

DIVISION II

CA07-76

JOHNNIE R. CRAWFORD, SPECIAL
ADMINISTRATRIX AND PERSONAL
REPRESENTATIVE FOR THE ESTATE
OF THELMA J. FISHER
APPELLANT

November 14, 2007

AN APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT
[CV-2006-724]

v.

SPARKS REGIONAL MEDICAL
SYSTEM, INC. AND KALA R.
MEHTA, M.D.

HONORABLE NORMAN WILKINSON,
JUDGE

APPELLEES

AFFIRMED

Appellant Johnnie R. Crawford, in her capacity as special administratrix and personal representative for the Estate of Thelma J. Fisher, appeals the dismissal with prejudice of her wrongful-death complaint. We affirm.

Thelma J. Fisher died on June 20, 2004, while hospitalized at Sparks Regional Medical Center. Johnnie Crawford was appointed the administratrix of Fisher's estate and, on June 20, 2006, she filed a wrongful-death action against Sparks, Kala Mehta, M.D., Csaba Kiss, M.D., and Jorge Hernandez-Torrez, M.D. The complaint named "The Estate of Thelma J. Fisher" as the plaintiff. Sparks and Mehta were served on July 21, 2006.

Crawford amended the complaint on July 28, 2006 (first amended complaint), to list only Sparks and Mehta as defendants. The first amended complaint was also brought on behalf of "The Estate of Thelma J. Fisher." Crawford amended the complaint again on August 10, 2006

(second amended complaint). The second amended complaint named Sparks and Mehta as defendants, but named “Johnnie R. Crawford, Special Administratrix and Personal Representative for the Estate of Thelma J. Fisher,” as the plaintiff.

Appellees, Sparks and Mehta, moved to dismiss the lawsuit with prejudice on August 11, 2006. A supporting brief was attached to the motion, which asserted that the complaint and first amended complaint were nullities on their faces because they were filed on behalf of “The Estate of Thelma J. Fisher” in violation of the Arkansas Wrongful Death Statute, which requires wrongful-death actions to be brought by the decedent’s personal representative or the decedent’s heirs. The motion and accompanying brief also argued that the second amended complaint was time barred because the statute of limitations had run prior to its filing. Moreover, the motion asserted that the second amended complaint could not relate back to the complaint because the complaint was void. For these reasons, the motion alleged that the lawsuit should be dismissed pursuant to Ark. R. Civ. P. 12(b).

In response, Crawford asserted that the appellees waived their defenses because they failed to timely respond to the complaint. She also asserted that Ark. R. Civ. P. 15 allowed the second amended complaint to relate back to the original complaint. Finally, she asserted that the naming of “The Estate of Thelma J. Fisher” as plaintiff was merely a scrivener’s error and that Ark. R. Civ. P. 17 required the trial court to provide her with time to correct the mistake before dismissal.

The trial court granted the motion to dismiss. In doing so, the court held that: (1) the motion to dismiss was timely filed; (2) the wrongful-death statute is to be strictly construed and that Crawford was required to strictly comply with the statute; (3) the original complaint and first

amended complaint, filed in the name of “the Estate of Thelma J. Fisher,” violated the Wrongful Death Statute and were nullities; and (4) the second amended complaint complied with the Wrongful Death Statute but was time barred. Crawford moved for reconsideration, which was denied. She now brings this appeal.

When reviewing a trial court’s decision on a motion to dismiss, the facts alleged in the complaint are treated as true and are viewed in the light most favorable to the plaintiff. *Sanderson v. McCollum*, 82 Ark. App. 111, 112 S.W.3d 363 (2003). In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and all pleadings are to be liberally construed. *Recinos v. Zelk*, 369 Ark. 7, ___ S.W.3d ___ (2007); *Rhuland v. Fahr*, 356 Ark. 382, 155 S.W.3d 2 (2004); *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002). A party who relies upon a statute of limitations as a defense to a claim has the burden of proving that the full statutory period has run on the claim before the action commenced. *Sanderson, supra*. To prevail on a motion to dismiss on the basis of the statute of limitations, the complaint must be barred on its face. *Id.*

Crawford first argues that the appellees’ claim, that the complaint and first amended complaint were nullities because they were brought by “The Estate of Thelma J. Fisher,” was waived by the appellees. She argues that Ark. R. Civ. P. 12(b) requires that every defense to a claim shall be asserted in the responsive pleading, and that the appellees failed to specifically assert this defense in their motion to dismiss. She also asserts that Ark. R. Civ. P. 8(c) specifically provides that the affirmative defense of waiver shall be set forth in the response to the complaint.

Crawford's argument, however, is somewhat misguided. The record is clear that appellees' motion to dismiss asserts that Crawford "failed to state facts upon which relief can be granted." The motion was accompanied by a supporting brief which was not only incorporated by reference in the motion, but was also filed with the clerk. The brief fully articulates the appellees' affirmative defense that Crawford failed to bring the wrongful-death action on behalf of decedent's personal representative. The motion and accompanying brief comply with Rule 12.

Crawford also asserts that the appellees failed to respond to the original complaint within twenty days, as prescribed by Ark. R. Civ. P. 12. Appellees, however, were served with the complaint on July 21, 2006. Appellees were then served with the first amended complaint on July 28, 2006. Rule 15(a) of the Arkansas Rules of Civil Procedure provides that "a party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 20 days after service of the amended pleading, whichever period is longer, unless the court otherwise orders." Therefore, pursuant to Rule 15(a), appellees were required to file a responsive pleading by August 17, which was twenty days from the date of service of the first amended complaint. Appellees filed the motion to dismiss on August 11, which was within the prescribed time period.

Crawford next asserts that Ark. R. Civ. P. 15(c) and 17 (a) allow for the amendment of a complaint, including an amendment to the real party in interest and that such an amendment will relate back to the original filing date. She further argues that it is untenable and an error for the trial court to read Rule 15(a) as permitting the appellees additional time to file a responsive

pleading due to the first amended complaint relating back to the original complaint, while, at the same time, holding that the second amended complaint does not relate back to the original complaint for purposes of correcting a scrivener's error as to the real party in interest.

First, we reject Crawford's argument that the failure to bring the suit on behalf of the real party in interest, "Johnnie R. Crawford, Special Administratrix and Personal Representative for the Estate of Thelma J. Fisher," was a scrivener's error. The complaint and first amended complaint named "The Estate of Thelma J. Fisher" as plaintiff and all allegations and relief in those pleadings were pursued by "The Estate of Thelma J. Fisher." Neither pleading ever mentions "Johnnie R. Crawford, Special Administratrix and Personal Representative for the Estate of Thelma J. Fisher." Consequently, there was no scrivener's error.

Further, we disagree with Crawford's argument that the second amended complaint relates back to the original complaint. A wrongful-death action is a statutory creation that is in derogation of, or at variance with, the common law. Therefore, the statute is strictly construed when determining whether a cause of action is stated. *Recinos, supra*; *Rhuland, supra*. The Arkansas Wrongful Death Statute requires every wrongful-death action to be brought in the name of the personal representative of the deceased person. Ark. Code Ann. §16-62-102(b) (Repl. 2005). If there is no personal representative, then the action shall be brought by the heirs at law of the deceased person. *Id.* Indeed, Johnnie R. Crawford was named the Special Administratrix of the Estate of Thelma J. Fisher, prior to the filing of the complaint. Therefore, the complaint had to be brought by Johnnie R. Crawford, as the Special Administratrix of the Fisher estate.

We addressed the issues raised by Crawford in *Estate of Byrd v. Tiner*, 81 Ark. App. 266,

101 S.W.3d 887 (2003). In that case, a timely wrongful-death action was filed on behalf of the “Estate of Daisy Byrd, Deceased,” although a personal representative had been appointed. After the running of the statute of limitations, the appellee moved for dismissal, alleging that the “Estate of Daisy Byrd, Deceased” was not the proper party to bring the wrongful-death action and that a suit by the proper party was barred by the statute of limitations. The appellant argued that it should be allowed to amend the complaint to name the proper plaintiff. The motion to dismiss was granted and the case was appealed. We affirmed the dismissal for two reasons. First, the “Estate of Daisy Byrd, Deceased” was not authorized to bring suit under the wrongful-death statute. Second, the trial court correctly denied the Estate’s motion to substitute the personal representative as the proper plaintiff because the original complaint was a nullity and, therefore, there was no complaint to amend.

Here, as in *Estate of Byrd*, the complaint and first amended complaint were not filed on behalf of the decedent’s personal representative. They were filed by the decedent’s estate. The wrongful-death statute does not authorize the estate to bring a wrongful-death action. Therefore, the original and first amended complaint are nullities. *See Brewer v. Poole*, 362 Ark. 1, 207 S.W.3d 458 (2005); *Estate of Byrd, supra*. When the original complaint is a nullity, Rules 15 and 17 are inapplicable because the original complaint never existed and, therefore, there is no pleading to amend and no pleading to which the alleged amendments can relate back. *Brewer, supra*.

Moreover, “The Estate of Thelma J. Fisher” and “Johnnie R. Crawford, Special Administratrix and Personal Representative for the Estate of Thelma J. Fisher” are separate and

distinct parties. *See St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County*, 348 Ark. 197, 73 S.W.3d 584 (2002). When an amended complaint substitutes out an old plaintiff and replaces it with a new plaintiff, a new suit is commenced. *Id.* Thus, when the second amended complaint was filed, it did not correct a mere scrivener's error, as suggested by Crawford. It commenced a new lawsuit on behalf of "Johnnie R. Crawford, Special Administratrix and Personal Representative for the Estate of Thelma J. Fisher." This new suit was filed after the limitations period had run, and the trial court properly dismissed the lawsuit.

Affirmed.

HART and GLOVER, JJ., agree.