IN THE SUPREME COURT OF MISSISSIPPI
NO. 2011-IA-00483-SCT

CAREGIVERS, LLC D/B/A
CLARKSDALE NURSING CENTER,
MAGNOLIA MANAGEMENT CORPORATION
D/B/A MAGNOLIA ANCILLARY SERVICES, INC.,
LEGACY MANAGEMENT SERVICES, LLC,
MAGNOLIA ANCILLARY SERVICES, INC. APPELLANTS

V.

ILEAN COMFORT AS EXECUTRIX
OF THE ESTATE OF MARIE ELLISON, DECEASED APPELLEE

APPELLANTS' BRIEF

(Oral Argument Requested)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following have an interest in the outcome of this case:

1. Caregivers, LLC d/b/a Clarksdale Nursing Center, Magnolia Management Corporation d/b/a Magnolia Ancillary Services, Inc., Legacy Management Services, LLC, Magnolia Ancillary Services, Inc., Appellants

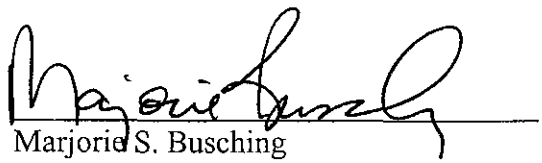
2. Ilean Comfort, Appellee

3. John L. Maxey II, S. Mark Wann, Marjorie S. Busching, Counsel for Appellants

4. George F. Hollowell, Jr., Counsel for Appellee

5. Honorable Albert B. Smith III, Circuit Court Judge

6. The Estate of Marie Ellison, Deceased



Marjorie S. Busching

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STATEMENT REGARDING ORAL ARGUMENT

The Appellants Caregivers, LLC d/b/a Clarksdale Nursing Center, Magnolia Management Corporation d/b/a Magnolia Ancillary Services, Inc., Legacy Management Services, LLC, Magnolia Ancillary Services, Inc., believe oral argument would aid the resolution of the appeal before this Court and respectfully request the Court consider and grant their request for oral argument. At present, little guidance exists under Mississippi law regarding next friend standing. This appeal provides an opportunity for the Court to elaborate on the circumstances under which a person may bring suit on behalf of another adult when such person has no express legal authority to do so.

STATEMENT OF THE ISSUES

1. Did Ilean Comfort establish next friend standing on behalf of Marie Ellison on the face of the Complaint in order to file suit on December 19, 2002?

2. Can a Complaint that is void from its inception be amended in order to establish standing months after suit was filed?

STATEMENT OF THE CASE

Defendants were sued for medical negligence in the operation of Caregivers, LLC d/b/a Clarksdale Nursing Center, a long-term care facility licensed and regulated by the Mississippi State Department of Health. Suit was filed December 19, 2002, styled *Marie Ellison, By and Through Next of Friend Ilean Comfort and* ***as Conservator*** *of the Estate of Marie Ellison.* (Emphasis added). Plaintiff's Complaint in the opening paragraph reads, "Comes now, the Plaintiffs, Ilean Comfort as Conservator of the Estate of Marie Ellison." The Complaint states, "Ms. Gray [*sic*] is the next friend of Marie Ellison and has petitioned for appointment as Conservator of the Estate of Marie Ellison in the Chancery Court of Coahoma County, Mississippi." None of these assertions were true at the time the Complaint was filed. Ilean Comfort ("Comfort") was not the Conservator, no petition for appointment as Conservator had been filed with the Chancery Court, nor did Comfort set forth any explanation whatsoever affording her the legal authority to sue as next friend. Comfort had no standing to file suit.

Comfort is not identified as "next friend" on the face of the Complaint, but only referenced in the styling. There is no declaration or statement set forth in the Complaint establishing next friend status of Comfort to sue on behalf of Marie Ellison ("Ellison"), no Affidavit of Ellison, no attached physician statement establishing Ellison's disability or incompetency, no Power of Attorney, and no record Ellison had any knowledge the lawsuit was filed for her alleged injuries. The first numbered paragraph, setting forth the identity of the Plaintiff to the lawsuit only identifies Comfort and states *her* name and *her* place of residence. *There is no identification of Ellison as a party*, only Comfort. The Complaint is void of any explanation setting forth why Ellison was not capable of filing a lawsuit on her own behalf.

Comfort had no standing as a Conservator and no standing as next friend to sue on behalf of Ellison. The Complaint was null and void at its inception and should have been dismissed.

STATEMENT OF THE FACTS

Ilean Comfort ("Comfort") filed this lawsuit acting as the "next friend" and as the Conservator of Marie Ellison. Comfort was not related to Ms. Ellison, but was only a friend. Ms. Ellison did have eleven children. It has clearly been established Comfort was not the Conservator nor had she petitioned for the appointment, nor was she appointed the Conservator when she filed a Petition almost six months later. Comfort only stated she was the "next of friend" [*sic*] of Ellison with no explanation as to why she necessarily had to act in that capacity for Ellison. (R.9). Comfort, in sworn testimony, stated Ms. Ellison "asked me to consult a lawyer on her behalf to pursue her claims against the nursing home." (R.1054) Comfort testified Ellison assisted in "providing information for Mr. Hollowell's use in pursuing Ms. Ellison's claims." (R.1054-55). Comfort testified Ellison "was aware that I [Comfort] would be filing a petition for Conservatorship of Ms. Ellison and approved of this action." (R.1055). Despite the testimony of Comfort, Ellison did not join the petition, even though Comfort indicated Ellison being aware of and approving filing the petition. Although Ellison purportedly approved Comfort serving as her Conservator, Comfort was *not* the person chosen by the Chancellor to serve as the Conservator when first appointed months after Comfort filed suit.

Ellison executed her Will one day before suit was filed by Comfort as her next friend. Comfort testified yet another attorney drafted Ellison's Will which was executed the day before suit was filed. (R.697). Ellison was able to hire an attorney to prepare a Will and, as Comfort testified, Ellison ". . . possessed sufficient mental capacity to understand the nature and extent of

her property. She also knew who her family and friends were and was aware of how often they did or did not visit and who did what for her."[1] (R.973). Based upon Comfort's Affidavit if taken as fact, Ellison was under no disability such that she had to be represented by a "next friend." Ellison was clearly able to direct an attorney to file suit on her behalf. Alternatively, Ellison was capable of executing a Power of Attorney if she was directing Comfort in pursuing various legal services on her behalf, especially given that she was competent and able to execute a Will only one day before Ellison filed suit on her behalf. If Ellison was providing the information indicated in Comfort's sworn Affidavit, a Power of Attorney would have been appropriate in order to establish the legal authority of Comfort to act on behalf of Ellison. None of that was done, but rather Comfort represented herself as the Next Friend of Ellison.

The docket of the Chancery Court of Coahoma County, Mississippi styled The Matter of The Estate Marie Ellison, reflects a Petition for Appointment of a Conservator filed by Comfort on June 19, 2003, almost six months after this lawsuit in Comfort's name, as Conservator, had already been filed. (R.479). However, when the Chancellor was presented with the Petition for Appointment of the Conservator, he appointed Leroy Davis, Ellison's son, and not Comfort, to serve as the Conservator. Comfort had not filed the Petition when she filed suit against Clarksdale Nursing Center, and subsequently was not appointed Conservator when the Chancellor did so July 17, 2003.[2] She relies rather upon her status as next friend to establish

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[1]It should be noted, Ellison had no property and had only her personal belongings at her death, her only potential asset being the lawsuit filed by Comfort, named as the Executrix and sole beneficiary under the Will of Ellison (R.483-85).

[2]While the Chancery Court Docket reflects an Order substituting the Conservator appointment this was the first Order ever entered by the Court appointing a Conservator. Ms. Ellison had no Conservator up and until this point in time. (R.479).

standing in this matter.

During the course of responding to Defendants' Motion to Dismiss, Plaintiff set forth the following in Affidavit form as part of her argument:

> When Ms. Ellison did not get the care she needed at the nursing home, she complained to Ms. Comfort and asked Ms. Comfort to help her get better care and to help her pursue her complaints against the nursing home; Ms. Ellison and Ms. Comfort discussed the problems with Ms. Ellison's care at the nursing home and Ms. Ellison asked Ms. Comfort to consult a lawyer on her behalf to purse her claims against the nursing home. Ms. Comfort contacted attorney George F. Hollowell, Jr. and entered into a contract for representation on Ms. Ellison's behalf. That contract designates the client as 'Marie Ellison by Ilean Comfort.'

(R.971-73) As to the contract engaging the services of The Hollowell Law Firm, while Comfort identifies "Marie Ellison by Ilean Comfort" the contract has Comfort's address as testified by her and is signed Ilean Comfort on the Client's signature. (R.482 and R.615). Clearly Comfort had no legal authority to enter into a contract for legal services as Ellison's friend, next friend or otherwise. Based upon the sworn pleadings of Ilean Comfort, the Plaintiff, Ellison purportedly was directing her [Comfort's] actions at the time suit was filed. The Complaint is void of any sworn testimony by Ellison acknowledging the need for Comfort to file suit on her behalf. The Complaint is void of any notice as to why it was necessary for Comfort to act on behalf of Ellison. Based upon the Affidavit of Comfort, Ms. Ellison was directing her [Comfort's] actions. If so, Ms. Ellison was under no disability qualifying Comfort to act as next friend.

Ellison engaged separate legal counsel to draft her Will. The Hollowell Law Firm was hired to file this suit. Based upon Comfort's testimony as to Ellison's capabilities and directions, counsel would have been able to file suit in Ellison's name. The findings of the Circuit Court to justify next friend standing were that Ellison was not in a "consistent lucid state." (R.1064).

Respectfully, the Court based its finding upon a myriad of medical records submitted as part of Plaintiff's response to the Motion to Dismiss.[3] Per Comfort's testimony, Ellison was directing a Complaint be filed. Mississippi law afforded her the option of executing a Power of Attorney in favor of Comfort, submitting an Affidavit, joining in the Petition for Appointment of Conservator or personally entering into a contract with Mr. Hollowell to retain his services. None of those actions were taken, despite Comfort's insistence that she was being directed by Ellison. Ellison's actions, as described by Comfort, reflects a person under no disability qualifying Comfort to act on her behalf and file suit.

Noteworthy, as referenced *supra,* is that on December 18, 2002, one day prior to this lawsuit being filed by Comfort, Ellison executed her Last Will naming Comfort as her sole beneficiary despite the fact Ms. Ellison had living children. (R.344-46). The Circuit Court acknowledged the Will as valid. (R.1064) Said Will states Marie Ellison is "of sound and disposing mind, memory and understanding...." (R.483-85) The Last Will and Testament of Ellison appointed Comfort as the Executrix and *sole beneficiary of the Estate of Marie Ellison.* (R.483-85)

The next day, on December 19, 2002, Comfort, purporting to act as next friend and the Conservator of Ellison, filed suit in the Circuit Court of Coahoma County styled *Marie Ellison, By and Through Next of Friend Ilean Comfort and as Conservator of the Estate of Marie Ellison.*

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[3]The Court's Order (R.1064) at page two references nursing home records submitted as part of Comfort's response to Defendant's Motion to Dismiss. Because one suffers from "physical injuries and illnesses," such does not support or delineate an inability on the part of Ellison to file suit on her own. In fact, the Affidavit of Comfort clearly establishes Ms. Ellison's ability to direct her affairs. (R.970-73)

(R.8-20)[4] Comfort established no legal standing when the Complaint was filed upon which she could initiate legal proceedings on behalf of Ellison. Ellison was the only person at that time with any standing to file suit. She was of sound mind, capable of hiring an attorney to draft her Will one day prior to this lawsuit being filed. (R.698). According to Comfort, Ellison was capable of making the decision to file a lawsuit and knowledgeable of the necessity of hiring legal counsel to proceed with that process. (R.902).

Defendants, in their Answer to the Complaint and subsequent First and Second Amended Complaints, set forth an affirmative defense of failure to state a claim upon which relief could be granted. (R.266) Not until a challenge to the Last Will of Marie Ellison was asserted by two of her eleven children were Defendants privy to the Chancery Court proceedings, including the Conservatorship file. At the time the lawsuit was filed, Defendants had no reason to doubt the Conservatorship pleadings and the capacity under which Comfort sued.[5] Defendants were given notice Ellison had in fact executed her Will one day prior to filing the lawsuit, years after this litigation was initiated. Ellison had legal counsel to draft her Will. Ellison was capable of directing legal counsel to file a lawsuit should she have chosen to do so. Ellison had several avenues for providing Comfort the legal authority to act on her behalf; however, the record contains no evidence she did so, other than Comfort's self-serving testimony. Comfort prematurely filed suit without any legal authority to act on behalf of Ellison. The Complaint is void of any such authority, as are the Amended Complaints filed on December 4, 2003 and again

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[4]In Plaintiff's Response to the Motion to Dismiss, Plaintiff additionally alleged "actual and apparent authority to act on Ellison's behalf...." (R.901).

[5]Had a Petition actually been filed to establish the Conservatorship prior to this suit being filed, there would have necessarily been the Affidavits of two medical doctors establishing the disability requirements.

on December 9, 2004. (R.8-20, 45-61, 510-600) Comfort was not the Conservator and established no requisite grounds entitling her to act as "next friend." One day after Ellison executed her Will naming Comfort as her sole beneficiary, Comfort served her own interests by filing suit alleging the Defendant was negligent in care provided to Ms. Ellison and seeking damages for same. Sworn statements in the Conservatorship accounting establish Ellison has no real or personal property other than her social security check. The only asset to Ellison's name was and continues to be this lawsuit. Comfort claimed legal authority to file suit on behalf of Ellison when she had none. Ellison was the only person under Mississippi law entitled to file this suit when the Complaint was filed on December 19, 2002. The Complaint is void at its inception and should be dismissed.

SUMMARY OF THE ARGUMENT

Defendants appealed the Lower Court's ruling denying their Motion to Dismiss for lack of standing on the part of Ilean Comfort to file suit as "next friend" of Marie Ellison. Marie Ellison was a resident at Clarksdale Nursing Center on December 19, 2002, when suit was filed. She continued to reside at Clarksdale Nursing Center during the course of this litigation until she passed away on February 28, 2007. Based upon pleadings filed in the Chancery Court related to a Will challenge initiated by two of Ellison's children, Defendants were made aware of the fact that Ellison executed her Will one day before this lawsuit was filed. The Will challenge was dropped and the Will declared valid. Ms. Ellison executed her Will the day before Comfort filed suit. She did not make any attempt to file a lawsuit which was clearly her right, and *her* right only on December 19, 2002.

Comfort acted as Ellison's responsible party when admitted to Clarksdale Nursing Center in 1996. Both Ellison and Comfort executed various admission documents. (R.949, 968). Comfort was a friend and claims to be the God child of Ellison. (Comfort established in her deposition however that she was not related to Marie Ellison whatsoever.) (R.623) Comfort was not the Conservator when suit was filed. Comfort failed to establish Ellison lacked access to the court due to mental incompetence or some other disability entitling her to serve as "next friend" when suit was filed. The fact that a person lives in a nursing home does not automatically mean he or she has no access to the Court system nor that they are under a qualifying disability for someone to simply act as "next friend" and take legal action on his or her behalf. The attorneys hired on behalf of Ellison had the same access to Ellison that Comfort had. Clarksdale Nursing Center was her place of residence.

Ellison was apparently clearly lucid the day before suit was filed, which was acknowledged by two witnesses in her Last Will, executed the very day before Comfort insists she [Comfort] had to file suit as her "next friend." Submission of a multitude of medical records for the Court to interpret, with no expert testimony, years after this suit was initiated cannot establish the requisite qualifications for Comfort to serve as Ellison's "next friend" as of the date the Complaint was filed. Defendants had no need to question Comforts' authority as next friend if she had petitioned to become the Conservator when suit was filed as she set forth in her sworn pleading. Comfort necessarily would have had the requisite Certificates of two physicians attesting to the need for Ellison to have a conservator appointed for her. Defendants were made privy to the sequencing of events only after the death of Ellison and the subsequent Will challenge. At the time suit was filed the Complaint established who Comfort was, where she

[Comfort] lived and that Ellison simply was ". . . a resident of The Nursing Home in Clarksdale, Coahoma Mississippi." (R.10). No facts were set forth establishing Comfort as next friend.

Leroy Davis, Ellison's son was named as her Conservator July 2003, after this suit was filed by Comfort. Leroy Davis was substituted as Ellison's representative in this lawsuit serving as her Conservator. The Complaint filed in this matter was void at its inception as Comfort had no standing to file suit for Ellison. The Court, therefore, had no jurisdiction over the parties at the time suit was filed. Any Order permitting an amendment to the Complaint once legal authority was established over Ellison is likewise null and void and the matter should be dismissed in its entirety.

ARGUMENT

I. Ilean Comfort did not establish next friend standing on behalf of Marie Ellison on the face of the Complaint.

A. Ilean Comfort did not and could not qualify as the next friend of Marie Ellison.

The United States Supreme Court has determined that "[i]n every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 at *9 (2004). The federal court system has addressed next friend standing. Standing in the federal courts encompasses two principles, the Constitution's case or controversy requirement, and prudential standing, which relates to "judicially self-imposed limits on the exercise of federal jurisdiction." *Id.* Prudential standing pertains to, among other things, "the general prohibition on a litigant's raising another person's legal rights." *Id.* at 2309. An exception to this prudential standing requirement occurs when a party proceeds as the "next

friend" of the real party in interest. *Whitmore v. Arkansas*, 495 U.S. 149, 161-62 (1990). "Most frequently, 'next friends' appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves." *Id.* at 162; *see also* Fed. R. Civ. P. 17(c)(stating that an infant or incompetent person may sue by a "next friend").

Regardless, the purported "next friend" must establish two elements. First, the "'next friend' must provide an adequate explanation – such as inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf to prosecute the action." *Id.* at 163. Comfort did *none* of these when filing the Complaint, only stating Ellison lived in a nursing home. (R.8-20). Second, "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate." *Id.* Comfort stated no reason other than seeking money for Ellison, while at the same time Ellison remained at Clarksdale Nursing Center. Neither Ellison nor Comfort sought a transfer to another facility with Ellison and ultimately Comfort, as the Conservator, choosing to allow Ellison to remain at Clarksdale for five (5) more years. The Supreme Court also suggested that a "next friend" must have a significant relationship with the real party in interest. *Id.* at 164. The burden of proving the above elements is on the purported "next friend." *Id.* Comfort established none of this in the Complaint.

Mississippi laws are relatively silent as to "next friend" standing. As the Lower Court pointed out in its Order "There appear to be no special requirements to serve as next friend in Mississippi." (R.1064). The Second Circuit years ago carefully outlined the next friend standing as it relates to the most common appearance of one acting as "next friend" in applying for a writ of habeas corpus stating:

> . . . [T]he complaint must set forth some reason or explanation satisfactory to the court showing why the detained person does not sign and verify the complaint and who 'the next friend' is. It was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.

U.S. ex rel. Bryant v. Houston, 273 F. 915, 916-17 (2d Cir. 1921), citing *Gusman v. Marrero*, 180 U.S. 81 (1901). ". . . [T]he District Court would have been justified in disallowing or dismissing the writ for failure on the part of the petitioner to show why she, and not Harris, signed . . . and for failure to show what relationship, if any, existed between Harris and herself. . . ." *Id.* at *917. Comfort did not establish any fact why Ellison could not file suit. ". . .[T]he application must set forth facts, which will satisfy the court that the interest of the next friend is appropriate, and that there is good reason why the detained person does not himself sign and verify the complaint. . . . " *Id.* The only relationship Comfort set forth in the Complaint was that she was both the Conservator and that she had petitioned for appointment as Conservator of Marie Ellison, neither of which was true. (R.9).

Under Mississippi law, there are permissible means by which a person may exercise the legal rights of another. Comfort did not seek to establish any legal authority over Ellison until months after the suit was filed. Even then, the court appointed someone other than Comfort as Conservator. It is only Ellison's competence at the time this suit was initiated that is relevant, not her level of competence at a later date. Defendants contend that Comfort fails to qualify as a "next friend" for two reasons. First, Comfort has failed to meet her burden of proving that Ms. Ellison lacked access to the courts due to mental incompetence or some other disability *when suit was filed.* The Lower Court entered its Order and referenced the Complaint, stating "It simply states that Comfort was serving as next friend in helping her to accomplish her desire to

file suit against the Defendants." (R.1064). Respectfully, the Complaint states "Ms. Gray [*sic*] is the next friend of Marie Ellison and has petitioned for appointment as Conservator of the Estate of Marie Ellison, in the Chancery Court of Coahoma County, Mississippi." (R.9). The only explanation stated in the Complaint as to next friend standing was that Comfort had petitioned to be the Conservator of Ellison which has been established as untrue. In fact, Comfort grossly overstates her authority in the first statement of the Complaint that she *was* the Conservator. (R.9)

The second, "necessary condition" to establishing "next friend" standing as referenced, *supra*, is a showing that "the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." *Whitmore* at 165. Ms. Ellison expressed her own competency before two witnesses the day before Comfort filed suit as her "next friend." Ms. Ellison was able to convey her wishes to an attorney to draw up her Will for her signature. That Will was ultimately determined to be valid. She had the right to have an attorney file suit on her behalf but did not do so. She had not been declared mentally incapacitated and had access to the court through legal representation; therefore, she was under no disability prohibiting her from bringing suit had she desired to do so.

The Plaintiff's argument effectively drew the Lower Court's attention away from the issue of standing to one of real party in interest when amending the Complaint. Absent standing to sue, the issue of the real party in interest has no bearing on the Motion. Defendants agreed with the Court's Order at page 3, that "...since Marie Ellison was a named party in the original complaint, she was the proper party to bring the suit." (R.1065). Marie Ellison was the proper party to bring suit, not Comfort. This comports with the 2007 decision of *Community Hospital*

of Jackson v. Goodlett, whereby it was argued that:

> ...Sarah is the *true plaintiff,* or real party in interest, and Bernadette did not obtain power of attorney over Sarah's affairs until *after* the lawsuit in the case *sub judice* was filed. Community further argues that since Sarah was never declared incompetent...We agree that only Sarah had standing to bring suit... as Bernadette, by her own sworn admission, did not have a power of attorney or any other legal authorization to act on behalf of her mother to enter into contracts or waive my mother's rights to obtain records.

Id. at *397, citing, *Owen & Galloway, L.L.C. v. Smart Corp.,* 913 So.2d 174, 178-79 (Miss. 2005).[6] Defendants have not challenged that Marie Ellison is the real party in interest. Ellison should have filed this lawsuit if that was her intention as represented by Comfort. Both parties agree standing can be raised at any time.

The Court cites *Necaise v. Sacks,* 541 So.2d 1098 (Miss. 2003), in support of its Order permitting a reasonable time for substitution of the real party in interest "...where a survival suit was brought originally by the proper party." (R.1065-66) In *Necaise,* the Plaintiff, Charles Freeman, filed his own medical negligence suit. He [Mr. Freeman] was the plaintiff and real party in interest. No person filed the original suit on his behalf. Motions to substitute the real party in interest were filed after his death and as this Court's Order noted "where a survival suit was brought *originally by the proper party."* (R.1065) (Emphasis added). In the instant matter, suit was never filed by Marie Ellison who was the proper party. Comfort lacked standing; therefore, the matter was void *ab initio.* "Rule 17(a) should not be applied blindly to permit substitution of the real party in interest in every case. . . Plaintiff must first establish that when he brought this action in his own name, he did so as the result of an honest and understandable

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[6]It is noted, Sarah Goodlett, as did Ellison, resided in a nursing home when suit was filed by her daughter.

mistake." *Wieburg v. GTE Southwest, Inc.*, 272 F.3d 302, 308 (5th Cir. 2001) (Internal citations omitted). There was no mistake when Comfort filed suit on behalf of Ms. Ellison. She had no authority by law to do so. She prematurely filed suit rather than wait until she had the legal authority to do so, either as the Conservator or a power of attorney, or otherwise.

The Lower Court's Order at page two and three discusses the Defendants failing to raise an issue of strict compliance with the notice requirements of Miss. Code Ann. § 11-1-58, and filing a Certificate of Expert Consultation. (R.1064-65) Said statute did not go into effect until January 1, ***2003***, after this suit was filed December 19, 2002.[7] No Certificate was necessary. Defendants argued to the Lower Court the case of *Community Hospital of Jackson Miss. v. Goodlett,* 968 So. 2d 391 (Miss. 2007) (rehearing denied). *Goodlett* was not cited for the issue of strict compliance with a statute that was not in effect at the time suit was filed. *Goodlett* demonstrates the identical situation of a person filing suit without obtaining the authority to do so. "Since Bernadette obtained Sarah's [the Resident's] authorization only after filing suit, Bernadette simply jumped the gun in filing suit...." *Goodlett* at *397. Comfort did not have the authority to file suit when she did. She represented no disability that Ms. Ellison was under to qualify as next friend, nor had she filed a petition to be appointed as her Conservator. Ellison conducted a legal transaction the day before in having her end of life wishes drafted in the form of a Will by an attorney. Ellison executed the document under no disability. In fact, the family of Ellison dismissed the challenge to the Will questioning Ms. Ellison's competency to execute her Will. Ellison was the only person legally entitled to file suit on her behalf December 19,

[7]This was argued before the Court as to Comfort having "jumped the gun" in filing suit - presumably in an attempt to avoid the caps on non-economic damages set to go into effect January 1, 2003.

2002.

Comfort represented that she had both petitioned to become the Conservator over the Estate of Marie Ellison and that she was the Conservator when filing suit December 19, 2002. As the docket reflects, Comfort did not file any petition with the Chancery Court of Coahoma County until six (6) months later. (R.479) She was therefore misrepresenting to the Circuit Court her authority to file suit on behalf of Ms. Ellison as she had no authority whatsoever.[8] The undisputed evidence demonstrates that Ms. Ellison was not "unable to litigate his [her] own cause due to mental incapacity, lack of access to court, or other similar disability." *Id.* The Complaint should be dismissed as void abnitio.

II. The Complaint is void from its inception. Any Amendment has no effect.

Standing is a question of law reviewed under a *de novo* standard. *Clark Sand Co., Inc. v. Kelly*, 60 So. 3d 149, 154 (Miss. 2011), citing, *Kirk v. Pope,* 973 So.2d 981, 986 (Miss. 2007) (citing *City of Picayune v. S. Reg'l Corp.,* 916 So.2d 510, 519 (Miss. 2005); *Brown v. Miss. Dep't of Human Servs.,* 806 So.2d 1004, 1005–06 (Miss. 2000)). Mississippi law is clear regarding standing to sue and be sued. The Mississippi Supreme Court previously reviewed the issue of standing in its is decision of *Delta Health Group v. Pope*, 995 So.2d 123, (Miss. 2008) (Rehearing denied). In *Pope* the Court stated:

> The record is clear that at the time of the filing of the complaint, no estate had been opened on behalf of Pope, thus Payne was not the

[8]These Defendants acknowledge the representative Plaintiff in this matter was substituted by Leroy Davis as the Conservator of Marie Ellison. The Order attached with the Amended Complaint is "an Order to Substitute the Appointment of Conservator". No Conservator had ever been appointed for which to substitute. Defendants requested a copy of the Chancery Court dockets in order to determine the status of the Will contest and the Conservatorship Estate and any accounting. Defendants noted Leroy Davis was not substituted as the Conservator but was, in fact, the first named Conservator for Marie Ellison. (R.479).

> administrator of a non-existent estate. Mississippi Code Annotated Section 91-7-233 (Rev. 2004) holds that "[e]xecutors, 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." Payne held none of the offices mentioned therein when suit was commenced.

Id. at 125-26. Although this instant matter did not involve an Estate but rather a Conservatorship estate, Comfort had no authority to act on behalf of Ms. Ellison at the time suit was filed as she was not the Conservator, nor had she petitioned to be appointed the Conservator as she alleged in the Complaint. Her actions taken as the purported Conservator of Marie Ellison are void. "The United States Supreme Court has ruled that '***standing is to be determined as of the commencement of suit***'." *Id.*, citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 571 (1992). (Emphasis supplied) The circumstances in the instant matter parallel those in *Pope*. "The fact that Payne [Comfort] subsequently was appointed as administrator [Conservator] does not change the undisputable fact that Payne [Comfort] lacked standing to *commence* the suit." *Id.* (Bracketed Material Added.) Marie Ellison was the only person with any standing to bring suit for her benefit on December 19, 2002. The Court never had jurisdiction; therefore, the matter must be dismissed. Once a Conservator was appointed for Ellison, a Motion was filed for leave to file an Amended Complaint on November 3, 2003. The Court granted Plaintiff's motion on November 18, 2003 with the Amended Complaint being filed December 8, 2003. Plaintiff moved to file the Amended Complaint pursuant to Rule 15(a) of the Mississippi Rules of Civil Procedure. The Amended Complaint cannot relate back when the original complaint is null and void. In *Tolliver ex rel. Wrongful Death Beneficiaries of Green v. Mladineo,* 987 So.2d 989, 995 -996 (Miss. Ct. App. 2007), the Mississippi Court of Appeals addressed the lack of standing

related to amendment of a complaint by the proper party. The Court found:

> Although the decedent's brother, Malone, brought the wrongful death claim within the applicable statute of limitations, his complaint lacked standing. This lack of standing " 'robs the court of jurisdiction to hear the case.'" *Pruitt v. Hancock Med. Ctr.*, 942 So.2d 797, 801 (Miss.2006) (quoting *McNair v. United States Postal Service,* 768 F.2d 730, 737 (5th Cir.1985)). Thus, any ruling on such a case is void *ab initio.* It follows, then, that an amended complaint filed in a case where the original complainant lacks standing cannot relate back to the filing of the original complaint, because a complaint cannot relate back to a nullity.

Id.

Leroy Davis was appointed Conservator July 14, 2003. The Amended Complaint was filed December 8, 2003. The Amended Complaint cannot relate back to a complaint wherein the original complainant, Comfort, lacked standing to bring suit. Plaintiff filed the Amended Complaint pursuant to Rule 15(a). Plaintiff substituted fictitious Defendants and corrected the identity of Clarksdale Nursing Center as Care Givers, LLC. What was impermissible in amending the Complaint was substituting a real party in interest when the original Plaintiff had no standing to file the suit. Comfort's filing suit was a nullity.

In *Kirk v. Pope,* 973 So.2d 981 (Miss. 2007), the Mississippi Supreme Court recognized the difference between standing and a real party in interest. Specifically, the Court found:

> Kirk correctly asserts that the trial court failed to recognize the distinction between standing and real party in interest. The trial court held that the judgment was void because the court lacked jurisdiction, finding: "Unfortunately for Kirk, the Mississippi Supreme Court has specifically held: '***Standing is a jurisdictional issue which may be raised by any party or the court at any time,' even by the appellate courts for the first time on appeal.***" (Citing *City of Madison v. Bryan,* 763 So.2d 162, 166 (Miss. 2000)). (Emphasis supplied)

Kirk at 996. Substitution of Leroy Davis as the Plaintiff on behalf of Ms. Ellison was

impermissible where the Court lacked jurisdiction over the parties. Comfort had no standing to bring suit on behalf of Marie Ellison. The Complaint filed December 19, 2002 was null and void, therefore any amendment to the Complaint would not relate back to a nullity.

Comfort's argument that the substitution was permissible under Rule 17 of the *Rules* fails as well. (*See* Rule 17 of the Mississippi Rules of Civil Procedure) In Mississippi, courts have consistently found this issue is governed by Rule 17(a), which requires that "every action shall be prosecuted in the name of the real party in interest." *Kirk v. Pope,* 973 So.2d 981, 997-98 (Miss. 2007); See *Wieburg v. GTE Southwest, Inc.*, 272 F.3d 302, 306. (5th Cir. 2001). The Court in *Wieburg, supra* noted:

> In accordance with the Advisory Committee's note, most courts have interpreted the last sentence of *Rule 17(a)* as being applicable only when the plaintiff brought the action in her own name as the result of an understandable mistake, because the determination of the correct party to bring the action is difficult. . . . *Feist* [*v. Consolidated Freightways Corp.*], 100 F.Supp.2d 273, 276 (E.D. Pa. 1999)("Rule 17(a) should not be applied blindly to permit substitution of the real party in interest in every case. In order to substitute the trustee as the real party in interest, Plaintiff must first establish that when he brought this action in his own name, he did so as the result of an honest and understandable mistake. . . .")

Kirk v. Pope, 973 So. 2d at 998. There was no mistake as to the correct party to bring an action against the Defendants. Marie Ellison was that person. Had Ellison wished to pursue a claim against these Defendants, such should have been brought in her own name as the real party in interest. Comfort had no standing whatsoever to file suit on behalf of Ellison. Marie Ellison was the only person under Mississippi law permitted to file suit on December 19, 2002. The Court lacks subject matter jurisdiction; therefore, dismissal is warranted.

Finally, The Lower Court's Order sets forth Miss. Code Ann. §15-1-69 would permit refiling of the Complaint were it to dismiss the matter. Plaintiff cannot ask the Court to make a

determination *based upon an event that has not occurred.* The issue before the Court was to determine whether the Complaint when filed was void as a matter of law, not whether the Savings Statute applies if the suit is dismissed. For argument's sake only, if dismissed, dismissal of the instant matter would not be for lack of form which would trigger the savings clause. Marie Ellison had standing to bring a lawsuit. She was not deemed incompetent nor did she lack access to the Courts. This Court addressed the issue of the Savings Clause of Miss. Code Ann. §15–1-69 in a medical malpractice case. *Arceo v. Tolliver*, 19 So. 3d 67, 74 (Miss. 2009) (Rehearing denied). In *Arceo*, the Court referenced, "The seminal case, still quoted and cited as authority, on this issue is *Hawkins v. Scottish Union & National Insurance Company,* 110 Miss. 23, 69 So. 710, 712 (1915).

> The savings clause applies to those cases duly commenced. But we do not understand that the action which was dismissed, in order to be duly commenced within the meaning of the statute, must necessarily have been commenced in a court having jurisdiction of the subject-matter. On the contrary, we think one of the designs of the statute, with which section 147 of the Constitution is in keeping, is to protect parties ***who have mistaken the forum in which their causes should be tried***, who have simply entered the temple of justice by the door on the left, when they should have entered by the door on the right.

Hawkins at 712. (Emphasis Supplied). The Circuit Court of Coahoma County would be the proper forum had Marie Ellison filed suit. Comfort, however, had no authority to file suit on behalf of Ms. Ellison. This renders the original suit void. Any Rule 17 substitution was improper, dismissal would be warranted and the savings statute would be inapplicable.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth hereinafter, a true and correct copy of the above and foregoing was sent via United States Mail, postage pre-paid to the following:

Honorable Albert B. Smith III
Coahoma County Circuit Judge
Courthouse, 200 Court Street
Cleveland, Mississippi 38732

George F. Hollowell, Jr., Esquire
Hollowell Law Firm
P.O. Drawer 1407
Greenville, Mississippi 38702-1407

Dated, this the 3rd day of January, 2012.

Marjorie S. Busching