

FILING SUIT AGAINST A DECEASED DEFENDANT¹

Sidney C. Summey

White Arnold & Dowd P.C.

ssummey@whitearnolddowd.com

2025 Third Avenue North, Suite 500

Birmingham, AL 35203

205-715-2690

It is clear that if a defendant has been sued and dies in the course of the litigation, a personal representative must be substituted for the defendant within six months of the filing of a suggestion of death upon the record. ***Big Red Elephant v. Bryant***, 477 So. 2d 342 (Ala. 1985). However, there is now more confusion over how a plaintiff might file a complaint against a defendant who dies before suit is filed.

In ***Maclin v. Congo***, 106 So. 3d 405 (Ala. Civ. App. 2012), Congo filed tort claims against Brotherton in an automobile crash. A limited appearance was filed on behalf of Brotherton for the purpose of suggesting the death of Brotherton who had died two weeks before the suit was filed, a fact which was not known to the plaintiff at the time the suit was filed. The limited appearance noted that Brotherton was a resident of Missouri at the time of his death and no estate had been opened and that under Missouri law, no estate could now be opened because the decedent had been dead for over one year. The limited appearance sought to quash service on Brotherton or his estate because there was no one to be served. Congo filed a motion to have the court

¹ © 2016 by Sidney C. Summey

appoint an Administrator ad litem pursuant to 43-2-250. The trial court granted the motion and appointed Maclin as AAL who filed a motion to dismiss on the basis of lack of jurisdiction because, he argued, there was no defendant and no estate to be represented. The trial court denied the motion to dismiss and the case was tried to a jury which rendered a verdict for the plaintiff. Maclin filed the appropriate post judgment motions which were denied and then filed an appeal to the Alabama Court of Civil Appeals.

The appellate court dismissed the appeal holding “[p]roceedings instituted against an individual who is deceased at the time the action is filed are a nullity and do not invoke the trial court’s jurisdiction.” 106 So. 3d 405 *citing A.E. v. M.C.*, 100 So.3d 587, 595 (Ala. Civ. App. 2012). The **A.E.** case is a custody case in which a father attempted to sue the mother of his child for custody four years after her death. That case adopted language from a Superior Court for the New Haven District in Connecticut [Noble v. Corkin, 45 Conn. Supp. 330, 332-33, 717 A.2d 301, 302-03 (1998)] stating that a deceased person is not an entity which can be sued and an action filed against a dead person is void *ab initio*.

The logic is clear and the rule announced is easy to apply. However, neither the **Congo** case nor the **A.E.** case upon which it relies even mentions the Alabama Supreme Court case of **Nelson v. Estate of Frederick**, 855 So. 2d 1043 (Ala. 2003) but instead relied upon the law of Connecticut. The **Nelson** case involved an automobile accident which occurred on March 1, 2000. A year later on March 13, 2001, the defendant/tortfeasor died. Suit was filed against the deceased defendant on March

1, 2002. Twenty nine days after the complaint was filed, an answer was filed “on behalf of Frederick [the deceased defendant]... denying the essential allegations of he complaint and asserting numerous defenses” including that the plaintiff failed to state a claim because he sued more than six months after the death of the defendant which, the estate argued, was “beyond the statutory limitations period.” 855 So. 2d at 1045. The court granted a motion to dismiss and the plaintiff filed a motion to amend his complaint to name the administrator of defendant’s estate or alternatively, to appoint an Administrator ad litem, if there was no administrator. The trial court treated the defendant’s motion to dismiss as a motion for summary judgment because it presented facts outside the pleadings in the form of the death certificate of the defendant. The trial court granted summary judgment for the defendant because the defendant had died before the filing of the filing of the complaint and that there was no valid action pending at the time the two year statutory limitations period expired. 855 So. 2d at 1045.

The court considered the issue of whether the trial court erred in finding that “no valid action pending at the time the statutory limitations period expired because Frederick had died before Nelson filed his claim” and concluded that the trial court did err in such a finding. 855 So. 2d at 1046. This is hardly the rule announced by the Court of Civil Appeals in the **Congo** case. In fact, the Supreme Court in the **Nelson** case went on to conclude that the trial court erred in not appointing an Administrator ad litem in response to the plaintiff’s request. 855 So. 2d at 1047. The defendant’s estate asserted that the plaintiff did not have a valid claim because the defendant was dead at the time the complaint was filed. However, the Court rejected this assertion holding that because the complaint was within the statutory two year statute of limitations (with an

added six months due to the death of a defendant), the claim was valid. Citing 43-2-250, the court further held that the trial court “had a duty” to appoint an AAL when requested to do so by the plaintiff. 855 So. 2d at 1048.

So which is it? The Supreme Court has held that a deceased defendant can be named in a suit and the plaintiff can request the court to appoint an AAL to defend if all of that is done within the statute of limitations for the acts complained of. More recently, the Court of Civil Appeals has not considered the opinion of the Alabama Supreme Court, but has adopted the opinion of a Connecticut court that an action filed against a deceased defendant is a nullity and is void *ab initio*.