

**IN THE COURT OF APPEALS OF TENNESSEE  
AT JACKSON**

**KRISTOPHER MCMICKENS,**

Plaintiff/Appellee,

v.

Case No. W2022-04455-COA-R3-CV

**VINCENT J. PERRYMAN, AS  
ADMINISTRATOR OF THE ESTATE  
OF ALFRED G. FARMER,**

Defendant/Appellants.

*Rule 3 Appeal from the Final Judgment of the  
Circuit Court for Shelby County, Docket No. CT-002948-17, Division VI*

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**BRIEF OF APPELLEE  
KRISTOPHER MCMICKENS**

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Ethan D. Sandifer, Esq.  
Attorney for Appellee  
John Michael Bailey Injury Lawyers  
5978 Knight Arnold Road, Suite 400  
Memphis, Tennessee 38115  
(901)529-1111

**[Oral Argument Waived]**

## I. TABLE OF CONTENTS

I. TABLE OF CONTENTS _____	ii
II. TABLE OF AUTHORITIES _____	v
III. STATE OF THE ISSUES PRESENTED FOR REVIEW _____	vi
IV. STATEMENT REGARDING RECORD CITATIONS _____	vii
V. APPLICABLE STANDARDS OF REVIEW _____	viii
VI. STATEMENT OF FACTS _____	9
VII. ARGUMENT _____	13

**A. The Trial Court erred in its ruling that the original lawsuit filed on July 17, 2017, was filed against a known non-entity, i.e. John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased. Even after a proper Administrator *ad Litem* of the Estate of Alfred G. Farmer, Deceased was appointed, Plaintiff never served J. Vincent Perryman, the Administrator. Instead, served the secretary, Tonya Wooden, of J. Vincent Perryman.**

1. Plaintiff asserts that no estate had been opened and no administrator had been appointed. On January 31, 2018, J. Vincent Perryman was appointed as the Administrator *ad Litem* of the Estate of Alfred G. Farmer. On February 13, 2018, a process server went to Mr. Perryman's law office to serve him with the Summons and Original Complaint. Ms. Tonya Wooden, Mr. Perryman's secretary, called Mr. Perryman to confirm that she had authority to accept service on his behalf. After receiving confirmation to accept service from Mr. Perryman, Ms. Wooden accepted service of process on his behalf.

**B. The Trial Court erred in its ruling that the filing of the Amended Complaint naming J. Vincent Perryman as well as Titanium, LLC and “Larson” did not toll the statute of limitations when service was not issued within one (1) year.**

1. Plaintiff asserts that the naming of Titanium, LLC and “Larson” were merely misnomers in the Amended Complaint.
2. Titanium, LLC and “Larson” were not parties to this suit and therefore it was not necessary to issue service of process serving non-parties to the suit.

**C. The Trial Court erred in its ruling that Plaintiff’s Amended Complaint did not relate back to the original Complaint and did not toll the statute of limitations since it was filed against an entity that did not exist at the time of filing and was never personally served with process.**

1. Plaintiff filed the original Complaint and service was issued to toll the statute of limitations. The Administrator *ad Litem* was appointed beyond the statutory time statute of limitations for which the statute of limitations is tolled for a period between death and the appointment of a personal representative, up to six months, following death. Plaintiff did not have the benefit of the saving statute since 1) the original Complaint was filed against a non-entity and 2) the Administrator *ad Litem* was not appointed until six (6) months after the statutory limit.
2. J. Vincent Perryman had notice of the suit prior to the expiration of the statute of limitations. J. Vincent Perryman was served with the original Complaint on February 13, 2018, thereby giving him timely notice of the suit before the running of the statute of limitations.

3. Tenn. Rule 15.03 requires that when a party is sought to be [A] party sought to [be] added by amendment must receive notice of the lawsuit before the limitation period expires, in order for the amendment to relate back to the filing of the complaint.

VIII. CONCLUSION \_\_\_\_\_ 18

CERTIFICATE OF SERVICE

## II. TABLE OF AUTHORITIES

### Cases

<i>Altman v. Third National Bank</i> , 30 Tenn. App. 81, 88, 203 S.W. 2d. 701, 704 (1947)	13
<i>Rose v. Third National Bank</i> , 27 Tenn. App. 553, 564-65, 183 S.W. 2d 1,5-6 (1944)	13
<i>Leglue v. Clarsville Dept. of Electricity</i> , 944 S.W.2d 364 (1995)	13
<i>Blanchard v. Terry &amp; Wright, Inc.</i> , 331 F.2d 467, 469 (6 <sup>th</sup> Cir. 1964), <i>cert. denied</i> , 379 U.S. 831, 85 S. Ct. 62, 13 L.Ed.2d 40(1964)	13, 14
5C. Wright & A. Miller, <i>Federal *366 Practice and Procedure</i> § 1321 at 460-61 (1969)	13, 14
<i>Tyrolf v. Veterans Administration</i> , 82 F.R.D. 372, 374-75 (E.D. La. 1979)	13, 14
<i>Greenwood v. Ross</i> , 778 F.2d 448, 452 (8 <sup>th</sup> Cir. 1985)	14
<i>Goss v. Hutchins</i> , 751 S.W.2d 821 (Tenn. 1988)	15
<i>Duke v. Replogle Enterprises</i> , 891 S.W. 2d 205 (Tenn. 1994)	16

### STATUTES AND RULES

Tenn. R. Civ. P. 10.01	13
Tenn. R. Civ. P. 15.03	15, 16
Tenn. Code Ann. § 28-3-104	13, 14
Tenn. Code Ann. § 28-1-110	13, 14

### **III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

Pursuant to Tenn. R. App. P. 27(b), Mr. McMickens submits his own competing statement of the issues. Further, Plaintiff submits the Declaration of J. Vincent Perryman filed in the Disciplinary District IX of the Board of Professional Responsibility of the Supreme Court of Tennessee. Docket No. 2020-3108-0-JB.

#### **Mr. McMickens Issues as Plaintiff/Appellant**

1. The Trial Court erred in its ruling that the original lawsuit filed on July 17, 2017, was filed against a known non-entity, i.e. John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased. Even after a proper Administrator *ad Litem* of the Estate of Alfred G. Farmer, Deceased was appointed, Plaintiff never served J. Vincent Perryman, the Administrator. Instead, served the secretary, Tonya Wooden, of J. Vincent Perryman.
2. The Trial Court erred in its ruling that the filing of the Amended Complaint naming J. Vincent Perryman as well as Titanium, LLC and “Larson” did not toll the statute of limitations when service was not issued within one (1) year.
3. The Trial Court erred in its ruling that Plaintiff’s theory of relation back to the original Complaint does not toll the statute of limitations since it was filed against an entity that did not exist at the time of filing and was never personally served with process.

#### **IV. STATEMENT REGARDING RECORD CITATIONS**

Mr. McMickens' brief uses the following designations when citing to the record:

1. Citations to the technical record are abbreviated as "R. at (page number)".
2. The transcript of the Parties' Vincent J. Perryman's as Administrator of the Estate of Alfred G. Farmer Motion to Dismiss, is cited as "Transcript at p. (page number) (line number)".
3. The transcript of the Parties' Plaintiff's Motion to Amend/Alter -FG, is cited as "Transcript -F at p. (page number) (line number)".

McMickens' citations and caselaw citations are footnoted throughout Mr. McMickens' brief, except where including a citation in the body of the brief improves clarity.

## V. APPLICABLE STANDARDS OF REVIEW

The following standards of review govern this appeal:

1. The Trial Court's Order granting Defendant's Motion to Dismiss is reviewable de novo with no presumption of correctness.<sup>1</sup>

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<sup>1</sup> *Benito T. Perez, Jr. v. Aetna Life Insurance Company*, 96 F3d. 813, U.S. COA 6<sup>th</sup> Cir. 95-111 (1996). Denials of motions to alter or amend judgment are typically reviewed for abuse of discretion: however, where appeal of denial of such motion is conjoined with appeal from summary judgment motion should be employed in reviewing motion to alter or amend. Fed. Rules Civ. Proc. Rules 56, 59E, 28 U.S.C.A. An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. *Northshore Corridor Association v. Knox County*, No. E2020-00573-COA -R3-cv, 633 S.W. 3d. 561 (Tenn. 2021).

## VI. STATEMENT OF FACTS

The procedural history of the case is complex. Mr. Mickens was previously represented by Attorney Daryl A. Gray. On December 3, 2016, Mr. McMickens was involved in a motor vehicle collision with Alfred G. Farmer. Alfred G. Farmer was 100% at fault for the motor vehicle collision. Mr. Farmer died from the injuries he sustained from the collision. Mr. McMickens, by and through Attorney Daryl Gray, filed a Complaint on July 12, 2017, in which he sought to sue, “John Doe”, as Administrator of the Estate of Alfred G. Farmer, Deceased. At that time, no estate had been established for Alfred Farmer and no administrator had been appointed. Plaintiff avers that he sued who he had available, which was John Doe. Doe signifies that it is used as a placeholder when a party is unknown. Once a party was known, Plaintiff changed the Complaint to sue that party, that party being J. Vincent Perryman.

Attorney Daryl Gray contacted J. Vincent Perryman to file a petition requesting appointment as Administrator *ad litem*. J. Vincent Perryman filed his petition for appointment on January 31, 2018, in the Probate Court of Shelby County, *In re: The Estate of Alfred George Farmer*, Docket No. PR-10506. The petition for appointment requested that the Probate Court appoint him “as Administrator *ad litem* of the Estate of Alfred George Farmer, Deceased, for the sole purpose of serving as a nominal defendant and accepting service of process in a cause of action in tort against the Estate [.]” *Id.* The tort action referenced in the petition for appointment was *Kristopher McMickens v. John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased*, CT-002948-17, in which Attorney Gray represented the plaintiff.

On January 31, 2018, the probate court entered its Order Appointing Administrator *ad Litem* for Cause of Action Only (“order of appointment”) for the sole purpose of serving as a

nominal defendant and accepting service of process in a cause of action tort against the Estate, pursuant to Tenn. Code Ann. § 20-5-103[.]

J. Vincent Perryman was appointed as the administrator ad litem of the estate of Alfred Farmer. On February 13, 2018, Plaintiff, by and through Attorney Daryl Gray, served the original Complaint on John Doe, serving Ms. Tonya Wooden, secretary for J. Vincent Perryman.

To correct the original Complaint and recognizing the error, Plaintiff filed an Amended Complaint, seeking to add J. Vincent Perryman as the administrator of the estate and real party in interest in personal injury in the personal injury action brought against Alfred Farmer. In the body of the Amended Complaint, Plaintiff inadvertently asserted claims against Titanium Transportation, LLC and someone named, "Larson". Process was never issued as to the Amended Complaint. The assertion of claims against Titanium Transportation, LLC and Larson were clearly flaws of the Amended Complaint. Titanium Transportation and Larson were not parties to the suit and therefore service of process was not issued for perfection of service to them.

On June 4, 2019, Defendant filed a Motion to Dismiss claiming insufficiency of process, jurisdiction and statute of limitations. On June 26, 2019, and June 27, 2019, Mr. Gray filed a Motion to Withdraw as Counsel of Record with a proposed order but did not set the motion to be heard by the Court.

Plaintiff, through Mr. Gray filed an Opposition to Defendant's Motion to Dismiss on July 29, 2019. After a hearing on the Motion to Dismiss, the Court issued an Order granting the Motion to Dismiss on September 18, 2019. The Court ruled:

"[T]he statute of limitations has run on this case, as the original lawsuit filed on July 12, 2017, was filed against a known non-entity, i.e. John Doe as Administrator *ad Litem* of the Estate of Alfred G. Farmer, Deceased. Even after a proper

*Administrator ad Litem* of the Estate of Alfred G. Farmer, Deceased, was appointed, Plaintiff never served J. Vincent Perryman, the Administrator. Instead, the secretary of J. Vincent Perryman was served with process, with no reason given whether the secretary was the agent for service of process of Mr. Perryman or why Mr. Perryman was not personally served.”

On October 18, 2019, Plaintiff, timely filed a Motion to Alter or Amend the Order granting The Motion to Dismiss. The Plaintiff raised two arguments in the Motion to Alter or Amend (1) the Court erred as a matter of law when it ruled Plaintiff had not properly served Mr. Perryman through his secretary, Ms. Wooden and (2) the Court erred when it found that the Amended Complaint did not relate back to the original Complaint.

At a hearing on Defendant’s Motion to Dismiss, Plaintiff raised the Relation-Back Doctrine. His argument was that his all three (3) elements necessary to meet the burden were present in the instant case. <sup>2</sup>First –the Complaint whether discussing May 2018 or July 2017, applies to the transaction that was originally complained of. There was no dispute that this matter involved a car accident and there was no new action or new facts. Second—there was some notice of action on the proper party before the cause of action would have expired.<sup>3</sup> Even in the brief of defendant, they acknowledged that there was some notice, whether it was through the 2017 or the February 2018 about the action and in May, that the estate was being sued. Third, a representative of J. Vincent Perryman was served.<sup>4</sup>

Defendant argued that the original Complaint was void because it sued something that did not exist. Thereafter, the Trial Court issued a written Order that expressly addressed that the statute

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<sup>2</sup> FG p (4) l(25)

<sup>3</sup> FG p(5) l(7-9)

<sup>4</sup> FG p(8) l(1-5)

of limitations had run on this case, as the original lawsuit filed on July 12, 2017, was filed against a known non-entity, i.e. John Doe as Administrator of the Estate of Alfred G. Farmer, Deceased. Even after a proper Administrator *ad Litem* of the Estate of Alfred G. Farmer was appointed, Plaintiff never served J. Vincent Perryman, the Administrator. Instead, the secretary of J. Vincent Perryman was served with process, with no reason given whether secretary was the agent for the services of process of Mr. Perryman or why Mr. Perryman was not served personally.

Finally, since the original Complaint was not properly served on the correct Defendant and the proper Defendant was not ever served, the Court ruled that the one (1) year statute of limitations had run on the original Complaint, even if the tolling statute of T.C.A. 28-1-110 is considered and factored into that time period. Plaintiff's theory of relation back did nothing to toll the statute of limitations when the original Complaint was filed against an entity that did not exist at the time of filing as was never personally served with process.

## VII. ARGUMENT

1. **The Trial Court erred in its ruling that the original lawsuit filed on July 12, 2017, was never properly served.**

Defendant filed a Motion to Dismiss and in his Memorandum in Support of Motion to Dismiss Defendant argues that Plaintiff's statute of limitations ran on June 3, 2018. Albeit the statute of limitations for personal injury is one year pursuant to T.C.A. § 28-3-104, T.C.A. § 28-1-110 grants that when the alleged tortfeasor dies, the statute of limitations will toll for a period between death and the appointment of a personal representative, up to six months, following death. In this case, Alfred Farmer died in the accident on December 3, 2016. A personal representative was not appointed within six months of that date. The one-year statute of limitations was tolled for the first six months, or until June 3, 2017. Plaintiff asserts that he filed the suit timely and served it on the proper defendant on February 13, 2018.

The rule in Tennessee before the adoption of the Tennessee Rules of Civil Procedure was that the failure to correctly identify a defendant in the caption was not a fatal defect if the bill itself stated a cause of action against the defendant. *See Altman v. Third National Bank*, 30 Tenn. App. 81, 88, 203 S.W. 2d. 701, 704 (1947); *Rose v. Third National Bank*, 27 Tenn. App. 553, 564-65, 183 S.W. 2d 1,5-6 (1944). The adoption of the Tennessee Rule of Civil Procedure has not changed this rule. Although Rule 10.01 requires the caption of a complaint to name all parties, this is merely a technical requirement. *See Leglue v. Clarsville Dept. of Electricity*, 944 S.W.2d 364 (1995) *Blanchard v. Terry & Wright, Inc.*, 331 F.2d 467, 469 (6<sup>th</sup> Cir. 1964), *cert. denied*, 379 U.S. 831, 85 S. Ct. 62, 13 L.Ed.2d 40(1964); 5C. Wright & A. Miller, *Federal \*366 Practice and Procedure* § 1321 at 460-61 (1969). The caption requirement of Rule 10 is merely for identification purposes and does not control who is a party in the action. *Greenwood v. Ross*, 778 F.2d 448, 452 (8<sup>th</sup> Cir.

1985); *Blanchard v. Terry Wright, Inc.*, *supra*, at 469; 5 C. Wright & A. Miller *supra*, at 458-59. The issue of who is a proper party defendant must be determined from the allegations of the complaint. *Tyrolf v. Veterans Administration*, 82 F.R.D. 372, 374-75 (E.D. La. 1979); 5 C. Wright & A. Miller, *supra*. An examination of the complaint filed in the first action reveals that a suit against the decedent's representative was intended by Plaintiff.

Plaintiff's position is that the defendant was properly served on February 13, 2018. Defendant argues that Plaintiff's statute of limitations ran on June 3, 2018. Albeit the statute of limitations for personal injury is one year pursuant to T.C.A. § 28-3-104, T.C.A. § 28-1-110 grants that when the alleged tortfeasor dies, the statute of limitations will toll for a period between death and the appointment of a personal representative, up to six months, following death. In this case, Alfred Farmer died in the accident on December 3, 2016. A personal representative was not appointed within six months of that date. The one-year statute of limitations was tolled for the first six months, or until June 3, 2017. Plaintiff asserts that he filed the suit timely and served it on the proper defendant on February 13, 2018.

Defendant's position is that the initial Complaint filed is void and a nullity. Re-asserting language from the Tennessee Supreme Court in *Goss v. Hutchins*, 751 S.W.2d 821 (Tenn. 1988) where a suit was filed against the defendant named as the "Estate of Myrtle Hutchins", the filing of the second suit, the "Estate of Annie Myrtle Hutchins" was primarily involved the application of the savings statute, and the Court, after determining that the estate was not a proper party defendant, reached the issue of "whether plaintiffs sued the personal representative of the Hutchins estate in the first lawsuit, filed on 1 October 1981 so that the second suit was timely filed by virtue of the savings statute". *Id.* at 824. In this instant matter, similarly to that in *Hutchins*, defendant argued that an estate is not a proper party to be sued because it is not a legal entity, that an action

brought against an estate is a complete nullity and since the action is a complete nullity, the savings statute cannot be used to avoid the statute of limitations because there is nothing to save. Plaintiff filed the lawsuit timely and served it upon Defendant on February 13, 2018.

**2. The Trial Court erred in its ruling that the filing of the Amended Complaint naming J. Vincent Perryman as well as Titanium, LLC and “Larson” did not toll the statute of limitations when service was not issued within one (1) year.**

The Tennessee Supreme Court added the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a misnomer or other similar mistake concerning the identity of the property party, the action would have been brought against him. Except as above specified, nothing in this rule shall be construed to extend any period of limitations governing the time in which any action may be brought. In this instance, J. Vincent Perryman and the Estate were not prejudiced by the omission of his name as personal representative in the caption of the original Complaint. Therefore, the original Complaint was timely filed.

**3. The Trial Court erred in its ruling that Plaintiff’s theory of relation back to the original Complaint does not toll the statute of limitations since it was filed against an entity that did not exist at the time of filing and was never personally served with process.**

*Goss v. Hutchins, supra*, the Court considered whether Rule 15.03 would prevent relation back when there was merely a misnomer as to the party defendant and proper service was made even after the running of the statute of limitations. Tennessee Supreme Court resolved the question

in *Duke v. Replogle Enterprises*, 891 S.W. 2d 205 (Tenn. 1994). The Court, in affirming the trial court's dismissal of the action stated:

[A] party sought to [be] added by amendment must receive notice of the lawsuit before the limitation period expires, in order for the amendment to relate back to the filing of the complaint.

In the instant case, J. Vincent Perryman had notice of the suit prior to the expiration of the statute of limitations. J. Vincent Perryman was served with the original Complaint on February 13, 2018, thereby giving him timely notice of the suit before the running of the statute of limitations. Plaintiff merely filed an Amended Complaint in an effort to correct an error. This filing did not absolve defendant of proper service. In the case at bar, it is noted that summons directs the sheriff to serve John Doe Administrator of the Estate of Alfred G. Farmer, Deceased through their Attorney of Record: J. Vincent Perryman, 4719 Spottswood, Memphis, TN 38117. Plaintiff served the summons and the original complaint on Tonya Wooden, who accepted service on behalf of J. Vincent Perryman on February 13, 2018. J. Vincent Perryman had prior notice of the suit. He had received such notice of the institution of the action and was not prejudiced in maintaining his defense on the merits and he knew or should have known that, but for a misnomer or other similar mistake concerning the identity of the proper party, the action was against him as the representative of the Estate of Alfred G. Farmer. Pursuant to Tenn. Rule 15.03, the Relation Back Doctrine does apply as service was proper. Plaintiff filed an Amended Complaint, which was flawed, but the proper party was noticed. The filing of the Amended Complaint was for the purposes of correcting issues in the original Complaint once an Administrator had been identified. Pursuant to Rule 150.3, the service of process was served before the expiration of statutory limitations.

Plaintiff filed a Motion to Alter or Amend asserting that the amending of the complaint should have related back to the initial service portion so long as there was not prejudice to the defendant.<sup>5</sup> At a hearing on the Motion to Alter or Amend, Plaintiff refers to a declaration filed in August 2021 by J. Vincent Perryman, under oath, that he had given authority to his secretary to accept service on his behalf.<sup>6</sup> The only party that would be prejudiced was Plaintiff by dismissing this instant case. The Trial Court denied Plaintiff's Motion to Alter or Amend.

Plaintiff's Motion to Alter or Amend should have been granted based on the timeliness of serving the original Complaint on J. Vincent Perryman on February 13, 2018. Therefore, the relation back doctrine is applicable and Defendant's Motion to Dismiss should be denied.

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<sup>5</sup> Transcript p(4) l(1-5)

<sup>6</sup> Transcript p(4) l(17-20)

### VIII. CONCLUSION

For the foregoing reasons, the Trial Court's judgment dismissing the underlying action should be vacated and remanded allowing Plaintiff to move forward in his claim of personal injuries against J. Vincent Perryman and the Estate of Alfred G. Farmer.

Respectfully submitted,



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Ethan D. Sandifer, TN Bar No. 35310  
John Michael Bailey Injury Lawyers  
5978 Knight Arnold Rd., Suite 400  
Memphis, TN 38115  
*Attorney for Appellee*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing document has been served upon :

Russell Rutledge

Attorney for Defendant/Appellant

5350 Poplar Ave., Suite 306

Memphis, TN 38119

[Insert Attorney's Name/Address and Indicate Attorney for Appellant or Appellee]

by placing the same, postage prepaid in the United States Mail on this the 21 day of October, 2022.

  
\_\_\_\_\_  
[Signature]

5978 Knight Arnold, Ste. 400

Memphis, TN 38115

[Party's address]

[Indicate here if acting *pro se*]