

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: TYLENOL® (ACETAMINOPHEN))	JUDGE LAWRENCE STENGEL
MARKETING, SALES PRACTICES AND)	
PRODUCTS LIABILITY LITIGATION)	MDL No. 2436
)	

This Document Relates to:

RANA TERRY, AS PERSONAL)	Member Action No. 2:12-cv-07263
ADMINISTRATOR OF THE ESTATE OF)	
DENICE HAYES, DECEASED)	
)	
Plaintiff,)	
)	
v.)	
)	
MCNEIL-PPC, INC., MCNEIL CONSUMER)	
HEALTHCARE, AND JOHNSON &)	
JOHNSON,)	
)	
Defendants.)	

**DEFENDANTS’ REPLY MEMORANDUM IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT ON PLAINTIFF’S CLAIM UNDER THE ALABAMA
WRONGFUL DEATH ACT**

Defendants McNEIL-PPC, Inc. and Johnson & Johnson submit this brief reply in support of their motion for summary judgment on Plaintiff’s claim under the Alabama Wrongful Death Act. Plaintiff concedes she did not meet the express statutory requirement in Ala. Code § 6-5-410, that suit be filed by a duly appointed personal administrator within two years after death, and that in fact no personal representative was appointed within that time. Plaintiff nonetheless argues summary judgment should be denied for three reasons: (a) she claims to be entitled to substitute herself, as the now-appointed representative, for her former self, who was not the personal representative when suit was filed, and to have that substitution relate back under

Federal Rule of Civil Procedure 17; (b) she argues Defendants waived this argument by not moving to dismiss before removal; and (c) she argues the motion is “hypothetical” because no one knows how the state court judge would have ruled on this issue had Defendants raised it there instead of removing the case here. None of these arguments is supported by any relevant law. Alabama law makes suit by a personal representative within two-years after death a *substantive* element of the statutory claim, and that substantive element cannot be ignored under the guise of applying a federal *procedural* rule.

I. Appointment of a Personal Representative and Suit Within Two Years Is a Substantive Element of the Claim That Cannot Be Overridden by Applying a Federal Procedural Rule.

Plaintiff does not dispute that the Alabama Supreme Court, and federal courts applying the same Alabama statute, consistently hold that suit by a duly appointed personal representative within two years after death is a substantive element of the claim, and that an action filed without compliance with this requirement is a nullity and must be dismissed. But she insists that in this Court, Rule 17 overrides this requirement.

The issue is not whether Rule 17 applies in this Court (it clearly does) but whether the rule may be used to eliminate a substantive element of the state law claim (it cannot). Plaintiff ignores holdings by the Alabama Supreme Court that this is a *substantive* element of the claim and not a statute of limitations, and that once the two-year period passes the claim and the liability cease to exist: “This two year period is part of the substantive cause of action and is not to be treated as a statute of limitations.” *Brown v. Mounger*, 541 So. 2d 463, 364 (Ala. 1989) (quoting *Downtown Nursing Home, Inc. v. Pool*, 375 So. 2d 465, 466 (Ala. 1979)).

A federal procedural rule cannot be applied to eliminate that substantive requirement because the “rules shall not ... enlarge or modify any substantive right.” 28 U.S.C. § 2072.

Other federal courts addressing the same type of statute have recognized this, *see* Doc. No. 45 (Defendants' Memo at 23-24, citing cases), and federal courts applying the Alabama Wrongful Death Act have acknowledged that failure to meet the requirement mandates dismissal with prejudice, *Wright v. Woodley Manor Nursing Home*, No. 2:06-cv-1041-WKW, 2007 WL 841614, at *4 (M.D. Ala. Mar. 19, 2007).

Plaintiff cites federal cases applying the "relation back" principle but none is on point. She refers to *Hess v. Eddy*, 689 F.2d 977 (11th Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983), as "a wrongful death case occurring in Alabama," but it was not, as her brief implies, a claim under the Alabama Wrongful Death Act. It was an action under 42 U.S.C. § 1983, in which the federal court borrowed the two-year period in state law as a federal statute of limitations for a federal civil rights claim involving a death. The court held that Rule 17 applied to permit relation back because this "is a *federal* civil rights action, brought in a *federal court*" 689 F.2d at 981 (emphasis original). The application of Rule 17 to permit relation back to save an action under federal law has no bearing on whether the rule may be used to eliminate a substantive element of a state law cause of action. The Rules Enabling Act has a direct bearing on that question, and says it cannot.¹

Several other decisions cited by Plaintiffs also involved application of the relation back principle where a *federal* procedural limitation otherwise would bar the claim and thus are not on

¹ Plaintiff also quotes this decision stating that "[i]f rules of procedure work as they should in an honest and fair judicial system they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to adjudication on the merits." *Id.* at 982. But the same court acknowledged that "it is not our place to comment upon the wisdom of Alabama's procedural rules." *Id.* at 980. To that extent the court misconstrued the two-year period it was borrowing for federal limitations purposes, because under state law it is not a procedural rule or a limitations period at all, but a substantive element of the cause of action. It any event, it is not the place of this or any federal court to override a substantive requirement of the controlling state law because it believes application of that requirement would unfairly prevent an "adjudication on the merits."

point. *See, e.g., Levinson v. Deupree*, 345 U.S. 648 (1953) (relation back permitted notwithstanding statute of limitations borrowed from state law in federal admiralty case); *Wadsworth v. U.S. Postal Service*, 511 F.2d 64, 66 (7th Cir. 1975) (applying Rule 17 to allow substitution and the action to proceed notwithstanding time limit for joinder of all interested parties under a federal statute governing claims against the Postal Service).

Plaintiff's cases involving application of the relation back principle in cases governed by state law also are not on point, because none involved a situation in which any court applied Rule 17 to eliminate a substantive requirement of the state law. In *Crowder v. Gordons Transports, Inc.*, 387 F. 2d 413 (8th Cir. 1967), the court allowed relation back in a wrongful death claim governed by Missouri law, but the relevant issue was the application of a statute of limitations, *see* Doc. No. 89 (Plaintiff's Memo at 5), and there was no indication the Missouri law included a requirement that the plaintiff sue within the statutory period as "part of the substantive cause of action," as the Alabama statute does, *Brown*, 541 So. 2d at 464. Similarly, in *Estate of Fortunato v. Handler*, 969 F. Supp. 963 (W.D. Pa. 1996), the issue was whether a state statute of limitations would preclude application of the relation back rule in Rule 17.

Plaintiff also cites *Hanna v. Plumer*, 380 U.S. 460 (1965), but that case obviously is not on point. It addressed whether the federal method for service of process in Rule 4 may be employed in a case litigated in federal court but governed by state substantive law. The Court held it could, because the rule addressed a purely procedural matter, but its reasoning has no application to Plaintiff's argument that a substantive element of a state law claim may be eliminated by resort to a federal procedural rule.

As this Court is aware from prior briefing, the Alabama Wrongful Death Act does not allow compensatory damages or give any remedy for the Plaintiff's loss, but instead provides a

cause of action for the sole purpose of imposing punishment through exemplary damages, in order to carry out the public policy of discouraging homicide and preserving human life. The Alabama Supreme Court noted, in one of the many cases dismissing claims under the Act where a personal representative did not sue within two years, that “[u]nder this statute the cause of action is vested in the personal representative who acts as an agent of legislative appointment for the purpose of effectuating public policy.” *Downtown Nursing Home*, 375 So. 2d at 466. Alabama’s legislature has the right to impose limits on the powers exercised by a private party acting as a “legislative appoint[ee] ... for the purpose of effectuating public policy.” *Id.* And where, as here, it did so as a matter of state substantive law, this Court cannot override that judgment through the application of a federal procedural rule.

II. Defendants Did Not Waive This Issue.

Plaintiff argues that Defendants waived this issue by removing rather than filing a motion to dismiss in state court, but cites no supporting law.

Because suit by a duly appointed personal representative within two years is a substantive element of the cause of action under Alabama law, it is entirely proper to show on summary judgment – which is the current stage of this case – that plaintiff cannot establish that element. Fed. R. Civ. P. 56. And because her original pleading falsely identified her as the personal representative, *see* Doc. 1 (State Court Compl, ¶ 1), a motion to dismiss would have been denied. On the face of that pleading she met the relevant requirement, even though we now know she did not. And of course, having stated falsely in her pleadings that she was the duly appointed personal representative, she cannot now be heard to argue waiver because Defendants only moved on this issue later – after they learned the actual facts.

Finally, the Court did not issue its opinion on choice of law, determining that the Alabama Wrongful Death Act applied, until May 20, 2015; only then was this motion germane. And in that ruling, this Court acknowledged that Defendants could raise this issue, but indicated they must do so in a dispositive motion. *See* Doc. No. 41 at 24 n.43.

III. This Motion is Neither Hypothetical Nor Speculative.

Plaintiff also argues this motion somehow is hypothetical or speculative, because no one knows how the state court would have ruled had Defendants filed the motion there, rather than removing to this Court.

Plaintiff cites no supporting law, and neither law nor common sense supports an argument that a federal court may not rule on a motion after removal because the parties do not know what a state court judge would have done with the same motion had the case not been removed. Once a case is removed it is in federal court and the legal issues are ruled on by that court. What the state court judge might have done, had the case not been removed, is irrelevant. Plaintiff argues here the state court might have ruled that New Jersey law applied to allow the late appointment of the personal representative to relate back, but the fact remains that the case is now here – and Plaintiff must meet here the substantive requirements of the state law that she insisted upon and the Court chose.

IV. Conclusion

A central theme of Plaintiff's opposition is that it is not fair to deprive her of a decision on the merits because she failed to meet the Alabama statutory requirement. She insists that even though her claim would be dismissed in an Alabama court it should not be here. But there is nothing unfair about insisting that Plaintiff comply with the substantive requirements of the law she asked this Court to apply. And she easily could have so. She had counsel advising her

early on and could have sought and obtained the required appointment in time. Indeed, since her original complaint filed in state court (within the two year statutory period) recited (falsely) that she was the personal representative and administrator of the estate, she and her counsel presumably understood that was the capacity in which she was required to sue. Because Plaintiff cannot meet the substantive requirement of Alabama law, summary judgment should be granted.

s/ David F. Abernethy

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CERTIFICATE OF SERVICE

I hereby certify on June 23, 2015, a copy of the foregoing document was filed and served through the Court's ECF system. Notice of this filing will be sent electronically to registered participants as identified on the Notice of Electronic Filing (NEF).

s/ David F. Abernethy
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