; CR 2:275) When substituted, Mary Pittman was not substituted as the executrix or administratrix of Lonnie Pittman’s estate as required by Mississippi Code Annotated §15-1-55⁶; instead she was substituted as the surviving

⁶ Mississippi Code Annotated §15-1-55 provides “If a person entitled to bring any of the personal actions herein mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or

heir of Lonnie Pittman. *Id.* As a surviving heir, Mary Pittman was not qualified to bring a survival action. *Johnson v. Med Express Ambulance Service, Inc.*, 565 F. Supp.2d 699, 703 (S.D. Miss. 2008). Mississippi Code Annotated §91-7-233 requires that a survival action be pursued by the executrix, administrator, or temporary administrator of the decedent's estate. *See*, Miss. Code. Ann. §91-7-233 (1972, as amended). Mary Pittman first appeared as the Executrix of the Estate of Lonnie Pittman on August 22, 2005, when she filed an Amended Complaint in Lonnie Pittman's original action. (*See*, Amended Complaint Jury Trial Requested at RE 2:282-300. 3:301-326; CR 3:325-369). For purposes of calculating the statute of limitations, the law states that any survival cause of action that could have been asserted would have had to be filed by the executor or administrator of Lonnie Pittman's estate "within one year after the death" of Lonnie Pittman. *See*, Miss. Code Ann. §91-7-233 (1972, as amended)⁷. Both of these filings were well outside of the one year statutory limitations period provided by the statute. Therefore, the statute of limitations barred the pursuit of any survival action on behalf of Lonnie Pittman before Mary Pittman appeared in this action.

The only other action which could have been asserted on Lonnie Pittman's behalf by Mary Pittman would have been a wrongful death action. Therefore, the next consideration is whether Mary Pittman appeared before the expiration of the statute of limitations barred the institution of any wrongful death action relating to the claims of Lonnie Pittman. In determining the statute of limitations applicable to a wrongful death claim, the Supreme Court has stated "[a]

administrator of the deceased person, after the expiration of said time, and within one year after the death of such person.

⁷ Mississippi Code Annotated §91-7-233 provides "Executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted. They shall also be liable to be sued in any court in any personal action which might have been maintained against the deceased."

wrongful death action, since it is predicated on an underlying tort, is limited by the statute of limitations applicable to the tort resulting in the wrongful death.” *Lee v. Thompson*, 859 So.2d 981, 990 at ¶21 (Miss. 2003). The Complaint filed in Lonnie Pittman’s name contained allegations relating to a personal injury suffered by Lonnie Pittman as a result of his exposure to asbestos and asbestos-containing products. (See, December 31, 2002 Complaint at RE 1:74-100; CR 1:73-99). In *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 706 (Miss. 1990), this Court decided that asbestos-related illnesses are considered latent injuries and are therefore subject to the three year statute of limitations set forth in Mississippi Code Annotated §15-1-49 (1972, as amended). Consequently, the three-year statute of limitation that applied to any wrongful death action by Lonnie Pittman began to run on March 11, 2001 – the date Lonnie Pittman died. Applying this limitations period to the facts of this case establishes that the last day on which Mary Pittman could have initiated an action to pursue a wrongful death claim on behalf of Lonnie Pittman was March 11, 2004, over one and one-half months before any mention was made of Mary Pittman in the judicial proceedings pending before the Hinds County Circuit Court, and over one year and five months before an Amended Complaint was filed by Mary Pittman in her representative capacity.

No specific wrongful death allegations were made in the December 31, 2002 Complaint. Counsel for Mary Pittman asserts that the language “..., the Plaintiffs allege they are entitled to all remedies and damages provided by the Mississippi Wrongful death or Survival laws” contained therein was sufficient to put all defendants on notice that a wrongful death claim was being asserted and to toll the statute of limitations. (See, August 16, 2007 Transcript of hearing before Honorable Winston L. Kidd at RE 4:517-551; T 10:3-37 and December 31, 2002 Complaint at RE 1:74-100; CR 1:73-99). Contrary to counsel’s assertions, the cited language was not sufficient to put defendants on notice that a wrongful death claim was being asserted or

to toll the statute of limitations where: (1) the claim was presented as a personal action brought by Lonnie Pittman, and (2) the Complaint established no basis for including language relating to any wrongful death claims, i.e., no circumstances, events or occurrences were provided to which a wrongful death claim might or would have applied. Interestingly enough, even while making this argument, counsel for Mary Pittman represented to the Circuit Court that “The claim has not changed. It’s still a survival action. It’s a claim for Lonnie Pittman. It’s for his damages. There are no wrongful death damages here, so that the claim has remained the same from 2002 until the present. We’re seeking damages for Lonnie Pittman, what he suffered”, thereby confirming that no wrongful death claims have been pursued by any plaintiff in this action. (See, August 16, 2007 Transcript of Hearing before Honorable Winston L. Kidd at RE 4:517-551; T 10:3-37). Finally, it should be noted that not even the August 22, 2005 Complaint filed by *Mary Pittman, as Executrix of the Estate of Lonnie Pittman, deceased v. Minnesota Mining and Manufacturing, et al.*, asserts any claim for relief pursuant to the wrongful death statute. (See, Amended Complaint Jury Trial Requested at RE 2:282-300, 3:301-326; CR 3:325-369). Thus, it appears that the insertion of the wrongful death language into the December 31, 2002 Complaint represents nothing more than an attempt to assert a contingent wrongful death claim, even though such a claim is not allowed in this state. See, *In re Conservatorship of Brantley*, 865 So.2d 1126, 1130 at ¶18 (Miss. 2004)(Mississippi’s wrongful death statute does not recognize contingent wrongful death claims since wrongful death claims come into being on the death of the deceased).

Regardless, the December 31, 2002, January 30, 2003 and April 24, 2003 Complaints were filed in the name of Lonnie Pittman, individually, and not in the names of any of the class of persons authorized by statute to pursue a wrongful death action. See, Miss. Code Anno. §11-7-13 (1972, as amended). Mississippi’s wrongful death statute reads in pertinent part:

Whenever the death of any person. . . shall be caused by any real, wrongful or negligent act or omission . . . [t]he action for such damages may be brought in the name of the personal representative of the deceased person . . . for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife,...

Miss. Code Anno. §11-7-13 (1972, as amended). Pursuant to this statute, Lonnie Pittman's personal representative, or his wife, Mary C. Pittman, was authorized by statute to pursue a wrongful death claim on his behalf. However, no appearance was made by Mary Pittman as the surviving heir of Lonnie Pittman or as Lonnie Pittman's personal representative until April 28, 2004 – well after the applicable three year statute of limitations period had expired. Mary Pittman's failure to initiate a wrongful death action within the statutory time period has extinguished her right to pursue such a claim, if one in fact exists. *See, Tolliver v. Mladineo*, 987 So.2d at 996 at ¶17, 18; *citing, University of Medical Center v. Robinson*, 876 So.2d 337, 340 (Miss. 2004).

Based on the uncontradicted facts as they appear in the record, the logical conclusion is that no survival or wrongful death action was attempted to be initiated by Mary Pittman until long after the limitations period for both actions had expired. Pursuant to Mississippi Code Annotated §15-1-3, "the completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy." Miss. Code Ann. §15-1-3 (1972, as amended). In furtherance of this principle, Mississippi courts have repeatedly stressed that a litigant obtains a vested right in the barring of a claim by the expiration of the statute of limitations. *Tolliver v. Mladineo*, 987 So. 2d at 996 at ¶18; *citing, University of Mississippi Medical Center v. Robinson*, 876 So.2d 337, 340 at ¶11 (Miss. 2004)("The running of the statute of limitations is the point where one's right to pursue a remedy is extinguished and another's vested right in the bar rises."); Mississippi Code Annotated §15-1-3 (Rev. 2003)("The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish

the right as well as the remedy) and *Cole v. National Life Insurance Company*, 549 So.2d 1301 (Miss. 1989)(“Since the defense of the statute of limitations is a vested right in Mississippi, any retroactive elimination of the right [the Mississippi Act] would violate due process and equal protection provisions of the 14th Amendment to the United States Constitution.”). Hence, once the limitations periods expired, Garlock acquired a vested right in the statute of limitations defense. Once a claim has been extinguished by the statute of limitations, a dismissal of the action is “warranted”. *Tolliver v. Mladineo*, 987 So.2d at 996 at ¶18. For these reasons, the Circuit Court of Hinds County erred in not finding that the statute of limitations barred the prosecution of any claim that could be asserted on behalf of Lonnie Pittman and dismissing the action in its entirety.

6. Whether the circuit court erred in denying Garlock Sealing Technologies, LLC, successor by merger to Garlock, Inc’s Motion for Summary Judgment.

In Garlock’s Motion for Summary Judgment, the Hinds County Circuit Court was presented with numerous arguments supporting the dismissal of this action, including but not limited to: (1) the fact that the action filed in the name of Lonnie Pittman individually was a nullity; (2) that Lonnie Pittman lacked standing to pursue any action before a court; (3) that Mary Pittman lacked standing to appear as the executrix of the Estate of Lonnie Pittman, deceased; (4) that the Court lacked subject matter jurisdiction over Mary Pittman’s pending claims; (5) that the substitution of Mary Pittman in the stead of Lonnie Pittman was improper; and (6) that the statute of limitations barred any survival or wrongful death action from being prosecuted on Lonnie Pittman’s behalf. However, on the scheduled hearing date, the Circuit Court refused to hear oral arguments from counsel for Garlock and further, refused to dismiss the action on the basis of any of the arguments presented in Garlock’s Motion.

As previously stated, the claim filed in the name of Lonnie Pittman was a nullity -- a claim that he did not have standing to file after his death -- thereby depriving the Circuit Court of Hinds County of subject matter jurisdiction over his claims. These facts alone justify the granting of Garlock's Motion for Summary Judgment and warrant the dismissal of the action. As if this were not enough, no party with standing to pursue Lonnie Pittman's claims attempted to pursue an action on his behalf until both the statute of limitations on any survival and wrongful death action had expired. Once the statute of limitations expired, Garlock obtained a vested interest in the statute of limitations defense and the dismissal that this defense warranted. For the reasons stated hereinabove, the Circuit Court of Hinds County, First Judicial District, Mississippi erred in denying Garlock's Motion for Summary Judgment and not dismissing any and all pending claims with prejudice.

CONCLUSION

Rule 56(c) of the Mississippi Rules of Civil Procedure states summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. Pro. 56(c).

This lawsuit was a nullity from its inception. It could not be revived either by the substitution of another party or the filing of an amended complaint. As a result, the Circuit Court of Hinds County, Mississippi never obtained subject matter jurisdiction over any of the claims presently pending before it. Nor did such a filing stop or interrupt the statute of limitations from expiring. Thus, any asbestos-related personal injury claims asserted on behalf of Lonnie Pittman expired, at the latest, on March 11, 2004. As a result, Garlock now has a vested right in the statute of limitations defense.

There can be no doubt, based on the record before this Court, that Garlock is entitled to summary judgment as to the claims of this Plaintiff as a matter of law. Garlock Sealing Technologies, LLC, successor by merger to Garlock, Inc would submit that the Circuit Court of Hinds County erred in not granting its Motion for Summary Judgment and dismissing this action in its entirety. Wherefore, Garlock Sealing Technologies, LLC, successor by merger to Garlock Inc would respectfully request that this Court reverse the Order of the Circuit Court of Hinds County and dismiss this action in its entirety.



Respectfully submitted,

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SUCCESSOR BY MERGER TO GARLOCK, INC.,
Appellant

By:


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