

**BRIEF IN SUPPORT OF MOTION TO
DISMISS OR FOR SUMMARY JUDGMENT**

The separate defendant, Sparks Regional Medical Center (hereinafter "Sparks"), submits this Brief in support of its Motion to Dismiss or for Summary Judgment.

FACTS

This is a medical malpractice case arising out of the treatment of Katherine L. Brown, who died on or about July 27, 1999. On July 20, 2001, one week before the expiration of the statute of limitations, James Filyaw, as Special Administrator of the Estate of Katherine L. Brown, Deceased, filed suit against the defendants herein. On that same day, James Filyaw filed a petition with the Circuit Court of Sebastian County, Fort Smith District, Probate Division, to be named Special Administrator of the Estate of Katherine L. Brown. (See Petition for Appointment of Special Administrator, dated and file-marked July 20, 2001, a copy of which is attached to the Motion as Exhibit A.)

On July 23, 2001, the Order naming James R. Filyaw as Special Administrator was entered. (See Order Appointing Special Administrator, dated July 20, 2001 and file-marked July 23, 2001, a copy of which is attached to the Motion as Exhibit B.) Also on July 23, 2001, James R. Filyaw signed his Acceptance of Appointment as Special Administrator and the Clerk issued him Special Letters of Administration. (See Acceptance of Appointment as Special Administrator, dated and file-marked July 23, 2001, a copy of which is attached to the Motion as Exhibit C;

and Special Letters of Administration, dated July 23, 2001, a copy of which is attached to the Motion as Exhibit D.)

On August 13, 2001, an Order of Dismissal was entered, granting the plaintiff a voluntary non-suit as to Sparks. On August 9, 2002, shortly before the expiration of the year allowed by the "savings statute," ARK. CODE ANN. § 16-56-126, plaintiff filed an amended complaint reinstating this suit as to Sparks.

Defendant Sparks affirmatively pleaded the defense of expiration of the statute of limitations in its Answers to both the original and Second Amended Complaints.

DISCUSSION

Arkansas Rule of Civil Procedure 12(b) establishes as affirmative defenses the lack of jurisdiction over subject matter (12(b)(1)) and the failure to state facts upon which relief can be granted (12(b)(6)). Where a defendant moves to dismiss the Complaint pursuant to R. 12(b), the Court must "treat the facts alleged in the complaint as true and view them in a light most favorable to the plaintiff," resolve all reasonable inferences in favor of the complaint, and liberally construe all pleadings. *Davenport v. Lee*, 348 Ark. 148, 156 (2002). Dismissal is appropriate where a cause of action is barred by the statute of limitations. *Id.* at 165.

Arkansas Rule of Civil Procedure 56 allows a defendant to move for Summary Judgment at any time. Such judgment "shall be

rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." ARK. R. CIV. P. 56(c)(2). "A motion for summary judgment is appropriate when no issue of fact, properly pleaded, remains to be decided." *Walker v. Hyde*, 303 Ark. 615, 619 (1990).

TWO-YEAR STATUTE OF LIMITATIONS

The Arkansas Medical Malpractice Act, ARK. CODE ANN. §§ 16-114-201 to -209, requires that all actions for medical injury be "commenced within two (2) years after the cause of action accrues." ARK. CODE ANN. § 16-114-203(a). The three-year limitation for wrongful death actions, ARK. CODE ANN. § 16-62-102, is not applicable because:

the language of the Medical Malpractice Act provides that the act supersedes any inconsistent provisions of law, [thus] the two-year statute of limitations provided in the act applies to any claim of medical injury, regardless of whether the injured person ultimately died as a result.

Morrison v. Jennings, 328 Ark. 278, 287 (1997).

The cause of action in the present case necessarily accrued on or before the day Katherine L. Brown passed away: July 27, 1999. Calculating two years from that day, the last possible day to file a medical malpractice action based on any alleged defect in her care would have been July 27, 2001. "For purposes of tolling the statute of limitations, this court looks to the time

that the complaint was filed." *Davenport*, 348 Ark. at 158. In this case, no valid complaint was filed before the statute of limitations ran.

STANDING TO FILE WRONGFUL DEATH SUIT

The law in Arkansas is clear that every suit for wrongful death, including those caused by medical malpractice, must be brought either by the administrator of the estate or by every heir at law. The wrongful death statute states:

Every action shall be brought by and in the name of the personal representative of the deceased person. If there is no personal representative, then the action shall be brought by the heirs at law of the deceased person.

Ark. Code Ann. § 16-62-102(b). The Arkansas Supreme Court has interpreted this section to mean that where a personal representative has been appointed a wrongful death action brought by any other person, including the heirs at law of the deceased, is a nullity. *St. Paul Mercury Ins. v. Circuit Court of Craighead County*, 348 Ark. 197, 200 (2002). Similarly, where there is no personal representative, all of the heirs at law must join to prosecute the action. *Ramirez v. White County Circuit Court*, 343 Ark. 372, 381 (2001). A single heir has no standing to bring such an action. *Id.*

Since the wrongful death action is a statutory creation "in derogation of or at variance with common law, we construe the wrongful death statute strictly." *Id.* at 377 (quoting *Babb v.*

Matlock, 340 Ark. 263 (2000)). It is interpreted according to a "narrow standard" which "requires that nothing be taken as intended that is not clearly expressed." *Id.* "[A]s a cause of action created by statute, 'it only exists in the manner and form and for the time prescribed by the statutes of the State which created it.'" *Id.* at 378 (quoting *Smith v. Missouri Pac. Rd. Co.*, 175 Ark. 626 (1927)).

The Arkansas Supreme Court has indeed interpreted this statute strictly, declaring complaints that did not exactly conform to its interpretation to be a nullity. In *St. Paul*, the action was commenced by the heirs at law of the decedent, but an administrator had already been appointed. The Court held that the plaintiffs were without standing and their Complaint thus a nullity. *St. Paul*, 348 Ark. at 200. In *Davenport*, a properly appointed administrator attempted to proceed *pro se*. The Court held that such an attempt equaled the unauthorized practice of law, and therefore the Complaint was a nullity. *Davenport*, 348 Ark. at 164. In *Ramirez*, one of the decedent's three heirs filed suit. No administrator had been appointed, but since only one of the three heirs filed suit (the father of the other two heirs, who were minor children) the Complaint was a nullity. *Ramirez*, 343 Ark. at 381.

In the present case, Filyaw was not the administrator of Katherine Brown's estate when the original complaint was filed.

Nor was he her "heirs at law." Therefore, he had no standing to file suit and that complaint was a nullity.

FILYAW'S STATUS AS ADMINISTRATOR

Filyaw filed his petition to be named special administrator of the estate of Katherine L. Brown on Friday, July 20, 2001. On the same day, he filed the original Complaint in this case. The following Monday, July 23, 2001, the Order appointing him as administrator was entered, he signed his acceptance, and received the Special Letters of Administration. Regardless of how he styled himself in the caption of the Complaint, on Friday he was merely James R. Filyaw, an individual. When the Complaint was filed, James R. Filyaw, Special Administrator of the Estate of Katherine L. Brown, did not exist.

The Arkansas Supreme Court has made it abundantly clear that an order is not effective until it is filed, regardless of when it is signed. "A judgment is effective upon entry of record, which occurs when it is filed." *Bradford v. State*, 351 Ark. 394, 401 (2003); see also *Price v. Price*, 341 Ark. 311 (2000) (holding that the Court's rule that an order is effective only upon filing trumps any statute to the contrary). This is so regardless of any harsh result of the rule, such as an "ex" wife able to inherit as a spouse because the order of divorce was not entered before the husband's death. *Price*, 341 Ark. 311; *Standridge v. Standridge*, 298 Ark. 494 (1989).

Because the Probate Court did not enter its order until Monday, July 23, 2001, James R. Filyaw was not Special Administrator of the Estate until that day.

An administrator, as a legal entity, does not exist until appointed. *Storey v. Smith*, 224 Ark. 163, 165 (1954). If he does not exist as a legal entity, he cannot "sue or be sued until such time as he has received letters of administration." *Jenkins v. Means*, 242 Ark. 111, 114 (1967). Both *Storey* and *Jenkins* deal with situations where a plaintiff attempted to bring suit against an administrator before that administrator was formally appointed. The Courts' conclusions in those two cases were that because the administrators were not named at the time the Complaints were filed and Summons issued, they did not exist when the suits were commenced. Since they did not exist when the suits were commenced, even if they were appointed shortly thereafter, they could not properly be named as a parties to the suits. *Jenkins*, 242 Ark. at 114; *Storey*, 224 Ark. at 165-66. Therefore, the Complaint was a nullity and "no legal proceeding actually existed." *Storey*, 224 Ark. at 167. Where the statute of limitations had expired before the suit was properly re-filed, no subsequent amendment could save the action by relating back to the date the original action was filed. *Jenkins*, 242 Ark. 114.

The present suit is directly analogous to these two cases; the only substantive difference is that the not-yet-appointed

administrator is the putative plaintiff instead of named as a defendant. If Arkansas law prevents suit *against* one who will be, but is not yet, appointed administrator, then it surely cannot allow suit *by* such an individual. James R. Filyaw, Special Administrator of the Estate of Katherine L. Brown, did not exist on the day suit was filed in his name. Arkansas law does not permit suit by nonexistent entities, and any such attempt is a nullity.

RELATION-BACK

The plaintiff will no doubt argue that one or both of the amended complaints filed after Filyaw's appointment as administrator, but also after the statute of limitations had run, relates back to the date of the original filing pursuant to Arkansas Rule of Civil Procedure 15. Rule 15 does, indeed, allowing subsequent pleadings to relate-back under most circumstances. However, "Rule 15 is a procedural rule that controls how a party may amend existing pleadings. Before the rule can apply, there must be pleadings to amend." *St. Paul*, 348 Ark. at 204. "Rule 15 simply would not help the appellees in this case because there was no pleading to amend" when the Complaint was a nullity because of the plaintiffs' lack of standing. *Id.* An amended Complaint filed after the defect is cured (by, e.g., substituting a party who has standing, such as a legally appointed administrator, for a party who does not have standing, such as a fictitious administrator) is not considered an amended Complaint

but rather the filing of a separate lawsuit. *Id.* at 205. If the statute of limitations has expired in the meantime, then that subsequent suit is time-barred. *Id.*

The original Complaint filed by James R. Filyaw before he was appointed administrator is a nullity. He could not act as administrator before the order appointing him was filed because that legal entity did not exist, nor could he file in his own name because he had no standing as an individual. The subsequent amended Complaints were filed after the statute of limitations had run. The rules allowing relation-back "cannot apply, because the original complaint, as a nullity never existed, and thus, an amended complaint cannot relate back to something that never existed, nor can a nonexistent complaint be corrected." *Davenport*, 348 Ark. 164.

CONCLUSION

James R. Filyaw, administrator, did not exist on July 20, 2001, nor did Filyaw the individual have any legal authority to act as an administrator. Regardless, instead of waiting until the Order was entered and the Letters of Administration issued, he filed a Complaint as administrator on July 20, 2001. Arkansas law clearly does not permit a single individual to file a wrongful death suit where there are multiple heirs at law, nor does it allow a not-yet-appointed administrator to file a suit of any kind. The Complaint filed on July 20, 2001, was either filed by someone with no

standing under the wrongful death statute or by a fictitious person. As a result, that Complaint had no legal effect; it was a nullity.

If the plaintiff had filed an amended complaint after being appointed administrator but before the statute of limitations expired, such amendment could be seen as initiating a valid suit. However, the plaintiff did not do that. The subsequent amendments were after July 27, 2001, cannot relate back to the original Complaint because it was a nullity, and therefore this action was not validly initiated before the expiration of the statute of limitations. Any "harsh result" to the plaintiff is a result of his own disregard for the well-established law in this state, and is his own fault.

Because no valid Complaint was filed before July 27, 2001, the cause of action was not commenced before that date and the statute of limitations was not tolled. This suit is therefore time-barred, and should be dismissed. In the alternative, the defendant Sparks Regional Medical Center is entitled to Summary Judgment as a matter of law.

Sparks Regional Medical Center respectfully requests the Court to grant its Motion to Dismiss the Complaint of the plaintiff, James R. Filyaw, Special Administrator of the Estate of Katherine L. Brown, as being time-barred; or, in the alternative, to enter Summary Judgment in its favor, dismissing the Complaint of the plaintiff James R. Filyaw, Special Administrator of the Estate of

Katherine L. Brown, with prejudice; and for costs and all proper relief.