IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
January 20, 2023 Session[1]

KRISTOPHER MCMICKENS v. VINCENT J. PERRYMAN, AS ADMINISTRATOR OF THE ESTATE OF ALFRED G. FARMER

Appeal from the Circuit Court for Shelby County
No. CT-002948-17 Jerry Stokes, Judge

No. W2022-00445-COA-R3-CV

The plaintiff filed this personal injury action following an automobile accident in which the other driver died. The plaintiff originally named the defendant as "John Doe, as Administrator of the Estate of [the deceased driver]." The trial court dismissed the action on the basis that the plaintiff failed to timely commence the action against the personal representative of the estate within the applicable statute of limitations. We affirm and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and ARNOLD B. GOLDIN, J., joined.

Ethan D. Sandifer, Memphis, Tennessee, for the appellant, Kristopher McMickens.

Russell C. Rutledge, Memphis, Tennessee, and Craig J. Lazarov, Germantown, Tennessee, for the appellee, Vincent J. Perryman.

MEMORANDUM OPINION[2]

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[1] Oral argument for this case was heard at the University of Memphis Law School.

[2] Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

I. FACTS & PROCEDURAL HISTORY

On July 12, 2017, Plaintiff Kristopher McMickens filed a complaint in circuit court against "John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased." The complaint stated that Plaintiff's causes of action and damages arose out of a motor vehicle collision that occurred on December 3, 2016. According to the complaint, Alfred Farmer was killed in the accident. The complaint stated, "Defendant John Doe is the Administrator of the Estate of Alfred G. Farmer and is unknown at this time. Plaintiff will amend this Complaint when the identity of John Doe becomes known." A summons was issued to "John Doe, Administrator of the Estate of Alfred G. Farmer, Deceased," listing the mailing address that Alfred Farmer utilized prior to his death (according to the complaint). The sheriff's "return of non-service," dated July 18, 2017, states that after a diligent search and inquiry, the defendant John Doe was not to be found in the county for the reason that "he does not exist."

On January 31, 2018, the probate court of Shelby County entered an "Order Appointing Administrator *Ad Litem* for Cause of Action Only." This order appointed J. Vincent Perryman, Esq., as administrator ad litem of the Estate of Alfred George Farmer "for the sole purpose of serving as a nominal defendant and accepting service of process in a cause of action in tort against the Estate, pursuant to Tenn. Code Ann. § 20-5-103."[3] Shortly thereafter, on February 8, 2018, a second summons was issued to the original defendant, "John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased," but rather than listing the mailing address of Alfred Farmer, the second summons stated: "Through Their Attorney of Record: J. Vincent Perryman," with Mr. Perryman's office address. The return of service states that a copy of the second summons and the complaint were delivered to "J. Vincent Perryman by serving Tanya Wooden. . . . Tanya Wooden accepting on behalf of J. Vincent Perryman." The return was signed by "Tanya Wooden secretary." We note, however, that no amended complaint was filed at this time, so the complaint that was served still identified the defendant as "John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased."

Three months later, on May 25, 2018, Plaintiff filed another "Complaint." This complaint named the defendant as "Vincent J. Perryman [sic], as Administrator of the Estate of Alfred G. Farmer, the Deceased." However, process was never issued or served

[3] Tennessee Code Annotated section 20-5-103 states, in pertinent part:

> (a) In all cases where a person commits a tortious or wrongful act causing injury or death to another, or property damage, and the person committing the wrongful act dies before suit is instituted to recover damages, the death of that person shall not abate any cause of action that the plaintiff would have otherwise had, but the cause of action shall survive and may be prosecuted against the personal representative of the tort-feasor or wrongdoer.

in connection with this complaint.

The parties agree that the statute of limitations expired on June 3, 2018.[4] One year later, on June 4, 2019, Mr. Perryman, as Administrator Ad Litem of the Estate, filed a motion to dismiss on the bases of insufficiency of process, insufficiency of service of process, expiration of the statute of limitations, and other grounds. He argued that the original complaint against John Doe was void and a nullity when no estate had been established and no administrator had been appointed. Mr. Perryman noted that even after he was appointed as administrator ad litem, Plaintiff did not immediately attempt to correct the original complaint but merely served the original complaint (asserting claims against John Doe) on his secretary, via a summons listing him as the attorney for John Doe. Lastly, Mr. Perryman noted that Plaintiff finally filed an amended complaint listing him in the caption on May 25, 2018, but, he pointed out, the body of the complaint listed the defendant as the "Estate of Alfred G. Farmer," and process was never issued as to the amended complaint. In short, Mr. Perryman argued that Plaintiff was required to file a new complaint naming him as the defendant in order to commence the action within the meaning of Tennessee Rule of Civil Procedure 3, and he failed to properly commence his action before the statute of limitations expired.

Plaintiff's counsel up to this point, Daryl Gray, filed a motion to withdraw on June 26, 2019. He also filed a response to the motion to dismiss, arguing that the fact that no personal representative was appointed at the time of the original complaint was "of little significance." He argued that it was appropriate to utilize "John Doe" because he did not yet know the identity of the "future administrator." Plaintiff's counsel insisted that his later amendment related back to the original complaint. He also contended that service of the original complaint was sufficient because it indicated that it was intended for the administrator of the estate.

On September 18, 2019, the trial court entered an order granting Mr. Perryman's motion to dismiss. The trial court found that the statute of limitations had expired because the original complaint was filed against "a known non-entity," as no estate had been opened and no administrator had been appointed, and even after an administrator ad litem was appointed, he was never properly served. The trial court found that the second summons was improperly served on the secretary with no explanation for why Mr. Perryman was not served personally or whether the secretary was an agent, and it found that the amended complaint adding Mr. Perryman as a defendant "was never served on anyone," as process was never issued. The court found that Plaintiff's relation back theory did nothing to save

[4] The accident and Mr. Farmer's death occurred on December 3, 2016. Tennessee Code Annotated section 28-1-110 provides that "[t]he time between the death of a person and the grant of letters testamentary or of administration on such person's estate, not exceeding six (6) months . . . is not to be taken as a part of the time limited for commencing actions which lie against the personal representative." Thus, both parties state in their briefs that the one-year statute of limitations began to run six months after Mr. Farmer's death, on June 3, 2017, and expired on June 3, 2018.

his claims from expiration of the statute of limitations because the original complaint was filed against an entity that did not exist and it was never properly served.

Plaintiff filed a motion to alter or amend on October 18, 2019, simply alleging that the trial court had erred in its rulings regarding proper service and relation back of the second complaint. However, this motion went unresolved for several years. On July 21, 2021, Plaintiff's counsel filed an amended motion to withdraw, as his previous motion had not been adjudicated. On August 13, 2021, Plaintiff filed a "supplemental brief" in support of his motion to alter or amend, along with an attached declaration regarding the circumstances surrounding service of process on the secretary. The trial court entered an order granting counsel's motion to withdraw on January 24, 2022. On March 11, 2022, the trial court entered an order denying Plaintiff's motion to alter or amend. The court reiterated its finding that Plaintiff's original complaint was filed against "a known non-entity" and that this was the only complaint for which process was issued. As a result, the trial court found that the statute of limitations barred Plaintiff's claim. It found no basis for relief pursuant to Tennessee Rule of Civil Procedure 59. Plaintiff timely filed a notice of appeal to this Court.

II. ISSUES PRESENTED

Plaintiff presents the following issues, as we perceive them, for review on appeal:

1. Whether the trial court erred in ruling that the original complaint was ineffective because it was filed against a known non-entity and not properly served;
2. Whether the trial court erred in ruling that the amended complaint did not toll the statute of limitations because process was not issued; and
3. Whether the trial court erred in ruling that Plaintiff's relation back theory was meritless.

For the following reasons, we affirm the decision of the circuit court and remand for further proceedings.

III. DISCUSSION

"At common law an action could not be brought against a deceased tort feasor." *Goss v. Hutchins*, 751 S.W.2d 821, 823 (Tenn. 1988). However, "[i]n 1935, the Legislature abrogated the common law rule by adopting the predecessor of the current T.C.A. § 20-5-103." *Id.* As noted above, Tennessee Code Annotated section 20-5-103, in its current form, provides, in relevant part:

> (a) In all cases where a person commits a tortious or wrongful act causing injury or death to another, or property damage, and the person committing the wrongful act dies before suit is instituted to recover damages, the death

> of that person shall not abate any cause of action that the plaintiff would have otherwise had, but the cause of action shall survive and may be prosecuted against *the personal representative* of the tort-feasor or wrongdoer.
> (b) The common law rule abating such actions upon the death of the wrongdoer and before suit is commenced is abrogated.

(emphasis added). This statute is commonly referred to as the "survival statute." *See Goss*, 751 S.W.2d at 823. It "preserves a cause of action against a tort-feasor who subsequently dies." *Id.* at 823-24 (citing *Goins v. Coulter*, 206 S.W.2d 379, 380 (Tenn. 1947)). Notably, however, "[a]n action preserved by this section may *only* be instituted against the personal representative of the tort-feasor." *Id.* at 824 (citing *Brooks v. Garner*, 254 S.W.2d 736, 737 (Tenn. 1953)) (emphasis added). For instance, in *Goss*, the Supreme Court explained that the suit could "only be instituted against Mrs. Hutchins' personal representative," and "the Estate was not a proper party defendant to plaintiff's action." *Id.* The Court acknowledged that the caption of the complaint in *Goss* named the defendant as "The Estate of Annie Myrtle Hutchins" and did not identify the personal representative. *Id.* However, the court explained that the caption is merely a technical requirement and that "[t]he issue of who is a proper party defendant must be determined from the allegations of the complaint." *Id.* Examining the allegations in the complaint, the Court determined that "a suit against the decedent's representative was intended by plaintiff." *Id.* at 825. "Moreover," the Court noted that the summons directed the sheriff to serve "the attorney for the administrator of the Hutchins' estate, naming the personal representative, 'Peanut' Hutchins." *Id.* Thus, the Court concluded that the plaintiff sued Hutchins in his representative capacity as the personal representative of the estate, so the original complaint "was not a nullity." *Id.*

The Tennessee Supreme Court examined the survival statute again in *Estate of Russell v. Snow*, 829 S.W.2d 136 (Tenn. 1992). The Court explained that "[w]hen a party who would have been a defendant in tort litigation dies before such litigation is commenced, the cause of action may be prosecuted against the personal representative of the decedent pursuant to T.C.A. § 20-5-103," but "[a] suit asserting a cause of action preserved from abatement by the above statute can be brought *only* against the personal representative of the decedent." *Id.* at 137 (emphasis added). Accordingly, "[a] personal representative of a deceased tortfeasor must exist before a right of action for tort is ripe for enforcement." *Id.* (citing *Brooks*, 254 S.W.2d at 737; *Goss*, 751 S.W.2d at 824). In the event that "there is no personal representative of the deceased tort-feasor upon whom process can be served, the plaintiff is entitled to have appointed an administrator *ad litem* pursuant to T.C.A. § 30-1-109." *Id.* The statute provides, in pertinent part:

> (a) In all proceedings in the probate or chancery courts, or any other court having chancery jurisdiction, where the estate of a deceased person must be represented, and there is no executor or administrator of the estate, or the executor or administrator of the estate is interested adversely to the estate, it

> shall be the duty of the judge or chancellor of the court, in which the proceeding is had, to appoint an administrator ad litem of the estate for the particular proceeding, and without requiring a bond of the administrator ad litem, except in a case where it becomes necessary for the administrator ad litem to take control and custody of property or assets of the intestate's estate, when the administrator ad litem shall execute a bond, with good security, as other administrators are required to give, in such amounts as the chancellor or judge may order, before taking control and custody of the property or assets.

Tenn. Code Ann. § 30-1-109(a).[5] In addition, as noted above, Tennessee Code Annotated section 28-1-110 provides, "The time between the death of a person and the grant of letters testamentary or of administration on such person's estate, not exceeding six (6) months . . . is not to be taken as a part of the time limited for commencing actions which lie against the personal representative."

Tennessee appellate courts have decided many cases over the years involving the interplay of these statutes. Most recently, in *Mott v. Luethke*, 633 S.W.3d 585, 588 (Tenn. Ct. App. 2021), this Court considered a situation in which suit was filed against an individual defendant who had passed away, unbeknownst to the plaintiff. We explained that Tennessee's survival statute applied upon the death of the tortfeasor to permit suit against the "personal representative," but "'[s]ince the statute defines the exclusive remedy and the steps to be taken to secure it, those steps must be strictly followed.'" *Id.* at 592-93 (quoting *Vaughn v. Morton*, 371 S.W.3d 116, 120 (Tenn. Ct. App. 2012)). We also observed that "'[t]he law protects an injured person from the possibility that no estate is opened for the tortfeasor by allowing the injured person to petition the chancery court to appoint an administrator for the limited purpose of serving as the defendant in the lawsuit.'" *Id.* at 593 (quoting *Vaughn*, 371 S.W.3d at 120). We explained that section 28-1-110 "operates to toll or suspend the statute of limitations between the death of the alleged tortfeasor and the appointment of the estate's representative for a period not to exceed six months," but "'[o]nce a personal representative has been appointed or six months has lapsed since the death of the tortfeasor, the statute of limitations begins to run again.'" *Id.* (quoting *Putnam v. Leach*, 572 S.W.3d 605, 611 (Tenn. Ct. App. 2018)). Taken together, then, "the steps required to 'strictly follow' the survival statute [are] 'to force the appointment of an administrator *ad litem* of [the decedent's] estate and serve the personal representative with process prior to the expiration of the applicable statute of limitations[.]'" *Id.* at 594 (quoting *Putnam*, 572 S.W.3d at 611-12). The plaintiff must strictly follow the "'mandatory step of securing the naming of the personal representative

[5] We note that in *Owens v. Muenzel*, No. E2018-00199-COA-R3-CV, 2018 WL 6721800, at *8 (Tenn. Ct. App. Dec. 21, 2018) *perm. app. denied* (Tenn. Apr. 11, 2019), this Court held that a circuit court judge lacked jurisdiction to appoint an administrator ad litem. Here, however, the administrator ad litem was appointed by the probate court.

as the defendant before the expiration of the statute of limitations.'" *Id.* at 593 (quoting *Vaughn*, 371 S.W.3d at 120). We noted that "this Court has routinely affirmed the dismissal of actions when the survival statute is not 'strictly followed' and the statute of limitations consequently expires." *Id.* at 594 (collecting cases).

Applying these rules to the facts before us in *Mott*, we concluded that the statute of limitations was tolled for six months after the decedent's death because no personal representative was appointed during that time, but then the one-year statute of limitations began to run again. *Id.* The plaintiff's initial civil summons was filed against the individual decedent, who was "an improper party defendant" because the "only proper defendant" is the personal representative of the deceased tortfeasor. *Id.* Even though the plaintiff in *Mott* had successfully petitioned for appointment of an administrator ad litem and "filed a 're-issue[d]' civil summons . . . and caused it to be served upon [the] Administrator," *id.* at 588, the Court pointed out that "he did not take further action by substituting [the] Administrator as the proper party defendant before the date of expiration for the statute of limitations." *Id.* at 594. Ultimately, the plaintiff's failure to strictly follow the mandatory steps of the survival statute prior to the expiration of the statute of limitations was "fatal" to his action. *Id.*

This Court has considered other cases in which a personal representative *has* been named as the defendant, but for various reasons, the named representative was not the *proper* personal representative. For instance, in *Owens v. Muenzel*, 2018 WL 6721800, at *1-2, the plaintiff initially commenced the action against a deceased individual, and upon learning of his death and the fact that the decedent did not have a personal representative, the plaintiff moved for the trial court to appoint an administrator ad litem. The trial court did appoint an administrator ad litem and granted the plaintiff's motion to file an amended complaint against him. *Id.* at *3. However, the trial court later determined that its order appointing the administrator ad litem was beyond the jurisdiction of the court, as the trial court was a circuit court, and therefore its order of appointment was void. *Id.* at *5. As a result, the trial court further concluded that the plaintiff failed to timely file an action "against a *proper* party defendant" under the survival statute. *Id.* (emphasis added). On appeal, this Court affirmed. We explained that the circuit court lacked jurisdiction to appoint the administrator ad litem. *Id.* at *8. Thus, "no personal representative of [the decedent] was *properly* appointed prior to the expiration of the one-year statute of limitations for personal injury actions." *Id.* (emphasis added). Because "[i]t is only by the appointment of an administrator ad litem that the action could go forward" under the survival statute, the plaintiff had "allowed the cause of action against the tortfeasor to lapse by not properly serving the administrator ad litem." *Id.*

This Court also considered an improperly named personal representative in *Algee v. Craig*, No. W2019-00587-COA-R3-CV, 2020 WL 1527234 (Tenn. Ct. App. Mar. 31, 2020). There, the would-be defendant died shortly after the auto accident at issue, and her estate "was opened, administered, and closed before the plaintiff filed suit" naming the

then-former personal representative as the defendant, within the applicable statute of limitations. *Id.* at *1. The former personal representative moved to dismiss on the basis that he had been released from service when the estate was closed, and he argued that the filing of suit against an improper party did not operate to toll the statute of limitations, which had since expired. *Id.* The trial court granted the motion to dismiss, and this Court affirmed on appeal. *Id.* "[T]he failure to 'strictly follow' the requirement of Section 20-5-103 by naming the personal representative was fatal to the survivability of the action." *Id.* at *3 (quoting *Vaughn*, 371 S.W.3d at 120-21).

In the case at bar, Plaintiff filed his original complaint against "John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased," at a time when no estate was open and no administrator had been appointed. As these cases demonstrate, Plaintiff's original complaint against an improper nonexistent administrator was insufficient to strictly comply with the survival statute. "A personal representative of a deceased tortfeasor must exist before a right of action for tort is ripe for enforcement." *Estate of Russell*, 829 S.W.2d at 137.

In his brief on appeal, Plaintiff suggests that the only problem with his original complaint was a mere failure to identify the correct defendant in the caption, as in *Goss*, and that this Court should examine the allegations of the complaint itself to determine that he intended a suit against "the decedent's representative." The record does not support this argument, however. Only the first page of Plaintiff's complaint referred to the defendant as "John Doe, as Administrator of the Estate of Alfred G. Farmer, Deceased," who was "unknown at this time." Every other reference in the nine-page complaint was to "Defendant Estate of Alfred G. Farmer" or "Defendant Estate." More importantly, Plaintiff's complaint failed to identify any *properly appointed* personal representative. Thus, Plaintiff's caption versus substance argument is unavailing. "While the failure to correctly identify a defendant in the caption of the complaint is not a fatal defect, it will be fatal to the action if the allegations of the complaint do not state a cause of action against the proper defendant." *Bryant v. Est. Of Klein*, No. M2008-01546-COA-R9-CV, 2009 WL 1065936, at *3 (Tenn. Ct. App. Apr. 20, 2009). In *Goss*, 751 S.W.2d at 824-85, the caption listed the "Estate" but an examination of the allegations of the complaint revealed that the plaintiff intended a suit against the personal representative, *and* the summons identified the personal representative by name. *See Liput v. Grinder*, 405 S.W.3d 664, 678 (Tenn. Ct. App. 2013) (explaining that in *Goss*, "the personal representative was clearly named in the body of the original complaint and was served with process"); *Hembree v. Est. of Styles*, No. E2006-02629-COA-R3-CV, 2007 WL 4374033, at *3 (Tenn. Ct. App. Dec. 17, 2007) ("[I]n [*Goss*], the body of the complaint contained allegations demonstrating that suit was actually being brought against the personal representative, and further, the personal representative was timely served with process."). In this case, the opposite is true, for both issues. First, the caption of the complaint and first page listed "John Doe, as Administrator," who was "unknown at this time," but the substantive allegations of the complaint referenced the "Estate" without any mention of a personal representative or Mr.

Perryman.[6] Secondly, the first and second summonses listed "John Doe, as Administrator," as the defendant, with Mr. Perryman listed only on the second summons as John Doe's attorney.

Thus, the problems in this case go far beyond a mere omission in the caption. As the trial court found, neither summons was properly served. The first summons addressed to John Doe was returned unserved. The second, also addressed to John Doe, was served along with a copy of the original complaint on Mr. Perryman's secretary rather than Mr. Perryman. Aside from any concerns regarding the fact that the summons and complaint both listed the defendant as John Doe, these documents were served on a secretary. "The plaintiff has the burden of proving that the person he or she elected to serve is the defendant's authorized agent for service of process." *Simmons v. Strickland*, No. W2020-01562-COA-R3-CV, 2022 WL 2115250, at *6 (Tenn. Ct. App. June 13, 2022) (citing *Milton v. Etezadi*, No. E2012-00777-COA-R3-CV, 2013 WL 1870052, at *6 (Tenn. Ct. App. May 3, 2013)). Here, Plaintiff presented no evidence in response to the motion to dismiss to indicate that such service was proper. According to our Supreme Court,

> In the context of serving process, the record must contain "evidence that the defendant intended to confer upon [the] agent the specific authority to receive and accept service of process for the defendant." *Arthur v. Litton Loan Servicing LP*, 249 F.Supp.2d 924, 929 (E.D. Tenn. 2002). Acting as the defendant's agent for some other purpose does not make the person an agent for receiving service of process. *Id*. Nor is the mere fact of acceptance of process sufficient to establish agency by appointment. *Id.*

Hall v. Haynes, 319 S.W.3d 564, 573 (Tenn. 2010). As the trial court noted, there was simply no explanation in this case for why Mr. Perryman was not served personally or whether the secretary was an agent for service of process.[7]

We recognize that Plaintiff later filed an amended complaint listing Mr. Perryman as the defendant, but this amended complaint was never served, nor was an additional summons ever issued. This Court considered a similar series of missteps in *Ferrell v. Miller*, No. M2013-00856-COA-R3-CV, 2013 WL 6228153 (Tenn. Ct. App. Nov. 27, 2013). In that case, the plaintiff originally sued an individual named Robert Miller, who had died, and although the trial court later entered an order appointing attorney David Silvus as an administrator ad litem, the plaintiff did not immediately amend his complaint

[6] Likewise, the amended complaint only references Mr. Perryman as administrator once, in the caption of the complaint, and all other references are to "Defendant Estate of Alfred G. Farmer (Deceased)."

[7] We note that in August 2021, Plaintiff filed a supplemental brief in support of his motion to alter or amend with an attached declaration regarding the circumstances surrounding service on the secretary. However, this evidence was not submitted in response to the motion to dismiss in 2019. The trial court found no basis for relief pursuant to Rule 59, and the issues framed by Plaintiff on appeal do not reference the motion to alter or amend.

to name the administrator ad litem as a defendant. *Id.* at *1-2. "Instead," we explained, the plaintiff "simply attempted to serve a copy of the original complaint – naming Mr. Miller as a defendant – upon 'Robert Miller c/o Attorney David Silvus.'" *Id.* at *2. Mr. Silvus refused service because the accompanying complaint was not filed against the administrator ad litem. *Id.* The plaintiff later attempted to serve Mr. Silvus again, "this time, with a summons issued in the name of 'Robert Miller, Deceased, c/o Attorney David Silvus, Administrator Ad Litem[.]'" *Id.* Again, Mr. Silvus refused service "because the complaint accompanying the summons remained the original complaint which did not name the Administrator Ad Litem as a defendant." *Id.* Without obtaining leave to amend, the plaintiff then filed an amended complaint naming "Estate of Robert Miller, Deceased" as a defendant. *Id.* at *3. Months later, the plaintiff finally filed a motion to amend to substitute the administrator ad litem for the deceased Mr. Miller. *Id.* The trial court granted a motion to dismiss because "the plaintiff failed to have appointed, to substitute, and to serve an administrator ad litem prior to the expiration of the statute of limitations." *Id.* at *1. On appeal, this Court applied the various statutes and explained that the plaintiff had "a six month tolling period following Mr. Miller's death, plus the one year statute of limitations—to have an Administrator Ad Litem appointed, substituted as the defendant, and served with process." *Id.* at *4. This, he failed to do. *Id.* The plaintiff argued that his amended complaint naming the "Estate of Robert Miller, Deceased," was timely, but we explained that this amendment "did not correct the Complaint's fatal flaw because the 'Estate' was also an improper party as no estate had been opened." *Id.* When the statute of limitations expired, the administrator ad litem had not been named as a defendant and "ha[d] apparently never been *served with a Complaint naming himself as a defendant*." *Id.* at *6. Because the plaintiff failed to follow these necessary "steps of the survival statute," we affirmed dismissal of the plaintiff's claims as time-barred. *Id.*

Here, Plaintiff finally amended his complaint to name Mr. Perryman as the defendant shortly before the statute of limitations expired, but that complaint was never served. Thus, Plaintiff failed to strictly follow the mandatory steps of the survival statute. *See Liput*, 405 S.W.3d at 672 (explaining that pursuant to "the mandates of the Survival Statute, Mr. Liput was required to serve Mr. Grinder's personal representative with process prior to the expiration of the statute of limitations"); *Hembree*, 2007 WL 4374033, at *3 ("[I]t was proper for [plaintiffs] to seek appointment of an administrator ad litem for the purpose of filing their tort claim against the estate of the deceased. However, plaintiffs did not then proceed to file a claim and serve process against the personal representative, i.e. the administrator ad litem that they had appointed.").

We note Plaintiff's final argument that his amended complaint should relate back to his original complaint. However, this Court rejected the same argument in *Algee*, 2020 WL 1527234, at *3, where the plaintiff's complaint named the former personal representative as the defendant after the estate was already closed. We explained that an amended complaint adding the personal representative as the defendant would not relate back to the original filing against the decedent because "'if a complaint does not commence

an action within the meaning of Rule 3 it does not commence an action that a later amendment can relate back to within the meaning of Rule 15.03.'" *Id.* (quoting *Vaughn*, 371 S.W.3d at 121). Thus, the failure to strictly follow the survival statute "by naming the personal representative was fatal to the survivability of the action." *Id. See also Carpenter v. Johnson*, 514 S.W.2d 868, 870 (Tenn. 1974) ("The entry of the order [] allowing the substitution of Mattie Lou Johnson, Administratrix of decedent's estate, in the place and stead of the decedent Gilford J. Johnson, as defendant, marked the commencement of the action within the meaning of Rule 3."); *Khah v. Capley*, No. M2018-02189-COA-R3-CV, 2019 WL 5618778, at *2 (Tenn. Ct. App. Oct. 31, 2019) (summarizing *Vaughn* as explaining that "an action under the survival statute does not commence until the personal representative of the estate is substituted for the deceased"); *Owens*, 2018 WL 6721800, at *9 ("A court's order allowing the substitution of the decedent's personal representative, not the previously filed complaint against the decedent, marks the commencement of the action.") (quotation omitted); *Bryant v. Est. of Klein*, No. M2008-01546-COA-R9-CV, 2009 WL 1065936, at *3 (Tenn. Ct. App. Apr. 20, 2009) ("Plaintiffs brought their action against the decedent, who, according to Tenn. Code Ann. § 20-5-103 and case law interpreting the statute, was not a proper party defendant. By bringing the action against an improper party, the filing of the Complaint did not 'commence' the action within the meaning of Rule 3 of the Tennessee Rules of Civil Procedure."). Thus, we reject Plaintiff's relation back argument and conclude that Plaintiff failed to strictly follow the mandatory steps required by the survival statute within the time afforded by the applicable statute of limitations.

We note that the appellee requests attorney fees on appeal but identifies no basis for the request. Thus, it is respectfully denied. *See Kholghi v. Aliabadi*, No. M2019-01793-COA-R3-CV, 2020 WL 5607816, at *27 (Tenn. Ct. App. Sept. 18, 2020) ("We decline to award attorney's fees to a party that cannot identify a contractual, statutory, or some other basis for such an award.") (quotation omitted).

IV. CONCLUSION

For the aforementioned reasons, the decision of the circuit court is affirmed and remanded. Costs of this appeal are taxed to the appellant, Kristopher McMickens, for which execution may issue if necessary.

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CARMA DENNIS MCGEE, JUDGE