Rel: 07/08/2016

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2016

1141158

Northstar Anesthesia of Alabama, LLC, and Maria Bolyard, CRNA

v.

Paula B. Noble, as personal representative of the Estate of Thomas A. Noble, deceased

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1141166

Parkway Medical Clinic, Inc., d/b/a Parkway Medical Center

v.

Paula B. Noble, as personal representative of the Estate of Thomas A. Noble, deceased

1141168

Jeffrey Markham, M.D.

v.

Paula B. Noble, as personal representative of the Estate of Thomas A. Noble, deceased

Appeals from Morgan Circuit Court
(CV-13-900673)

PER CURIAM.

Northstar Anesthesia of Alabama, LLC ("Northstar"), and Maria Bolyard, CRNA; Parkway Medical Clinic, Inc., d/b/a Parkway Medical Center ("Parkway"); and Jeffrey Markham, M.D. ("Dr. Markham") (hereinafter collectively referred to as "the appellants"), filed three petitions for a permissive appeal, pursuant to Rule 5, Ala. R. App. P., from the Morgan Circuit Court's orders denying the appellants' motions for a summary judgment in a wrongful-death action brought by Paula B. Noble ("Paula"), as personal representative of the estate of Thomas A. Noble ("Thomas"), deceased, against the appellants.

I. Facts and Procedural History

The facts are undisputed. On November 18, 2011, Thomas died. On January 9, 2012, Paula filed a petition in the Morgan Probate Court ("the probate court") for letters of administration, seeking to be appointed the personal representative of Thomas's estate. On January 18, 2012, the probate court granted Paula's petition and appointed her personal representative of Thomas's estate. On the same day, the probate court also issued letters of administration to Paula.

On August 10, 2012, Paula filed a petition for a consent settlement of Thomas's estate, seeking to close the estate; Paula specifically requested that she be discharged as the personal representative. On August 16, 2012, the probate court granted Paula's petition and, among other things, ordered that "said Personal Representative be discharged and released."

On November 15, 2013, Paula, on behalf of Thomas's heirs at law, after being discharged and released as the personal representative of Thomas's estate, filed a wrongful-death action against the appellants under § 6-5-410, Ala. Code 1975. On November 18, 2013, the two-year limitations period for

bringing a wrongful-death action set forth in § 6-5-410(d), Ala. Code 1975, expired: "(d) The [wrongful-death] action must be commenced within two years from and after the death of the testator or intestate."

On December 16, 2013, having become aware of the fact that she lacked the representative capacity to maintain the wrongful-death action because she had been discharged and released as the personal representative of Thomas's estate before she commenced the action, Paula filed a petition to "re-open" Thomas's estate "so that she [could] continue as Personal Representative" for purposes of pursuing the wrongful-death action she filed on November 15, 2013. On the same day, the probate court entered an order in which it "re-appointed" Paula as the personal representative of Thomas's estate and "re-issued" "the Original Letters of Administration" for the purpose of pursuing the wrongful-death litigation.

On December 30, 2013, Parkway filed an answer to Paula's complaint; Parkway did not allege in its answer that Paula lacked the representative capacity to bring the wrongful-death action. On January 17, 2014, Dr. Markham also filed an answer

to Paula's complaint; Dr. Markham did not allege in his answer that Paula lacked the representative capacity to bring the wrongful-death action. On June 6, 2014, Northstar and Bolyard filed an answer to Paula's complaint asserting, among other defenses, that Paula lacked the representative capacity to bring the wrongful-death action.

On April 24, 2015, Northstar and Bolyard filed a motion for a summary judgment. Northstar and Bolyard argued that the wrongful-death action brought by Paula is a nullity because Paula was not the personal representative of Thomas's estate at the time she filed the complaint. Northstar and Bolyard further argued that Paula's action is barred because she was not reappointed as personal representative of Thomas's estate until December 16, 2013, which is beyond the two-year limitations period set forth in § 6-5-410(d). Parkway and Dr. Markham also filed motions for a summary judgment asserting the same grounds.

On May 29, 2015, Paula filed a response to the appellants' summary-judgment motions. Paula argued that the wrongful-death action is not a nullity and is not barred by the two-year limitations period in § 6-5-410(d) because, she

argued, even though she was not the personal representative at the time she commenced the wrongful-death action, her reappointment as personal representative of Thomas's estate related back to the time of Thomas's death, to the date she filed her original petition for letters of administration, or to the date the probate court originally appointed her as personal representative of Thomas's estate. Paula also argued that Parkway and Dr. Markham "failed to plead any affirmative defense of lack of capacity and ... therefore waived their ability to avail themselves of that affirmative defense."

On June 19, 2015, the circuit court denied the appellants' summary-judgment motions. The circuit court concluded that Paula "was personal representative at the time this wrongful death action was filed because [Paula] was established as personal representative and was never thereafter removed or replaced."

On July 9, 2015, Paula filed an amended complaint setting forth the additional fact that the probate court had reappointed her as personal representative of Thomas's estate. The appellants subsequently filed answers to Paula's amended complaint.

On July 24, 2015, the circuit court granted the appellants permission to appeal the circuit court's denial of their summary-judgment motions pursuant to Rule 5, Ala. R. App. P. The appellants then filed petitions for permission to appeal with this Court, which this Court granted.

II. Standard of Review

> "'Where, as here, the facts of a case are essentially undisputed, this Court must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review. Carter v. City of Haleyville, 669 So. 2d 812, 815 (Ala. 1995). Here, in reviewing the denial of a summary judgment when the facts are undisputed, we review de novo the trial court's interpretation of statutory language and our previous caselaw on a controlling question of law.'"

Wood v. Wayman, 47 So. 3d 1212, 1215 (Ala. 2010)(quoting Continental Nat'l Indem. Co. v. Fields, 926 So. 2d 1033, 1035 (Ala. 2005)).

III. Discussion

This Court has stated the following with regard to permissive appeals:

> "In the petition for a permissive appeal, the party seeking to appeal must include a certification by the trial court that the interlocutory order involves a controlling question of law, and the trial court must include in the certification a statement of the controlling question of law. Rule 5(a), Ala. R. App. P. In conducting our de novo

> review of the question presented on a permissive appeal, 'this Court will not expand its review ... beyond the question of law stated by the trial court. Any such expansion would usurp the responsibility entrusted to the trial court by Rule 5(a).' BE & K, Inc. v. Baker, 875 So. 2d 1185, 1189 (Ala. 2003). ..."

Alabama Powersport Auction, LLC v. Wiese, 143 So. 3d 713, 716 (Ala. 2013). In the present case, the circuit court certified the following controlling question of law:

> "Is a wrongful death complaint filed by a person who had been appointed as the personal representative of the estate of the deceased ('the estate') a nullity when (1) the person was appointed personal representative of the estate on January 18, 2012, within two years of the death of the deceased; (2) the estate was closed and the person was discharged and released of her fiduciary duties and fiduciary capacity with regard to probate administration matters by order of the Probate Court on August 16, 2012; (3) no other person was appointed personal representative and no other probate matters were pursued; (4) the person, who had previously been appointed to serve as personal representative of the estate, filed the complaint on November 15, 2013, within two years of the death of the deceased; and (5) the estate was re-opened and letters of administration were re-issued to the person on December 16, 2013, more than two years after the death of the deceased?"

Initially, we note that "a wrongful-death action in Alabama brought pursuant to § 6-5-410, Ala. Code 1975, a cause of action unknown at common law, is purely statutory and that this Court's role is to strictly enforce the wrongful-death

statute as written, and intended, by the legislature." Alvarado v. Estate of Kidd, [Ms. 1140706, January 29, 2016] ___ So. 3d ___, ___ (Ala. 2016)(Bolin, J., concurring specially). Section 6-5-410 states, in pertinent part:

> "(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama where provided for in subsection (e), and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or her or their servants or agents, whereby the death of the testator or intestate was caused, provided the testator or intestate could have commenced an action for the wrongful act, omission, or negligence if it had not caused death."

(Emphasis added.) In Ex parte Hubbard Properties, Inc., [Ms. 1141196, March 4, 2016] ___ So. 3d ___, ___ (Ala. 2016), this Court reaffirmed the following principles set forth in Waters v. Hipp, 600 So. 2d 981 (Ala. 1992), concerning the language in § 6-5-410 that only a personal representative may commence a wrongful-death action:

> "In Waters v. Hipp, 600 So. 2d 981, 982 (Ala. 1992), this Court explained:
>
> > "'A wrongful death action is purely statutory; no such action existed at common law. Simmons v. Pulmosan Safety Equipment Corp., 471 F. Supp. 999 (S.D. Ala. 1979). Section 6-5-410 provides that the personal representative of the deceased may bring a

> wrongful death action. A "personal representative," for the purposes of § 6-5-410, is an executor or an administrator. Hatas v. Partin, 278 Ala. 65, 175 So. 2d 759 (1965). One who sues under this section without having been appointed executor or administrator does not qualify under this section as a personal representative, and the suit is a nullity. Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465 (Ala. 1979), cert. denied, 445 U.S. 930, 100 S. Ct. 1318, 63 L. Ed. 2d 763 (1980).'"

The appellants initially argue that Paula's wrongful-death action is a nullity because Paula was not the personal representative of Thomas's estate on November 15, 2013, when she filed the complaint in the wrongful-death action. The appellants argue that, even though Paula had been the personal representative of Thomas's estate at one time, Paula was discharged and released as the personal representative of Thomas's estate by the probate court's August 16, 2012, order.

Paula argues that the probate court's August 16, 2012, order should be read as discharging and releasing her from only the administrative matters regarding Thomas's estate. Paula notes that this Court's precedent very clearly states that a wrongful-death action is not brought on behalf of the estate of the deceased and that any damages awarded in such an

action do not benefit the estate. Therefore, Paula argues, the probate court's August 16, 2012, order discharged and released her only from her role as personal representative concerning administrative matters that benefit the estate. Paula argues that this Court should not read the probate court's August 16, 2012, order as discharging and releasing her as personal representative for purposes of bringing a wrongful-death action on behalf of Thomas's heirs at law.

Paula's argument is not persuasive. The probate court's August 16, 2012, order was a final judgment; it closed Thomas's estate and discharged and released Paula from her responsibilities as personal representative. The probate court's order broadly states that "said Personal Representative be discharged and released." Nothing in the probate court's order holds Thomas's estate open for any reason or limits the court's discharge and release of Paula as the personal representative of the estate. The probate court's order is clear and unambiguous; Paula was discharged and released as personal representative for all purposes. As the appellants note in their briefs before this Court: "It appears axiomatic that one who may act only upon authority of

a court appointment, may not continue to act after such authority has terminated, whether by death, resignation or by order of discharge or removal." Humphrey v. Boschung, 47 Ala. App. 310, 315, 253 So. 2d 760, 765 (1970).

As set forth above, a wrongful-death action may be brought only by a legally appointed "personal representative." § 6-5-410(a). In Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465, 466 (Ala. 1979), this Court explained that "[t]he words 'personal representative' are broader in some respects, but when used in [§ 6-5-410], they can only mean the executor or administrator of the injured testator or intestate. Hatas v. Partin, 278 Ala. 65, 175 So. 2d 759 (1965)." See also Waters, 600 So. 2d at 982 ("A 'personal representative,' for the purposes of § 6-5-410, is an executor or an administrator."). Paula had been discharged and released as the personal representative of Thomas's estate before she filed the complaint in the wrongful-death action. Therefore, Paula was without authority on November 15, 2013, to commence the wrongful-death action, and it was a nullity.[1]

[1]Although its decision is not binding on this Court, we note that in Nailen v. Ford Motor Co., 690 F. Supp. 552 (S.D. Miss. 1988), the United States District Court for the Southern District of Mississippi reached the same conclusion in

Next, we must consider the effect, if any, of the probate court's "re-appointment" of Paula as the personal representative of Thomas's estate on December 16, 2013. We note that Paula's reappointment as personal representative of Thomas's estate occurred after the expiration of the two-year limitations period for wrongful-death actions set forth in § 6-5-410(d). The appellants argue that, based on their successful argument that the wrongful-death action is a

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applying § 6-5-410 to nearly identical facts:

> "Whether or not this action has been brought by a personal representative of the estate cannot be disputed. The plaintiff was at one time the administrator of [the deceased's] estate; however, the deceased's estate was closed and the plaintiff was discharged and released as administrator some seventeen (17) months prior to the filing of this action. In Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465, 466 (Ala. 1979), it was determined that the term 'personal representative', as it is used in the wrongful death statute, means the executor or administrator of the testator or intestate. The Pool court further concluded that the person filing suit must be the personal representative at the time of filing and that amendments to substitute the personal representation or to otherwise comply after suit was filed, would not preclude dismissal of the action. Id. at 466. In light of Pool, it is obvious that this suit must be dismissed, if for no other reason than because the plaintiff was not the personal representative of the deceased's estate at the time suit was filed."

690 F. Supp. at 556.

nullity because Paula was not the personal representative of Thomas's estate when she filed the complaint, Paula's subsequent reappointment as personal representative is irrelevant because there is nothing for her reappointment to relate back to. Paula argues that her "re-appointment as personal representative and the re-issuance of the original Letters of Administration on December 16, 2013 relate back to the date of [her] original Petition for Letters of Administration on January 9, 2012 or the filing of the original Complaint on November 15, 2013."[2] Paula's brief, at p. 36.

The appellants are correct. In Wood v. Wayman, 47 So. 3d 1212 (Ala. 2010), this Court held, as explained in Alvarado, "that relation back generally cannot be used to prevent a wrongful-death claim from being time-barred where the personal representative is appointed after the two-year limitations period has expired." Alvarado, ___ So. 3d at ___. As further explained in Alvarado, there is one exception to this general rule: "A personal representative appointed after the

[2]We note that Paula does not argue on appeal, as she did in the circuit court, that her reappointment as personal representative of Thomas's estate relates back to the time of Thomas's death.

limitations period has expired may relate the appointment back to the filing of the petition within the limitations period if the delay in appointment is due to inadvertence by the probate court, as in Ogle[v. Gordon, 706 So. 2d 707 (Ala. 1997)]." Alvarado, ___ So. 3d at ___.

In the present case, Paula cites Ogle v. Gordon, 706 So. 2d 707 (Ala. 1997), but she does not argue that the probate court's inadvertence caused any delay in her being reappointed as the personal representative of Thomas's estate. In fact, the only inadvertence was on Paula's part, because she waited until after the two-year limitations period for brining a wrongful-death action had expired before she filed her petition to be reappointed as personal representative of Thomas's estate. The probate court granted Paula's petition on the same day she filed it. Therefore, the general rule set forth in Wood is applicable; the relation-back doctrine does not apply in this case.

We note that Paula argues that Wood, Waters, Pool, and Humphrey, among other cases, are "distinguishable from the present case and inapposite because those cases involved situations where no probate proceedings involving appointment

of a personal representative had ever been initiated prior to the filing of the lawsuit or expiration of the two-year limitations period." Paula's brief, at p. 42. However, as explained above, this is not a significant factor in this case. Paula was not the personal representative of Thomas's estate at the time she commenced the wrongful-death action.

We also note that Paula requests that we overrule Wood and Pool. We decline to do so. In fact, on January 29, 2016, in Alvarado, this Court reaffirmed the applicability of Wood, which relied upon Pool. On March 4, 2016, in Ex parte Hubbard Properties, this Court relied upon these same principles. Paula has not presented any convincing argument that would cause this Court to reverse course. As Justice Bolin stated in his special concurrence in Alvarado:

> "[A]ny revision of the wrongful-death statute, § 6-5-410, to provide for the possibility of the invocation of the relation-back doctrine, or any other savings provision, is within the wisdom and responsibility of the legislature and not a task for this Court. See, e.g., Thomas v. Grayson, 318 S.C. 82, 86, 456 S.E.2d 377, 379 (1995)('The rule prohibiting an amendment to relate back was established when the period of limitation was a part of the wrongful death act. The limitation period has been moved from the wrongful death act to the general statute for limitation of civil actions. § 15-3-530(6)[, Ala. Code 1975]. This change indicates a legislative intent to no longer consider it a

> condition precedent to a wrongful death action, but rather a statute of limitations that would allow the relation back of an amendment.')."

___ So. 3d at ___ (Bolin, J., concurring specially). The result in this case is mandated by the plain language of § 6-5-410; only the legislature has the authority to amend § 6-5-410.

Accordingly, we answer the controlling question of law certified by the circuit court in the affirmative: Paula's complaint is a nullity. The relation-back doctrine does not apply to save it.

We note that Paula also argues that Parkway and Dr. Markham "never pleaded or asserted, and therefore waived, any affirmative defense related to Paula Noble's alleged lack of capacity or standing to bring and maintain this wrongful death action." Paula's brief, at p. 31. Paula argues that, "[a]s a necessary precedent to claiming or proving that Paula['s] wrongful death lawsuit is a nullity, ... Markham and Parkway must challenge [Paula's] capacity and/or standing to bring and maintain this wrongful death action by asserting an affirmative defense averring such an alleged lack of capacity

or standing in this case." Id. We do not find Paula's argument convincing.

As explained above, Paula's initial complaint is a nullity. A "nullity" is "[n]othing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect." Black's Law Dictionary 1067 (6th ed. 1990). As a result, the appellants were not under an obligation to raise the affirmative defense of capacity because the filing of Paula's complaint was "an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect." In short, a nullity is a nullity and there is no need for one to timely assert an affirmative defense to it. This is in accord with our opinion released just four months ago stating the same proposition. Ex parte Hubbard Properties, supra (holding that a wrongful-death action commenced by a person who was not a personal representative was a nullity); see also Waters, 600 So. 2d at 982 ("One who sues under [Ala. Code 1975, § 6-5-410,] without having been appointed executor or administrator does not

qualify under this section as a personal representative, and the suit is a nullity."); and Pool, 375 So. 2d at 466 (holding that, because the person who commenced the wrongful-death action "did not qualify under § 6-5-410 as a personal representative this suit was a nullity").[3]

IV. Conclusion

Based on the foregoing, we reverse the circuit court's order denying the appellants' summary-judgment motions and remand the case for proceedings consistent with this opinion.

1141158 -- REVERSED AND REMANDED.

1141166 -- REVERSED AND REMANDED.

1141168 -- REVERSED AND REMANDED.

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[3]Paula relies upon Alabama Power Co. v. White, 377 So. 2d 930 (Ala. 1979), in making her argument. Alabama Power, however, is distinguishable. In Alabama Power, a plaintiff commenced an action under § 25-5-11, Ala. Code 1975, a part of the Workers' Compensation Act. This Court addressed the following issue:

> "Does 'dependents,' as used in [Ala.] Code 1975, § 25-5-11(a), require proof by the plaintiff as an essential element of her prima facie case that she is a dependent of the deceased employee, or does this term have reference to the capacity of a party to bring the action ...?"

Alabama Power, 377 So. 2d at 931. In the present case, Paula brought an action under § 6-5-410, and the question before us is whether that action is a nullity. The present case in no way implicates § 25-5-11 or the Workers' Compensation Act.

Stuart, Bolin, Parker, and Main, JJ., concur.

Shaw, J., concurs in the result.

Murdock, Wise, and Bryan, JJ., dissent.

SHAW, Justice (concurring in the result).

The main opinion holds that the wrongful-death action brought by Paula B. Noble is a nullity. I agree; this holding is in accord with an opinion released just four months ago stating the same proposition. Ex parte Hubbard Props., Inc., [Ms. 1141196, March 4, 2016] ___ So. 3d ___ (Ala. 2016) (holding that a wrongful-death action commenced by a person who was not the personal representative was a nullity). See also Waters v. Hipp, 600 So. 2d 981, 982 (Ala. 1992) ("One who sues under [Ala. Code 1975, § 6-5-410,] without having been appointed executor or administrator does not qualify under this section as a personal representative, and the suit is a nullity."); and Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465, 466 (Ala. 1979) (holding that because the person who commenced the wrongful-death action "did not qualify under § 6-5-410 as a personal representative this suit was a nullity").

This Court has held that the doctrine of "relation back" does not apply when someone who is not the personal representative[4] commences a wrongful-death action and the

[4]The term "personal representative" is not defined in § 6-5-410, but our caselaw has interpreted the phrase to include

proper person is later substituted as the plaintiff. There are several reasons for this. Because the original filing is a nullity, there is nothing to relate back to. Ex parte Hubbard Properties, supra; Alvarado v. Estate of Kidd, [Ms. 1140706, January 29, 2016] ___ So. 3d ___ (Ala. 2016); and Downtown Nursing Home, 375 So. 2d at 466 ("In the present case, Johnnie E. Parker filed suit without having been appointed executor or administrator. Since he did not qualify under § 6-5-410 as a personal representative this suit was a nullity. Therefore, the doctrine of relation back, found in Rule 15(c), [Ala. R. Civ. P.], does not apply."). See also Wood v. Wayman, 47 So. 3d 1212 (Ala. 2010) (holding that the appointment of a personal representative accomplished after the limitations period did not relate back to filing of the wrongful-death complaint). Additionally, as extensively discussed in Justice Bolin's special writing in Alvarado, the failure of the personal representative to initiate a wrongful-death action means that the action never actually commenced.

"executors and administrators." Waters v. Hipp, 600 So. 2d at 982, and Hatas v. Partin, 278 Ala. 65, 67, 175 So. 2d 759, 761 (1965). See also Affinity Hosp., L.L.C. v. Williford, 21 So. 3d 712, 718 (Ala. 2009) (holding that an administrator ad litem is a "personal representative" for purposes of prosecuting a wrongful-death action).

Alvarado, ___ So. 3d at ___ (Bolin, J., concurring specially). Moreover, the limitations period in § 6-5-410 is not a statute of limitations but instead is "a nonclaim bar to recovery," Ogle v. Gordon, 706 So. 2d 707, 708 (Ala. 1997), the expiration of which extinguishes the cause of action itself. Ex parte FMC Corp., 599 So. 2d 592, 594 (Ala. 1992) ("It is well settled that the time limitation set out in § 6-5-410(d) is part of the substantive cause of action .... The two-year period is not a limitation against the remedy only, because after two years the cause of action expires."). For these reasons, the subsequent substitution of the proper party does not "relate back" to the initial attempt to commence the action. Ex parte Hubbard Properties, supra; Alvarado, supra; Wood, supra; and Downtown Nursing Home, supra. See also City of Birmingham v. Davis, 613 So. 2d 1222, 1224 (Ala. 1992) (holding that the doctrine of "'relation back' and other procedural rules designed to 'heal' violations of the statute of limitations cannot 'heal' violations of" a nonclaim bar to recovery). In fact, in Hubbard Properties, this Court stated that there cannot even be a substitution of another party

because the action is a nullity in the first place. ___ So. 3d at ___.

This Court, in Alabama Power Co. v. White, 377 So. 2d 930 (Ala. 1979), addressed the following issue:

> "Does 'dependents,' as used in [Ala.] Code 1975, § 25-5-11(a), require proof by the plaintiff as an essential element of her prima facie case that she is a dependent of the deceased employee, or does this term have reference to the capacity of a party to bring the action ...?"

Alabama Power, 377 So. 2d at 931. As I recently explained, the issue whether one is a "dependent" within the context of the Workers' Compensation Act is different from the issue whether one is a "personal representative" under the wrongful-death statute:

> "The respondent cites Ex parte Tyson Foods, Inc., 146 So. 3d 1041 (Ala. 2013), for the proposition that Carolyn merely lacked capacity to commence the [wrongful-death] action [under § 6-5-410] and, therefore, that the substitution of the personal representative of Louis's estate as the plaintiff 'relates back' to the filing date of the complaint. Tyson dealt with whether the proper person had commenced a wrongful-death action under the additional strictures found in the Workers' Compensation Act, Ala. Code 1975, § 25-5-1 et seq. In that case, the personal representative filed the complaint, which would properly commence the action under Ala. Code 1975, § 6-5-410, the wrongful-death statute. However, Ala. Code 1975, § 25-5-11, a part of the Workers' Compensation Act, requires that a 'dependent' file the complaint; the personal

> representative in that case was not a dependent. A dependent was not substituted as a plaintiff until after the two-year 'nonclaim bar to recovery' in the wrongful-death statute had expired. See Ogle v. Gordon, 706 So. 2d 707, 708 (Ala. 1997) (noting that 'this Court has held that the wrongful death statute, which provides a two-year limitations period, is a statute of creation, otherwise known as a nonclaim bar to recovery, and that it is not subject to tolling provisions').
>
> "The issues in Tyson were whether the personal representative simply lacked capacity under the Workers' Compensation Act and whether a dependent could be substituted as the proper plaintiff and, if so, whether the substitution would 'relate back' to the date the complaint was filed. Nevertheless, the action had been properly commenced for purposes of the wrongful-death statute."

Ex parte Hubbard Properties, ___ So. 3d at ___ (Shaw, J., concurring specially).[5]

Paula's second appointment as personal representative occurred after the limitations period had expired and does not relate back to the initial, timely filing of the complaint in

[5]To the extent that the prior decisions cited in Alabama Power discuss the lack of a requirement to plead and prove that one is a personal representative for purposes of the wrongful-death statute, and such discussion indicates that the issue is one of "capacity," the more recent caselaw discussed above has called any such inference into question. If Alabama Power intended to hold that the failure of the personal representative to commence a wrongful-death action is a waivable issue of capacity, then it is contrary to Downtown Nursing Home, which was released the same day, and which held that such failure resulted in a "nullity" and that there could be no relation back.

the wrongful-death action because that initial filing was a nullity; the action never commenced in the first place; and after the limitations period expired without a personal representative commencing the action, the cause of action expired.

MURDOCK, Justice (dissenting).

I respectfully dissent because of my view that Paula B. Noble's second appointment as personal representative of the estate of Thomas A. Noble relates back to the date she filed her complaint in the wrongful-death action. See Wood v. Wayman, 47 So. 3d 1212, 1220 (Ala. 2010) (Murdock, J., dissenting); Richards v. Baptist Health Sys., Inc., 176 So. 3d 179, 179 (Ala. 2014) (Murdock, J., dissenting); and Alvarado v. Estate of Kidd, [Ms. 1140706, Jan. 29, 2016] ___ So. 3d ___, ___ (Ala. 2016) (Murdock, J., dissenting) (urging a return to the holding in Ogle v. Gordon, 706 So. 2d 707 (Ala. 1997), and to a straightforward, simple rule that the subsequent appointment of a person as the personal representative relates back so as to validate the timely commencement of a wrongful-death action by that person).

I agree with much of Justice Bryan's well written dissenting opinion. And he and I, as well as Justice Wise, reach the same result. I am not prepared, however, to conclude, as Justice Bryan does, that that result can be reached using Rule 15(c) and Rule 17(a), Ala. R. Civ. P., "regardless of the application of § 43-2-831," Ala. Code 1975,

___ So. 3d at ___ (Bryan, J., dissenting), a substantive-law provision based on a long history of common-law precedent providing for the ratification of actions taken by a personal representative before the issuance of letters testamentary or letters of administration, or perhaps of the application of the common-law principles underlying that statute. See Ogle, 706 So. 2d at 709 ("The doctrine of relation back with respect to the powers of a personal representative has been in existence for approximately 500 years, and this Court first recognized it in Blackwell v. Blackwell, 33 Ala. 57 (1858)." (footnote omitted)); see also Wood v. Wayman, 47 So. 3d at 1220 (Murdock, J., dissenting). To the contrary, like Justice Maddox when he wrote for the Court in Ogle, I believe the debate over § 43-2-831 and these common-law principles in which members of this Court have engaged off and on for over 40 years -- beginning in Strickland v. Mobile Towing & Wrecking Co., 293 Ala. 348, 303 So. 2d 98 (1974), and continuing in Ogle, Wood, Alvarado, Ex parte Hubbard Properties, Inc., [Ms. 1141196, March 4, 2016] ___ So. 3d ___

(Ala. 2016) (four Justices dissenting), and other cases[6] -- not only is not irrelevant, it is essential.

It is not that Rule 15 and Rule 17, Ala. R. Civ. P., are themselves irrelevant. Indeed, the debate over this relation-back or ratification issue has always presumed that Rule 15 and/or Rule 17 (or their predecessors) was waiting in the wings to serve as the procedural vehicle for "correcting" the pleadings once the substantive issues were resolved. But without first giving an affirmative answer to the substantive relation-back/ratification question, we would ask too much of these procedural rules. Substituting one party for another when both were in existence at the time of the filing of a pleading but a mistake was made as to which party should be named in the pleading is one thing; substituting a party retroactively to a pleading filed when that party did not even exist as such is something different. I do not think the procedural rules in question were designed to do the

[6]Other cases in which the Court has found it important either explicitly or implicitly to work through the substantive-law question addressed in § 43-2-831 include Marvin v. Healthcare Auth. for Baptist Health, [Ms. 1140581, Jan. 29, 2016] ___ So. 3d ___ (Ala. 2016), and Richards v. Baptist Health Sys., Inc., 176 So. 3d 179 (Ala. 2014).

substantive, nunc pro tunc work of carrying some newly created entity, or newly acquired capacity of a party, back in time. Instead, the substantive relation back or ratification must first be in place. If it is, Rule 15 and Rule 17 are then available for the procedural work for which they were designed.

I would add as well that examination of the issue solely under a real-party-in-interest rubric does not yield a bright-line test, but instead apparently requires a case-by-case judgment call by the trial court as to whether the party bringing the wrongful-death lawsuit initially had a sufficiently close relationship or connection to the decedent's heirs in order to allow the application of real-party-in-interest jurisprudence. See, e.g., Chavez v. Regents of Univ. of New Mexico, 103 N.M. 606, 610, 711 P.2d 883, 887 (1985) ("Where the real parties in interest received sufficient notice of the proceedings or were involved unofficially at an early stage, the statute of limitations should not be used mechanically to bar an otherwise valid claim."); 6A Charles Alan Wright et al., Federal Practice & Procedure § 1555 (3d ed. 2008) ("A literal interpretation of

Rule 17(a)(3) would make it applicable to every case in which an inappropriate plaintiff has been named. However, the rule should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice. Thus, it has been held that when the determination of the right party to bring the action was not difficult and when no excusable mistake had been made, then Rule 17(a)(3) is not applicable and the action should be dismissed." (footnotes omitted)).[7] In contrast, if a person commences a wrongful-death lawsuit and subsequently is appointed as the personal representative of the decedent's estate, a bright line is crossed for purpose of application of the statute of limitations; no further relationship need be established.

Finally, I note, as does the main opinion, that Paula argues that Parkway Medical Clinic, Inc. ("Parkway"), and

[7]Federal jurisprudence on the issue reflects the "evolution" of the law in the federal courts as to whether state law or federal law is ultimately controlling. See, e.g., In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab. Litig., (No. 2:12-cv-07263, November 13, 2015) (E.D. Pa.) (not selected for publication in F. Supp.); see also Estate of Rowell v. Walker Baptist Med. Ctr., 290 F.R.D. 549, 561 (N.D. Ala. 2013) ("Eleventh Circuit authority on whether relation back is governed by federal or state law in federal court is presently unsettled ....").

Dr. Jeffrey Markham waived the lack-of-capacity issue. The main opinion rejects that argument based on its decision that the original complaint filed by Paula was a nullity. Obviously, I disagree with that rationale. Nonetheless, I reject Paula's waiver argument also, as I must in order to dissent. I do so for the different reason that I do not believe the issue of waiver is properly before us in this permissive appeal under Rule 5, Ala. R. App. P.

In a Rule 5 permissive appeal, this Court is limited to answering the specific legal question certified by the trial court and accepted by this Court. The only question certified to this Court is the substantive issue whether the wrongful-death action was a nullity when the plaintiff, Paula, had been discharged as the personal representative of the estate at the time of the filing of the initial complaint but was later reappointed. The question whether, as a procedural matter, Parkway and Dr. Markham failed to raise that issue soon enough provided no basis for the trial court's denial of their summary-judgment motions and is not a question certified to us by the trial court.

In the trial court, all parties argued over whether Paula had timely commenced a wrongful-death action at a point in time when she had the authority or capacity to do so. As to defendants Parkway and Dr. Markham, however, Paula also argued that those defendants had waived the issue of her capacity at the time she filed her initial complaint. The order denying the defendants' motions for a summary judgment, however, decided the merits of the limitations defense as to all four defendants -- Northstar Anesthesia of Alabama, LLC, and Maria Bolyard, CRNA, as well as Parkway and Dr. Markham -- based solely on whether Paula should be considered in law to have been the personal representative at the time the initial complaint was filed. The trial court's order did not discuss the issue of any alleged waiver as to Parkway and Dr. Markham. And, in accord with its own consistent rationale for denying the summary-judgment motions of all four defendants, the question certified to this Court by the trial court was limited to that capacity issue. Specifically, the trial court certified only the following question:

> "Is a wrongful death complaint filed by a person who had been appointed as the personal representative of the estate of the deceased ('the estate') a nullity when (1) the person was appointed

> personal representative of the estate on January 18, 2012, within two years of the death of the deceased; (2) the estate was closed and the person was discharged and released of her fiduciary duties and fiduciary capacity with regard to the probate administration matters by order of the Probate Court on August 16, 2012; (3) no other person was appointed personal representative and no other probate matters were pursued; (4) the person, who had previously been appointed to serve as personal representative of the estate, filed the complaint on November 15, 2013, within two years of the death of the deceased; and (5) the estate was re-opened and letters of administration were re-issued to the person on December 16, 2013, more than two years after the death of the deceased?"

Thus, the question of law certified to this Court is one of the merits of the issue of Paula's capacity or authority to file the initial complaint when she did, not the procedural question whether any defendant had waived the right to assert that issue.

> "'In conducting our de novo review of the question presented on a permissive appeal, "this Court will not expand its review ... beyond the question of law stated by the trial court. Any such expansion would usurp the responsibility entrusted to the trial court by Rule 5(a)." BE & K, Inc. v. Baker, 875 So. 2d 1185, 1189 (Ala. 2003). ...'
>
> "Alabama Powersport Auction, LLC v. Wiese, 143 So. 3d 713, 716 (Ala. 2013)."

___ So. 3d at ___ (emphasis added). See also Regions Bank v. Kramer, 98 So. 3d 510, 513 (Ala. 2012) (to like effect, and adding that, "[t]herefore, the only issue before this Court is the following question of law identified by the trial court in its Rule 5 certifications"); Precision Gear Co. v. Continental Motors, Inc., 135 So. 3d 953, 956 (Ala. 2013) ("[T]he only issue before this Court is the issue framed in the previously quoted question of law.").

As this Court stated in BE&K, Inc. v. Baker, 875 So. 2d 1185 (Ala. 2003):

> "It is 'our time-honored rule that a final judgment is an essential precondition for appealing to this Court.' John Crane-Houdaille, Inc. v. Lucas, 534 So. 2d 1070, 1073 (Ala. 1988). However, in exercising its rulemaking authority, this Court has provided in Rule 5 that '[a] party may request permission to appeal from an interlocutory order in civil actions under limited circumstances.' (Emphasis added.) Before a party may request permission to appeal from an interlocutory order, the trial court must determine that 'the interlocutory order involves a controlling question of law as to which there is substantial ground for difference of opinion,' and '[t]he trial judge must include in the [Rule 5(a)] certification a statement of the controlling question of law.' Once the trial court provides that certification, a petition for permission to appeal, in order to comply with Rule 5(b), must focus on 'the controlling question of law determined by the order of the trial court.'

> "The purposes of these requirements are obvious. First, Rule 5(a) ensures that the trial court has identified, and focused upon, what it considers to be the controlling question of law. Second, Rule 5(b) ensures that this Court is made aware of the question of law that will be presented for its review, if it grants permission to appeal. Therefore, consistent with the present requirements of Rule 5 and their purposes, this Court will not expand its review on permissive appeal beyond the question of law stated by the trial court. Any such expansion would usurp the responsibility entrusted to the trial court by Rule 5(a).
>
> "In its Rule 5(a) certification, the trial court identified what, in its opinion, is the 'controlling question of law' in this case: 'Specifically, the issue presented is whether the claims asserted in the counterclaim relate back as to [the counterclaim defendants] under Ala. Code [1975,] § 6-8-84.' However, under the undisputed facts, the trial court has not identified 'a controlling question of law.' Indeed, § 6-8-84 is irrelevant to any consideration of the compulsory counterclaims asserted by the Baker defendants. See Romar Dev. Co. v. Gulf View Mgmt. Corp., 644 So. 2d 462, 473 (Ala. 1994) ('§ 6-8-84 ... appl[ies] only to permissive counterclaims') .... See also Exxon Corp. v. Department of Conservation & Natural Res., 859 So. 2d 1096, 1102 (Ala. 2002)('In Romar, this Court ruled that all compulsory counterclaims, whether offensive or defensive, are not subject to the statute-of-limitations defense.').
>
> "On appeal, the counterclaim defendants seek to redefine the issue presented for our review, effectively abandoning the issue stated by the trial court. In their initial brief, Polar Property Development, Inc., and Polar Real Estate Corporation claim that the issue is whether 'an untimely [compulsory] counterclaim relate[s] back for statute of limitation purposes, against counterclaim

> defendants who were not plaintiffs in the original complaint.' Similarly, in their initial brief, BE&K, Inc., and BE&K Properties, Inc., identify the issue as whether 'the untimely claims asserted in the [compulsory] counterclaim relate back as to newly added counterclaim defendants ..., none of which are or have ever been plaintiffs.' These issues are beyond the scope of the issue stated by the trial court, and, consequently, are beyond the scope of our review on permissive appeal.
>
> "For the foregoing reasons, we dismiss the appeal without prejudice."

875 So. 2d at 1188-89 (footnotes omitted; some emphasis added and some emphasis omitted). See also, e.g., Continental Cas. Co. v. Pinkston, 941 So. 2d 926 (Ala. 2006); Century Tel of Alabama, LLC v. Dothan/Houston Cty. Commc'ns Dist., [Ms. 1131313, Sept. 30, 2015] ___ So. 3d ___, ___ (Ala. 2015) ("[T]he only issues before this Court are those included in the controlling questions of law identified in the circuit court's certification." (citation omitted)); Public Bldg. Auth. of Huntsville v. St. Paul Fire & Marine Ins. Co., 80 So. 3d 171, 181 (Ala. 2010) (to like effect); and Okeke v. Craig, 782 So. 2d 281, 282 (Ala. 2000) ("We granted the [Rule 5] petition only as to the question stated in Dr. Okeke's petition. We therefore decline to respond to Dr. Okeke's attempt to convert the premise of the first question into a

second issue. We answer only the question stated in the petition to appeal."); cf. Alabama Powersport Auction, LLC v. Wiese, 143 So. 3d 713, 720 (Ala. 2013) ("It is not clear from the wording of the question exactly what controlling question of law the circuit court would have this Court answer; thus, we will reframe the question. In reframing the above question, however, we are mindful that this Court is to provide a de novo review of the controlling question of law presented by the circuit court, and, as noted above, 'this Court will not expand its review on permissive appeal beyond the question of law stated by the trial court. Any such expansion would usurp the responsibility entrusted to the trial court by Rule 5(a).' Baker, 875 So.2d at 1189." (footnote omitted)); Carfax, Inc. v. Browning, 982 So. 2d 491, 494 (Ala. 2007) ("The dispositive question ... would appear to be whether the trial court correctly applied the 'seriously inconvenient' standard announced in Ex parte Rymer[, 860 So. 2d 339, 341 (Ala. 2003),] to the record before it. That question is not properly before us in this Rule 5 permissive appeal, however. We therefore dismiss the appeal.").

Even if it had been expressly certified by the trial court, the waiver question by its nature does not meet the requirements for permissive appeal. Whereas the capacity issue is a purely legal issue, the question of waiver discussed in the lead opinion is not. It turns on a fact-intensive inquiry into such matters as the timing and substance of the parties' various filings with the trial court and that court's discretionary determination as to whether any prejudice or other cause would preclude amending one or more of those filings. Yet, Rule 5 review is limited to "controlling question[s] of law." Further still, it is limited to "controlling questions of law as to which there is substantial ground for difference of opinion." There is not a substantial ground for difference of opinion as to the principles of waiver in relation to the assertion of an affirmative defense. There is only the issue of how the previously established principles of waiver should apply to any given set of procedural facts. Rule 5 is not an appropriate vehicle for assisting a trial court in doing its job of applying undisputed principles of law to the particular facts of a given case. See Gowens v. Tys. S., 948 So. 2d 513,

530 (Ala. 2006); see also McFarlin v. Conseco Servs., LLC, 381 F.3d 1251, 1259 (11th Cir. 2004); Once Upon a Time, LLC v. Chappelle Props., LLC, [Ms. 1141052, May 27, 2016] ___ So. 3d ___ (Ala. 2016) (Murdock, J., dissenting).

Based on the foregoing, I do not see the waiver issue as an issue that is before this Court in this permissive appeal and therefore as an issue that stands in the way of my voting to dissent.

BRYAN, Justice (dissenting).

I agree that, under our current precedent, a wrongful-death action commenced by someone other than the personal representative is a nullity. However, I believe that precedent is out of line with the modern trend and should be overruled. The plaintiff, Paula B. Noble ("Paula"), has placed this issue squarely before us by asking us to overrule that precedent. I believe her request is well taken.

Alabama has a "nullity rule," i.e., a wrongful-death action commenced by someone other than the personal representative is a nullity. See Ex parte Hubbard Props., Inc., [Ms. 1141196, March 4, 2016] ___ So. 3d ___ (Ala. 2016); Wood v. Wayman, 47 So. 3d 1212, 1218 (Ala. 2010); Waters v. Hipp, 600 So. 2d 981, 982 (Ala. 1992); Brown v. Mounger, 541 So. 2d 463, 464 (Ala. 1989); Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465, 466 (Ala. 1979); and Strickland v. Mobile Towing & Wrecking Co., 293 Ala. 348, 354, 303 So. 2d 98, 103 (1974). In my opinion, this Court has never adequately explained why an action so commenced is a nullity. In our recent decision in Ex parte Hubbard Properties, the Court implied that a wrongful-death action brought by an

improper plaintiff is a nullity because that person lacks "standing" to file the action. In that case the Court by way of a mandamus petition reviewed the denial of a summary-judgment motion -- a situation that typically does not support mandamus review -- on the ground that "'"[m]andamus review is available where the petitioner challenges the subject-matter jurisdiction of the trial court based on the plaintiff's lack of standing to bring the lawsuit."'" ___ So. 3d at ___ (quoting Ex parte Rhodes, 144 So. 3d 316, 318 (Ala. 2013), quoting in turn Ex parte HealthSouth Corp., 974 So. 2d 288, 292 (Ala. 2007)). Standing is a component of subject-matter jurisdiction, Ex parte Overton, 985 So. 2d 423, 427 (Ala. 2007), and an action commenced without subject-matter jurisdiction is a nullity, Alabama Dep't of Corr. v. Montgomery Cty. Comm'n, 11 So. 3d 189, 192 (Ala. 2008). Although it is unclear, it may be that an action commenced in a case like this one is considered a nullity based on the idea that the plaintiff lacks standing.

However, in 2013, this Court clarified that, in Alabama, "standing" is a concept that is relevant only in public-law cases, not in private-law cases like the present one. Ex

parte BAC Home Loans Servicing, LP, 159 So. 3d 31 (Ala. 2013). In doing so, this Court distanced itself from some of our cases that had taken a more expansive view of the concept of standing. See also Jerome A. Hoffman, The Malignant Mystique of "Standing", 73 Ala. Law. 360 (2012) (arguing that Alabama caselaw had expanded the concept of standing beyond its appropriate scope). I suspect that the nullity rule applied in our wrongful-death cases is a holdover from caselaw concerning standing that this Court distanced itself from in Ex parte BAC. However, as noted, "standing" is irrelevant in this private-law action and cannot serve as a legitimate basis for the nullity rule found in our wrongful-death caselaw.

Regardless of the underpinnings of the nullity rule in wrongful-death cases, I believe that position is outdated and that it should be abandoned. The nullity rule has been criticized as "a remnant of an earlier era of strict pleading requirements." Trimble v. Engelking, 130 Idaho 300, 302, 939 P.2d 1379, 1381 (1997) (addressing an argument that an action against a decedent is a nullity because dead persons are not legal entities capable of being sued). "Adopting such a rule, and thereby precluding amendment and relation back where a

party is improperly named, would frustrate the purpose of our modern rules of pleading which seek to promote the resolution of disputes on their merits rather than to bar suit based on antiquated pleading requirements." Id. Under our nullity rule, a wrongful-death complaint filed by anyone other than the personal representative is a nullity, which is incapable of being amended. The more modern position is to allow such a complaint to be amended through relation back under the Alabama Rules of Civil Procedure.

The modern position is illustrated by the Supreme Court of New Mexico's decision in Chavez v. Regents of University of New Mexico, 103 N.M. 606, 609, 711 P.2d 883, 886 (1985), which described the nullity rule as "unnecessarily restrictive." In New Mexico, as in Alabama, a wrongful-death action must be brought by the personal representative.[8] In Chavez, when the plaintiffs, who were the parents of the decedent, brought their wrongful-death action, a personal representative had not yet been appointed. The decedent's mother was later appointed

[8]Alabama does have an exception to the general rule that a personal representative must bring a wrongful-death action. Section 6-5-391, Ala. Code 1975, which provides for a wrongful-death action based on the death of a minor, permits a father or a mother to sue under that statute, without being appointed personal representative.

personal representative after the limitations period had expired. The issue was whether the action was barred "because the parents failed to secure court appointment as personal representatives within the two-year period." 103 N.M. at 607, 711 P.2d at 884. A lower appellate court determined that the case was controlled by an earlier decision in which that court "would not allow an amended complaint, which added the father as personal representative and which was filed after the limitations period, to relate back to the original complaint, so as to bring the amended complaint within the statute of limitations." 103 N.M. at 608, 711 P.2d at 885. The lower appellate court in the earlier decision had "held that the original complaint was a nullity." Id. The Supreme Court of New Mexico disagreed, concluding that the relation-back provisions of Rule 15(a) and Rule 17(c) of New Mexico's civil-procedure rules dictated a different result. The court explained:

> "Our Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure. A majority of the federal courts allow a change in a plaintiff's capacity to sue to relate back to the action's commencement under Fed. Rules Civ. P. 15(c) and 17(a). See 3 J. Moore, Moore's Federal Practice § 15.15 [4] (2d ed. 1985); 6 C. Wright & A. Miller, Federal Practice & Procedure § 1555 (1971).

Wrongful death actions have been specifically included within this principle. See, e.g., Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir.), cert. dismissed, 448 U.S. 911, 101 S. Ct. 25, 65 L. Ed. 2d 1141 (1980); Holmes v. Pennsylvania New York Central Transportation Co., 48 F.R.D. 449 (N.D. Ind. 1969); Shinkle v. Union City Body Co., 94 F.R.D. 631 (D. Kan. 1982); Hunt v. Penn Central Transportation Co., 414 F. Supp. 1157 (W.D. Pa. 1976). See also Annot., 12 A.L.R.Fed. 233 (1972).

"The reasoning of these cases has been explained as follows:

> "'Thus in cases involving an amendment, made after the applicable limitation period has run, which attempted to change the capacity or identity of the parties, the courts generally examined the facts of the case to ascertain whether the allowance of such amendment would be inconsistent with the notice requirements inherent in such limitation. Where plaintiff sought to change the capacity in which the action is brought, or in which defendant is sued, there is no change in the parties before the court, all parties are on notice of the facts out of which the claim arose, and relation back was allowed in both the case of the plaintiff and the defendant.'

"3 J. Moore, supra § 15.15[4.-1] at 15-157 (... footnotes omitted).

"Also, a majority of the state courts that have recently considered the issue have reached a similar result. See Annot., 27 A.L.R.4th 198 (1984); Annot., 3 A.L.R.3d 1234 (1965)....

"In the present case, the original pleading alleged a valid cause of action and certainly gave

> defendants notice of the claim within the statutory period. ... Defendants would in no way be prejudiced if the appointment of [the mother] as personal representative is allowed to relate back to the initial filing of the action. We determine, therefore, that in this case relation-back should be permitted. Such relation-back may be accomplished either by permitting an amendment to relate back under Rule 15(c) or by allowing under Rule 17(a) 'a reasonable time for ratification of commencement of the action by, or joinder or subdivision of' the personal representative."

Chavez, 103 N.M. at 611-12, 711 P.2d at 888-89 (emphasis omitted).

Like New Mexico's Rules of Civil Procedure, the Alabama Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure. Thus, federal cases applying the Federal Rules of Civil Procedure are persuasive authority in construing the Alabama Rules of Civil Procedure. Hilb, Rogal & Hamilton Co. v. Beiersdoerfer, 989 So. 2d 1045, 1056 n.3 (Ala. 2007). Federal and state courts have allowed amendments to name the proper plaintiff in a wrongful-death action using relation back under versions of either Rule 15(c) or Rule 17(a), Ala. R. Civ. P., or both. Although Rule 15(c) does not by its text apply to amendments substituting plaintiffs, courts have applied it by analogy to such amendments. See, e.g., English v. State ex rel. Purvis, 585 So. 2d 910, 911-12

(Ala. 1991); see also 6A Charles Alan Wright et al., Federal Practice and Procedure § 1501 (2010) (stating that Rule 15(c) extends by analogy to amendments substituting plaintiffs). Additionally, Rule 17(a) provides for the relation back of plaintiffs, making it especially applicable in a case like the present one. Rule 17(a) provides, in pertinent part:

> "Every action shall be prosecuted in the name of the real party in interest. ... No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

(Emphasis added.)

In Strother v. District of Columbia, 372 A.2d 1291 (D.C. 1977), the District of Columbia Court of Appeals applied relation back under that court's version of Rule 15(c) to allow the personal representative to be added as a plaintiff in a wrongful-death action. In doing so, the court in Strother, like the court in Chavez, rejected the nullity rule. The court observed:

> "While there is a split of authority on the issue of whether amendments seeking to change the

> capacity in which a plaintiff is suing relate back to the original filing, federal courts and state courts which have adopted the substance of Fed. R. Civ. P. 15(c) have interpreted the rule as permitting relation back. E.g., Longbottom v. Swaby, 397 F.2d 45 (5th Cir. 1968); Crowder v. Gordons Transports, Inc., 387 F.2d 413 (8th Cir. 1967); Russell v. New Amsterdam Casualty Co., 303 F.2d 674 (8th Cir. 1962); Atlanta Newspapers, Inc. v. Shaw, 123 Ga. App. 848, 182 S.E.2d 683 (1971); Gogan v. Jones, 197 Tenn. 436, 273 S.W.2d 700 (1954). These cases have found that there is no substantial prejudice to the defendant because 'there is no change in the parties before the court (and) all parties are on notice of the facts out of which the claim arose.' Moore's Federal Practice 15.15(4.-1) (1974). We think this reasoning is sound.
>
> "....
>
> "We note that even before the adoption of the Federal Rules of Civil Procedure and our adoption of Rule 15(c), the [United States] Supreme Court held, under circumstances similar to those before us, that an amendment to change the capacity in which a plaintiff sues ought to relate back to the original filing. Missouri, Kansas & Texas Ry. v. Wulf, 226 U.S. 570, 33 S. Ct. 135, 57 L. Ed. 355 (1913)."

Strother, 372 A.2d at 1297-99. See also Estate of Kitzman v. Kitzman, 163 Wis. 2d 399, 403, 471 N.W.2d 293, 294 (1991) (rejecting the nullity rule, allowing relation back under a version of Rule 15(c), and citing the Supreme Court's 1913 decision in Missouri, Kansas & Texas Ry. v. Wulf, 226 U.S. 570

(1913), for the proposition that the Kitzman court's "view of the matter is hardly new or novel").

Other cases are in accord with the cases cited above. See, e.g., Espisito v. United States, 368 F.3d 1271 (10th Cir. 2004) (applying Rule 17(a), Fed. R. Civ. P., to allow the substitution of the proper plaintiff in a wrongful-death action); and Burcl v. North Carolina Baptist Hosp., Inc., 306 N.C. 214, 228-29, 293 S.E.2d 85, 93-94 (1982) (rejecting the nullity rule in a wrongful-death action and allowing relation back under Rules 15 and 17(a), N.C. R. Civ. P.); see also Lavean v. Cowels, 835 F. Supp. 375 (W.D. Mich. 1993) (applying Rule 17(a), Fed. R. Civ. P., to allow the relation back of a personal representative in a quiet-title action). In short, "[a] majority of the reported cases do allow a complaint amendment changing the capacity in which the plaintiff sues to relate back to the original complaint filed within the limitation period." Regie de l'assurance Auto. du Quebec v. Jensen, 399 N.W.2d 85, 90 (Minn. 1987). However, "[i]n rejecting the 'relation back' doctrine [in wrongful-death cases], Alabama represents a minority position among common law jurisdictions." Hess v. Eddy, 689 F.2d 977, 980 n.4 (11th

Cir. 1982), abrogated on other grounds by Wilson v. Garcia, 471 U.S. 261 (1985).

The position I advocate is not completely new even in this Court. In 1997, this Court actually took steps to move away from the nullity rule. In Ellis v. Hilburn, 688 So. 2d 236 (Ala. 1997), a case relied on by Paula, the plaintiff commenced a wrongful-death action without having been appointed personal representative; the plaintiff was later appointed personal representative. Both the filing of the complaint and the plaintiff's appointment as personal representative occurred within the limitations period. After the limitations period expired, the plaintiff attempted to amend her complaint under Rule 17(a) to add herself as a plaintiff in her role as personal representative. The defendant argued that the original complaint was nullity, an argument I believe is consistent with the bright-line nullity rule as currently applied by this Court. See, e.g., this Court's recent decision in Ex parte Hubbard Properties. However, the Court rejected the nullity-rule argument and instead applied Rule 17(a) to allow relation back. In allowing relation back, the Court emphasized that the

plaintiff both commenced her action and was appointed personal representative within the limitations period. 688 So. 2d at 238. Although the scope of Ellis is unclear, it is evident that the Court in Ellis did not apply a bright-line nullity rule and allowed relation back under Rule 17(a) in at least some circumstances.[9]

Several months later in 1997, the Court moved even further away from the nullity rule in Ogle v. Gordon, 706 So. 2d 707 (Ala. 1997).[10] The Court in Ogle framed the issue fairly simply: "[W]e must determine whether the doctrine of relation back applies to our wrongful death limitations provision." 706 So. 2d at 708-09. Ogle answered that inquiry affirmatively, allowing relation back in wrongful-death cases on the basis of § 43-2-831, Ala. Code 1975, which Ogle concluded codified the common-law doctrine of relation back as it relates to personal representatives. Although Ogle used § 43-2-831 to allow relation back, Rule 15(c) or Rule 17(a)

[9]There were no dissenters in Ellis, which was authored by Justice Shores and joined by Chief Justice Hooper and Justices Maddox, Houston, Kennedy, Cook, and Butts.

[10]There were no dissenters in Ogle, which was authored by Justice Maddox and joined by Chief Justice Hooper and Justices Kennedy, Butts, and See; Justice Cook concurred in the result.

could have been used to reach the same result. The important point is that Ogle rejected the nullity rule first stated in 1974 in Strickland and allowed relation back in wrongful-death cases. This Court stated in Ogle:

> "The defendants cite Strickland v. Mobile Towing & Wrecking Co., 293 Ala. 348, 303 So. 2d 98 (1974), a case construing federal statutes (and holding that the plaintiff who filed the wrongful death claim was not the personal representative at the time the action was filed), for the proposition that the doctrine of relation back does not apply in this case, on the basis that the appointment, coming beyond the two-year limitations period, gave the plaintiff no capacity to sue and was a nullity and that, therefore, there is nothing to relate back to. Our decision in Strickland, however, came long before the Legislature's codification of § 43-2-831. We, therefore, overrule Strickland's holding regarding the application of the doctrine of relation back, insofar as it is inconsistent with what we hold today, but we note that Strickland correctly points out that under the doctrine of relation back one must have something to relate back to, and we note that in the present case the filing of the original petition is the event to which the appointment would relate back."

706 So. 2d at 710 (emphasis added).

Thus, in my opinion, Ogle actually eliminated the nullity rule in wrongful-death cases in 1997. However, 13 years later, in Wood, this Court concluded that "[t]he legal issue presented in Ogle was not one of relation back," 47 So. 3d at 1217, despite the Court in Ogle having stated that it "must

determine whether the doctrine of relation back applies to our wrongful death limitations provision." 706 So. 2d at 708-09. Wood instead characterized Ogle as essentially creating an equitable exception to the nullity rule in cases of the probate court's inadvertence in appointing a personal representative. However, as to this purported equitable exception, Ogle simply noted that relation back is "especially applicable" -- which I read to mean "especially equitable" -- in cases of the probate court's inadvertence. Ogle, 706 So. 2d at 710. In my opinion, the actual holding of Ogle is that a wrongful-death action commenced by someone other than the personal representative is not a nullity and that, under § 43-2-831, relation back may be used to amend the complaint in such a case. Since Wood, this Court had debated whether the text of § 43-2-831 supports the application of relation back in a wrongful-death case, and I will not rehash that debate. See, e.g., Wood, 706 So. 2d at 1219 (Murdock, J., dissenting); Richards v. Baptist Health Sys., Inc., 176 So. 3d 179, 179, 183 (Ala. 2014) (Murdock, J., concurring specially, and Moore, C.J., dissenting); and Alvarado v. Estate of Kidd, [Ms. 1140706, January 29, 2016] ___ So. 3d ___ (Ala. 2016).

However, regardless of the application of § 43-2-831, I believe that we may use Rule 15(c) or Rule 17(a) to allow relation back in wrongful-death cases, as explained above. In my opinion, doing so would simply put us back in the same place we were in 1997 in Ogle, though by a different route.[11]

In sum, I would overrule the nullity rule as stated in our wrongful-death cases beginning with Strickland, and I would allow relation back under Rule 15(c) or Rule 17(a) when appropriate. In this case, Paula should be allowed to amend the complaint to add herself as plaintiff in her role as personal representative, and that amendment should relate back to the filing of her complaint within the limitations period. The defendants had notice of the action within the limitations period and would not be prejudiced by the amendment. After the amendment, Paula would still be the party pursuing the action, though in her role as personal representative. The factual and legal issues would be unchanged. I see nothing in

[11]It is unclear to me whether the other 1997 decision, Ellis, remains good law. Based on recent precedent applying a bright-line nullity rule, e.g., Ex parte Hubbard Properties, it is possible that Ellis has been silently overruled. However, it is also possible that a majority of the Court would view Ellis as essentially creating an exception to the nullity rule, based on the facts of that case, in the same vein as Ogle, at least as that case was viewed by Wood.

Alabama's wrongful-death statute, § 6-5-410, that precludes the application of Rule 15(c) or Rule 17(a) in this case. Further, the fact that this Court has construed § 6-5-410, which provides a two-year limitations period, as a "statute of creation" and not as a statute of limitations does not bar the application of relation back under the Alabama Rules of Civil Procedure. See Ex parte Tyson Foods, Inc., 146 So. 3d 1041, 1045 n.5 (Ala. 2013) (indicating that the expiration of a statute of creation would not bar the application of relation back under Rule 17(a)).

Accordingly, I respectfully dissent.

Wise, J., concurs.