
SC 88606

IN THE MISSOURI SUPREME COURT

SHARON PEYTON,
Appellant,

v.

BELLEFONTAINE GARDENS NURSING & REHABILITATION, INC., JOHN
DOE ADMINISTRATOR, JOHN DOE MANAGEMENT ENTITY AND JOHN
DOE ENTITY
Respondents.

Appeal from the Circuit Court of the City of St. Louis, Missouri
22nd Judicial Circuit
The Honorable John J. Riley, Division I

SUBSTITUTE BRIEF OF RESPONDENTS BELLEFONTAINE GARDENS
NURSING & REHABILITATION, INC., JOHN DOE ADMINISTRATOR, JOHN
DOE MANAGEMENT ENTITY, AND JOHN DOE ENTITY

SUSAN FORD ROBERTSON #35932
FORD, PARSHALL & BAKER
3210 Bluff Creek Drive
Columbia, MO 65201-3525
(573) 449-2613 FAX: (573) 875-8154
srobertson@fpb-law.com

www.fpb-law.com

ATTORNEYS FOR RESPONDENTS
BELLEFONTAINE GARDENS NURSING &
REHABILITATION, INC., JOHN DOE
ADMINISTRATOR, JOHN DOE
MANAGEMENT ENTITY AND JOHN DOE
ENTITY

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STATEMENT OF FACTS

Respondents Bellefontaine Gardens (all Respondents referred to collectively as Bellefontaine Gardens) disagree with Appellant Sharon Peyton’s statement of facts and offer the following in compliance with Rule 84.04 and the relevant standard of review.

On July 15, 2005 Sharon Peyton filed a petition against Respondents Bellefontaine Gardens seeking damages for the alleged wrongful death of her grandmother Ruby Lane. (L.F. 6-19; Appendix at A1-A14). The caption of the petition was entitled “Sharon L. Peyton, as Surviving Heir of Decedent Ruby Lane.” The petition contained several counts. Count I for wrongful death—nursing home negligence alleged:

Comes now plaintiffs (sic) Sharon L. Peyton, as surviving heir of Decedent Ruby L. Lane, by and through the undersigned counsel and for her cause of action for wrongful death alleges and states as follows:

1. Plaintiff Sharon L. Peyton (hereinafter “plaintiff”) is the surviving granddaughter of decedent Ruby L. Lane. She is a member of the wrongful death class, pursuant to R.S.Mo. 537.080 and is entitled to damages pursuant to R.S.Mo. 537.090.

...

4. Decedent Ruby L. Lane died on July 26, 2002.

5. Mary Williams, adult natural daughter of Ruby L. Lane; Jennifer Degraffenreid, adult natural granddaughter of Ruby L. Lane

although they are not named plaintiffs in this action, they have been notified of this cause of action pursuant to R.S.Mo. 537.080 and 537.095.

...

WHEREFORE, plaintiff Sharon L. Peyton, a surviving heir of decedent Ruby Lane prays for damages in excess of \$25,000.00 and pursuant to Missouri Wrongful Death Statute (sic) R.S.Mo. §537.090, against defendants jointly and severally, and each of them, acting by and through the other, in an amount the court and jury determine to be fair and reasonable and for such other damages, expenses and interest allowed by Missouri law. (L.F. 6-19; Appendix A1-14.)

Count II for negligence per se states in paragraph 19: “Plaintiff, in her individual capacity, incorporates paragraphs 1 through 18 of the petition for damages as if fully set forth herein” (emphasis added). (L.F. 11; Appendix at A6.) Peyton prays for damages for “plaintiff, Sharon L. Peyton, as surviving heir of decedent Ruby Lane.” (L.F. 16: Appendix at A11.) Count III of the petition for wrongful death—res ipsa loquitur incorporates by reference paragraphs 1 through 29 of the petition and contains the same prayer: “plaintiff, Sharon L. Peyton, as surviving heir of decedent Ruby Lane” requests damages against defendants. (L.F.16-17; Appendix at A11-12.)

Respondents Bellefontaine Gardens filed a motion to dismiss for lack of standing which was sustained by the court on January 30, 2006. (L.F. 20-27; 56-60.) In the January 30, 2006 order, the trial court found that Sharon Peyton lacked standing to bring an action for wrongful death as there is a surviving member of the first class of persons

entitled and eligible to bring a wrongful death action pursuant to Section 537.080 R.S.Mo. (L.F. 56-60.) The court found that Sharon Peyton lacked standing to bring the action for the alleged wrongful death of Ruby Lane and dismissal was appropriate. The court found that Section 537.080 R.S.Mo. creates a hierarchy where individuals in the first category are entitled to bring the action and individuals in the second category may only bring a wrongful death action if there are no individuals existing in the first category. As Sharon Peyton's petition alleges that there are surviving members from the first category of wrongful death prospective plaintiffs, she lacked standing to bring a wrongful death action. (L.F. 56-60.)

Within the January 30, 2006 order the court also denied plaintiff leave to file an amended petition as it would not cure the standing defect. (L.F.56-60.) Peyton along with opposing Respondents' motion to dismiss had filed a motion for leave to file an amended petition on September 29, 2005 captioned "Sharon Peyton, as Power of Attorney for surviving heir of Decedent Ruby Lane." (L.F. 42-54.) The proposed amended petition stated that Peyton has a durable power of attorney for her mother, Mary Williams but the petition still stated that Mary Williams, adult natural daughter of the deceased, although not named as a plaintiff has been notified of the action. (L.F. 42-54.) The proposed amended petition still requested relief for Peyton only as surviving heir of her grandmother, Ruby Lane. (L.F. 42-54.)

The court found that Sharon Peyton's proposed first amended petition did not claim she brought the action pursuant to an assignment of her mother's cause of action but instead pursuant to a purported power of attorney granted by her mother to give

Peyton standing to bring the action in Peyton's own name. The court found this to be inappropriate and ineffective in that the real party in interest in the case would be Mary Williams who is not named as a plaintiff in either the original or proposed amended petition. (L.F. 56-60.) Sharon Peyton then attempted to file a second amended petition on March 6, 2006 and for the first time showed the caption of Mary Jo Williams by and through Sharon Peyton her attorney in fact. (L.F. 85-106.)

This pleading for the first time attempts to bring the action in the name of and for the benefit of Mary Jo Williams. (L.F.89.) The petition states that Mary Jo Williams "is the sole surviving adult natural daughter of decedent Ruby L. Lane, who had no surviving spouse." (L.F. 89.) The petition also states that there are no other persons entitled to bring an action under Section 537.080 R.S.Mo. (L.F. 90.)

On August 2, 2006 the trial court entered judgment as follows:

The Court has before it Plaintiff's Motion for Leave to File Second Amended Petition or, in the Alternative, to Enter Final Judgment. The Court now rules as follows: By order stated January 30, 2006, and March 2, 2006, this Court found that Plaintiff Sharon L. Peyton did not have standing to bring a wrongful death suit for the death of Ruby Lane. Plaintiff now moves for leave to file an amended petition substituting Mary Jo Williams, a person authorized to bring a wrongful death suit by §537.080 R.S.Mo, as the party plaintiff.

The court finds that granting leave to file the amended petition would be futile. As the lawsuit was originally drafted, plaintiff had no standing to bring the wrongful death suit. If a party lacks standing, the court must dismiss the case

because it does not have jurisdiction. Farmer v. Kinder, 89 S.W.3d 447, 451 (Mo. banc 2002).

Under §537.100 R.S.Mo., the statute of limitations for a wrongful death claim is three years from the date of decedent's death. Where the original party plaintiff has no right to maintain an action, has no standing to sue under the statute and is not a party authorized to sue under the strict wording of the statute, an amendment which adds or substitutes a proper party does not relate back to the original petition so as to save the action from the running of the statute of limitations. Henderson v. Fields, 68 S.W.3d 455, 467 (Mo.App. W.D. 2001) citing State ex rel. Jewish Hospital of St. Louis v. Buder, 540 S.W.2d 100, 107 (Mo.App. E.D. 1976). Plaintiff's Motion for Leave to File Second Amended Petition was filed more than three years after Ruby Lane's death. Mary Williams' claims for wrongful death are therefore barred by the statute of limitations.

THEREFORE, it is Ordered and Decreed that Plaintiff's Motion for Leave to File Second Amended Petition is DENIED. Plaintiff's Motion to Enter Final Judgment is GRANTED. Judgment is hereby entered in favor of defendants and against plaintiff for lack of Standing. (L.F. 171-173; Appendix 15-17.)

ARGUMENT

The trial court correctly dismissed Peyton's original petition. Peyton filed a lawsuit in her own name seeking damages only for herself for the death of her grandmother, Ruby Lane. The petition's caption, three counts and three prayers all seek damages only in the name of and for Peyton. However, Peyton had no claim for the death of her grandmother, Ruby Lane, because Peyton's mother (Lane's daughter) survived Lane's death. Under Section 537.080 R.S.Mo., only Mary Williams (Lane's daughter) could bring a claim seeking damages for Lane's death. Peyton's petition was not brought in the name of or for the benefit of Williams. Peyton lacked standing and her petition was properly dismissed.

The trial court also correctly denied Peyton's request for leave to file a second amended petition after the wrongful death statute of limitations ran naming Mary Williams (by and through Peyton as attorney-in-fact for Williams) as plaintiff. Williams never filed suit before the statute of limitations ran. Peyton never filed suit for or on behalf of Williams before the statute ran. Instead, the only petition filed before the statute of limitations ran was the one by Peyton for Peyton. However, she lacked standing to assert a claim. Her argument that the second amended petition should relate back to the filing of the first petition lacks factual or legal support.

This case does not involve issues relating to Peyton's capacity to sue. Instead, this is a case addressing Peyton's lack of standing to sue. As this court has determined, capacity can be fixed; standing cannot. City of Wellston v. SBC Communications, Inc.,

203 S.W.3d 189, 193, 194 (Mo. banc 2006). Peyton cannot seek to substitute Williams after the statute of limitations ran because Peyton had no standing to file the original petition. Peyton did not have a joint or beneficial interest along with Williams in seeking recovery for the death of Lane. Peyton did not file the original petition for or on behalf of Williams. Peyton did not lack the capacity to sue. Instead, she lacked standing to sue.

As this court explained in Webster v. Joplin Water Works Co., 177 S.W.2d 447, 341 (Mo. 1944) the real party in interest may be substituted in an action and the substitution relate back to the original filed action where the pleading discloses that the action was in fact being prosecuted in the interest of the substituted plaintiff. But the real party in interest may not be substituted as plaintiff to avoid the limitations bar where the pleading shows that the original plaintiff was a stranger to and could have no interest in the cause of action and fails to show that the action was being prosecuted in the interest of the real party in interest.

Despite Peyton's repeated attempts to characterize her original petition as being brought in the name of and for the benefit of Mary Williams, the actual petition shows otherwise. The caption of the petition was entitled "Sharon L. Peyton, as Surviving Heir of Decedent Ruby Lane." The petition contained several counts. Count I for wrongful death—nursing home negligence alleged:

Comes now plaintiffs (sic) Sharon L. Peyton, as surviving heir of Decedent Ruby L. Lane, by and through the undersigned counsel and for her cause of action for wrongful death alleges and states as follows:

1. Plaintiff Sharon L. Peyton (hereinafter “plaintiff”) is the surviving granddaughter of decedent Ruby L. Lane. She is a member of the wrongful death class, pursuant to R.S.Mo. 537.080 and is entitled to damages pursuant to R.S.Mo. 537.090.

...

4. Decedent Ruby L. Lane died on July 26, 2002.

5. Mary Williams, adult natural daughter of Ruby L. Lane; Jennifer Degraffenreid, adult natural granddaughter of Ruby L. Lane although they are not named plaintiffs in this action, they have been notified of this cause of action pursuant to R.S.Mo. 537.080 and 537.095.

...

WHEREFORE, plaintiff Sharon L. Peyton, a surviving heir of decedent Ruby Lane prays for damages in excess of \$25,000.00 and pursuant to Missouri Wrongful Death Statue (sic) R.S.Mo. §537.090, against defendants jointly and severally, and each of them, acting by and through the other, in an amount the court and jury determine to be fair and reasonable and for such other damages, expenses and interest allowed by Missouri law. (L.F. 6-19; Appendix A1-14.)

Count II for negligence per se states in paragraph 19: “Plaintiff, in her individual capacity, incorporates paragraphs 1 through 18 of the petition for damages as if fully set forth herein” (emphasis added). (L.F. 11; Appendix at A6.) Peyton prays for damages for “plaintiff, Sharon L. Peyton, as surviving heir of decedent Ruby Lane.” (L.F. 16:

Appendix at A11.) Count III of the petition for wrongful death—res ipsa loquitor incorporates by reference paragraphs 1 through 29 of the petition and contains the same prayer: “plaintiff, Sharon L. Peyton, as surviving heir of decedent Ruby Lane” requests damages against defendants. (L.F.16-17; Appendix at A11-12.)

Peyton is not allowed to bootstrap Section 537.095 R.S.Mo. to create standing to file the lawsuit. Section 537.095.1 states in part: “...if two or more persons are entitled to sue for and recover damages as herein allowed, then any one or more of them may compromise or settle the claim for damages with approval of any circuit court, or may maintain such suit and recover such damages without joinder therein by any other person...” (emphasis added). (Appendix at A19.) Merely alleging that Williams was notified of Peyton’s action did not create standing for Peyton. It also does not disclose an intent to sue on William’s behalf. In fact, it demonstrates the opposite—Peyton filed the action to recover herself for the death of her grandmother. Peyton was never “entitled to sue for and recover damages” so her reliance upon Section 537.095 R.S.Mo. is misplaced.

Peyton thought she was a class member entitled to damages. The actual language of the petition shows that she brought the action in her name for her benefit only. She did not bring the action on behalf of Mary Williams for Mary Williams. She lacked standing to bring an action as a “surviving heir” of her grandmother. The trial court properly ruled she could not substitute Mary Williams after the statute of limitations ran.

Peyton argues this case is one involving capacity to sue, not standing to sue. Peyton is factually and legally incorrect. Mary Williams had standing to file suit within

the statute of limitations but she did not do so. If the power of attorney authorized Peyton to file suit for Williams, Peyton did not do so before the relevant statute of limitations ran. Peyton as a surviving heir of her grandmother did not have any joint or beneficial interest with her mother in the wrongful death claim. Her original petition contained no facts disclosing an intent to file or seek damages in a representative capacity on behalf of the real party in interest (her mother).

Peyton's reliance upon the following cases is misplaced as Peyton herself never had any joint or beneficial interest when she filed the wrongful death petition in her own name only seeking damages for herself and no facts allege an intent to seek recovery on behalf of the real party in interest (her mother). Rotella v. Joseph, 615 S.W.2d 616 (Mo.App. S.D. 1981) and Mikesic v. Trinity Lutheran Hospital, 980 S.W.2d 68 (Mo.App. W.D. 1998); Webster v. Joplin Water Works, Co., 177 S.W.2d 447 (Mo. 1944); Slater v. Kansas City Terminal Railway Co., 271 S.W.2d 581 (Mo. 1954); Forehand v. Hall, 355 S.W.2d 940 (Mo. 1962).

In Rotella, though the petition for wrongful death was filed by a foreign administrator, the body of the petition reflected that the action was brought on behalf of the proper plaintiff (the infant daughter of the decedent). The court found it dispositive that there was an expressed intention on the part of the administrator to bring the original action for the child. Rotella, 615 S.W.2d at 621, 622. In Mikesic, the court focused not only on the caption but the body of the petition to determine on whose behalf relief was sought. The court found that the petition contained an expressed intention to file suit on behalf of one incapacitated. Mikesic, 980 S.W.2d at 73. In Slater, the appellate court

held that though the plaintiff misconceived the nature of her claim when she filed an action as administratrix she was attempting to state a claim for the benefit of herself, individually as a widow, the real party in interest. Slater, 271 S.W.2d at 583.

The critical focus is on the petition itself and whether the caption, body and prayer reveal a lack of standing or a lack of capacity to sue. The concepts of standing and capacity to sue should be consistent, regardless of whether the action is one for wrongful death or for some other type of injury. Standing is a jurisdictional matter antecedent to the claimant's right to relief in any type of case. Farmer v. Kinder, 89 S.W.3d 447, 451 (Mo. banc 2002). Lack of standing cannot be waived and if a party lacks standing the court must dismiss the case because the court lacks jurisdiction to proceed. Id. To have standing to sue, a plaintiff must have an interest in the subject of the lawsuit, which gives the plaintiff a right to relief. Switzer v. Hart, 957 S.W.2d 512, 514 (Mo.App. E.D. 1997).

In order to determine whether Peyton had standing to bring a lawsuit for the wrongful of her grandmother, resort to the classes defined under Section 537.080 R.S.Mo. is required. Sullivan v. Carlisle, 851 S.W.2d 510 (Mo. banc 1993). The wrongful death action was designed to compensate specifically designated relatives of the deceased for the loss of the decedent's economic support. Carlisle, 851 S.W.2d at 513. In 1979 the General Assembly expanded the range of recoverable damages but the statute continues to restrict the rights of parties affected by an untimely death, by drawing the line between those who will and those who will not be allowed to recover damages by reason of the death. Id., see, Powell v. American Motors Corp., 834 S.W.2d 184, 188 (Mo. banc 1992). A party suing under the wrongful death statute must bring that party in

the pleading strictly within the statutory requirements necessary to confer the rights. Nelms v. Bright, 299 S.W.2d 483, 487 (Mo. banc 1957).

Section 537.080 R.S.Mo. creates three categories or classes of persons who may bring a suit for wrongful death:

- (1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;
- (2) If there be no person in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;
- (3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem.

Section 537.080.1 R.S.Mo. (Appendix at A18.)

Sharon Peyton lacked standing to file suit for the alleged wrongful death of her grandmother because there was a class one member (Mary Williams as the adult natural daughter of the decedent, Ruby Lane) who was the only one with standing to bring the action. The petition was only filed by Peyton for Peyton. There is no mention made anywhere in the original petition that Peyton was attempting to sue on behalf of Williams or for the benefit of Williams. Dismissal of the action was appropriate.

This finding is consistent with long-standing authority. Smith v. Tang, 926 S.W.2d 716, 719 (Mo.App. E.D. 1996); Buder, 540 S.W.2d at 107; Caldwell v. Lester E. Cox

Medical Centers-South, Inc., 943 S.W.2d 5,8, 9 (Mo.App. S.D. 1997); Henderson v. Fields, 68 S.W.3d 455, 467 (Mo.App. W.D. 2001); Forehand v. Hall, 355 S.W.2d 940 (Mo. 1962); Fair v. Agur, 133 S.W.2d 402 (Mo. 1939); Goldschmidt v. Pevely Dairy Co., 111 S.W.2d 1, 3 (Mo. 1937).

In Buder the appellate court determined that if a petition for wrongful death was improperly filed in the name of the adult child for the wrongful death of her mother within the statute of limitations, an amended petition substituting the administratrix for the adult child (filed after the statute of limitations ran) does not relate back to the original petition. Buder, 540 S.W.2d at 107. The fact that the plaintiff in Buder was not appointed administratrix until after the statute ran and Peyton held a power of attorney for her mother before the statute of limitations ran is not the relevant point.

What is relevant and why Buder and these other cases are dispositive is that Peyton did not sue in a representative capacity for her mother pursuant to the power of attorney before the wrongful death statute of limitations ran. This case is not about her capacity to sue. Though she may have held the power of attorney before the statute ran, she did not file a petition for or on behalf of her mother within the statute of limitations. She only filed as herself seeking damages only for herself. There is simply no fact alleged or reference made anywhere in the petition to Peyton bringing this action on behalf of or for the benefit of Williams.

In Tang the appellate court ruled the relation back doctrine did not apply to when the original action was filed by the plaintiff in her individual capacity for lost chance of survival for her father and then dismissed and refiled by her in the capacity as personal

representative after the statute of limitations had run. The appellate court found that the plaintiff, in her capacity as an individual and as a personal representative were legally different plaintiffs and that the rationale expressed in Buder applied equally to the case at hand:

An adult child has no right or standing, under the circumstances here, to maintain suit under the wording of the statute, and an amendment substituting an authorized and designated party cannot therefore relate back to the original petition. The breath of life cannot, by judicial hands, be instilled into a petition devoid of life.

Tang, 926 S.W.2d at 720, quoting, Buder, 540 S.W.2d at 107. A similar result was reached in Henderson wherein the appellate court determined that the plaintiffs originally filed suit within the statute of limitations as the surviving grandparents of their deceased grandchildren but they were not appointed plaintiffs ad litem until after the statute ran. The court found they did not have standing under the wrongful death statute to bring an action in their individual capacities. Since they lacked standing to file the original action there can be no relation back under Rule 55.33. Henderson, 68 S.W.3d at 467.

The court found that the legal capacities of suing individually and as plaintiff ad litem were separate and distinct and the later appointed plaintiff ad litem was a stranger to the original petition. Id. The case now before this court is no different from the cases above cited. Even though Peyton may have possessed a power of attorney this would not have prevented Williams from bringing suit. Furthermore, nothing in the petition reveals Peyton was attempting to bring an action for or on behalf of Williams. Her attempt to

change the nature of the action from one brought by Peyton for Peyton to one brought by Williams for Williams fails. The relation back doctrine is inapplicable. This analysis and result is consistent even with cases not involving wrongful death. See Mikesic, 980 S.W.2d at 73 and Ausmus v. Capital Region Family Practice, 115 S.W.3d 427, 432 (Mo.App. W.D. 2003).

Peyton's reliance upon Rule 55.33 is misplaced. This rule applies only to amendments changing the party against whom the claim is asserted—not to amendments that seek to add or substitute a party. Hilker v. Sweeney, 877 S.W.2d 624, 628 (Mo. banc 1994); Harting v. City of Black Jack, 768 S.W.2d 633, 636 (Mo.App. E.D. 1989); Caldwell, 943 S.W.2d at 8. Furthermore, an amendment relates back to the original petition to save the action from the statute of limitations only when the original plaintiff had the legal right to sue and stated a cause of action at the time suit was filed. Harting, 768 S.W.2d at 636; Don Roth Dev. Co., Inc. v. Missouri Highway and Transp. Comm'n, 668 S.W.2d 177, 179 [3] (Mo.App E.D. 1984).

The trial court correctly entered judgment in this case finding Peyton had no standing to file the original petition and the relation back doctrine was inapplicable. This court should affirm the trial court's judgment in all respects.

SUSAN FORD ROBERTSON #35932
FORD, PARSHALL & BAKER
3210 Bluff Creek Drive
Columbia, MO 65201-3525
(573) 449-2613 (phone)
(573) 875-8154 (fax)
srobertson@fpb-law.com
www.fpb-law.com

ATTORNEYS FOR RESPONDENTS
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APPENDIX

Peyton’s original petition A1

Judgment A15

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