

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-IA-01437-SCT

***CLARK SAND COMPANY, INC., CLEMCO
INDUSTRIES CORPORATION, PANGBORN
CORPORATION, P. K. LINDSAY COMPANY,
SOUTHERN SILICA OF LOUISIANA, INC.,
MISSISSIPPI VALLEY SILICA COMPANY, INC.,
AND PULMOSAN SAFETY EQUIPMENT
CORPORATION***

v.

***RUBY C. KELLY a/k/a RUBY KELLEY,
EXECUTRIX OF THE ESTATE OF DAVID C.
BOZEMAN, DECEASED AND ON BEHALF OF
ALL WRONGFUL DEATH BENEFICIARIES OF
DAVID C. BOZEMAN, DECEASED***

DATE OF JUDGMENT:	08/11/2008
TRIAL JUDGE:	HON. ISADORE W. PATRICK, JR.
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	FRED KRUTZ, III EDWIN S. GAULT, JR. JENNIFER J. SKIPPER CLYDE L. NICHOLS, III BLAYNE T. INGRAM
ATTORNEYS FOR APPELLEE:	R. ALLEN SMITH, JR. DAVID NEIL McCARTY
NATURE OF THE CASE:	CIVIL - WRONGFUL DEATH
DISPOSITION:	REVERSED AND RENDERED - 02/25/2010
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

WALLER, CHIEF JUSTICE, FOR THE COURT:

¶1. Defendant Clark Sand Company brings this interlocutory appeal from the Warren County Circuit Court’s denial of its motion for summary judgment. The circuit court found that the plaintiff, Ruby C. Kelley, had standing to bring this wrongful-death action, either as the decedent’s personal representative or as an interested party, and that the suit was brought within the applicable statute of limitations. Finding that Kelley lacked standing to commence this action at the time she did, we reverse the circuit court’s decision.

FACTS AND PROCEDURAL HISTORY

¶2. David T. Bozeman¹ worked with silica and silica products throughout his entire working life, but his last exposure to silica was sometime in 1994. On June 2, 2002, Bozeman was diagnosed with lung cancer caused by silicosis. On September 23, 2002, Bozeman joined with fifty-four other plaintiffs in a mass-tort, personal-injury suit against various silica manufacturers and distributors, including Clark Sand Company, styled *Danny McBride, et al. v. Pulmosan Safety Equipment Corporation, et al.* The *McBride* complaint included claims for all the plaintiffs’ personal injuries, but it also alleged generally that “[s]ome of the Plaintiffs to this action have suffered injury and premature death[, and] the Defendants referenced herein have therefore injured those decedents’ wrongful death beneficiaries.” Thus, the *McBride* complaint included claims for the decedents’ wrongful deaths in favor of their purported beneficiaries. *McBride* was filed in the Circuit Court of Holmes County, Mississippi.

¹ Bozeman’s will and death certificate give Bozeman’s middle initial as “T.” Apparently, Kelley’s complaint is incorrectly styled, giving “C” as his middle initial.

¶3. Bozeman died on March 11, 2005, while *McBride* was pending. Ruby C. Kelley, Bozeman’s live-in girlfriend, was listed as the “informant” on Bozeman’s death certificate. The certificate gave Bozeman’s marital status as “widowed,” and the space for “surviving spouse” was left blank. Kelley was named executrix in Bozeman’s will, which bequeathed all of Bozeman’s property except his pick-up truck to her. Bozeman also was survived by two sons, one of whom was mentioned in his will.² After Bozeman’s death, Kelley did not amend the complaint regarding Bozeman’s *McBride* claim or move the trial court to substitute her as the real party in interest.

¶4. On March 10, 2006, *McBride* was dismissed without prejudice pursuant to this Court’s decision in *Canadian National v. Smith, et al.*, 926 So. 2d 839 (Miss. 2006).³

¶5. Kelley filed the instant action on March 5, 2007, in the Circuit Court of Warren County, Mississippi. Her complaint was styled “*Ruby C. Kelley, Executrix of the Estate of David C. Bozeman, Deceased and on behalf of all Wrongful Death Beneficiaries of David C. Bozeman, Deceased v. Clark Sand Co., Inc., et al.*” Kelley specifically averred in her complaint that this suit is merely a continuation of Bozeman’s previous *McBride* claim,

² These sons are identified in the parties’ pleadings and other documents as David Clarke Bozeman and Joey Bozeman.

³ *Canadian National* held that all claims previously filed en masse for silicosis damages that were not filed in the proper venue should be severed as misjoined pursuant to *Janssen Pharmaceutica v. Armond*, 866 So. 2d 1092 (Miss. 2004). *Canadian Nat’l*, 926 So. 2d at 845 (citing *Armond*, 866 So. 2d at 1099 (requiring each claim joined in a single lawsuit to arise from a “distinct, litigable event”)). The *Canadian National* Court stated that the dismissal would be “as to a matter of form,” for purposes of the savings statute. *Canadian Nat’l*, 926 So. 2d at 845. Thus, a plaintiff whose claim was dismissed would have one year to refile his or her claim in an appropriate venue of his or her choice. Miss. Code Ann. § 15-1-69 (Rev. 2003).

which the savings statute allowed her to bring within one year after the dismissal of *McBride* pursuant to *Canadian National*. The complaint included claims for Bozeman's personal injuries caused by exposure to silica and for his wrongful death, and Kelley specifically sought "All Wrongful Death Damages and Survival Damages" in connection with Bozeman's death.⁴

¶6. Clark Sand answered the complaint, asserting various affirmative defenses. Specifically, Clark Sand argued that the court lacked subject-matter jurisdiction over the cause and that the applicable statute of limitations barred Kelley's suit. Clark Sand moved for summary judgment on July 2, 2007, arguing that Kelley's suit was time-barred because she had missed the deadline under the "survival savings statute" found in Mississippi Code Section 15-1-55. Clark Sand also argued that, at the time she filed suit, Kelley lacked standing to bring the suit because she had not yet been formally appointed executrix of Bozeman's estate and she was not Bozeman's wife. Clark Sand pointed out that, in his sworn deposition, taken in 2004, Bozeman specifically stated that "I don't have a wife," and Bozeman and his attorney both referred to Kelley as Bozeman's girlfriend.

¶7. On July 20, 2007, Kelley responded to Clark Sand's summary-judgment motion. She argued first that she had standing as Bozeman's personal representative to initiate the wrongful-death action because she was named executrix in Bozeman's will. Kelley also contended that she and Bozeman had maintained a common-law marriage because they had

⁴ An action for wrongful death includes not only the claimants' "wrongful-death" claims, such as loss of consortium, society, and companionship, but also the decedent's "survival-type" claims, such as claims for his or her personal injury, property damage, and medical and funeral expenses. *Caves v. Yarbrough*, 991 So. 2d 142, 148-49 (Miss. 2008).

held themselves out as husband and wife and had cohabitated for six years. Finally, Kelley argued that the statute of limitations had not run because the limitation period was tolled either by the savings statute or the pendency of *McBride*. Kelley was formally appointed executrix of Bozeman's estate on August 7, 2007, when she was issued letters testamentary by the Probate Court of Choctaw County, Alabama.

¶8. Clark Sand moved for summary judgment again on June 18, 2008, arguing that Kelley's action was untimely filed. Specifically, Clark Sand argued that the parties and claims asserted in Kelley's complaint were different from those in *McBride*, and because of this, Kelley had failed to meet the requirements of the savings statute. Both of Clark Sand's motions for summary judgment were taken under advisement by the circuit court.

¶9. By order dated August 11, 2008, the circuit court denied both of Clark Sand's motions. The circuit court held that Kelley had standing to file the wrongful-death action, either as Bozeman's personal representative or as an interested party, and that Kelley's suit was filed within the applicable statute of limitations because of the savings statute's one-year tolling effect after the dismissal of *McBride*.

¶10. Clark Sand petitioned this Court for interlocutory appeal, asserting two issues:

- I. Does a decedent's girlfriend – without court approval or authorization – have standing to file an action under the survival statute and/or the wrongful death statute?
- II. Does the provision in Mississippi's savings statute allowing one year to refile apply to a second suit which differs from the original in both the identity of parties and the identity of claims?

We granted Clark Sand’s petition for interlocutory appeal on September 18, 2008.⁵ We find the first issue, Kelley’s standing to commence this suit, dispositive.

STANDARD OF REVIEW

¶11. This Court reviews a trial court’s grant or denial of a motion for summary judgment or a motion to dismiss under a *de novo* standard. *Monsanto v. Hall*, 912 So. 2d 134, 136 (Miss. 2005).

DISCUSSION

Whether Kelley had standing to commence the instant action.

¶12. Our analysis of this issue implicates the savings statute and the wrongful-death statute. Miss. Code Ann. § 15-1-69 (Rev. 2003); Miss. Code Ann. § 11-7-13 (Rev. 2004).⁶ Clark Sand argues that this suit is different from Bozeman’s claim in *McBride* because the parties and claims are different, and thus the savings statute does not apply. However, Kelley specifically averred in her complaint that this suit is a continuation of Bozeman’s previous

⁵ On August 28, 2008, Kelley sought a declaration from an Alabama circuit court that she was Bozeman’s common-law wife. The Alabama court found on October 23, 2008, that Kelley and Bozeman had maintained a common-law marriage. However, that decision was later vacated and set aside by the Alabama court. A subsequent proceeding in Alabama regarding Kelley’s and Bozeman’s purported common-law marriage was stayed on April 21, 2009, pending resolution of this appeal.

⁶ Clark Sand also asks us to determine Kelley’s standing under the survival statute. Apparently, Clark Sand interpreted Kelley’s seeking “Survival Damages” in her complaint as an “attempt at making a claim under the survival statute.” However, it is undisputed that Bozeman’s death was the result of lung cancer caused by silicosis. And “[w]hen the same wrongful conduct causes both personal injury and death, at the instant of death, the recovery is embraced by the ‘one suit’ for wrongful death and is not actionable . . . under the survival statute.” *In re Estate of England*, 846 So. 2d 1060, 1068 (Miss. Ct. App. 2003) (citing *Edward Hines Yellow Pine Trustees v. Stewart*, 135 Miss. 331, 347, 100 So. 12, 14 (1924)). Thus, neither the survival statute nor the so-called “survival savings statute” applies to Kelley’s action for Bozeman’s wrongful death. *England*, 846 So. 2d at 1068.

McBride claim, which the savings statute allowed her to bring within one year of *McBride*'s dismissal pursuant to *Canadian National*.

¶13. The savings statute requires the “new action” to be “for the same cause.” Miss. Code Ann. § 15-1-69 (Rev. 2003). However, whether the instant action is the same as or different from Bozeman’s *McBride* claim need not be addressed. We need only decide whether Kelley had standing to bring it. Both the savings statute and the wrongful-death statute permit the action to be brought by the decedent’s personal representative. Miss. Code Ann. § 15-1-69 (“executor or administrator may, in case of the plaintiff’s death, commence such new action”); Miss. Code Ann. § 11-7-13 (“action . . . may be brought in the name of the personal representative of the deceased person”). Hence, if we determine Kelley’s standing to bring this action under the wrongful-death statute, we simultaneously determine her standing, or lack thereof, under the savings statute.

¶14. The United States Supreme Court has stated that “the irreducible constitutional minimum of standing contains three elements.”

First, the plaintiff must have suffered an “injury in fact” – an invasion of a *legally protected interest* which is (a) concrete and particularized [and] (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351, 357 (1992) (internal citations omitted) (emphasis added). And standing “is to be determined as of the commencement of suit.” *Delta Health Group, Inc. v. Estate of Pope*,

995 So. 2d 123, 126 (Miss. 2008) (quoting *Lujan*, 504 U.S. at 571, 112 S. Ct. at 2142, 119 L. Ed. 2d at 371).

¶15. The wrongful-death statute expressly lists the potential claimants who may commence a wrongful-death action. Specifically, the statute provides that:

*[T]he action for such damages may be brought in the name of the personal representative of the deceased person or unborn quick child for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child or unborn quick child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. Except as otherwise provided in Section 11-1-69, in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and *all parties interested in the suit.**

[I]n an action brought pursuant to the provisions of this section by the widow, husband, child, father, mother, sister or brother of the deceased or unborn quick child, or by all interested parties, such party or parties may recover as damages property damages and funeral, medical or other related expenses incurred by or for the deceased as a result of such wrongful or negligent act or omission or breach of warranty, whether an estate has been opened or not. . .

Miss. Code Ann. § 11-7-13 (Rev. 2004) (emphasis added). Therefore, a wrongful-death action may be brought: “(1) by the *personal representative* on behalf of the estate and all other persons entitled to recover; (2) by one of the *wrongful death beneficiaries* [hereinafter “*listed relatives*”]⁷ on behalf of all persons entitled to recover; or (3) by “all *interested parties*

⁷ The “wrongful death beneficiaries” enumerated in the statute are the decedent’s immediate family members, *i.e.*, “the widow, husband, child, father, mother, sister [and]

...” *Long v. McKinney*, 897 So. 2d 160, 168 (Miss. 2004) (quoting Miss. Code Ann. § 11-7-13). The three categories are separate and distinct and should not be conflated. Therefore, it is useful to define these categories of wrongful-death claimants, to the extent possible, and to determine if Kelley qualifies as either of them.

A. Whether Kelley had standing as a personal representative.

¶16. The first potential wrongful-death claimant is “the personal representative of the deceased person.” Miss. Code Ann. § 11-7-13 (Rev. 2004). “Personal representative” is defined as “[a] person who manages the legal affairs of another because of incapacity or death” and when it is used by a testator, the term refers to an executor or administrator of the estate. Black’s Law Dictionary 1045 (abr. 7th ed. 2000). *See also Hill v. James*, 252 Miss. at 507-508, 175 So. 2d at 179 (finding terms “personal representative” and “legal representative” to be synonymous, defined simply as “executors and administrators of persons deceased”).

¶17. To have standing as a personal representative to bring a wrongful-death action, the plaintiff must be formally appointed as such prior to filing the complaint for wrongful death. *Long*, 897 So. 2d at 174. We have held that “[i]n the event the litigants wish to pursue a claim on behalf of the estate of the deceased, such estate must, of course, be opened and

brother of the deceased.” Miss. Code Ann. § 11-7-13. These family members are known to the bench and bar by the term of art “statutory wrongful-death beneficiaries.” However, the wrongful-death action can be brought by persons other than a family member, namely the decedent’s personal representative or an interested party, who also may “benefit” from recovering damages from the wrongful-death suit. Thus, for the sake of clarity, we will not use the term “beneficiaries” to describe these relatives, since any potential wrongful-death claimant technically could be considered a “beneficiary.” Instead, we will refer to these family members as “listed relatives.”

administered through the chancery court.” *Id.* Thus, if the potential claimant has not been formally appointed administrator or executor of the decedent’s estate at the time he or she commences the wrongful-death action, it follows that the person is without standing as a personal representative to bring the suit. *Id.*; *see also, Pope*, 995 So. 2d at 126 (holding that decedent’s great-nephew did not cure lack of standing by subsequently being appointed administrator of decedent’s estate).

¶18. In this case, it is undisputed that, at the time she filed the suit, Kelley had not yet been formally appointed executrix of Bozeman’s estate. Therefore, she did not have standing as Bozeman’s personal representative to bring this action at that time. *Long*, 897 So. 2d at 174. Her being named executrix in Bozeman’s will does not change this. Until it was probated, Bozeman’s will conferred no legal authority upon Kelley. Miss. Code Ann. § 91-7-41 (Rev. 2004).⁸ She thus had no authority to bring a wrongful-death claim on behalf of the estate until she was formally appointed executrix thereof. *Long*, 897 So. 2d at 174.⁹ Since

⁸ “[T]he process of probating the will . . . begins the process of administration [of the estate] by appointing an executor [who is] issued ‘letters testamentary[.]’ [T]his *beginning* of the administration is commonly referred to as ‘opening the estate.’” Robert A. Weems, *Wills and Administration of Estates in Mississippi* 160-61 (3d. ed. 2003) (emphasis added). *Weems* explains that “[i]n order to be legally effective, a will must be probated. [U]ntil this is done, it is nothing more than a piece of paper with writing on it. [A]n unprobated will cannot be relied on to determine the ownership of property because it is not effective as an instrument of title[.]” *Id.* at 160. In fact, the oath executors must take in order to be issued letters testamentary recognizes that they may enter upon the decedent’s property and execute the will only “*if and when appointed as executor.*” Miss. Code Ann. § 91-7-41 (Rev. 2004) (emphasis added).

⁹ Under Alabama law (the state in which Bozeman’s will was probated), “a probate ‘estate’ does not come into existence until a proceeding to administer the same is filed in the appropriate probate court[.]” Until such time, the estate “has no legal existence, and no lawsuit can be filed on its behalf by the decedent’s personal representative.” *In re Eldridge*, 348 B.R. 834, 845-46 (Bkrtcy. N.D. Ala. 2006) (citing *Jones v. Blanton*, 644 So. 2d 882,

“standing is to be determined as of the commencement of suit,” and Kelley was not appointed executrix until after she had commenced this action, Kelley did not have standing as a personal representative to commence this wrongful-death action when she did. *Pope*, 995 So. 2d 123. Thus, Kelley lacked standing as Bozeman’s executrix under the savings statute as well.

B. Whether Kelley had standing as a “listed relative.”

¶19. The wrongful-death statute enumerates certain of the decedent’s immediate family members, whom we shall call “listed relatives,” who also may bring a wrongful-death action. Miss. Code Ann. § 11-7-13 (Rev. 2004). The statute restricts the “listed relatives” to the decedent’s “widow or children . . . or husband or father or mother, or sister, or brother” *Id.* Throughout her appellate brief, Kelley refers to herself as Bozeman’s widow and thus argues that she had standing as such to bring this suit. This argument, however, is without merit.

¶20. Bozeman and Kelley never underwent a formal marriage ceremony. Also, Bozeman disclaimed any marriage in his sworn deposition, taken in 2004. In fact, he specifically stated during the deposition that “I don’t have a wife.” Further, both Bozeman and his attorney referred to Kelley as Bozeman’s girlfriend at the deposition. Finally, Bozeman’s death certificate, to which Kelley was the “informant,” listed his marital status as “widowed,” not “married,” and the space for “surviving spouse” was left blank.

887 (Ala. 1994) (holding that “until the will was admitted to probate, the estate had no legal existence, and, therefore, could not maintain an action”).

¶21. Kelley asserts, however, that she and Bozeman had maintained a “common-law” marriage. Although Mississippi law does not provide for “common-law” marriage, this state gives full faith and credit to a valid “common-law” marriage from another state. **George v. George**, 389 So. 2d 1389, 1390 (Miss. 1980) (citing Miss. Code Ann. § 93-1-15 (1972); **Walker v. Matthews**, 191 Miss. 489, 3 So. 2d 820 (1941)). Kelley did procure an order from an Alabama circuit court finding that she and Bozeman had maintained a common-law marriage.¹⁰ However, Kelley sought this decree only after Bozeman’s death and after Clark Sand had petitioned this Court for interlocutory appeal. Furthermore, the common-law marriage decree was later vacated by the Alabama court. Thus, the common-law marriage decree did not give Kelley standing as a “listed relative” to bring this action, because “standing is to be determined as of the commencement of suit.” **Pope**, 995 So. 2d at 126.

C. *Whether Kelley had standing as an interested party.*

¶22. The third category of potential wrongful-death claimants includes “all parties interested in the suit.” Miss. Code Ann. § 11-7-13 (Rev. 2004). This Court has defined the term “interested parties” in the context of probate and will contests. We stated that “parties who have a *pecuniary interest* in the subject of the contest, and under all of the authorities the heirs at law who would take the property of the deceased in the absence of a valid will are interested parties” **Matter of Estate of McClerkin**, 651 So. 2d 1052, 1057 (Miss. 1995) (quoting **Hoskins v. Holmes County Cmty. Hosp.**, 135 Miss. 89, 101, 99 So. 570, 573 (1924)) (emphasis added). *See also*, **Tatum v. Wells**, 2 So. 3d 739, 742 (Miss. App. 2009).

¹⁰ *See Swan v. Swan*, 627 So. 2d 429, 430 (Ala. Civ. App. 1993) (regarding the requirements of a valid common-law marriage in Alabama).

However, a person who has an interest in a will contest is not necessarily an “interested party” for purposes of standing to commence a wrongful-death action, as the following analysis explains.

¶23. The wrongful-death statute initially provides that the wrongful-death action “may be brought in the name of the personal representative of the deceased person . . . for the benefit of all persons entitled under the law to recover, or by [one of the “listed relatives”], or *all parties interested* may join in the suit[.]” Miss. Code Ann. § 11-7-13 (Rev. 2004). Later, however, the statute refers to “an action brought pursuant to the provisions of this section . . . by *all interested parties*.” *Id.* (emphasis added). See also, **Long**, 897 So. 2d at 168 (quoting Miss. Code Ann. § 11-7-13); **Estate of Klaus ex rel. Klaus v. Vicksburg Healthcare, LLC**, 972 So. 2d 555, 559 n.3 (Miss. 2007) (quoting Miss. Code Ann. § 11-7-13) (noting that “a wrongful death action may be brought ‘by all interested parties,’ and ‘all parties interested may join the suit’”). Therefore, the statute indicates that an interested party may either *join* or *initiate* a wrongful-death action. But this does not help us delineate who qualifies as an “interested party.”

¶24. The only other appearance of interested parties in the statute is slightly more helpful. It states that “the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to *any and all parties interested in the suit*.” Miss. Code Ann. § 11-7-13 (Rev. 2004) (emphasis added). This language suggests that, to qualify as an interested party under the statute, a prospective claimant need only have some legally sufficient interest in the wrongful-death lawsuit. *Id.*

¶25. But determining who has a legally sufficient interest in the wrongful-death action is not a clear question. Previously, we have held that one who qualifies as a statutory heir of the deceased also qualifies as an interested party under the wrongful-death statute. In *Alack v. Phelps*, 230 So. 2d 789 (Miss. 1970), we held that adopted twins could still inherit from their natural father, and we specifically stated that the twins were “interested parties” under the wrongful-death statute and should have been included in the wrongful-death action for their natural father’s death. *Id.* at 793; *see also, Estate of Jones v. Howell*, 687 So. 2d 1171, 1175 (Miss. 1996). In other words, because the adopted twins remained heirs-at-law of their natural father, even after the adoption, they were interested parties under the wrongful-death statute. But *Alack* did not define the nature of a party’s interest in the suit or otherwise define the term “interested party.”

¶26. In another adoption case, *McLemore v. Gannon*, 468 So. 2d 84 (Miss. 1985), we held that the adoptive brothers and sisters of an adopted child killed in a car accident could inherit from the child and bring a wrongful-death action for the child’s death, *to the exclusion of the adopted child’s natural siblings*. *Id.* at 87 (emphasis added). We stated that “[i]t would be less than logical to hold that the [natural siblings] could not inherit from or through [the adopted child] but that they could sue for his wrongful death.” *Id.* But *McLemore* does not specifically address the definition of “interested parties”; indeed, the term “interested party” is not used in the decision at all.¹¹ As such, *McLemore* does not stand for the proposition

¹¹ Instead, the reasoning behind *McLemore*’s holding was that, under our adoption laws, the rights of the adopted child’s natural relatives were completely severed and transferred to the child’s adoptive relatives. *Id.* at 86-87 (citing Miss. Code Ann. § 93-17-13 (Rev. 2004)). *McLemore* thus stands for the proposition that the adopted child’s natural

that one who is not an heir of the decedent is not an interested party for purposes of standing to commence a wrongful-death action.¹²

¶27. We implicitly held as much in *Cleveland v. Mann*, 942 So. 2d 108 (Miss. 2006). The *Mann* Court stated that “[t]he parties ‘interested in the suit’ are not limited to the wrongful death beneficiaries, but could include the estate of the decedent, an insurance company exercising its right of subrogation, and any other parties claiming a right of recovery.” *Id.* at 118 (emphasis added). Therefore, we must conclude that, to have a legally sufficient interest in the wrongful-death action, the claimant must be able to claim some arguable right of recovery therefrom.

¶28. It follows from the authorities discussed above, however, that to claim such a right of recovery, the claimant must have had some relationship with the decedent that is recognized by law. In the adoption cases, the adopted children had such a legal relationship by virtue of the rights imparted upon them by our adoption statutes and our intestate descent and distribution laws. Miss. Code Ann. § 93-17-13 (Rev. 2004); Miss. Code Ann. §§ 91-1-1 to 91-1-31 (Rev. 2004). *See, e.g., Alack*, 230 So. 2d at 793; *Howell*, 687 So. 2d at 1175; *McLemore*, 468 So. 2d at 86-87; *Dodds*, 371 So. 2d at 881 (all explaining that adoption

siblings had been supplanted as the child’s “brothers and sisters” by the adoptive siblings, and therefore, the adoptive siblings stood as “listed relatives” under the wrongful-death statute. *Id.*; *see also Dodds v. Deposit Guar. Nat’l Bank*, 371 So. 2d 878, 881 (Miss. 1979) (holding that adopted child can inherit from his or her adoptive parents). As we stated in *Howell*, “the *Dodds* case certainly stands for the proposition that an adopted child, under our statutory laws, stands in the place of a natural child for the purposes of inheriting from an adoptive parent.” *Howell*, 687 So. 2d at 1175 (citing *Dodds*, 371 So. 2d at 881).

¹² It is logically fallacious to hold as much. It does not follow from “all heirs-at-law are interested parties” that “all persons who are not heirs-at-law are not interested parties.”

statute and laws of intestacy allow adopted children to inherit by and through their adoptive kindred and their natural kindred). *See also, Burley v. Douglas*, No. 2007-CA-02134-SCT, – So. 3d –, 2009 WL 3645687, *6 (Miss. Nov. 5, 2009) (holding grandfather of deceased children qualified as interested party by virtue of his status as statutory heir under laws of intestate descent and distribution).

¶29. The parties mentioned in *Cleveland v. Mann* all have legal relationships with the decedent that give them a right of recovery as well. The estate (once it is opened) has a legal relationship with the decedent by virtue of our probate and intestate descent and distribution laws. Miss. Code Ann. §§ 91-1-1 to 91-1-31 (Rev. 2004); Miss. Code Ann. §§ 91-5-1 to 91-5-35 (Rev. 2004); Miss. Code Ann. §§ 91-7-1 to 91-7-51 (Rev. 2004). And the insurance company has a legally recognized relationship to the decedent by virtue of its contractual subrogation rights. *See, e.g.*, Miss. Code Ann. § 83-11-107 (Rev. 1999).

¶30. A person with such a recognized-by-law relationship to the decedent therefore may claim a genuine right of recovery from the decedent’s wrongful-death action. In other words, without such a legally recognized relationship to the decedent, the person has not suffered “an invasion of a *legally protected interest*,” as *Lujan*’s “injury” prong of constitutional standing requires. *Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2136. In the absence of such an “injury,” the person cannot “claim a right of recovery” from the decedent’s wrongful-death action. *Cleveland v. Mann*, 942 So. 2d at 118.¹³

¹³ Black’s Law Dictionary thus defines “interested party” as “[a] party who has a *recognizable* stake (and therefore standing) in a matter.” Black’s Law Dictionary 917 (abr. 7th ed. 2000) (emphasis added).

¶31. Synthesizing the preceding statements of law, we are able to construct a workable definition of an “interested party” under the wrongful-death statute. Put simply, an interested party is a person who has a *relationship* to the decedent that is *recognized by law*, and who therefore has suffered legally recognized *injury* from the wrongful deprivation of the decedent’s life at the defendant’s hands. Such a person thus may claim a genuine *right of recovery* from the decedent’s wrongful-death action by seeking damages for his or her injuries, and that right makes the claimant’s *interest* in the action *legally sufficient* to make him or her an “interested party” under the wrongful-death statute.¹⁴

¶32. Pursuant to the foregoing authorities, Kelley does not qualify as an interested party under the wrongful-death statute. She would not be entitled to inherit from Bozeman under our laws of intestate descent and distribution, so she is not a statutory heir of Bozeman and could never be formally adjudicated as an heir-at-law by the chancery court. Miss. Code Ann. §§ 91-1-1 to 91-1-31 (Rev. 2004). Hence, she is not an interested party under the “statutory-heir” rationale of *Alack v. Phelps* and *Burley v. Douglas*.¹⁵

¹⁴ In this sense, the “interested-party” category of potential wrongful-death claimants can be thought of as a “catch-all” category of persons who are permitted by the statute to bring a wrongful-death action for the decedent’s death even though they do not qualify as a personal representative or a “listed relative.”

¹⁵ There is a subtle yet critical difference between a statutory heir of the deceased and a person who is named a “devisee” in the decedent’s will. A statutory heir’s legal relationship to the decedent, and thus, his or her right of recovery from the decedent’s wrongful-death action, is vested upon the decedent’s death by the operation of our intestate descent and distribution statutes. Miss. Code Ann. §§ 91-1-1 to 91-1-31. But as already noted, a will has no legal effect and confers no rights or authority until it is probated. *See* footnote 8, *supra*. Thus, a devisee’s relationship to the decedent is not validated, and his or her right of recovery from the wrongful-death suit is not vested, until the will is probated.

¶33. Furthermore, at the time she commenced this suit, Kelley had no relationship to Bozeman adequate to give her a right of recovery under the rationale of *Cleveland v. Mann*. Notwithstanding the fact that Kelley may have been Bozeman’s live-in girlfriend, she was not his wife. And she had no other relationship to Bozeman, legally speaking, to justify conferring upon her a right of recovery from the wrongful-death action or to give her a legally sufficient interest in the suit. Thus, at the time she brought suit, Kelley did not qualify as an interested party for the purpose of standing to commence an action for Bozeman’s death under the wrongful-death statute.

¶34. Kelley’s being named executrix in Bozeman’s will does not change this. Bozeman’s will had no legal effect until it was probated. Miss. Code Ann. § 91-7-41 (Rev. 2004).¹⁶ Until then, the will did not evince a legally recognized relationship to Bozeman or his yet-to-be-opened estate. *Id.* Therefore, the mere fact that Kelley was named in Bozeman’s will gave her no right of recovery from his wrongful-death suit or a legally sufficient interest therein. As such, she lacked standing as an interested party under the wrongful-death statute to bring such an action. Finally, Kelley’s later formal appointment as executrix of Bozeman’s estate did not cure her lack of standing, because standing is to be determined as of the commencement of the suit. *Pope*, 995 So. 2d at 126.

CONCLUSION

¶35. Pursuant to the terms of the wrongful-death statute and the savings statute, Kelley did not have standing as a personal representative, a “listed relative,” or an interested party at the

¹⁶ See footnote 8, *supra*.

time she brought this wrongful-death action. Therefore, we reverse and render the Warren County Circuit Court’s denial of Clark Sand’s first motion for summary judgment. Clark Sand’s first motion for summary judgment is granted, and Kelley’s suit is dismissed.

¶36. **REVERSED AND RENDERED.**

CARLSON, P.J., RANDOLPH, LAMAR AND PIERCE, JJ., CONCUR. DICKINSON, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS AND CHANDLER, JJ. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY GRAVES, P.J.; DICKINSON AND CHANDLER, JJ., JOIN IN PART.

DICKINSON, JUSTICE, DISSENTING:

¶37. This Court has held that an heir under the laws of intestate succession qualifies as an “interested party” for purposes of initiating a wrongful-death suit. *Burley v. Douglas*, 2007-CA-2134-SCT, 2009 WL 3645687 (Miss. Nov. 5, 2009). Because I cannot agree with the majority’s narrow view that a devisee under a will does not also qualify as an “interested party” under our wrongful-death statute, I respectfully dissent.

¶38. As a general rule, whether or not a will exists, and subject to few exceptions,¹⁷ personal property of a decedent, including tort claims, must pass through an estate before being distributed to the decedent’s heirs at law. *Long v. McKinney*, 897 So. 2d 160, 174 (Miss. 2004).¹⁸ I see no reason why an heir at law, but not a devisee, should be considered

¹⁷See e.g. Miss. Code Ann. § 81-5-63 (Rev. 2001) (bank accounts less than \$12,500); Miss. Code Ann. § 91-7-322 (Rev. 2004 & Supp. 2009) (debts owed or property belonging to estates of less than \$50,000); Miss. Code Ann. § 91-7-323 (Rev. 2004) (wages owed to decedent).

¹⁸Furthermore, “it has been held that heirs may recover in chancery the personalty of a decedent without an administration of the estate, provided there are no creditors.” Robert A. Weems, *Wills and Administration of Estates in Mississippi* § 2:52 (2003) (citing *Partee v. Kortrecht*, 54 Miss. 66, 71, 1876 WL 5134 (1876). Miss. Code Ann. § 91-1-27 (Rev.

as having an interest in the wrongful-death action sufficient to confer standing to bring suit under our wrongful-death statute. I therefore respectfully dissent.

KITCHENS AND CHANDLER, JJ., JOIN THIS OPINION.

KITCHENS, JUSTICE, DISSENTING:

¶39. I respectfully dissent from the majority opinion and would affirm the trial court's finding that Ruby Kelley had standing to bring this wrongful death action as the decedent's personal representative and as an interested party. I also dissent from the majority's adjudication of the issue of whether she was the common-law wife of the decedent, an issue which is not ripe for review.

(1) Whether Ruby Kelley was the personal representative of the decedent when she filed the complaint in this action.

¶40. It is not disputed that the decedent named Ruby Kelley as his executrix in his will, or that she was approved as his executrix on August 7, 2007, by the Probate Court of Choctaw County, Alabama. No one disputes that Kelley currently serves as the decedent's executrix, or that she will inherit the entire estate, save and except a pickup truck, which was bequeathed to one of the decedent's sons. Thus, Kelley *is* the personal representative of the decedent's estate. *Hill v. James*, 175 So. 2d 176, 179 (Miss. 1965). Her status as such came to fruition upon the decedent's death, subject only to approval of the appropriate court, which was granted in due course. The question, then, is whether this Court is willing to decide that a named executrix is not a decedent's personal representative within the meaning of the

2004) lays out the chancery procedure for recognition as an heir at law.

wrongful death statute, unless and until the testator’s appointment has been ratified by a court of competent jurisdiction, a question that, until now, has never been squarely addressed or answered by this Court.

¶41. The majority holds that Kelley – the decedent’s chosen executrix – was not the decedent’s personal representative when she filed the complaint in this action because her appointment had not been judicially blessed. To support its holding, the majority relies on *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004). *Long* addressed different aspects of wrongful death litigation than those now before the Court. Although the *Long* decision meticulously analyzed the issue of standing as it applies to multiple wrongful death beneficiaries, it is not dispositive of the question presented in the case at bar. Clearly, the *Long* case, which requires that the estate, at some point, be opened, does not require that a person be formally appointed as executor, executrix, administrator, or administratrix prior to his or her filing a complaint on behalf of the estate. *Id.* at 174, 175.

¶42. Consistent with our established precedent, Ruby Kelley became David T. Bozeman’s personal representative when Bozeman died and left a will in which he had named Kelley as his executrix. “An executor derives his authority from the will,” and “his interest is completely vested at the testator’s death.” *Ricks v. Johnson*, 99 So. 142, 146 (Miss. 1924).

¶43. While it may have been preferable for Kelley to have received judicial ratification of Bozeman’s testamentary appointment before filing the wrongful death action, such was not required. Her failure to jump through that procedural hoop should not deprive Bozeman’s estate or his statutory wrongful death beneficiaries of the right to pursue the claims that she asserted for them.

(2) Whether Ruby Kelley is the widow of the decedent.

¶44. With respect, the majority opinion is premature in adjudicating the question of whether Ruby Kelley is the common-law widow of the decedent, as there is no appealable decision from a trial court on this extremely relevant issue. The record clearly indicates that a matter styled *In Re: The Marriage of Ruby Kelley and Dave T. Bozeman, deceased*, case number DR-2008-43, is pending in the Circuit Court of Choctaw County, Alabama. Although all of the details of this pending matter cannot be discerned from the record now before us, it does contain an order signed by an Alabama trial judge noting that “[a]ll proceedings in this matter shall be stayed until the pending appellate action in Mississippi is resolved.” This order was signed by the trial judge on April 21, 2009, and was filed on April 30, 2009.

¶45. Given that there are facts strongly suggesting that there was an Alabama common-law marriage between Kelley and the decedent at the time of his death, and that there has been no adjudication of this issue by any court, either in Alabama or Mississippi, the question is not ripe for review by this Court, and we are premature in addressing it. Accordingly, this Court should remand the case for a hearing on this outcome-determinative issue before stripping Bozeman’s beneficiaries of their day in court.

(3) Whether Kelley has standing as an interested party.

¶46. The new rule of this Court crafted in the majority opinion is that a person must have a legal relationship with the decedent, such that he or she suffers a “legally recognized *injury* from the wrongful deprivation of the decedent’s life at the defendant’s hands.” Maj. Op. at ¶ 31 (emphasis in original).

¶47. Such an expansive definition of the broadly encompassing term *interested parties* requires a high degree of judicial creativity. Given the protracted duration and apparent closeness of the relationship between Ruby Kelley and David Bozeman that this record reveals, a great stretch of the imagination is necessary for a conclusion that Kelley would not have been interested in all things concerning the life and death of this man with whom she had spent a significant portion of her life, so much so that he had named her to act as his personal representative after his death. Given the facts available to us, how is it possible for us to divine that she is not an interested party?

¶48. After creating a specific list of persons it authorized to initiate wrongful death actions, the legislature moved to a much more general, catch-all category of authorized parties by providing that such actions could be filed by *interested parties*. There is no requirement that such a party even be a human being. If an insurance company with subrogation rights can qualify as an interested party with sufficient standing to bring a wrongful death suit (as the majority acknowledges), surely a person with longstanding personal ties to a decedent such as Ruby Kelley had to David Bozeman meets any ordinary and reasonable definition of *interested party*, without regard to whether she had a pecuniary interest in the outcome of the wrongful-death litigation. Maj. Op. at ¶ 27.

¶49. By having named her as his executrix, David Bozeman died with the understanding that he had entrusted Ruby Kelley with the responsibility of handling his post-mortem affairs. Even though he had living blood relatives, Bozeman designated Ruby Kelley as his personal representative. This alone is more than sufficient to make her a party interested in seeing that

a wrongful death action was timely filed on behalf of Bozeman's statutory beneficiaries, without regard to whether she ultimately would be determined to be numbered among them.

¶50. She did file such an action in time to protect the beneficiaries' rights under the applicable Mississippi statute of limitations, without waiting for an Alabama probate court to ratify Bozeman's selection of her as his executrix (which the Alabama court eventually did). The point is, of course, that Kelley's knowledge, at the time she filed the wrongful death suit in Mississippi, that she had been chosen by Bozeman as his executrix was more than enough to have made her a very interested party.

¶51. I regret the conclusion of my respected colleagues in the majority that one must have a financial stake in litigation in order to file suit on behalf of those who do. Surely our legislature, in authorizing interested parties to bring such matters into our courts, did so with the knowledge that the hope of financial gain is not the only thing that can motivate people to be interested in acting for the benefit of others.

GRAVES, P.J., JOINS THIS OPINION. DICKINSON AND CHANDLER, JJ., JOIN THIS OPINION IN PART.