

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

KRISTOPHER MCMICKENS

Appellant,

vs.

NO.: W2022-00445-COA-R3-CV

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

Appellee.

*Rule 3 Appeal from the final Judgment of
the Circuit Court of Shelby County, Docket No.: CT-002948-17 (Div. VI)*

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

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Oral Argument Requested

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STATEMENT OF ISSUES PRESENTED ON APPEAL

Plaintiff/Appellant's appeal presents two issues for review for the court. First, whether the Plaintiff/Appellant can rely upon a Complaint filed against a non-existing entity to satisfy the requirements of T.C.A. §20-5-103, T.C.A. §30-1-109, and the application of the Statute of Limitations as extended by T.C.A. §28-1-110. Second, whether the Trial Court abused its discretion in denying Plaintiff/Appellant's Motion to Alter or Amend Judgment when it found Plaintiff/Appellant had failed to provide new information sufficient to require relief from judgment under Tennessee Rule of Civil Procedure 59 as it related to the Court's prior Order of Dismissal.

Defendant/Appellee contends that Plaintiff/Appellant's issues for review are without merit and are not based upon a proper reading of the record, the applicable statutes, and/or pertinent caselaw and requests the Appeal be dismissed and Appellee be awarded attorney's fees incurred for the appeal.

STATEMENT OF THE CASE

The instant appeal arises out of an automobile accident tort case. The case was dismissed upon motion by the Defendant/Appellee. As the procedural history of the case and timeline of events are central to the issues on appeal as to the granting of the motion to dismiss, they will be set out as follows:

December 3, 2016 – The parties were involved in an automobile accident. Defendant/Appellee Farmer dies in accident. (R. Vol. 1, p. 1-9)

July 12, 2017 – The initial Complaint was filed by Plaintiff/Appellant against “John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased”. (R. Vol. 1, p. 1-9)

July 12, 2017 - A summons was issued for “John Doe, Administrator of the Estate of Alfred G. Farmer, Deceased”. (R. Vol. 1, p. 11)

July 19, 2017 – The summons was returned unserved with the notation from the Sheriff that John Doe did not exist. (R. Vol. 1, p. 12)

January 31, 2018 – A Petition to appoint Administrator ad Litem for the Estate of Alfred G. Farmer was filed (R. Vol. 1, p. 87-90) at the behest and arrangement with counsel for Plaintiff/Appellant. (R. Vol. 1, p.86) ¹

¹ Reference to Plaintiff/Appellant’s counsel throughout this brief refers to Plaintiff/Appellant’s original counsel in this case. A conflict of interest arose during the representation in this case resulting in disciplinary proceedings, an ongoing malpractice lawsuit, and the ultimate withdrawal of that counsel. Any reference to the actions or inactions of counsel or Plaintiff/Appellant are not attributable to Plaintiff/Appellant’s present counsel.

January 31, 2018 – The Probate Court of Shelby County entered its order appointing J. Vincent Perryman as Administrator ad Litem. (R. Vol. 1, p. 91-93)

February 8, 2018 – A summons directed to “John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased, through their attorney of record J. Vincent Perryman” was filed by Plaintiff/Appellant. (R. Vol. 1, p. 14)

February 14, 2018 – The summons was returned indicating service on Perryman, through his secretary Tanya Wooden. The Complaint served upon Perryman’s office was the original Complaint filed on July 12, 2017, against John Doe. (R. Vol. 1, p. 14-15)

May 25, 2018 – A Complaint made out against “Vincent J. Perryman, as Administrator of the Estate of Alfred G. Farmer, the Deceased” was filed by Plaintiff/Appellant. No process for this Complaint has been issued or served. (R. Vol. 1, p. 17-25)

April 29, 2019 – Plaintiff/Appellant filed a complaint with the Tennessee Board of Professional Responsibility regarding the representation by his counsel in this matter. (R. Vol. 1, p. 78)

June 4, 2019 – Defendant/Appellee filed its Motion to Dismiss primarily on the basis that no valid Complaint was filed which would fall within the applicable statute of limitations. (R. Vol. 1, p. 26-27; Vol. 2, transcript of proceedings p. 3, l. 5 – p. 4, l. 9)

June 26, 2019 – Plaintiff/Appellant’s counsel filed a Motion to Withdraw because of a conflict of interest with Plaintiff/Appellant. However, this motion was not set for hearing by counsel. (R. Vol. 1, p. 48-49)

July 29, 2019 - Plaintiff/Appellant filed a response to the Motion to Dismiss. (R. Vol. 1, p. 51-57)

September 18, 2019 – The trial court enters its Order granting the Motion to Dismiss.

October 18, 2019 – Plaintiff/Appellant files a Rule 59 Motion to Alter or Amend Judgment alleging the unserved May 25, 2018, Complaint should relate back to the original filing of the John Doe Complaint. (R. Vol. 1, p. 61-63)

October 19, 2019 – Plaintiff/Appellant files his supporting Memorandum for the Motion to Alter or Amend which only argues that the secretary for Perryman had “apparent authority” to accept service of the original John Doe Complaint. (R. Vol. 1, p.64-65)

The Motion to Alter or Amend was abandoned Plaintiff/Appellant, not set for hearing, and the case was closed. However, the court in 2021 sua sponte contacted the parties to dispose of the Motion to Alter or Amend.

July 21, 2021 – Counsel for Plaintiff/Appellant filed an Amended Motion to Withdraw based on the ongoing conflict of interest with the Plaintiff. (R. Vol. 1, p.67-68)

August 11, 2021 – Defendant/Appellee filed its Memorandum in opposition to the Motion to Alter or Amend. (R. Vol. 1, p.70-76)

August 13, 2021 – Plaintiff/Appellant filed his supplemental brief in support of the Motion to Alter or Amend, including, for the first time, support for the claim of authority of Perryman’s secretary to accept service in the form of a declaration submitted in a disciplinary hearing against Plaintiff/Appellant’s counsel (R. Vol. 1, p.77-82)

August 17, 2021 – Plaintiff/Appellant filed a copy of the declaration filed in the disciplinary hearing against Plaintiff/Appellant’s counsel. (R. Vol. 1, p.83-85)

January 24, 2022 – The trial court entered its Order granting counsel for Plaintiff/Appellant’s Motion to Withdraw. (R. Vol. 1, p. 94-95)

March 11, 2022 – The trial court heard arguments (with Plaintiff/Appellant’s present counsel) and entered its Order Denying Plaintiff/Appellant’s Motion to Alter or Amend. (R. Vol. 1, p.96-97; R. Vol. 3)

April 8, 2022 - Notice of Appeal filed. (R. Vol. 1, p.100-101)

STATEMENT OF FACTS

Appellee submits that Plaintiff/Appellant's Statement of Facts regarding this case includes assertions of facts which are not supported in the record. Plaintiff/Appellant states that Alfred Farmer was 100% at fault for the motor vehicle collision. That has yet to be determined and is otherwise not relevant to the issues on appeal. Defendant/Appellee does not take issue with the remaining Statement of Facts in the Plaintiff/Appellant's brief which are substantially covered in Defendant/Appellee's Statement of the Case and references to the record therein.

SUMMARY OF ARGUMENT

Tennessee law requires that when a potential defendant dies prior to the filing of an action against them, a personal representative for the deceased's estate is the only proper party defendant and that personal representative must exist prior to the filing of suit. To qualify for the extended statute of limitations provided under T.C.A. §28-1-110, suit must be properly commenced against that existing personal representative of the estate pursuant to T.C.A. §20-5-103. Plaintiff/Appellant's original July 2017 Complaint sued a non-existent entity and not a proper party defendant. Therefore, that initial Complaint has no legal effect and did not commence an action. Plaintiff/Appellant's May 2018 Complaint, misnomers notwithstanding, did attempt to name a proper, existing personal representative of the estate. However, due to Plaintiff/Appellant's failure to ever issue process for this Complaint, Plaintiff/Appellant did not commence his action pursuant to Tennessee Rule of Civil Procedure 3 and has, therefore, not commenced an action within the applicable statute of limitations.

ARGUMENT

I. Standard of Review

The Court of Appeals reviews the denial of a Tenn. R. Civ. P. 59.04 motion to alter or amend under an abuse of discretion standard. Chambliss v. Stohler, 124 S.W.3d 116, 120 (Tenn. Ct. App. 2003), citing Schaefer v. Larson, 688 S.W.2d 430, 433-34 (Tenn. Ct. App. 1985). A court is said to abuse its discretion "when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an

application of the correct legal standards to the evidence found in the record.” Armbrister v. Armbrister, 414 S.W.3d 685, 692-93 (Tenn. 2013) (quoting Eldridge v. Eldridge, 42 S.W.3d 82, 88 (Tenn. 2001)).

The determination of whether the trial court erred in granting or denying a motion to dismiss is a question of law. Doe v. Cath. Bishop for Diocese of Memphis, 306 S.W.3d 712, 717 (Tenn. Ct. App. 2008) The Court of Appeals would review the trial court’s ruling on a Tenn. R. Civ. P. 12 motion de novo. Id.

II. Failure to commence an action against a presently existing personal representative of an estate requires dismissal of an action for failure to comply with T.C.A §20-5-103.

This court has previously addressed substantially similar issues as to those of this appeal in the case of Algee v. Craig, 2020 Tenn.App. LEXIS 137 (Tenn. Ct. App. March 31, 2020) *application for cert. denied*, 2020 Tenn. LEXIS 329 (Tenn. July 23, 2020) In Algee, the Plaintiff had filed suit against David Craig, as personal representative of the Estate of Nancy Craig, on September 24, 2018. Algee at *2. This was one day shy of a year after the September 25, 2017, automobile accident which was the subject of the lawsuit. Id. David Craig had been appointed the personal representative of the estate of Nancy Craig on February 22, 2018, after Nancy Craig died on January 21, 2018. Id. However, David Craig was released of his duties as personal representative when the estate was closed by the probate court on July 13, 2018, two (2) months prior to Algee’s filing suit. Id. In that case, this Court found that at the time suit was filed, David Craig was not the personal representative of

the estate and, therefore, the suit was filed against an improper party and not properly commenced. The court addressed the issue and stated:

[T.C.A. §20-5-103] is abundantly clear. The cause of action survives only against the personal representative of the tortfeasor [sic] or wrongdoer. At common law, no cause of action existed against a deceased tortfeasor for personal injury. The cause of action abated at the time of death. Since the statute defines the exclusive remedy and the steps to be taken to secure it, those steps must be strictly followed. The action available under the statute may only be instituted against the personal representative of the tort-feasor [sic]. The law protects an injured person from the possibility that no estate is opened for the tortfeasor by allowing the injured person to petition the chancery court to appoint an administrator for the limited purpose of serving as the defendant in the lawsuit. Algee at *6, quoting Vaughn v. Morton, 371 S.W.2d 116, 120 (Tenn. Ct. App. 2012).

This court recognized that the failure to strictly follow the requirement of Section 20-5-103 by naming an existing personal representative was fatal to the survivability of the action. Algee *7, citing Vaughn at 120-21 and Brooks v. Garner, 254 S.W.2d 736, 737 (Tenn. 1953)

The same is true in this case.

III. Dismissal of Plaintiff/Appellant's case was proper as it is barred by the Statute of Limitations because Plaintiff/Appellant has not commenced an action against an existing personal representative of the Estate of Farmer.

A. Plaintiff/Appellant's statute of limitations ran June 3, 2018.

The accident at issue in this case occurred on December 3, 2016. The statute of limitations for personal injury is one year under T.C.A. §28-3-104. However, T.C.A. §28-1-110 grants that when the alleged tortfeasor dies, the statute of limitations will toll for the 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 6 months of that date, so the one-year statute of limitations was tolled for the first 6 months, or until June 3, 2017. Therefore, the statute began to run on June 3, 2017, and it would have expired on June 3, 2018. Suit must have been properly commenced on or before that date. *See Putnam v. Leach*, 572 S.W.3d 605 (Tenn. Ct. App. 2018)

B. T.C.A. §20-5-103 must be strictly construed and requires suit be filed against an existing personal representative of the estate with personal service of same.

At common law, the Plaintiff/Appellant's cause of action would have abated with the death of the alleged tortfeasor prior to the filing of suit. T.C.A. §20-5-103, also known as the survival statute, preserves such a cause of action in derogation of common law. Therefore, in preserving the cause of action and creating a specific remedy and steps to be taken,

those steps provided **must be strictly followed**. Vaughn v. Morton, 371 S.W.2d 116, 120 (Tenn. Ct. App. 2012) (emphasis added), quoting Brooks v. Garner, 254 S.W.2d 736, 737 (Tenn. 1953). The survival statute requires that the action against the deceased tortfeasor be filed against the personal representative of the tortfeasor. *See* T.C.A. §20-5-103, T.C.A. §30-1-109, and Goss v. Hutchins 751 S.W.2d 821, 824 (Tenn. 1988).

C. The initial Complaint did not commence an action and cannot be relied upon for purposes of filing to meet the Statute of Limitations.

Plaintiff's initial Complaint was filed on July 12, 2017. Plaintiff alleged in this Complaint that Alfred Farmer had died in the accident of December 3, 2016.² The initial Complaint purports to sue "John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased". At that time, no formal estate for Alfred G. Farmer had been opened and no administrator of the Estate of Alfred G. Farmer existed. This is acknowledged and admitted by Plaintiff/Appellant. (Brief of Appellant, Statement of Facts, p. 9) In fact, John Doe, Administrator of an Estate, cannot exist, as a person certain must be appointed administrator for an estate. Plaintiff/Appellant has acknowledged that his filing suit against John Doe, who he knew did not exist at that time, was knowing and intentional. (R. Vol. 1, p. 52)

² This establishes Plaintiff's knowledge of Farmer's death, and the date thereof, on the part of Plaintiff at the time of filing.

The law in Tennessee is clear. A suit asserting a cause of action preserved from abatement by T.C.A. §28-1-110 can only be brought against a personal representative of the decedent. Estate of Russell v. Snow, 829 S.W.2d 136, 137 (Tenn. 1992). In Russell, the Supreme Court stated that “[a] personal representative of a deceased tortfeasor ***must exist*** before a right of action for tort is ripe for enforcement. Id. (emphasis added), citing Brooks v. Garner, 254 S.W.2d 736, 737 (Tenn. 1953) and Goss v. Hutchins, 751 S.W.2d 821, 824 (Tenn. 1988). Potential plaintiffs can meet this requirement through the statutory mechanism that exists to allow them to petition the court for appointment of an administrator ad litem pursuant to T.C.A. §30-1-109. Estate of Russell at 137.

Plaintiff/Appellant’s initial Complaint simply did not sue a personal representative of the tortfeasor. Because the Complaint sought to sue a defendant which did not legally exist or have the capacity to be sued, the Complaint was a nullity as was the complaint in Algee. Therefore, it is of no legal effect and is as though it never existed. See e.g., Mortg. Elec. Registration Sys., Inc. v. Ditto, 488 S.W.3d 265, 277-78 (Tenn. 2015); State v. Campbell, 641 S.W.2d 890,893 (Tenn. 1982); and Cumberland Capital Corp. v. Patty, 556 S.W.2d 516, 538 (Tenn. 1977).

D. Plaintiff/Appellant’s February 2018 process is insufficient and does not toll the Statute of Limitations as it served the original John Doe Complaint.

In February 2018, Plaintiff/Appellant again issued process to “John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased” who was known to the Plaintiff/Appellant at that time to not be the proper

defendant. The summons indicated that service was to be obtained through John Doe's "attorney of record, J. Vincent Perryman". Mr. Perryman was not attorney of record for John Doe, John Doe Administrator did not exist, and was known by the Plaintiff/Appellant at the time not to exist. Therefore, any service of that John Doe Complaint was insufficient to have any legal effect and did not commence an action as it was attempted service of a nullity.

At this point, in February 2018, Plaintiff/Appellant was aware that there was an existing personal representative for the estate and the identity of that representative, because Plaintiff/Appellant's counsel had arranged for the appointment. (R. Vol. 1, p. 86-90) Plaintiff/Appellant simply had to draft proper complaint against the administrator, Perryman, and have him personally served with a duly filed Complaint and a properly issued Summons. However, he did not. The only document submitted by the Plaintiff to Perryman was the void July 2017 Complaint.

Plaintiff/Appellant argues that the service of the initial John Doe Complaint on Perryman's office suffices to satisfy the requirements to comply with the Statute of Limitations. However, because no new Complaint naming an existing proper defendant had been filed, the case still had not properly been commenced. T.C.A. §20-5-103 and its interpreting cases are clear, and the statute must be strictly construed. A suit must be filed against a then existing personal representative and then that action is to be personally served on the representative.

No Complaint against an existing personal representative of the tortfeasor was filed prior to May 25, 2018.

E. There is not a Tennessee Rule of Civil Procedure 15.03 “relation back” issue as there is no properly commenced action to which the May 25, 2018, Complaint may relate back.

Plaintiff argues that Tennessee Rule of Civil Procedure 15.03 applies and that the filing of the May 25, 2018, Complaint should relate back to the filing date of the first, John Doe, Complaint. This court has recognized that if a Complaint does not commence an action within the meaning of Rule 3 it does not commence an action that a later amendment can relate back to within the meaning of Rule 15.03. Algee at *7, quoting Vaughn at 121.

To pursue his cause of action, Plaintiff/Appellant was required to commence his action against an existing personal representative of Farmer prior to the expiration of the statute of limitations. He did not do so with his first filing against an improper party and, therefore, the filing of that initial Complaint did not “commence” the action within the meaning of Tennessee Rule of Civil Procedure 3. *See* Carpenter v. Johnson, 514 S.W.2d 868, 870 (Tenn. 1974)

Further, this is not a case where the original filing was proper, and the second filing is simply a matter of misnomer. Plaintiff/Appellant admits he purposefully filed a Complaint against a “John Doe” in place of an existing personal representative as a “placeholder”. There was no mistake concerning the identity of the proper party at the time of the original filing. As discussed above, there was no proper party at the time

of the original filing. Therefore, Plaintiff/Appellant fails to qualify for relation back under the rule.

There is no need for further Rule 15.03 analysis because there is only one pleading with any potential legal effect, and that is the May 2018 Complaint.

F. Plaintiff/Appellant cannot rely on the May 25, 2018, Complaint filing to satisfy the Statute of Limitations.

Defendant/Appellee submits that none of the above referenced filings, based upon the initial John Doe Complaint, act to commence an action against any defendant. However, Plaintiff/Appellant still had until June 3, 2018, in which to properly commence suit against J. Vincent Perryman, the then existing personal representative of the Estate of Farmer. Plaintiff/Appellant, on May 25, 2018, apparently recognizing this fact, did file what was captioned as a Complaint, but has been referred to as an “Amended Complaint”, which identified as a defendant Vincent J. Perryman as administrator for the estate of Alfred G. Farmer.³

However, Plaintiff/Appellant cannot rely upon the May 25, 2018, Complaint as commencing an action against the personal representative

³ Plaintiff’s May 25, 2018, Complaint also included allegations of negligence against two other entities, although this appears to have been a drafting error and is irrelevant and immaterial to the issues on appeal. Additionally, Defendant understands that the difference between Vincent J. Perryman and J. Vincent Perryman in the May 23, 2018, Complaint would be a simple misnomer and submits that this error is not relevant to any issues before the court.

of the estate as it fails to meet the requirements of Tennessee Rule of Civil Procedure 3 for commencing suit.

Tennessee Rule of Civil Procedure 3 states:

If process remains unissued for 90 days ... the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.

Plaintiff/Appellant has never issued process on the May 25, 2018, Complaint. Therefore, Plaintiff/Appellant cannot rely on its May 25, 2018, filing date to toll the statute of limitations.

IV. The Trial Court did not abuse its discretion when it held that Appellant had failed to provide additional evidence, change in the law, or error in the law to require relief under Tennessee Rule of Civil Procedure 59 from the September 18, 2019, order dismissing the Appellant's case.

A. Plaintiff/Appellant's Motion to Alter or Amend did not present new law or argument that was not reasonably available to Defendant at the time of the original hearing on the Motion to Dismiss.

Plaintiff/Appellant brought his Motion to Alter or Amend Judgment "pursuant to Rule 59 of the Tennessee Laws of Civil Procedure." Plaintiff/Appellant's Motion raised no new arguments or presented a

change in controlling law, and was, in essence, a Motion to Reconsider. A Rule 59.04 Motion “may be granted (1) when the controlling law changes before a judgment becomes final, (2) when previously unavailable evidence becomes available, or (3) when, for sui generis reasons, a judgment should be amended to correct a clear error of law or to prevent injustice. They should not, however, be granted if they are simply seeking to relitigate matters that have already been adjudicated.” Vaccarella v. Vaccarella, 49 S.W.3d 307, 312 (Tenn. Ct. App. 2001), citing Bradley v. McLeod, 984 S.W.2d 929, 933 (Tenn. Ct. App. 1998). Moreover, a Motion to Alter or Amend should not be used to raise or present new, previously untried, or unasserted theories or legal arguments. In re M.L.D., 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005).

Plaintiff/Appellant’s Motion to Alter or Amend Judgment simply states that “the Court erred as a matter of law when it found that the Defendant as the administrator was not properly served even though the office secretary was served”, and that the “Court erred when it found that the amended complaint did not relate back to the original complaint.” These arguments were raised and ruled upon in Plaintiff/Appellant’s response to the original Motion to Dismiss.

In the Motion (and again in his brief) the Plaintiff/Appellant argues the validity of service through Perryman’s secretary of the John Doe Complaint as a basis to grant the Rule 59 Motion. However, the issue of the authority of Perryman’s secretary to accept service is not relevant to the basis of the dismissal of Plaintiff/Appellant’s suit. The dismissal is based on the failure of Plaintiff/Appellant to commence suit by the filing

of the original suit, which was not against a personal representative, or by filing the second suit for which process has never been issued and has never been served upon the personal representative.

Additionally, when a party files a Rule 59 motion seeking to alter or amend a judgment and attempts to present additional evidence in support of such motion, the trial court should consider the moving party's effort to obtain the additional evidence that the moving party seeks to present, the moving party's explanation for failing to offer the evidence earlier in the proceedings, the importance of the new evidence to the moving party's case, the unfair prejudice to the non-moving party, and any other relevant consideration. Linkous v. Lane 276 S.W.3d 917, 924 (Tenn. Ct. App. 2008) quoting Stovall v. Clarke, 113 S.W.3d 715, 721 (Tenn. 2003)

The original Motion to Dismiss was filed on June 4, 2019, heard on September 13, 2019, more than three (3) months after its filing, and Plaintiff/Appellant's Motion to Alter or Amend was filed on October 18, 2019, four and a half (4 ½) months after the Motion to Dismiss was filed and served. Despite this, Plaintiff/Appellant's first attempt to provide any support for an argument on the issue of authority to accept service was not provided until August 17, 2021. The support provided was a declaration by Perryman which would have been appropriate to bring in response to the original Motion to Dismiss, or in the Motion to Alter or Amend. Plaintiff/Appellant produced no explanation as to why this information was not previously available to Plaintiff/Appellant in the four and a half (4 ½) months between the filing of the Motion to Dismiss

to the time of the filing of the original Motion to Alter or Amend. This issue was argued and considered before the court at the hearing on the Amended Motion to Dismiss on March 11, 2022. (R. Vol. 3, transcript pages 4-6, 8)

The Motion to Alter or Amend and Amended Motion to Alter or Amend were essentially requests to re-litigate the same issues with evidence that was available at the time of the initial Motion to Dismiss and at the time of the original Motion to Alter or Amend.

B. Plaintiff/Appellant's arguments in support of his Motion to Alter or Amend Judgment do not address the basis for the dismissal of the suit.

Plaintiff/Appellant fails to address the trial court's ruling that the Statute of Limitations expired because 1) the first Complaint which was filed against a non-existent entity, therefore, not the personal representative of the estate, and was void and 2) once Plaintiff/Appellant filed what would be a valid Complaint, he failed to issue any process with one year and could not rely on the date of its filing to comply with the Statute of Limitations.

Plaintiff/Appellant has not set out a reason why the holdings of Algee v. Craig, Vaughn v. Morton, Estate of Russell v. Snow, Brooks v. Garner, and Goss v. Hutchins would not apply and that strict compliance with T.C.A. §20-5-103 requires that suit be filed against a personal representative of the estate, after the existence of the personal representative is established, and that the suit be personally served on that representative.

CONCLUSION

Plaintiff/Appellant failed to commence action against a personal representative for the Estate of Farmer within the Statute of Limitations. T.C.A. §20-5-103 requires strict compliance and the law in Tennessee is clear that to comply, a personal representative must exist prior to the Plaintiff/Appellant being able to commence an action under that statute. Plaintiff/Appellant did not do that. After a personal representative was appointed, Plaintiff/Appellant did file a Complaint naming the proper party but did not commence the action as he did not issue a summons for service of the Complaint. As a result, he cannot rely upon the filing date of that Complaint to comply with the Statute of Limitations. T.C.A. §20-5-103 and T.C.A. §30-1-109 set out a clear process that must be followed and the Plaintiff/Appellant simply did not follow the requirements to commence the action prior to the expiration of the Statute of Limitations.

While Plaintiff/Appellant seeks to argue regarding the relation back of the second Complaint to the first, the first filing was void and there is nothing to which the second filing may relate back. Also, relation back would be inappropriate because the Plaintiff/Appellant's failure to name the proper party in the initial Complaint was not a mistake, misnomer, or inadvertent, but rather, was an intentional decision to simply put in a placeholder "John Doe" rather than petition to have a proper party appointed prior to filing. Because no action was commenced with the initial Complaint, and because there was no mistake concerning

the identity of the proper party, there is no Tennessee Rule of Civil Procedure 15 issue.

Plaintiff/Appellant's position to allow the use of a Complaint filed against a John Doe outside of specific legally allowable circumstances (such as Uninsured Motorist claims) as asserted in this case would circumvent the application of statutes of limitations and any case could be filed against a John Doe with actual personal service against a defendant coming well after the statute of limitations expires. This circumvention of the statute of limitations is not valid, particularly under the strict construction of T.C.A. §20-5-103 which tolls the limitations period and T.C.A. §30-1-109 which provides for the mechanism for pursuit of claims such as those of the Plaintiff/Appellant.

For the foregoing reasons, the judgment of the Trial Court should be affirmed, and Defendant/Appellee awarded attorney's fees for the defense of the instant appeal.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I, the undersigned attorney, do hereby certify pursuant to Tennessee Supreme Court Rule 46, Section 3.02(c) that this brief is in compliance with the word limitations, font requirements of Century, 14 point and spacing as set out in Tennessee Supreme Court Rule 46, Section 3.02(a) for electronically filed briefs in appellate courts.

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a true and exact copy of the foregoing instrument has been served on the following interested parties, via U.S. Mail, postage pre-paid, on this the 17th day of November, 2022:

Ethan D. Sandifer
Attorney for Appellant/Plaintiff
254 Court Avenue, Suite 111
Memphis, TN 38103



RUSSELL C. RUTLEDGE

APPENDIX

UNREPORTED CASES

Algee v. Craig, 2020 Tenn.App. LEXIS 137 (Tenn.Ct.App. March 31, 2020) *application for cert. denied*, 2020 Tenn. LEXIS 329 (Tenn. July 23, 2020)



Neutral

As of: November 11, 2022 9:23 PM Z

Algee v. Craig

Court of Appeals of Tennessee, At Jackson

January 14, 2020, Session; March 31, 2020, Filed

No. W2019-00587-COA-R3-CV

Reporter

2020 Tenn. App. LEXIS 137 *; 2020 WL 1527234

ROBERT LEE ALGEE v. DAVID ANTHONY CRAIG AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NANCY P. CRAIG

Subsequent History: Appeal denied by [Algee v. Craig, 2020 Tenn. LEXIS 329 \(Tenn., July 23, 2020\)](#)

Prior History: *Tenn. R. App. P. 3[*1]* Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded. Appeal from the Circuit Court for Dyer County. No. 2018-CV-84. R. Lee Moore, Jr., Judge.

Disposition: Judgment of the Circuit Court Affirmed; Case Remanded.

Core Terms

personal representative, statute of limitations, trial court, excusable neglect, cause of action, tort-feasor

Case Summary

Overview

HOLDINGS: [1]-The trial court properly dismissed plaintiff's personal injury lawsuit and denied plaintiff's relief under *Tenn. R. Civ. P. 6.02* based on a claim of excusable neglect; plaintiff filed suit against the former personal representative of defendant, after the estate was opened, administered, and closed. The trial court found that the original lawsuit, while timely filed, was a nullity because the estate had been closed. The failure to strictly follow the requirement of [Tenn. Code Ann. § 20-5-103](#) by naming the personal representative was fatal to the survivability of the action.

Outcome

Judgment affirmed, case remanded.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Motion Practice > Time Limitations

[HN1](#) [↓] **Defenses, Demurrers & Objections, Motions to Dismiss**

The grant of a motion to dismiss is subject to a de novo review with no presumption of correctness because the appellate court is reviewing the trial court's legal conclusion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Pleading & Practice > Motion Practice > Time Limitations

[HN2](#) [↓] **Standards of Review, Abuse of Discretion**

The grant or denial of relief pursuant to *Tenn. R. Civ. P. 6.02* is subject to review under an abuse of discretion standard. A trial court abuses its discretion when it fails to consider the applicable law and relevant facts in reaching its decision. A court is said to abuse its discretion when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.

Torts > ... > Commencement &
 Prosecution > Survival of Actions > Death of
 Defendants

[HN3](#) **Survival of Actions, Death of Defendants**

The statutory language of [Tenn. Code Ann. § 20-5-103](#) is abundantly clear. The cause of action survives only against the personal representative of the tortfeasor or wrongdoer. At common law, no cause of action existed against a deceased tortfeasor for personal injury. The cause of action abated at the time of death. Since the statute defines the exclusive remedy and the steps to be taken to secure it, those steps must be strictly followed. The action available under the statute may only be instituted against the personal representative of the tortfeasor. The law protects an injured person from the possibility that no estate is opened for the tortfeasor by allowing the injured person to petition the chancery court to appoint an administrator for the limited purpose of serving as the defendant in the lawsuit.

Civil Procedure > Pleading &
 Practice > Pleadings > Complaints

Civil Procedure > ... > Pleadings > Amendment of
 Pleadings > Relation Back

[HN4](#) **Pleadings, Complaints**

If a complaint does not commence an action within the meaning of *Tenn. R. Civ. P. 3* it does not commence an action that a later amendment can relate back to within the meaning of *Tenn. R. Civ. P. 15.03*.

Torts > ... > Commencement &
 Prosecution > Survival of Actions > Death of
 Defendants

[HN5](#) **Survival of Actions, Death of Defendants**

Case law requires strict compliance with [Tenn. Code Ann. § 20-5-103](#).

Counsel: Spencer R. Barnes and Terri S. Crider, Jackson, Tennessee, for the appellant, Robert Lee Algee.

Jeffrey L. Lay, Dyersburg, Tennessee, for the appellee, David Anthony Craig, as personal representative of the Estate of Nancy P. Craig.

Judges: JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which ARNOLD B. GOLDIN and KENNY ARMSTRONG, JJ., joined.

Opinion by: JOHN W. MCCLARTY

Opinion

This personal injury action concerns an automobile accident. The defendant died shortly after the accident. The estate was opened, administered, and closed before the plaintiff filed suit against the former personal representative within the applicable statute of limitations. The personal representative moved to dismiss for failure to state a claim. The plaintiff moved to enlarge the time for filing service of process based upon a claim of excusable neglect. The trial court dismissed the action as untimely. We affirm.

OPINION

I. BACKGROUND

This action arises out of an automobile accident that occurred on September [*2] 25, 2017, between Robert Lee Algee ("Plaintiff") and Nancy P. Craig ("Decedent"), who died on January 21, 2018, at the age of 83.¹ Decedent's will was admitted to probate, and letters testamentary were issued to David Anthony Craig as her personal representative ("Defendant") on February 22, 2018, in the Dyer County Probate Court. The estate was closed on July 13, 2018, by order of the Probate Court.

Plaintiff filed this complaint on September 24, 2018, in the Circuit Court for Dyer County against Defendant as the personal representative of the estate. On November 2, Defendant moved to dismiss, alleging that the suit was filed against an improper party because he had been released from service when the estate was closed. He further claimed that the filing of the suit against an improper party did not operate to toll the statute of limitations, which expired on October 29.² Defendant

¹ It is unclear whether she died from injuries relating to the accident.

² Pursuant to [Tennessee Code Annotated section 28-1-110](#), the statute of limitations is tolled between the death of the

argued that Plaintiff was required to reopen the estate and appoint an administrator ad litem prior to filing suit. On February 28, 2019, Plaintiff conceded that the statute of limitations had passed but moved to enlarge the time for filing service of process anew after he reopened the estate pursuant to *Rule 6.02 of the Tennessee Rules of Civil Procedure* [*3], which provides, in pertinent part, as follows:

When by statute or by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done, where the failure to act was the result of excusable neglect[.]

Plaintiff claimed excusable neglect, explaining that he filed the instant action without knowledge that the estate had been closed. He alleged that he was not given a copy of the order releasing Defendant from service, despite his request to the clerk for a copy of the entirety of the pleadings filed in the estate action.

Defendant argued that relief was not available through *Rule 6.02* because Plaintiff failed to strictly follow the statute providing for such actions filed against a decedent. Following a hearing, the trial court acknowledged the presence of excusable neglect but ultimately concluded [*4] that relief was not available through *Rule 6.02* to extend the statute of limitations in this personal injury action. The trial court found that while suit was filed within one year of the statute of limitations, the original lawsuit was a nullity because the estate had been closed. This timely appeal followed.

II. ISSUE

The sole and dispositive issue on appeal is whether the trial court properly dismissed the action, denying Plaintiff's request for relief pursuant to *Rule 6.02* based upon a claim of excusable neglect.

III. STANDARD OF REVIEW

person and the appointment of the representative of the estate, for a period not to exceed six months.

HN1[↑] The grant of a motion to dismiss is subject to a de novo review with no presumption of correctness because we are reviewing the trial court's legal conclusion. *Blackburn v. Blackburn*, 270 S.W.3d 42, 47 (Tenn. 2008); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). **HN2**[↑] The grant or denial of relief pursuant to *Rule 6.02 of the Tennessee Rules of Civil Procedure* is subject to review under an abuse of discretion standard. *Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 551 (Tenn. 2006). A trial court abuses its discretion when it fails to consider the applicable law and relevant facts in reaching its decision. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008). A court is said to abuse its discretion "when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Armbrister v. Armbrister*, 414 S.W.3d 685, 692-93 (Tenn. 2013) (quoting *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001)).

IV. DISCUSSION

Plaintiff argues that dismissal [*5] of his claim was unwarranted when he filed the instant action within the applicable statute of limitations against the listed personal representative of the estate. He claims that the court's denial of relief pursuant to *Rule 6.02* to reopen the estate and issue new service to Defendant as the active personal representative was error. Defendant responds that the action was not timely commenced because it was filed against an improper party and that even if the court were to grant Plaintiff additional time in which to appoint an administrator and amend the pleadings, any such amendment would not relate back to the original action.

A suit to recover personal injury damages from a decedent is governed by *Tennessee Code Annotated section 20-5-103*, which provides, in pertinent part, as follows:

(a) In all cases where a person commits a tortious or wrongful act causing injury or death to another, or property damage, and the person committing the wrongful act dies before suit is instituted to recover damages, the death of that person shall not abate any cause of action that the plaintiff would have otherwise had, but the cause of action shall survive and may be prosecuted against the personal representative of the tort-feasor or wrongdoer.

[*6] (b) The common law rule abating such actions upon the death of the wrongdoer and before suit is commenced is abrogated.

This court has explained the application of the statute as follows:

[HN3](#)[↑] The statutory language is abundantly clear. The cause of action survives only against the personal representative of the tort-feasor [sic] or wrongdoer. At common law, no cause of action existed against a deceased tortfeasor for personal injury. The cause of action abated at the time of death. Since the statute defines the exclusive remedy and the steps to be taken to secure it, those steps must be strictly followed. The action available under the statute may only be instituted against the personal representative of the tort-feasor [sic]. The law protects an injured person from the possibility that no estate is opened for the tortfeasor by allowing the injured person to petition the chancery court to appoint an administrator for the limited purpose of serving as the defendant in the lawsuit.

[Vaughn v. Morton, 371 S.W.3d 116, 120 \(Tenn. Ct. App. 2012\)](#) (internal citations and quotations omitted).

A similar issue was addressed by this court in *Vaughn*, where the plaintiff filed a personal injury action against the defendant-decedent instead of the personal representative. [*7] [Id. at 117](#). Following the expiration of the one-year statute of limitations, the plaintiff moved to amend the pleadings to substitute the personal representative as the defendant. *Id.* The trial court denied the request and dismissed, holding that an amended complaint adding the personal representative as the defendant would not relate back to the original filing against the decedent. [Id. at 120-21](#). [HN4](#)[↑] We affirmed and explained that "if a complaint does not commence an action within the meaning of *Rule 3* it does not commence an action that a later amendment can relate back to within the meaning of *Rule 15.03*." [Id. at 121](#). We concluded that the failure to "strictly follow" the requirement of [Section 20-5-103](#) by naming the personal representative was fatal to the survivability of the action. [Id. at 120-21](#). See also [Brooks v. Garner, 194 Tenn. 624, 254 S.W.2d 736, 737 \(Tenn. 1953\)](#) [HN5](#)[↑] (requiring strict compliance with [Section 20-5-103](#)). The same holds true here. See [Brooks, 254 S.W.2d at 737](#) (affirming the court's dismissal of the action for failure to file the personal injury action against the personal representative of the defendant-decedent). Accordingly, we affirm the court's dismissal of the action

based upon its holding that *Rule 6.02* may not operate to extend the statute of limitations under the circumstances presented here.

V. CONCLUSION

We affirm the decision of the trial court [*8] and remand for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, Robert Lee Algee.

JOHN W. McCLARTY, JUDGE

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