

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-TS-00132

LOUIS M. WALLACE, PERSONAL REPRESENTATIVE
OF THE ESTATE OF CYNTHIA GILKEY WALLACE

APPELLANT

v.

EMAD H. MOHAMED, M.D., ET AL.

APPELLEES

**BRIEF OF APPELLEE
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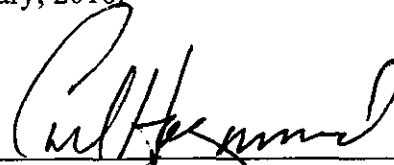
CERTIFICATE OF INTERESTED PERSONS

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 their possible disqualification or recusal.

1. Louis Wallace, Personal Representative of the Estate of Cynthia Gilkey Wallace, Appellant;
2. Christopher S. Wallace;
3. J'Bria Gilkey a/k/a J'Bria Iyallah;
4. Emad H. Mohamed, M.D., Appellee;
5. Bristol-Myers Squibb Company, Appellee;
6. Sanofi-Synthelabo, Inc., Appellee;
7. Shirley C. Byers, Byers Law Firm, Counsel for Appellant Louis M. Wallace;
8. Bennie L. Turner, Esq., Turner & Associates, Counsel for Heir-At-Law J'Bria Gilkey;
9. Winston J. Thompson, Esq., Watkins & Eager, PLLC, Counsel for Appellees Bristol-Myers Squibb Company and Sanofi-Synthelabo;
10. L. Carl Hagwood, Esq., Christopher Wayne Winter, Esq., and Diane Pradat, Esq., Wilkins Tipton, P.A., Counsel for Appellee Emad H. Mohamed, M.D.; and

11. The Honorable Lee J. Howard, Circuit Court Judge, Lowndes County Circuit Court.

Dated this the 16th day of February, 2010.

A handwritten signature in black ink, appearing to read "Diane V. Pradat", written over a horizontal line.

DIANE V. PRADAT
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Attorneys for Appellee
Emad H. Mohamed, M.D.

11. The Honorable Lee J. Howard, Circuit Court Judge, Lowndes County Circuit Court.

Dated this the 16th day of February, 2010.

Diane Pradat by Robert Stephens w/permission
DIANE V. PRADAT
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STATEMENT OF ISSUES

- I. Whether the Lowndes County Circuit Court's Order Granting Defendants' Motion to Dismiss and Denying Plaintiff's Motion to Substitute Should Be Affirmed.**

STATEMENT OF THE CASE

I. NATURE OF CASE AND COURSE OF PROCEEDINGS BELOW

A. Introduction

Louis Wallace (“Louis”) misrepresented to the Chancery and Circuit Courts of Lowndes County, Mississippi, that he was the husband of Cynthia Wallace, deceased, in an effort to personally assert a wrongful death claim against Emad H. Mohamed, M.D. (“Dr. Mohamed”). As it turned out, Louis is not related to Cynthia in any manner. During the course of the proceedings, the courts were informed of Louis Wallace’s deception. For that reason, the chancery court removed Louis as the administrator of Cynthia Wallace’s estate, and the circuit court dismissed Louis’ wrongful death lawsuit for lack of standing. Louis Wallace has appealed the dismissal of his wrongful death complaint.

B. Brief History of Proceedings Below

On November 30, 2005, the plaintiff, Louis Wallace, filed a wrongful death lawsuit arising out of the death of Cynthia Gilkey Magee a/k/a Cynthia Wallace (“Cynthia”), against Emad H. Mohamed, M.D. (“Dr. Mohamed”). (R., p. 261). Cynthia had died roughly one year earlier on November 26, 2004. *Id.* at 257. Louis, who claimed to be Cynthia’s husband, filed the lawsuit as the “personal representative of the Estate of Cynthia Wallace.” *Id.* at 261. Louis had previously been appointed as Administrator of the Estate of Cynthia Wallace based upon his misrepresentation to the Chancery Court of Lowndes County, Mississippi, that he was Cynthia Wallace’s husband. *Id.* at 254, 257.

During a deposition in December, 2006, Dr. Mohamed’s counsel learned that Louis Wallace had never been legally married to Cynthia. *Id.* at 344-51. Cynthia, it turned out, was married to Keith Magee at the time of her death. *Id.* Cynthia and Keith were married on December 11, 1983.

Id. Cynthia and Louis Wallace attempted to be married on February 4, 1989; however, this bigamous relationship was not a legal marriage because Cynthia was still married to Keith Magee, to whom she stayed married for the remainder of her life. *Id.*

Upon learning that Louis Wallace had misrepresented the nature of his relationship with Cynthia, the Chancery Court of Lowndes County, Mississippi, removed Louis as administrator of Cynthia's estate, and replaced him with the Lowndes County Chancery Court Clerk. *Id.* at 379. Dr. Mohamed filed a motion to dismiss the wrongful death claim which Louis Wallace had filed against him because Louis, who is not one of Cynthia's three wrongful death beneficiaries, has no standing to pursue such a claim. *Id.* at 248.

Louis Wallace claims to be the father of Christopher Wallace, one of Cynthia's children. On August 12, 2008, Louis Wallace filed a motion requesting that the Circuit Court substitute him as the plaintiff in a different capacity. *Id.* at 395. He asked that the court permit him to remain as the plaintiff in the wrongful death suit as the "biological father" of Christopher Wallace, a minor child. The Circuit Court denied Louis's motion to substitute and granted Dr. Mohammed's motion to dismiss. *Id.* at 420. It is from the order of dismissal that Louis Wallace appeals.

II. FACTS RELEVANT TO ISSUES PRESENTED

Louis Wallace, as the "personal representative of the Estate of Cynthia Wallace" filed a wrongful death claim against Dr. Mohammed. (R., p. 261). Louis is not related to Cynthia Wallace ("Cynthia") and is obviously not one of Cynthia's wrongful death beneficiaries. Louis has appealed the dismissal of the wrongful death claim which he filed arising out of Cynthia's death. The complaint he filed does not state that Louis is of any relation to Cynthia.

Prior to filing the wrongful death lawsuit, Louis had petitioned the Chancery Court of Lowndes County, Mississippi, requesting that the court appoint him administrator of Cynthia

Wallace's estate. (R., p. 254). The petition misrepresented that Louis Wallace was Cynthia Wallace's husband. *Id.* The petition also stated that J'Bria Gilkey ("J'Bria")¹ and Christopher Wallace ("Christopher") are Cynthia's children. *Id.* Louis and J'Bria signed affidavits affirming that Louis was Cynthia's husband at the time of her death. Based upon this misrepresentation, on October 4, 2005, the chancery court appointed Louis as administrator and opened the estate. *Id.* at 257.

Louis filed a wrongful death lawsuit against Dr. Mohammed on November 30, 2005. *Id.* at 261. During discovery, Dr. Mohammed's counsel learned that Louis was never legally married to Cynthia Wallace. Louis testified that he was unsure of whether Cynthia had any prior marriages. *Id.* at 358. On December 22, 2006, Cynthia's daughter, J'Bria, testified that she knew that her mother had been married to her father, Keith Magee. *Id.* at 370. J'Bria also testified that she did not believe that Louis should have ever been part of the wrongful death lawsuit because he was not "legally married" to her mother. *Id.* at 372. J'Bria's testimony was clear that Louis Wallace knew that he was never married to Cynthia:

Q. You said that you didn't think that when your mother and Mr. Wallace first got married they had a legal marriage because your mother was still married to Mr. McGee.²

A. Yes, ma'am.

Q. When did you find that out?

¹ In the estate proceeding, J'Bria signed an affidavit as J'Bria Gilkey. She later testified that her name is J'Bria Iyallah.

² Keith Magee is referred to as Mr. McGee in the deposition transcript.

A. It was – she didn't know that she – the marriage – the divorce wasn't final yet either until probably a year or so after they were married, which made their – they told her that she would have to remarry Louis in order for it to be a legit marriage. And when she asked him to remarry her, he didn't.

Q. Did that cause some problems in the relationship?

A. Somewhat.

Q. Do you know if Mr. Wallace was aware that your mom wasn't actually divorced from Mr. McGee?

A. Yes, ma'am. She told him.

(R., p. 374).

Louis has maintained that he had no knowledge of Cynthia's prior marriage. J'Bria's testimony obviously casts doubt upon whether he intentionally misled the chancery court when he requested that the court appoint him to be the administrator. In any event, by December, 2006, Louis had every reason to believe that he was not Cynthia's husband after J'Bria testified that his marriage was not a legal one. Nonetheless, Louis waited over one and one-half (1 ½) years, or until August 12, 2008, to file a motion to substitute his purported son, Christopher³, as the plaintiff in the wrongful death action. *Id.* at 395. For one and one-half (1 ½) years after J'Bria's testimony regarding his relationship to Cynthia, Louis insisted on prosecuting the wrongful death claim. His prosecution of the wrongful death case as personal representative of Cynthia's estate was premised upon his misrepresentation to the chancery court that he and Cynthia had been married. The

³ Cynthia's son, Christopher, was born while Cynthia was married to Keith Magee.

wrongful death lawsuit languished for this interim period of time, and Louis's motion to substitute was filed only after Dr. Mohammed had filed a motion to dismiss.

After J'Bria testified that Louis was not Cynthia's husband, an investigation was conducted into Louis's contention that he and Cynthia were, in fact, "married". Based upon that investigation, it is now undisputed that Cynthia and Keith Magee were married on October 19, 1984, and they separated shortly thereafter. *Id.* at 344. Less than five (5) years later, on February 4, 1989, Cynthia "married" Louis Wallace, in that a marriage certificate was issued. *Id.* at 350. Of course, because Cynthia never divorced Keith Magee, her relationship to Louis Wallace was bigamous, was in violation of Mississippi law, and was not a valid marriage. Shortly after her "marriage" to Louis, on February 23, 1989, Cynthia filed a complaint for divorce from Keith Magee. *Id.* at 346. This gives support to J'Bria's testimony that Cynthia wanted to make her marriage to Louis Wallace valid and would have discussed it with him. Cynthia never followed through with the divorce proceeding which was dismissed on December 31, 1991. *Id.* at 345. The dismissal also supports J'Bria's testimony that Louis Wallace and Cynthia made the decision not to become legally married. With Louis expressing a lack of interest in legally marrying Cynthia, there was no reason for Cynthia to take the necessary steps to finalize her divorce from Keith Magee.

After it was clear to Dr. Mohammed that Louis Wallace was not Cynthia's husband, he intervened in Cynthia's estate proceeding and requested that the chancery court remove Louis as administrator of the estate. The Lowndes County Chancery Court granted this request, removing Louis as administrator and replacing him with the Court Clerk. *Id.* at 379-80. The Chancellor's order observes that Louis was not legally married to Cynthia, yet both J'Bria and Louis represented in a sworn petition that he was Cynthia's husband at the time of her death. *Id.* at 379. Louis

contested the request that he be removed as administrator of Cynthia's estate and has appealed the Chancellor's order to the Mississippi Supreme Court.⁴

On July 1, 2008, Dr. Mohamed filed a motion to dismiss the wrongful death claim brought by Louis Wallace. *Id.* at 248. The motion to dismiss was based upon the fact that Louis Wallace is not one of Cynthia's wrongful death beneficiaries and is not the administrator of Cynthia's estate. Louis objected to the motion to dismiss and also filed a separate motion to substitute parties. *Id.* at 395. In his motion to substitute, he asked that the circuit court permit him to remain as the plaintiff as Christopher's "biological father". *Id.* at 395. No court has appointed Louis as Christopher's legal guardian or provided him with authority to pursue a claim on Christopher's behalf.

⁴ The appeal from the Chancellor's order is still pending before the Mississippi Supreme Court. *See Estate of Cynthia Gilkey Wallace, Deceased, et al. v. Mohamed*, Mississippi Supreme Court Case No. 2008-CA-01334.

SUMMARY OF THE ARGUMENT

Louis Wallace lacks standing to pursue a wrongful death claim on behalf of Cynthia's wrongful death beneficiaries. He is neither Cynthia's heir at law nor her wrongful death beneficiary. Louis filed the wrongful death claim as administrator of Cynthia's estate; however, his appointment as administrator was premised upon his misrepresentation to the chancery court that he was Cynthia's husband at the time of her death. Louis argues that because he successfully deceived the chancery court and then filed a wrongful death claim, he was able to open the courthouse door for others to later come in and join the lawsuit.

Louis' argument has already been rejected by the Mississippi Supreme Court in *Delta Health Group, Inc. v. Pope*, where the plaintiff, who was the decedent's great-nephew, "falsely testified that he was the nephew" of the decedent, which would have made him an heir at law. 995 So.2d 123, 124 (¶ 3) (Miss. 2008). The plaintiff filed a wrongful death claim and later obtained letters of administration. In response to the defendant's motion to dismiss, the plaintiff requested that the trial court substitute him as the administrator of the estate. The Mississippi Supreme Court held that the trial court should have dismissed the plaintiff's lawsuit because he "unequivocally lacked standing to commence an action" under Mississippi's wrongful death statute, Miss. Code Ann. § 11-7-13. *Delta Health Group, Inc.*, 995 So.2d at 126 (¶ 15). The Court reasoned that under this code section, a "distant relative such as [the plaintiff] is not empowered to exercise rights restricted to close family members by the Legislature or persons approved by a chancery court, **even pre-commencement of suit.**" *Id.* at 126 (¶ 16) (emphasis added). Were the Court to have held otherwise, "any person could commence an action, toll the statute of limitations, open an estate when convenient, and during the interim, keep the courthouse door open until a real party in interest, that is one, who has suffered injury and is entitled to remedy, appears before the bench and bar for relief." *Id.*

Louis' actions constitute an abuse of Mississippi's wrongful death statute. He asks this Court to approve of the procedure leading to his filing the wrongful death action simply because he was the administrator when the lawsuit was filed, even though his appointment as administrator was premised upon his own deception. Essentially, Louis argues that any person should be permitted to open an estate and file a wrongful death lawsuit, regardless of whether he has any connection to the deceased. If such a procedure is authorized by this Court, what would prevent an attorney (or any other person) who has no familial relation to a decedent but knows of the person's alleged wrongful death from opening an estate and filing a wrongful death claim to toll the statute of limitations until he can find the wrongful death beneficiaries? Louis' conduct is even more alarming because he sought personal gain to which he has no right, and executed a false affidavit in an attempt to further this effort. Moreover, Louis then waited until his misrepresentation had been discovered and he had been removed by the chancery court as administrator before seeking to substitute a party with standing to the lawsuit. If Louis' misrepresentation had not been discovered, it is possible that he would have obtained a judgment against the defendants in this case. If the circuit court had approved of Louis' conduct and denied Dr. Mohamed's motion to dismiss, it would have improperly rewarded Louis for misrepresenting that he had standing as a wrongful death beneficiary.

Louis' lack of standing to bring the wrongful death claim "robs the court of jurisdiction to hear the case." *Tolliver v. Mladineo*, 987 So.2d 989, 995 (¶ 16) (Miss. Ct. App. 2008). Because he lacks standing to institute the action, he also lacks standing to file a motion to substitute. Louis' motion to substitute was properly denied for that reason. Louis argues that the trial court should have granted the motion pursuant to Miss. R. Civ. P. 17(a), which relates to the substitution of a real party in interest. Louis' argument has already been rejected in *Delta Health Group v. Pope*, *supra*, *Tolliver v. Mladineo*, *supra*, and *Pruitt v. Hancock Medical Center*, 942 So.2d 797 (Miss. 2006).

His argument improperly confuses the concept of a real party in interest with the issue of standing. Rule 17(a) is not a vehicle by which one can cure a lawsuit brought by a plaintiff who lacks standing. *See Zurich Insurance Company v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir. 2002). The Mississippi Supreme Court has already agreed with a party who argued that “Rule 17(a) does not contemplate allowing a party that completely lacks standing to stand in the place of a proper party until the proper party can be found. Such an interpretation of Rule 17(a) would render the doctrine of standing meaningless” *Pruitt*, 942 So.2d at 800 (¶ 7). Rule 17 was created to protect litigants from multiple lawsuits arising out of the same injury, and it allows the substitution of a real party in interest in actions where that determination may be challenging, *i.e.*, subrogation lawsuits. Rule 17 does not, as Louis argues, expand the jurisdiction of Mississippi’s courts to include actions brought by parties lacking standing. For these reasons, Dr. Mohammed’s motion to dismiss was properly granted, and Louis’ motion for substitution properly denied.

ARGUMENT

I. STANDARD OF REVIEW

“‘When considering a motion to dismiss, [the Mississippi Supreme] Court’s standard of review is *de novo*.’” *Pruitt v. Hancock Medical Center*, 942 So.2d 797, 800 (¶ 11) (Miss. 2006) (quoting *Scaggs v. GPCH-GP, Inc.*, 931 So.2d 1274, 1275 (Miss. 2006)) (affirming dismissal of medical malpractice action for lack of standing).

II. LOUIS WALLACE DOES NOT HAVE STANDING AS PLAINTIFF IN CYNTHIA’S WRONGFUL DEATH LAWSUIT, AND THE CIRCUIT COURT PROPERLY GRANTED DR. MOHAMED’S MOTION TO DISMISS.

Louis Wallace did not and does not have standing to pursue a wrongful death claim on behalf of Cynthia’s three wrongful death beneficiaries. He was not properly appointed to be administrator of the Cynthia’s estate. His initial appointment was based upon his and J’Bria’s misrepresentation to the chancery court that he was Cynthia’s husband. J’Bria later admitted that she knew that Louis was never legally married to Cynthia. J’Bria’s testimony also provides evidence that Louis had knowledge that he and Cynthia were never legally married.

The Mississippi Supreme Court and Mississippi Court of Appeals have consistently held that a party who lacks standing cannot open the courthouse door for the wrongful death beneficiaries to later enter and pursue a claim. *See Delta Health Group, Inc. v. Pope*, 995 So.2d 123 (Miss. 2008); *National Heritage Realty, Inc. v. Boles*, 947 So.2d 238 (Miss. 2007); and *Tolliver v. Mladineo*, 987 So.2d 989 (Miss. Ct. App. 2008). *See also Pruitt v. Hancock Medical Center*, 942 So.2d 797 (Miss. 2006). “A lack of standing ‘robs the court of jurisdiction to hear the case.’” *Schmidt v. Catholic Diocese of Biloxi*, 18 So.3d 814, 826 (¶ 32) (Miss. 2009) (quoting *Pruitt*, 942 So.2d at 801). In the case at bar, Louis Wallace does not have standing to pursue the wrongful death claim as he has no

relation to the decedent and is not otherwise authorized to pursue the claim under Mississippi's wrongful death statute.

A. Mississippi's Wrongful Death Statute Makes Clear That Louis Wallace Does Not Have Standing as Plaintiff.

Miss. Code Ann. § 11-7-13 provides that the wrongful death

action for such damages may be brought in the name of the personal representative of the deceased person or unborn quick child 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, or by the parent for the death of a child or unborn quick child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits.

Under the statute the "suit may be brought by one entitled to recover for all entitled to recover, or by the estate's representative for those entitled to recover, and recovery shall be for all interested parties." *Partyka v. Yazoo Development Corp.*, 376 So.2d 646, 648 (Miss. 1979). Louis Wallace is not entitled to recover for Cynthia's death, and he is not the estate's representative. The estate's representative is the Lowndes County Chancery Clerk.

While Louis Wallace previously obtained letters of administration, his petition to the chancery court misrepresented that he was Cynthia's husband. The chancery court relied upon and adopted this misrepresentation in its order appointing Louis as administrator. Its order states that "Cynthia Gilkey Wallace is believed to have left as her sole and only heirs at-law, Louis M. Wallace, her husband, her natural daughter, J'Bria Gilkey, an adult, and Christopher Wallace, a minor, her natural son." (R., p. 257). Louis Wallace should have never been appointed to be the administrator of Cynthia's estate. After it was informed of his misrepresentation, the chancery court agreed and promptly removed him.

Louis Wallace lacks standing for another reason. The wrongful death statute permits the personal representative of the deceased person to bring the wrongful death action “for the benefit of all persons entitled under the law to recover” Miss. Code Ann. § 11-7-13. When Louis filed the lawsuit, he sought to exclude Cynthia’s husband, Keith Magee, from recovering for her death, and attempted to unlawfully recover in his place. The wrongful death action should have been brought for the benefit of J’Bria, Christopher, and Keith. Louis’ petition to the chancery court makes his intent clear - he represented that he, Christopher and J’Bria are Cynthia’s heirs at law and requested authority to pursue a wrongful death claim. For that reason, Louis Wallace did not pursue the wrongful death claim “for the benefit of all persons entitled under the law to recover”; rather, he filed the lawsuit hoping to obtain a recovery for himself, personally. Although he has continued to claim ignorance of Cynthia’s real marriage, J’Bria’s testimony is clear that (1) Louis knew he was not married to Cynthia; (2) when requested by Cynthia, Louis refused to make an effort to legally marry her; and (3) Louis’ refusal caused problems in his relationship with Cynthia.

Louis Wallace has no connection to the wrongful death action and clearly lacks standing to pursue the wrongful death claim on behalf of Cynthia’s statutory beneficiaries. He has made no credible argument that he does.

B. The Holdings in *Delta Health Group, Inc. v. Pope*, and *Tolliver v. Mladineo* Support Only One Conclusion: Louis Wallace Lacks Standing to Bring Wrongful Death Action for Cynthia’s Statutory Beneficiaries.

Both *Delta Health Group, Inc. v. Pope* and *Tolliver v. Mladineo* are on all fours with the case at bar and stand for the proposition that a wrongful death claim brought by a party lacking standing must be dismissed. Stated another way, a party who lacks standing cannot hold the courthouse door open until a party with standing enters to join a wrongful death claim.

In *Delta Health Group*, the decedent had no statutory wrongful death beneficiaries. 995 So.2d at 124 (¶ 4). A wrongful death claim was filed by the decedent's great-nephew on behalf of the estate of the decedent. *Id.* at 123 (¶ 2). No estate had been opened when the lawsuit was filed, but the plaintiff subsequently opened an estate. *Id.* at 124 (¶ 3). In his petition for letters of administration, the plaintiff "falsely testified that he was the nephew of [the decedent]", which would have made him an heir-at-law. *Id.* During discovery, the plaintiff admitted that he was actually the great-nephew of the decedent. *Id.* at 124 (¶ 4).

After the defendant learned that the plaintiff was not the decedent's heir-at-law, it filed a motion to dismiss based upon the plaintiff's lack of standing to pursue the claim. The plaintiff responded with a motion to substitute arguing that the wrongful death claim was brought by the estate; the plaintiff had been issued letters of administration; and the estate was the proper party. *Id.* at 124 (¶ 6). The trial court granted the plaintiff's motion to substitute and denied the defendant's motion to dismiss.

The Mississippi Supreme Court granted the defendant's petition for interlocutory appeal and reversed the trial court's decision. *Id.* at 125-126 (¶¶ 8, 17). The Court held that the plaintiff "did not qualify as a wrongful-death beneficiary or as an officer of an estate, [and] he unequivocally lacked standing to commence an action." *Id.* at 126 (¶ 15). The Court reasoned that under Mississippi's wrongful death lawsuit, "[a] distant relative such as [the plaintiff] is not empowered to exercise rights restricted to close family members by the Legislature or persons approved by a chancery court, **even pre-commencement of suit.**" *Id.* at 126 (¶ 16) (emphasis added). In other words, the plaintiff had no standing to file the wrongful death lawsuit, regardless of whether he was appointed administrator after the lawsuit had been filed or "pre-commencement of suit" because he was a "distant relative" and not one of the close family members who the Legislature has authorized

to file suit. The Court noted that were it to hold otherwise, “any person could commence an action, toll the statute of limitations, open an estate when convenient, and during the interim, keep the courthouse door open until a real party in interest, that is, one who has suffered injury and is entitled to remedy, appears before the bench and bar for relief.” *Id.*

Under *Delta Health Group*, Louis Wallace lacks standing to bring a wrongful death action for the benefit of Cynthia’s three wrongful death beneficiaries. Louis is not even a distant relative of Cynthia; he has no legal relation to her. His only connection to this lawsuit is premised upon his prior misrepresentation to the Lowndes County Chancery Court that he was Cynthia’s husband. As someone with no connection to this claim, Louis Wallace cannot “keep the courthouse door open” for Cynthia’s wrongful death beneficiaries to later enter.

The Mississippi Court of Appeals’ holding in *Tolliver v. Mladineo* also requires the dismissal of Louis Wallace’s lawsuit. In *Tolliver*, the brother of the deceased filed a wrongful death claim. 987 So.2d 989, 991-92 (¶ 2) (Miss. Ct. App. 2008). As the Court observed, a brother is “among the class of individuals permitted to bring a wrongful death suit by virtue of his sibling relationship to the decedent.” *Tolliver*, 987 So.2d at 994 (¶ 10). “However, [the brother’s] standing to bring the wrongful death suit was conditional upon the event that the decedent did not have a surviving spouse or children, who would have the exclusive right to bring the wrongful death action.” *Id.* The decedent in *Tolliver* had both a surviving spouse and children. The Court went on to hold that not only did the brother lack standing, “his complaint lacked standing”, and “[t]his lack of standing ‘robs the court of jurisdiction to hear the case.’” *Id.* at 995 (¶ 16). “Thus, any ruling on such a case is void *ab initio*.” *Id.*

Similarly, Louis Wallace lacks standing under the wrongful death statute. *See* Miss. Code Ann. § 11-7-13. He is not a listed relative, and he did not have the authority to bring suit on behalf

of the wrongful death beneficiaries. His initiation of the lawsuit as “personal representative” should be disregarded, also, because his appointment as administrator was based upon a misrepresentation to the chancery court. Because he was neither an heir at law or wrongful death beneficiary, Louis should not have filed this lawsuit, nor should he have sought appointment as the administrator for the purpose of filing suit. The Mississippi Supreme Court has held that a distant relative appointed administrator “even pre-commencement of suit” is not someone authorized to file a wrongful death lawsuit. *Delta Health Group*, 995 So.2d at 126 (¶ 16). The same is true for Louis Wallace, who misrepresented his status as one of Cynthia’s relatives.

C. Louis Wallace’s Reliance upon *Burley v. Douglas* is Misplaced.

Louis Wallace’s argument that *Burley v. Douglas* supports his standing to bring the wrongful death action has no basis. Mississippi’s wrongful death statute identifies the parties authorized to file a wrongful death claim. The statute states that “all interested parties” are authorized to file the lawsuit. See Miss. Code Ann. § 11-7-13. In *Burley v. Douglas*, the Mississippi Supreme Court held that an heir at law of a decedent with no wrongful death beneficiaries qualifies as an “interested party” who may institute a wrongful death action. 2009 WL 3645687 (Miss. Nov. 5, 2009). Louis Wallace is not an “interested party”, and for that reason, *Burley*’s holding has no application to the case at bar.

In *Burley v. Douglas*, the plaintiff who was the grandfather of the decedents, filed a wrongful death action, without having first opened an estate. *Burley*, at *1 (¶¶ 3, 4). The plaintiff opened estates for his deceased grandchildren one year after filing the wrongful death lawsuit. *Id.* The chancery court in the estate proceedings determined that the plaintiff was an heir-at-law of both of his deceased grandchildren. *Id.* at *1 (¶ 5). The defendant then filed a motion to dismiss and argued that the plaintiff lacked standing to commence the wrongful death action. *Id.* at *1 (¶ 6). The

Mississippi Supreme Court held that one of the categories of potential wrongful death claimants authorized to file the wrongful death lawsuit includes “‘all interested parties” *Id.* at *3 (¶ 11). (quoting *Long v. McKinney*, 897 So.2d 160, 168 (Miss. 2004)).

The Court observed that no Mississippi case had defined an “interested party” for purposes of the wrongful death statute. *Id.* at *6 (¶ 25). The Court concluded that the plaintiff was an interested party because he was an heir of the deceased. *Id.* at *6 (¶¶ 25-26). The Court observed that both of the deceased grandchildren lacked “listed relatives”, meaning that they did not have the specific relatives identified in the wrongful death statute who are authorized to file a wrongful death lawsuit. *Id.* Because he was an heir, the plaintiff stood to inherit property from his grandchildren, including any recovery from a wrongful death claim. *Id.* It was his status as an heir that made him an interested party. The Court held that the plaintiff “brought this action as an ‘interested party’, [and his] later-acquired status as administrator . . . did not confer upon him standing, . . . but merely gave him authority to bring additional *claims* within that action” *Id.* at *8 (¶ 33). In other words, the plaintiff had standing to file the wrongful death lawsuit when he filed it and continued to possess standing from that point forward.

Burley’s holding does not, as Louis Wallace contends, confer standing upon him to bring the wrongful death action. He is not an “interested party” as defined by *Burley* for two reasons. First, the decedents in *Burley* had no wrongful death beneficiaries. In the case at bar, Cynthia has three - her two children and her widower. Second, even if Cynthia did not have wrongful death beneficiaries, Louis is not related to her in any manner and is accordingly not one of her heirs under any scenario. For that reason also, he is not an “interested party” under *Burley*’s holding. In short, the holding in *Burley v. Douglas* does not change the fact that Louis Wallace lacks standing to bring a wrongful death action.

III. THE CIRCUIT COURT PROPERLY DENIED LOUIS WALLACE'S MOTION TO SUBSTITUTE.

Louis argues that the Circuit Court erred in denying his motion to substitute. Louis relies upon Miss. R. Civ. P. 17(a) which states that an action shall not be dismissed when it is not prosecuted by the real party in interest “until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest” Louis argues that the Circuit Court should have allowed him to substitute himself in his capacity as “biological father” of Christopher Wallace under Rule 17(a). His argument fails for two reasons. First, the same argument was considered and rejected in *Delta Health Group, Inc. v. Pope*, 995 So.2d 123 (Miss. 2008); and *Tolliver v. Mladineo*, 987 So.2d 989 (Miss. Ct. App. 2008). Second, Rule 17(a) does not cure Louis’ lack of standing; rather, it was designed to protect defendants from multiple lawsuits brought by plaintiffs asserting an interest in a claim. The rule was not intended to permit a party lacking standing to file suit and later substitute the party with standing as a plaintiff into the litigation.

A. *Delta Health Group, Inc. v. Pope*; and *Tolliver v. Mladineo* Rejected Louis Wallace’s Argument Supporting His Motion To Substitute.

The plaintiffs in both *Delta Health Group, supra*, and *Tolliver, supra*, argued that their lack of standing to file a wrongful death claim should have been cured by the trial court’s granting their motion to substitute the real party in interest pursuant to Rule 17(a). Their arguments were rejected in both of these opinions, and Louis Wallace’s motion to substitute was properly denied for the same reasons.

In *Delta Health Group, Inc. v. Pope*, the plaintiff, the decedent’s great-nephew, filed suit on behalf of the estate prior to the issuance of letters of administration. 995 So.2d 123, 124 (¶ 3) (Miss. 2008). He subsequently opened an estate. In response to the defendant’s motion to dismiss, the

plaintiff filed a motion to substitute himself in his capacity as administrator. The trial court granted the plaintiff's motion, which he argued was proper pursuant to Miss. R. Civ. P. 17(a). *Id.* at 125 (¶ 11). The Mississippi Supreme Court reversed the trial court's ruling. The Court's rationale supporting its decision concentrates on the plaintiff's status as a "distant relative" of the decedent who was not authorized by Miss. Code Ann. § 11-7-13 to file a wrongful death action. The Court held that a distant relative is not empowered to file a wrongful death action because this right is "restricted to close family members" *Id.* at 127 (¶ 16).

In *Delta Health Group*, the plaintiff had been appointed administrator and presumably authorized to file a wrongful death action. The Court recognized this appointment but held that a great-nephew was not someone who should have filed suit even had he been approved by the chancery court "pre-commencement of suit." *Id.* The Court then explained the reason for limiting the persons who are authorized to file the wrongful death action:

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

Id. (Emphasis added).

In the case at bar, Louis Wallace attempts to do exactly what *Delta Health Group* prohibits. He has no personal connection to the wrongful death claim which could have been brought by any of Cynthia's wrongful death beneficiaries, yet he opened an estate and commenced an action in an effort to "keep the courthouse door open" for the parties with standing. Not only is such a procedure not proper under Rule 17(a), but it also "subverts the Rules of Civil Procedure."

In *Tolliver v. Mladineo*, the Mississippi Court of Appeals also considered and rejected Louis Wallace's argument. In *Tolliver*, the brother of the decedent, a person who had no standing to file the wrongful death claim, filed a motion to substitute the decedent's son. 987 So.2d 989, 992 (¶ 2). The motion was granted by the trial court, and the Mississippi Court of Appeals reversed the ruling. The dissenting opinion in *Tolliver* argues that substitution should have been permitted pursuant to Miss. R. Civ. P. 17(a). The plaintiff in *Tolliver* argued that the amended complaint filed by the son of the decedent related back to the original complaint. The majority opinion in *Tolliver* disagreed. The Court held that "an amended complaint filed in a case where the original complaint lacks standing cannot relate back to the filing of the original complaint, because a complaint cannot relate back to a nullity." *Id.* at 995-96 (¶ 16). The Court went on to clarify that "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." *Id.* at 996 (¶ 17). For the same reasons, Louis Wallace cannot rely upon Miss. R. Civ. P. 17(a) to overcome his lack of standing to file the wrongful death claim.

B. Miss. R. Civ. P. 17(a) Does Not Permit Party Lacking Standing to File Wrongful Death Claim.

Louis Wallace argues that Rule 17(a) is intended to protect a complaint filed by a plaintiff who lacks standing. This argument confuses the concept of standing with that of a "real party in interest" and the purpose of Rule 17. Rule 17's "function . . . is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as *res judicata*." *Comment* to Miss. R. Civ. P. 17. The provision regarding the substitution of the real party in interest was "added simply in the interests of justice." *Id.* The creation of the rule was in response to the "restrictive common law practice"

which did not allow parties such as assignees or subrogees who possessed only an equitable or beneficial interest in a cause of action to file lawsuits in their own names. *See Turner v. Haynes*, 489 So.2d 494 (Miss. 1986) (discussing historical context of Rule 17 and stating that Rule's function is to protect litigants from harassment and multiple suits).

In *Zurich Insurance Company v. Logitrans, Inc.*, the Sixth Circuit was called upon to analyze the distinction between standing and Rule 17's concept of the real party in interest. 297 F.3d 528 (6th Cir. 2002). An insurer in *Zurich Insurance* filed a subrogation claim and later realized that the claim belonged to another insurance company. The insurer filed a motion to substitute the correct party. The trial court denied the motion and the Sixth Circuit affirmed. The court observed that the issue of standing is one which goes to the jurisdiction of the court. *Zurich Insurance Company*, 297 F.3d at 531. The court also observed that the plaintiff must have an injury in fact in order to establish standing. *Id.* The court went on to hold that because the insurer had not suffered an "injury in fact by the defendants, it had no standing to bring this action and no standing to make a motion to substitute the real party in interest." *Id.* "The Federal Rules of Civil Procedure cannot expand the subject matter jurisdiction of federal courts" *Id.* The Court reviewed the advisory committee notes to Rule 17(a) which support this interpretation of the rule:

[Rule 17(a)] should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. *It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitations period.*

Id. at 532 (quoting advisory committee notes) (emphasis of Court).

The holding in *Pruitt v. Hancock Medical Center* also supports the distinction between standing and the real party in interest. 942 So.2d 797 (Miss. 2006). The plaintiffs in *Pruitt* obtained bankruptcy after an alleged medical malpractice claim occurred. The plaintiffs failed to list the claim in their bankruptcy schedules. The defendant filed a motion to dismiss arguing that the claim belonged to the bankruptcy trustee and that the plaintiffs lacked standing to pursue the claim. The plaintiffs responded and requested that the trial court allow time for a trustee to be appointed and to then pursue the claim. The defendant responded to this request and argued that “Rule 17(a) does not contemplate allowing a party that completely lacks standing to stand in the place of a proper party until the proper party can be found. Such an interpretation of Rule 17(a) would render the doctrine of standing meaningless” *Pruitt*, 942 So.2d at 800 (¶ 7). The Mississippi Supreme Court agreed and affirmed the dismissal, holding that exclusive standing to bring the lawsuit belonged to the bankruptcy trustee. *Id.* at 802 (¶ 18).

In the case at bar, Louis Wallace does not have standing as the plaintiff in the wrongful death action arising out of Cynthia’s death. His lack of standing robs the court of jurisdiction. *See Schmidt v. Catholic Diocese of Biloxi*, 18 So.3d 814, 826 (¶ 32) (Miss. 2009). Rule 17 cannot be relied upon to confer standing upon Louis Wallace - not even standing to file a motion to substitute the proper party. Rule 17’s language does not even reference the concept of “standing”. Rule 17 cannot be utilized where the plaintiff lacks standing. Holding otherwise is inconsistent with Rule 17, its purpose and the prior rulings from this Court. Rule 17 was not designed to accomplish what Louis Wallace seeks to do, which is to permit the substitution of a party in place of one who lacks standing to bring the lawsuit. Rule 17’s concern, rather, is in protecting parties from multiple lawsuits, each with plaintiffs claiming to be the proper party.

IV. LOUIS WALLACE'S MOTION FOR RECONSIDERATION WAS PROPERLY DENIED.

Louis Wallace's brief includes a substantial discussion regarding his motion for reconsideration which the trial court found it did not have jurisdiction to consider and from which it abstained from entering a ruling. *See* Brief of Appellant, pp. 23-27. Louis argues that the trial court did, in fact, have jurisdiction to hear the motion to reconsider. Resolving this issue on appeal would appear to be of no consequence to the outcome of the appeal. The motion for reconsideration essentially reargued the issues previously presented to the trial court. Louis' brief virtually concedes as much. *See* Brief of Appellant, p. 26. His brief also concedes that these types of motions should be denied where they are merely attempts to relitigate the case. *See Id.* at 25; and *Noble House, Inc. v. W & W Plumbing & Heating, Inc.*, 881 So.2d 377, 383 (§ 22) (Miss. Ct. App. 2004). Louis' motion was properly denied for that reason.

The issues presented in the motion for reconsideration are whether Dr. Mohamed's motion to dismiss and Louis Wallace's motion for substitution were properly granted and denied. These issues had already been considered by the trial court when it denied the motion for substitution and granted the motion to dismiss. Regardless of whether the trial court had jurisdiction to hear the motion for reconsideration, the same issues included in the motion are presented in this appeal, namely whether the motions were ruled upon correctly by the trial court. The outcome of the appeal will not change based upon whether the Court finds that the trial court should have or could have ruled on the motion for reconsideration. The Mississippi Supreme Court has held that it "will not adjudicate moot questions." *Allred v. Webb*, 641 So.2d 1218, 1220 (Miss. 1994). A question is moot where its answer "would be of no practical benefit to the plaintiff or detriment to the defendant." *Gantrell v. Gantrell*, 936 So.2d 915, 916 (§ 8) (Miss. 2006). Whether the trial court was

correct in abstaining from ruling on the motion for reconsideration is a moot question, and there is no reason for the parties to litigate the same. In any event, had the trial court ruled upon the motion to reconsider, the motion should have been denied for the reasons the motion to dismiss was granted and the motion for substitution was denied, and the case would be in the same posture on appeal which it presently is.

CONCLUSION

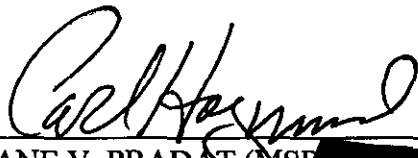
Louis Wallace has no standing to bring the wrongful death action against Dr. Mohamed. Finding that his lawsuit should proceed invites an abuse of Mississippi's wrongful death statute. Under such circumstances, any party unconnected to a deceased could open an estate, file a wrongful death lawsuit, and hold the courthouse doors open until the wrongful death beneficiaries or heirs at law are found. As alluded to in the advisory committee notes to Rule 17, an attorney who has knowledge of an alleged wrongful death could open an estate and file a wrongful death complaint, hoping to enlist the support of the decedent's relatives at a later time. The Mississippi Legislature chose to limit the right to pursue a wrongful death claim to certain listed persons. *See Delta Health Group*, 995 So.2d at 126 (¶ 16). Louis Wallace has invited this Court to disregard that choice and render the limitation upon the right to file a wrongful death claim meaningless. This Court should decline his invitation and affirm the circuit court's order.

Respectfully submitted,

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