

IN THE MISSOURI SUPREME COURT

No. SC85902

IN THE MATTER OF THE ESTATE OF JOHN J. BOLAND, SR.

CLAIM OF MARY FRANCES (BOLAND) HALLIDAY,

Petitioner/Appellant.

APPELLANT'S REPLY BRIEF

**Appeal from Judgment of the Probate Division
of the Missouri Circuit Court
St. Louis, Missouri**

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT TO RESPONDENT POINT I - JURISDICTION

Halliday acknowledges the maxim that constitutional objections are waived unless made at the earliest opportunity. Halliday objected timely to the unconstitutional retrospective application of statutes at the earliest opportunity where Boland's Estate never filed *any* Answer to Halliday's claim, much less an Answer asserting an affirmative defense of lapse / failure to revive judgment based on retrospective application of Mo. Rev. Stat. §516.350 (1984), (2001), or (2002). Ultimately the court denied Halliday's claim without explanation; but inevitably the court's decision was based on Boland's Estate affirmative avoidance concepts built around either §516.350(1)(2)(3) R.S.Mo.(2001), or Hanff v. Hanff's construction of §516.350 (1994) in a constructive trust civil action. Either way the denial of Halliday's claim rests on an unconstitutional retrospective application of statutes adumbrated by Boland's Estate for the first time in its memorandum of law in opposition to Halliday's claim, filed and delivered to Halliday on the date of the hearing, March 2, 2004, and Halliday objected to that as soon as possible.

Estate of Boland's rebuttal to jurisdiction in Point I is mischievous and meritless. The mischief stems from gambits in citation. Notice in the "Points Relied On" sections of Boland's brief, (Br. 6-7), Point I cites § 516.350 R.S. Mo. *without* a date. In contrast, in Points II, III, and IV, each statute citation is dated. Moreover, each citation *date* is after 1981. Halliday and Boland executed their separation agreement on July 7, 1981, and the Decree of Dissolution that incorporated their contract was July 9, 1981. So whenever

Boland's estate cites a *dated* statute in its brief, it serves to clarify its defense of the probate court's judgment denying Halliday's claim depends *entirely* on retrospective application of subsequently enacted statutes. In each instance Boland's position is, first, unconstitutional in violation of the prohibition against ex post facto laws; and, secondly, a wrongful application of statutes that exclude application to judgments that include maintenance; and, third, a wrongful application of statutes concerning judgments to nullify a contract that exists independent of a judgment that incorporated that contract.

In Argument on Point I, the Estate tries to finesse its' gambit of undated citation. To understand the finesse, we begin by noting Missouri Supreme Court Rule 41.01(a) declares that the Rules apply to civil actions pending before a circuit judge, *except* as governed by the probate code. Rule 41.01 (b) specifies Rules that do apply to probate actions, but the list does not include Rule 55.01(Pleading Required), or Rule 55.08 (Affirmative Defenses), or Rule 55.25 (Time of Answer). Taking advantage of these gaps in the Rules, Boland's Estate never filed an Answer to Halliday's claim, much less an Answer that raised affirmative defenses, particularly any affirmative defense built around retrospective application of statutes enacted after Halliday and Bolland made their contract July 7, 1981 and the Court entered judgment July 9, 1981.

To circumvent this state of non-existent pleading, Boland's Estate launches its argument under Point I by mentioning a letter March 12, 2003, from Mr. Vancil to Mr. Frankel. (Br. 8-9). Mr. Vancil's letter is at L.F. 44-45; for convenience, we provide a copy in the Appendix, pg. 1-2. In paragraph 3 of that letter Mr. Vancil initiated his 'statute without date citation' gambit as follows:

“It is the position of the estate that due to the fact the the 1981 Divorce Decree has not been revived in accordance with Section 516.350, that the provisions of the decree referencing the life insurance is not enforceable.”

In that letter Mr. Vancil never cited a statute enacted *after* 1981 as the basis of an affirmative defense to cancel, nullify, or otherwise avoid Boland’s promise to provide Halliday \$50,000.00 life insurance. Boland’s claim that Halliday should have somehow filed an anticipatory constitutional objection would require her to be clairvoyant!

In addition, Boland’s Estate brief wrongly states at page 5, “Halliday discussed at length the applicability of Section 516.350 without raising any constitutional objection.” Halliday filed a Memorandum of Law in support of her claim on March 2, 2004 at the hearing.(L.F. 40-42.) The aim of Halliday’s memorandum was to explain why Hanff v Hanff, as an action to impose a constructive trust against the beneficiary of an insurance policy, was inapplicable precedent to Halliday’s direct breach of contract and contempt of judgment action against the estate of a decedent. Halliday quoted excerpts from Hanff v. Hanff in paragraph 10 to emphasize ‘apples and oranges’ distinctions (*see* L.F. 52):

- Hanff was not a probate action;
- Hanff was not a breach of contract suit;
- Hanff was a species of contempt of judgment action, oddly against someone who neither made nor breached the contract, nor was a party to the judgment, something of a ‘received stolen goods’ notion of constructive trust.

At the Hearing March 2, 2004, the Estate of Boland filed with Court and hand delivered its Memorandum of Law in Opposition to Claim of Mary Halliday. (L.F. 60 – 63). In its’ “Argument” (L.F. 61) the Estate wrote: “Claimant as a matter of law, is barred from collecting this Judgment pursuant to § 516.350 RSMo. *In 2001 the Legislature amended* § 516.350 RSMo. which now provides that:” (emphasis added). Boland’s Estate then turned its “Argument” to one, and only one case: Hanff v. Hanff 987 S.W.2d 352 (Mo. App. E.D. 1998). (L.F. 61-62). These were the first obtuse hints Boland was really asserting an ex post facto statutory defense.

Estate of Boland extends its’ citation gambits from Mr. Vancil’s letter and March 2, 2004 Memorandum of Law by mentioning Mo. Rev. Stat. § 516.350 in Point I of its brief, again *without* a date. This is mischievous. §516.350 R.S. Mo. (1978) existed. when the court Decreed Boland’s marriage dissolved on July 9, 1981. That is the only statute to apply to that judgment in a constitutionally legitimate way. Holt v. Holt, 635 S.W.2d 335 (Mo. banc 1982) (June 1982), construed *that* statute. The *Holt* Court reversed a trial court order that quashed a garnishment levied to collect unpaid support obligations mandated in 1972 dissolution decree, holding the trial court reasoned incorrectly in favor of an affirmative defense that § 516.350 R.S. Mo. (1978) barred enforcement of periodic support obligations in a divorce judgment that was more than 10 years old, and unrevived. The *Holt* court acknowledge the soundness of Smith v Smith, 168 Ohio St. 447, 156 N.E. 2d 113 (1959) in holding that Orders for future payments are different from other judgments that provide a sum certain remedy for past harms, so as to “afford relief to the appellant under the statute (516.350) in its present form”. *Holt*, at 337.

Furthermore, the Holt court went beyond that logic to provide the appellant – who was seeking the unpaid debt – the benefit of the 1982 modification in the statute that specifically exempted maintenance decrees from ‘lapsing’ due to the presumption of payment and satisfaction of judgments within ten years of entry. The coup de grace of Estate of Boland’s gambit is to ignore Holt’s construction of §516.350 (1978) in effect July 9, 1981, when the court included Boland’s separation agreement in the Dissolution of Marriage Decree.

Next, Boland’s authorities in Point I are readily distinguishable. Severson v. Dickinson 248 S.W. 595 (Mo.1923) was a civil action to enforce a foreign judgment entered in Wisconsin. The defendant Answered, then “interposed an *amended* answer”. The Court detailed the objections in the amended answer, particularly the claim that absence of original jurisdiction in Wisconsin due to improper service of process invalidated that judgment. Plaintiff filed an *affirmative reply* to the Answer. At trial the defendant stood on its defense and lost. After trial defendant clarified a *new* defense, to wit deprivation of property without due process in violation of the 14th Amendment to the U.S. Constitution. The court reasoned, “...that good pleading and orderly procedure first compelled the defendant to raise constitutional question in his Answer.” Id. 596[2]. There was no comparable orderly exchange of pleadings here, where Boland never filed an affirmative defense. No court has ever held that in order to preserve a constitutional objection, a claimant has to be clairvoyant, and anticipate that its opponent may assert an affirmative defense that rests on retrospective application of subsequently enacted

statutes, and - to preserve a constitutional objection – make the objection before an Answer or affirmative defense invoking unconstitutional action has been made.

Estate's reliance on Morrow v. Caloric Appliance Corp, 362 S.W. 2d 282 (Mo.App. 1962) is equally puzzling. *Morrow* transferred an appeal from a judgment that a manufacturer breached an implied warranty of fitness and was liable for property damage due to a stove explosion, where the court held the defendant – a Pennsylvania Corporation – properly raised its objection to deprivation of due process of law in violation of the 14th Amendment to the United States Constitution by moving to quash service of process. *Morrow* responded to an improper court action – issuance and service of a summons - after an official delivered the court summons to on an out of state corporation that claimed inadequate Missouri contacts to be sued in this state. That is quite different from Mr. Vancil's letter saying his client wouldn't pay.

In this case Boland's Estate never contended that the Halliday – Boland separation agreement was an invalid contract, or that the Dissolution Decree was invalid. Therefore, the only basis for the court to deny the claim was on the basis of affirmative avoidance Boland's Estate advanced for the first time at the hearing March 2, 2004: (1) the 2001 revision of 516.350; (2) Hanff v. Hanff. Since *Hanff* construed 516.350 (1994) vis-à-vis a constructive trust claim against someone who was neither a party to the contract that was breached, nor the judgment that had been entered, either way, the court *had* to apply subsequently enacted law retrospectively, and that's unconstitutional. Consequently, Halliday raised her constitutional objection to the unconstitutional retrospective application of laws to deny Halliday's claim in a timely way, and every court has

jurisdiction to consider unconstitutional basis of court action. Boland's Estate's Point I objection to jurisdiction is meritless.

REPLY ARGUMENT TO POINTS II, III, AND IV.

First, lapse and failure to revive judgments are reciprocal notions of the same affirmative defense, and the Estate of Boland makes redundant points about the flip sides of the same legal coin. The Estate of Boland concedes the Separation Agreement between Boland and Halliday was a valid contract. The Estate of Boland concedes the Dissolution Decree was a valid judgment. Obviously that Decree incorporates the separation agreement, and the separation agreement includes Maintenance, ... and the Maintenance includes Boland's promise to, "keep in full force and effect life insurance covering his life in the principal sum of not less than \$50,000, upon which Wife is irrevocably designated as the beneficiary during her lifetime." (L.F. 24).

All the editions and revisions of 516.350 enacted after 1981 specifically include a limitation of applicability, '*except for any judgment, order, or decree awarding child support or maintenance which mandates the making of payments over time*'. The disjunctive exemption list exists in the 2002 edition of 516.350 quoted in Boland's Brief, pg. 11:

'Every judgment, order or decree of any court of record... except for any judgment, order, or decree awarding –

- Child support, or
- Maintenance or

- Dividing pension, retirement, life insurance, or other employee benefits in connection with a dissolution of marriage, legal separation or annulment which mandates the making of payments over a period of time,
- Or payments in the future

Shall be presumed paid and satisfied after the expiration of ten years from the date ...

The ‘exceptions’ in these statutory revisions establish the antithesis of applying the revised statutes to the Halliday-Boland Dissolution Decree July 9, 1981, since that decree included an award of maintenance to Halliday. (L.F. 20-30, Maintenance at 23-24.) Consequently, not only is the application of statutes enacted after 1981 to the Decree unconstitutional, but wrong as a matter of statutory construction, as well.

Next, the incorporation of the separation agreement into the judgment shortcut proof of that contract, and eliminated potential defenses to the contract; but the incorporation of the agreement into the Decree didn’t vitiate the contract. Halliday proved both the judgment and the contract it incorporated. Any application of a statute about lapsed ‘judgments’ is limited to the subject of ‘judgment’. It was wrong and erroneous to apply Section 516.350 – any edition – (1978) (1982) (1994) (1998) (2001) or (2002) beyond the decree so as to negate Boland’s contractual promise to irrevocably name Halliday beneficiary of a \$50,000 life insurance policy.

Furthermore, since the Boland – Halliday dissolution decree does not include any term, ‘*dividing* pension, retirement, life insurance, or other employee benefits’ but merely provides a promise of life insurance, it lies outside the boundaries of the 2002

revisions to the judgment lapse statute. Again, in addition to being constitutionally protected against any adverse retrospective application of the subsequent statutory revisions, that statute itself is inapplicable to the Halliday Dissolution Decree because that decree doesn't contain a *division* of insurance or an employee benefit. In its brief at page 16, these distinctions collapse Boland's Estate into war with one of the statutes it claimed applied: "There is no logical reason to except one type of life insurance and not another". Here the Estate of Boland adumbrates a denial of equal protection argument about the statute it seeks to apply, but which it now recognizes does not apply. This is meritless.

CONCLUSION

The probate court erred in denying Halliday's claim for insurance benefits Boland **promised** her (and the court) in the separation agreement incorporated into the judgment. That contract was never revoked, nullified, cancelled nor vitiated in any way. Consequently Halliday had a valid claim to the benefits against Boland's Estate because Boland failed to irrevocably name her as beneficiary, and he thereby breached his promise. The judgment statute in existence in 1981 when Halliday and Boland allowed their contract to become part of the Dissolution Decree is the only statute that constitutionally applies to that judgment. We move the Court to reverse and remand the judgment denying Halliday's claim, with directions to enter Judgment in favor of Halliday, and conduct further action only consistent with that reversal. Respectfully submitted.

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CERTIFICATE OF COMPLIANCE AND SERVICE

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who by his signature below hereby certifies that this APPELLANTS' REPLY BRIEF complies with Rule 84.06(b), and contains **2499 words**, not including the cover, certificate of service, certificate of compliance, signature block or appendix, and that accompanying diskettes for Court and opposing counsel with an electronic copy of the brief has been scanned and is virus-free.

Counsel for Appellant certifies that on October 11, 2004:

- (1) he sent one original and 10 copies of brief to the Clerk of the Missouri Supreme Court for filing, together with a floppy disk of containing the brief;
- (2) PURSUANT TO RULE 84.06 (h) effective July 1, 2004, he sent an electronic (e-mail) of this brief to the Court and defense counsel listed below, and
- (3) he served one hard paper copy of the brief together with one diskette Word electronic copy of the brief to each counsel listed below further
- (4) diskettes were scanned for viruses and found to be clean containing the electronic copy of this brief, and that he sent one paper copy and one diskette to each of the

attorneys for the Estate of John Boland, listed below, in compliance with Rule 84.06(a) and (g).

With respect to the The Appendix , (Mr. Vancil's letter March 12, 2003,) counsel has scanned that into PDF format in Adobe, exactly as we convert documents to digital format for the Federal Courts, and the appendix PDF has been electronically sent along with the electronic copy of the briefs in PDF format for all parties.

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APPENDIX

Mr. Vancil Letter March 12, 2003.....A-1,2