

IN THE SUPREME COURT OF MISSOURI

NO. SC88606

SHARON L. PETYON,

Plaintiff-Appellant,

v.

BELLEFONTAINE GARDENS NURSING & REHAB, INC., ET AL,

Defendants-Respondents.

**Appeal from the Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit
Division No. 1
The Honorable John J. Riley**

SUBSTITUTE BRIEF OF PLAINTIFF-APPELLANT

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in favor of Defendant, because the basis of the denial of leave was the trial court's conclusion that granting leave to amend would be futile because the proposed Second Amended Petition substituting Mary Jo Williams as the named plaintiff would not relate back to the timely filed original Petition. The trial court's conclusion that the proposed Second Amended Petition would not relate back erroneously declared and applied the law in that the proposed Second Amended Petition would properly relate back to the original Petition because:

- (a) (1) a cause of action for the wrongful death of Ruby L. Lane was lawfully vested in Mary Jo Williams for which Williams was entitled to file suit when the original Petition was timely filed less than three years after the date of death; and
- (2) the original Petition was served on Defendant; and
- (3) the original Petition stated facts that identified Mary Jo Williams as a person entitled to sue, stated facts sufficient to state a cause of action for Mary Jo Williams for wrongful death, and disclosed an intent to seek recovery on behalf of and for the use and benefit

of Mary Jo Williams; and because

(b) the proposed Second Amended Petition “arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in original” Petition, the wrongful death of Ruby L. Lane due to the negligence of Defendants, and thus would properly relate back to the original Petition under Rule 55.33 (c), Missouri Rules of Civil Procedure. 32

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JURISDICTIONAL STATEMENT

Timeliness of Notice of Appeal, Finality of Judgment and Jurisdiction of This Court On Transfer

This is an appeal from the Order and Judgment entered on August 2, 2006, (LF 162; A-1)¹, by the Honorable John J. Riley, Circuit Judge of the City of St. Louis, Twentieth Judicial Circuit, Division No.1, denying the Motion of Plaintiff-Appellant Sharon L. Peyton (“Plaintiff” or “Peyton”) for Leave to File Second Amended Petition and granting final judgment in favor of Defendant-Respondents (as well at the previous Order entered by the Honorable Steven Ohmer on January 30, 2006, dismissing the original Petition and denying leave to file the Plaintiff’s First Amended Petition (LF 56; A-4)). In her Motion for Leave to File Second Amended Petition, Plaintiff sought leave to amend to name “Mary Jo Williams, by and through Sharon Peyton, her attorney in fact” as the named plaintiff in this action wrongful death action. In the alternative, Plaintiff requested that if the trial court denied the Motion for Leave to File Second Amended Petition that the trial court then enter a final judgment to permit an appeal of the denial of leave to file the Second Amended Petition. In the Order and Judgment of August 2, 2006, the trial court granted Plaintiff’s alternative motion and entered final judgment in

¹ References to the Legal File will shown as LF _____. References to the Separate Appendix to this Brief will be shown as A-_____.

favor of Defendants and against Plaintiff. Plaintiff filed a timely notice of appeal on September 8, 2006 (L.F. 165; A-73).

In its Order and Judgment of August 2, 2006, as will be more fully described in the Statement of Facts, the trial court stated that granting leave to file the Second Amended Petition would be futile because, in the trial court's view, the statute of limitations in this wrongful death case had expired since the filing of the original petition, which had been dismissed for lack of standing, and the proposed Second Amended Petition would not relate back to the original petition for limitations purposes. The effect of the trial court's Order and Judgment is to dismiss this action and not merely a pleading, and it has the practical effect of terminating the litigation in the form cast. Given the conclusions reached by the trial court, as set forth above, a further request to file another amended petition or the filing of another separate suit on this claim would be a futile act. For these reasons, the Order and Judgment of August 2, 2006 is final and appealable. *See, e.g., Chromalloy v. Elyria Foundry Co.*, 955 S.W.2d 1, 3-4 (Mo. banc 1997); *Doe v. Visionaire Corp.*, 13 S.W.3d 674 (Mo.App.E.D.2000). *Doe* specifically stated dismissal based on statutes of limitations or lack of standing is appealable under the foregoing rules. *See Doe*, 13 S.W.3d at 676.

No ground for jurisdiction on direct appeal in this Court was present and, accordingly, the appeal fell within the general appellate jurisdiction of Missouri Court of Appeals, Eastern District, pursuant to Article V, § 3 of the Missouri Constitution and Mo.Rev.Stat. § 477.050 (2000).

On April 17, 2007, the Court of Appeals issued an opinion dismissing the appeal for lack of appellate jurisdiction, stating as grounds the Court’s view that Plaintiff was not “aggrieved” by the order and judgment of the trial court. *Peyton v. Bellefontaine Gardens Nursing & Rehab, Inc.*, No. ED 88689, 2007 WL 1119868 (April 17, 2007).² This Court granted Plaintiff’s Application for Transfer on November 6, 2007. This Court therefore has jurisdiction. Article V, § 10, Missouri Constitution, and Rule 83.04, Missouri Rules of Civil Procedure.

Appellant Is An “Aggrieved” Party Under Section 512.020, RSMo

Under Section 512.020, RSMo., “any party to a suit aggrieved by” a final judgment may take an appeal.³ The general standard that is frequently stated is that a party is “aggrieved” “within the meaning of the statute when the judgment operates prejudicially and directly on his personal property rights or interests and such effect is immediate and not merely a possible remote consequence. *E.g., Shelter Mutual Insurance Co. v. Briggs*, 793 S.W.2d 861, 863 (Mo. banc 1990). It has been recognized, however, when applying that general test to specific cases, that whether an appellant is “aggrieved” by a judgment within the meaning of the

² This issue was raised *sua sponte* by the Court of Appeals, and was not raised or briefed by Defendants in the Court of Appeals.

³ In order to appeal under Section 512.020, one must have been a party to the action in the trial court. *E.g., In the Matter of K.W.*, 32 S.W.3d 674, 675 (Mo.App.W.D. 2000).

statute depends on the particular facts and circumstances of each case. Thus, the Court of Appeals in *Bydalek v. Brines*, 29 S.W.3d 848, 852 (Mo.App.S.D. 2000) (footnote omitted), stated:

The word “aggrieved” is not defined in § 512.020. However, case law provides many broad, definitive statements concerning when a person is “aggrieved” within the contemplation of § 512.020. For instance, Defendants cite *Hertz Corp. v. State Tax Comm'n*, 528 S.W.2d 952[2] (Mo.banc 1975), for the general rule that a party is “aggrieved” when the judgment operates prejudicially and directly on a party's personal or property rights or interests and such effect is an immediate and not merely a possible remote consequence. *Id.* at 954. Many other efforts at defining an “aggrieved party” can be found, but an examination of the whole body of case law on this subject “impels the conclusion that whether or not a [party] is ‘aggrieved’ may not be determined by application of any definition or formula but depends upon the circumstances of the particular situation at hand.” *Listerman v. Day and Night Plumbing & Htg. Serv.*, 384 S.W.2d 111, 119-20 (Mo.App.1964). The *Listerman* case also reminds us that statutes which authorize appeals should be liberally construed as appeals are favored in the law. *Id.* at 120[11]. Where doubt

exists as to the right of appeal, it should be resolved in favor of that right. *Id*

See also *Schroff v. Smart*, 120 S.W.3d 751, 755 (Mo.App. W.D. 2003) (“This court has recognized that the determination of whether an entity is an aggrieved party depends not on the application of a precise definition or formula but rather on the circumstances of the particular situation at hand.”) (*citing Bydalek*; internal quotation marks omitted).

This Court in its recent cases has explicitly recognized the principle that the “right to appeal should be liberally construed as appeals are favored in the law” and that “[i]f doubt exists as to the right of appeal, it should be resolved in favor of that right.” *In the Matter of the Competency of Barkus*, 219 S.W.3d 250, 259 (Mo. banc 2007), *citing Schroff v. Smart*, 120 S.W.3d 751, 755 (Mo.App. W.D. 2003); *Lavelock v. Cooper Tire & Rubber Co.*, 169 S.W.3d 865, 866 n.1 (Mo. banc 2005).

In this case, Peyton was aggrieved by the Order and Judgment of the trial court, denying Leave to file the proposed Second Amended Petition, because in seeking leave to file the Second Amended Petition, and in appealing from the order and judgment of the trial court, Plaintiff Peyton has acted for the sole purpose of fulfilling and carrying out her fiduciary duty to the proposed named Plaintiff in the Second Amended Petition, “Mary Jo Williams, acting by and through her attorney in fact, Sharon Peyton.” Peyton has a fiduciary duty to the proposed Plaintiff in the Second Amended Petition because she was and is the

attorney in fact of Mary Jo Williams pursuant to a durable power of attorney executed prior to the filing of the original Petition in this action. By statute an attorney in fact has a fiduciary duty to his or her principal, to act in the best interests of the principal, a duty the applicable statute explicitly equates to that of a trustee to the trustee's beneficiary. See Section 404.714, RSMo.⁴

The facts as they pertain to jurisdiction in this regard are as follows:⁵

Plaintiff-Appellant Sharon Peyton ("Peyton") filed a timely wrongful death action against defendants for the death of her grandmother, Ruby Lane (LF 6; A-21).

Peyton was the only named plaintiff in the original Petition. However, Peyton also

⁴ Section 404.714 provides in part:

A person who is appointed an attorney in fact under a power of attorney, either durable or not durable, who undertakes to exercise the authority conferred by the power of attorney, has a fiduciary obligation to exercise the powers conferred in the best interests of the principal, and to avoid self-dealing and conflicts of interest, as in the case of a trustee with respect to the trustee's beneficiary or beneficiaries;

⁵ A more complete statement is set forth below in the Statement of Facts portion of this Substitute Brief. The statement here is limited to those facts deemed necessary to the understanding of this jurisdictional discussion. For purposes of clarity, Plaintiff will be referred to as "Peyton."

alleged Mary Jo Williams (“Williams”), was the natural daughter of decedent Lane, thus stating facts showing that Williams was entitled to recover as a class 1 beneficiary under the wrongful death statute (LF 7; ¶ 5; A-22). See Section 537.080.1 (1), RSMo. In referring to Williams in the original Petition, Peyton also pleaded Section 537.095 (LF 7, ¶ 5; A-22), which provides that any settlement or recovery in a death case “*shall be for the use and benefit of those who sue or join, or who are entitled to sue or join, and of whom the court has actual written notice.*” (emphasis supplied).

After expiration of statute of limitations, Defendants filed a Motion to Dismiss for lack of standing (LF 22). It alleged, upon information and belief, that Williams was Peyton’s mother, and that Peyton herself was not in fact in the wrongful death class and was not entitled to recover because her mother, Williams, was still living. The Motion to Dismiss argued that Williams was a natural daughter of the decedent, and was not deceased, that Williams had standing to sue under the wrongful death statute, but Williams’ daughter, Peyton, although she was a lineal descendant of the decedent, did not. See Section 537.080.1 (1) (class 1 beneficiaries include “the spouse or children or the surviving lineal descendants of any *deceased* children, natural or adopted, legitimate or illegitimate”) (emphasis supplied).

In response to the Motion to Dismiss, Peyton stated that she was, and had been since August 2002, the attorney in fact for Williams, pursuant to a durable power of attorney, and that she was entitled to bring the wrongful death action for

Williams pursuant to her powers under the durable power of attorney (LF 39, 43; A-33, A-37). Peyton sought leave to file a First Amended Petition in which the named plaintiff was “SHARON L. PEYTON, as Power of Attorney for surviving heir of Decedent RUBY LANE.” (LF 41-54; A-35 to A-48) The proposed First Amended Petition alleged the existence of the durable power of attorney and Williams’ status as a member of the wrongful death class, and in substance sought recovery as attorney in fact for Williams (LF 43; A-27). The trial court denied leave to amend, stating in part that an attorney in fact filing a petition on behalf of the principal and grantor of the power of attorney should sue in the name of the grantor or principal of the power of attorney, rather than in the name of the attorney in fact. The trial court granted the motion to dismiss the original Petition (LF 56-60; A-4 to A-8). The trial court also denied a motion for reconsideration of its order (LF 82-84; A-9 to A-11).

Peyton sought leave to file a Second Amended Petition substituting Williams, a proper party plaintiff, as the named plaintiff, acting by and through Peyton, her attorney-in-fact (LF 85-106; A-51 to A-72). The Motion for Leave to Amend stated in so many words that it did so in order to address the trial court’s expressed view that a suit by an attorney in fact for the principal should be in the name of the principal. The substance of the proposed Second Amended Petition, which was attached to and made a part of the Motion for Leave to Amend as an exhibit, showed that Peyton was attempting to act on Williams’ behalf under the durable power of attorney. The trial court denied the motion for leave to amend,

and entered final judgment in favor of Defendants (LF 162; A-1). This appeal followed (LF 165; A-73).

Plaintiff Peyton was aggrieved by the order and judgment of the trial court because, in seeking leave to file the Second Amended Petition and in appealing the Order and Judgment, Plaintiff was attempting to fulfill her fiduciary duty to her principal under the durable power of attorney, Mary Jo Williams. *In the Matter of the Estate of Savage*, 650 S.W.2d 346 (Mo.App.S.D. 1983). *Savage* holds that a fiduciary is aggrieved by a judgment that has an adverse impact on the interests of the fiduciary's principal (rather than on the fiduciary's own personal interests) when, as here, the principal was not a party to the suit in the trial court. *Savage* held that because a personal representative has a fiduciary duty as to the assets of an estate and the interests in the estate of those claiming through the decedent, the personal representative is aggrieved, and may appeal from a judgment in favor of one claiming against the estate in order to fulfill his fiduciary duty to protect the interests of the heirs and devisees when they were not parties in the trial court. *See Savage*, 650 S.W.2d at 349; *Estate of Munzert*, 887 S.W.2d 764, 766-767 (Mo.App. E.D. 1994) (following *Savage* on this point). *Savage's* holding that a fiduciary is aggrieved by and may appeal a judgment adverse to his principal's interests is in accord with this Court's holding in *Garrison v. Garrison*, 354 Mo. 62, 188 S.W.2d 644 (1945) (testamentary trustees were aggrieved by and could appeal from judgment affecting the interests of possible future born beneficiaries who were not parties to the suit in the trial court). *See also Pugh v. St. Louis*

Police Relief Ass'n, 237 Mo.App. 922, 179 S.W.2d 927 (1944) (trustee of property is aggrieved by judgment affecting the interests of his *cestui que trust* – or beneficiary – and could appeal from such a judgment, even when beneficiary was a party in the trial court and did not appeal, cited with approval by this Court in *Garrison*, 354 Mo. at 67, 188 S.W.2d at 645); Section 404.714, RSMo. (fiduciary duty of attorney in fact under power of attorney equated to trustee’s fiduciary duty to beneficiary).⁶

In appealing the Order and Judgment, which denied leave to file the Second Amended Petition and held that the Second Amended Petition would not relate back to the filing of the timely original Petition so as to avoid the statute of limitations, Peyton was further attempting to fulfill her fiduciary duty to her principal, Mary Jo Williams. Williams was not named as a party in the original Petition. The whole point of this appeal is in fact that Plaintiff Peyton’s efforts to amend the Petition to name Williams a party plaintiff in this action were denied by

⁶ This case is completely distinguishable from *In the Matter of Swearingen*, 42 S.W.3d 741 (Mo.App.W.D. 2001), because in that case the probate court had entered an order appointing a conservator of the principal’s estate, specifically finding the attorney in fact was not qualified to handle the principal’s financial affairs due to a conflict of interest, thereby in effect revoking any authority of the attorney in fact to deal with the principal’s financial affairs. *See Swearingen*, 42 S.W.3d at 750-751.

the trial court. Peyton plainly has no purpose in this appeal other than to fulfill and discharge her fiduciary duty to Williams by attempting to preserve Williams' wrongful death claim, and permit it to be tried in this action. There can be no doubt here that the Order and Judgment affects the interests of Peyton's principal, Williams, because the trial court explicitly found that granting leave to file the proposed Second Amended Petition would be futile on the ground that the amendment would not relate back to the original Petition and that "Mary Williams' claims for wrongful death are therefore barred by the statute of limitations." (LF 163; A-2)

The opinion in the Court of Appeals appears to have focused on whether the caption of the Motion for Leave to file the proposed Second Amended Petition and the caption and identification of the appealing party in the Notice of Appeal specifically stated that Peyton was acting as the attorney in fact for Williams in filing the Motion for Leave to File Second Amended Petition and/or the Notice of Appeal. However, the *substance* of Peyton's filings in the trial court, including the body of the Motion for Leave to File Second Amended Petition, and the attachments to the Notice of Appeal, have consistently asserted that Peyton was attempting to act on behalf of her principal, Williams, pursuant to the durable power of attorney. The orders entered by the trial court also show that the trial court understood this to be the case.

This Court has held that:

Technical adherence to the formal averments of a notice of appeal is not jurisdictional, and the averments are to be liberally construed to permit appellate review, so long as the opposing party is not misled to his or her irreparable harm.

L.J.B. v. L.W.B., 908 S.W.2d 349, 351 (Mo. banc 1995). See *Weller v. Hayes Truck Lines*, 355 Mo. 695, 197 S.W.2d 657 (Mo. banc 1946); *Willis v. Whitlock*, 139 S.W.3d 643, 657-658 (Mo.App.W.D. 2004); *Robin Farms, Inc. v. Bartholome*, 989 S.W.238, 245 (Mo.App.W.D. 1999). Further, this Court has held that the body of a pleading, rather than its caption, determines the nature and intent of the pleading. *Watson v. Watson*, 562 S.W.2d 620 (Mo. banc 1978). See also *Rotella v. Joseph*, 615 S.W.2d 616, 620-621 (Mo.App.S.D. 1981).

Review of the Legal File shows that the substance of Plaintiff's pleadings in the trial court, as well her filings in the Court of Appeals, have repeatedly and consistently stated that Peyton was acting to fulfill her fiduciary duty to Williams, the named Plaintiff in the proposed Second Amended Petition, in filing this wrongful death action, in opposing Defendants' motion to dismiss in the trial court, in seeking leave to file the proposed First Amended Petition, in moving for reconsideration of the denial of leave to file the First Amended Petition, in seeking leave to file the proposed Second Amended Petition, and in presenting this appeal. The following references to the Legal File from the trial court are illustrative of the point.

Peyton's Response and Memorandum in Opposition to Defendant's Motion for Dismiss for Lack of Standing argued the original Petition was intended by her to be brought for Williams pursuant to the durable power of attorney (LF. 39; A-33). The body of the proposed First Amended Petition alleged that Mary Williams was the only member of the wrongful death class, and that the proposed First Amended Petition was being filed by Peyton for Mary Williams, the surviving heir of Ruby L. Lane, pursuant to the power of attorney (LF 43, ¶ 1, LF 44, ¶ 8; A-33, A-38). It alleged that Peyton had the power of attorney for Williams, and that Williams was a member of the wrongful death class and that there were no other persons within the wrongful death class. The caption of the proposed First Amended Petition explicitly states that Peyton was acting pursuant to the power of attorney in seeking to file the proposed First Amended Petition. That caption shows the plaintiff as "SHARON L. PEYTON, as Power of Attorney for surviving heir of decedent, RUBY LANE." (LF 42; A-36). The trial court's initial order of January 30, 2006, denying leave to file the First Amended Petition clearly indicated that the trial court understood that Peyton's argument was that she was acting for Mary Williams pursuant to the power of attorney. See LF 57, 58; A-5, A-6. Plaintiff's Motion to Reconsider This Court's Order Dated January 30, 2006 Regarding Defendant's Motion to Dismiss for Lack of Standing also states that Peyton was attempting to act for Mary Williams pursuant to the power of attorney, and the caption of that Motion to Reconsider showed the plaintiff as "Sharon Kay Lane-Peyton, as Power of Attorney of Surviving heir of Decedent Ruby Lane" (LF

61-62; A-49 to A-50). All of these filings also show they were based on the assumption that the attorney in fact, suing on behalf of her principal, could file such suit in the name of the attorney in fact, rather than in the name of her principal, pursuant to Section 507.010, RSMo.

The Motion for Leave to File Second Amended Petition explicitly referred to the prior orders of the trial court opining that an action brought by the attorney in fact pursuant to the power of attorney should be brought in the name of the principal and grantor of the power of attorney. The Motion for Leave clearly indicates that the prior pleadings were intended to be brought by Peyton on behalf of Mary Williams pursuant to the power of attorney and that the proposed Second Amended Petition names Mary Williams as the party plaintiff, further stating that she is acting by and through her attorney in fact Sharon Peyton (LF 85-86, 89-90; A-51 to A-52, A-55 to A-56). The substance of these pleadings is that Peyton was acting as the attorney in fact. The caption of the proposed Second Amended Petition shows the name of the proposed plaintiff as “MARY JO WILLIAMS, by and through, SHARON PEYTON, her attorney in fact.” (LF 89; A-55).

The attachment to Civil Case Information Form, that was attached to and made a part of the Notice of Appeal, specifically the Brief Description of the Case, also made reference to and specifically stated that Peyton was attempting to act for and on behalf of Williams pursuant to the durable power of attorney (LF 170; A-78). The trial court’s orders of January 30, 2006 and March 2, 2006, as well as the Order and Judgment of August 2, 2006, as described above, were also attached to

the Notice of Appeal (LF 171-181). The briefs in the Court of Appeals also reflected Peyton's position that she was attempting to act for Williams pursuant to the durable power of attorney. Court of Appeals Opening Brief, p.17-19, fn. 8 and accompanying text. The opening Brief also argued that because of her fiduciary duty to Williams, Peyton could not be considered a "stranger" to the subject matter of the action. Opening Brief, p. 22, fn. 10.

Given the foregoing, it is apparent that Defendants were not misled as to Peyton's position and assertion that she was attempting to act pursuant to the power of attorney both in the trial court and on appeal because the power of attorney was not referred in listing Peyton as the party appealing in the Notice of Appeal. Defendants did not raise any issue in this regard in their Respondents' Brief in the Court of Appeals. The nature of the issues on appeal was clear from the Legal File and from the briefs filed by Peyton in the Court of Appeals, and they are now set forth in this Substitute Brief as well. *See, e.g., Allison v. Sverdrup & Parcel and Associates, Inc.*, 738 S.W.2d 440 , 442-443 (Mo.App. E.D. 1987). Respondents were not and are not prevented from making any argument in this Court as a result of any alleged deficiency in the designation of the party appealing in the notice of appeal or in the caption of the Motion for Leave to File Second Amended Petition. They have certainly not in any way been misled to their irreparable harm. Moreover, it is understandable that Peyton, having been denied leave to file an amended petition that would have shown in the caption that she was acting as the attorney in fact and having been denied leave to file an amended

petition that would have substituted Williams, acting through Peyton as the attorney in fact, did not believe that she was entitled to unilaterally make such amendments to the designation of parties in her Notice of Appeal from the denial of leave to so amend.

The filings described above show in substance that Plaintiff Peyton, in filing the Motion for Leave to File Second Amended Petition and in filing this appeal, was attempting to fulfill her fiduciary duty to the grantor and principal of the durable power of attorney, Mary Jo Williams. The Order and Judgment of the trial court operated prejudicially and directly on Peyton's legal interests in fulfilling her fiduciary duty to Williams with respect to Williams' claim for the wrongful death of Ruby Lane, a claim that Peyton has been seeking to vindicate from the outset and which is the subject matter of the proposed Second Amended Petition and this appeal. Williams was a party in the trial court; the whole point of the appeal is the claim that the trial court erred in denying leave to amend to make Williams a party. The effect on Peyton's legal interests in fulfilling her fiduciary duty to Williams in this respect is immediate and not merely a possible remote consequence because the practical effect of the trial court's Order and Judgment, if not reversed by this Court, will be that Williams' claim will be completely lost. Plaintiff was therefore aggrieved by the Order and Judgment of the trial court, denying the Motion for Leave to File Second Amended Petition and dismissing this action, within the meaning of Section 512.020. This Court has jurisdiction of this appeal.

STATEMENT OF FACTS

The Original Petition

This substance of this appeal involves an issue of relation back of a proposed amended petition in a claim for the wrongful death of Ruby L. Lane against defendant Bellefontaine Gardens Nursing and Rehab, Inc. (“Defendant” or “Bellefontaine Gardens”). The original Petition, as well as the proposed First and Second Amended Petitions, allege that Ruby Lane died on July 26, 2002 (LF 7, 43, 90; A-22, A-37, A-56), that she was at that time a resident of a skilled nursing facility that was owned and operated by Defendant Bellefontaine Gardens (LF 7, 8, 43, 44, 90, 91; A-22, A-23, A-37, A-38, A-56, A-57) and that her death was due to the negligence of Bellefontaine Gardens and/or its agents, employees and servants acting within the course and scope of their employment (LF 7-15, 44-51, 90-94; A-22 to A-30, A-38 to A-45, A-56 to A-60).

The original Petition, as well as both the proposed First and Second Amended Petitions, allege that Mary Jo Williams (“Williams”) is the surviving adult natural daughter of the decedent Ruby L. Lane (LF 7, 43, 89; A-22, A-37, A-55).

As alleged in the original Petition, Sharon L. Peyton (“Peyton” or “Plaintiff”) is the granddaughter of the decedent Ruby L. Lane (LF 7; A-22).

Peyton is also the Attorney in Fact of Mary Jo Williams, pursuant to a durable power of attorney that was executed by Williams on August 8, 2002 (LF 43, 90, 103-106; A-37, A-56, A-69 to A-72). A copy of the durable power of

attorney was attached to and incorporated in the proposed Second Amended Petition as Ex. 1 (LF 103; A-69).

The powers granted to Peyton by the durable power of attorney as the Attorney in Fact of Mary Jo Williams include general powers and specifically include the power to “demand, collect, sue for, compromise, settle, adjust, receive and hold all debts, moneys, claims, or other personal property of whatever kind and description to which I am now or may hereafter become entitled and to do any and all acts which may be necessary in connection with the collection of any moneys, claims or other personal property which may now or hereafter be due me or which I may now or hereafter be entitled.” (LF 77, 103; A-69).

The original Petition was filed on July 15, 2005 (LF 1, 6; A-21), approximately 11 days prior to the expiration of three years from the date of the death of Ruby L. Lane on July 26, 2002. The original Petition was timely filed under the three year wrongful death statute of limitations. Section 537.100. Return of service on Defendant Bellefontaine Gardens and the other defendants was filed in the trial court on July 26, 2005 (LF 1-2). The durable power of attorney, whereby Williams named and appointed Sharon L. Peyton as her Attorney in Fact, was already in existence at the time of the filing of the original Petition, having been executed by Williams on August 8, 2002 (LF 103-106; A-69 to A-72), but it was not mentioned in the original Petition.

The named plaintiff in the caption of the original Petition was “Sharon L. Peyton, as surviving heir of Decedent Ruby L. Lane.” (LF 6; A-21).⁷ The Petition alleged that Peyton was the surviving granddaughter of decedent Lane, and that Peyton was a “member of the wrongful death class, pursuant to RSMo. 537.080 and is entitled to damages pursuant to RSMo.537.090.” (LF 7, ¶ 1; A-22).

Paragraph 5 of the Petition stated:

5. Mary William, 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 RSMo. 537.080 and 537.095.

(LF 7, ¶ 5; A-22) (emphasis supplied). Section 537.080, as referred to in ¶ 5 of the Petition, describes the classes of persons entitled to sue and receive damages in a wrongful death action. In pertinent part, Section 537.080 designates Class I claimants as “the spouse or children or the surviving lineal descendants of any deceased children, natural or adoptive.” By alleging that Williams was the adult natural daughter of Ruby Lane, the original Petition alleged that Williams was within Class I and entitled to sue for and recover damages.

Section 537.095, specifically referred to in ¶ 5 of the Petition, provides in subsection 1 as follows:

⁷ The original Petition is included in the separately bound Appendix at A-21.

1. Except as provided in subsection 2 of this section, 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, provided that the claimant or petitioner shall satisfy the court that he has diligently attempted to notify all parties having a cause of action under section 537.080. *Any settlement or recovery by suit shall be for the use and benefit of those who sue or join, or who are entitled to sue or join, and of whom the court has actual written notice.*

(emphasis supplied).

The Motion to Dismiss

Defendant Bellefontaine Gardens responded by filing Defendant Bellefontaine Gardens Nursing & Rehab, Inc.'s Motion to Dismiss for Lack of Standing ("Motion to Dismiss") on August 26, 2005 (LF 2, 20). The Motion to Dismiss acknowledged that the original Petition had alleged that Mary Williams, the surviving daughter of Ruby L. Lane, was a Class I beneficiary entitled to recover for the death of Ruby Lane under Section 537.080. The unverified Motion to Dismiss further alleged that, "upon information and belief, Mary Williams is Plaintiff Sharon Peyton's mother." (LF 21) As a result, the Motion to

Dismiss argued, Peyton herself was not a Class I beneficiary because Peyton was not “a surviving lineal descendant of any deceased children” because her mother, Mary Jo Williams, was still living.⁸ The Motion to Dismiss stated that Williams, as the surviving child of Ruby L. Lane, was therefore the only person entitled to recover damages for the death of Ruby Lane.⁹

The Response to The Motion to Dismiss and the Motion for Leave to Amend and File First Amended Petition

In response, Peyton filed Plaintiff’s Response and Memorandum in Opposition to Defendant’s Motion to Dismiss for Lack of Standing (“Memorandum in Opposition”) on September 27, 2005. The Memorandum in Opposition stated that Plaintiff Sharon Peyton at all times relevant to the cause, had possessed Durable Power of Attorney for Mary Williams, the natural daughter

⁸ The original Petition did not allege or state that Williams is Peyton’s mother, and the original Petition thus did not show on its face that Peyton was not entitled to recover for this reason. The statement that Peyton was Williams’ daughter was set forth for the first time in the unverified Motion to Dismiss. No affidavit was filed by Defendants with their Motion to Dismiss in support of this allegation. Peyton did not dispute in the trial court and not dispute on appeal that Williams is her mother.

⁹ Bellefontaine Gardens also Motion to Quash Service as to the John Doe entities only and a Motion to Transfer for Improper Venue. (LF 2, 28).

of Ruby Lane and that, since Williams was admitted by Bellefontaine Gardens to be a member of the wrongful death class, Peyton was authorized to bring the wrongful death action under the authority and powers granted to her in the Durable Power of Attorney (LF 39; A-33). At the same time, she also filed a Motion for Leave to Amend and to File First Amended Petition (LF 41; A-35). The caption and style of the proposed First Amended Petition stated the party plaintiff was “SHARON L. PEYTON, as Power of Attorney for surviving heir of Decedent RUBY LANE.” (LF 42; A-36). Paragraph 1 of the proposed First Amended Petition stated:

1. Plaintiff, Sharon L. Peyton (hereinafter “Plaintiff”) has Durable Power of Mary Jo Williams, the surviving heir of Decedent Ruby L. Lane. Sharon Peyton has had Durable Power of Attorney, with general powers, for Mary Jo Williams since August 2002. Mary Jo Williams is a member of the wrongful death class, pursuant to RSMo. 537.080 and is entitled to damages pursuant RSMo. 537.090.

(LF 43; A-37). The allegation contained in paragraph 1 of the original Petition - that Peyton herself was a member of the wrongful death class pursuant to RSMo. 537.080, and entitled to damages – was completely deleted from the proposed First Amended Petition. Compare LF 7, ¶ 1; A-22 with LF 43, ¶ 1; A-37.

Paragraph 5 of the proposed First Amended Petition stated:

5. Mary Williams, adult natural daughter of Ruby L. Lane, although not as named plaintiff in this action, has been notified of this cause of action pursuant to RSMo. 537.080 and 537.095.

(LF 43; A-37)

Paragraph 8 of the proposed First Amended Petition further stated:

8. There are no other persons entitled to bring action under § 537.080; and that the cause of action is proper herein pursuant to RSMo. 508.070.

(LF 44; A-38).

The allegations of the First Amended Petition as to the death of Ruby L. Lane, and the negligence and liability of the defendants for the death of Ruby L. Lane, remained the same as those in the original Petition. Compare LF 7-17; A-22 to A-32 with LF 43-53; A-37 to A-47.

Bellefontaine Gardens' motion to dismiss for lack of standing and the motion to dismiss for improper venue, along with Plaintiff's motion to amend, were argued and submitted on October 21, 2005 (LF 55).

The Trial Court's Order of January 30, 2006

On January 30, 2006, the Honorable Steven Ohmer entered an Order granting Defendant Bellefontaine Gardens' motion to dismiss the original Petition for lack of standing because Peyton was not a lineal descendant of a deceased child of the deceased, and therefore was not entitled to bring a wrongful death

action as a member of the first class under Section 537.080 (LF 56-58; A-4 to A-6). Williams, the surviving natural daughter of the deceased, however, was a member of the first class under Section 537.080, entitled to sue and recover under the wrongful death statute (LF 59; A-7). Judge Ohmer stated that an action brought by Peyton for Williams under the durable power of attorney should be in the name of Williams, the principal, and not in the name of Peyton, the attorney in fact. For that reason, Judge Ohmer stated that the proposed First Amended Petition, in which Williams was not the named party plaintiff, did not in his view cure the standing deficiency in the original Petition, and for that reason denied the motion for leave to amend (LF 58-60; A-6 to A-8).¹⁰

The Motion to Reconsider

Plaintiff filed a Motion to Reconsider This Court's Order Dated January 30, 2006 Regarding Defendant's Motion to Dismiss for Lack of Standing ("Motion to Reconsider") (LF 61; A-49). The Motion to Reconsider was based on the argument that under Section 507.010, the real party in interest statute, and Section 404.710, dealing with durable powers of attorney, Peyton could bring the action for Williams under the power of attorney in her own name, without joining Williams as a party (LF 61-62; A-49 to A-50). At the hearing on the Motion to Reconsider on February 22, 2006, Plaintiff offered as an Exhibit a copy of the Durable Power of Attorney (LF 77-81). On March 1, 2006, the Honorable

¹⁰ A copy of the Order of January 30, 2006 is included in the Appendix at A-4.

Thomas Grady entered an Order denying the motion to reconsider (LF 82; A-9).¹¹ Judge Grady stated that Section 507.010 did not specifically include “power of attorney” in the list of those representatives allowed to sue in their own name and that a suit brought by an attorney in fact pursuant to a power of attorney should be brought in the name of the principal and not in the name of the attorney in fact (LF 82-83; A-9 to A-10). Judge Grady also expressed the view that the proposed First Amended Petition would be time-barred because the Motion for Leave to Amend was filed more than three years after the death of Ruby Lane and, in Judge Grady’s view, would not relate back to the original Petition (LF 84; A-11).

The Motion for Leave to File Second Amended Petition

Plaintiff then filed a Motion for Leave to File a Second Amended Petition or, In the Alternative, to Enter Final Judgment (LF 85; A-51). In the proposed Second Amended Petition,¹² the named party plaintiff in the caption and style was “MARY JO WILLIAMS, by and through SHARON L. PEYTON, her attorney in fact.” (LF 89; A-55). The beginning of the body of the proposed Second Amended Petition stated as follows:

COMES NOW Mary Jo Williams, the surviving adult
daughter of Ruby L. Lane, acting by and through her attorney

¹¹ A copy of the Order of March 1, 2006 is included in the Appendix at A-9.

¹² A copy of the proposed Second Amended Petition, along with the attached durable power of attorney, is included in the Appendix at A-55.

in fact, Sharon Peyton (hereinafter “Plaintiff”), and for this cause of action for wrongful death, alleges and states as follows:

1. Mary Jo Williams is sole surviving adult natural daughter of decedent Ruby L. Lane, who had no surviving spouse. Mary Jo Williams is within the wrongful death class, pursuant to RSMo. 537.080, and is entitled to damages pursuant to RSMo. 537.090.

2. At all relevant times herein, Ruby L. Lane and Mary Jo Williams were residents of the State of Missouri.

3. Sharon L. Peyton, the natural daughter of Mary Jo Williams and the natural granddaughter of Ruby L. Lane, is Mary Jo Williams’ Attorney in Fact, pursuant to a written durable Power of Attorney, appointing and designating Sharon Peyton as Mary Jo Williams’ Attorney in Fact, executed by Mary Jo Williams, on August 8, 2002, which authorizes the Attorney in Fact to bring this action. A true and complete copy of the durable Power of Attorney is attached hereto as Exhibit 1, and is incorporated by reference as if fully set forth herein.

(LF 89-90; A-55 to A-56). As stated the Durable Power of Attorney was attached to the proposed Second Amended Petition as Exhibit 1.

With the exception of the foregoing, the proposed Second Amended Petition set forth the same factual allegations concerning the death of Ruby L. Lane and the same allegations of negligence as the original Petition, using substantially the same exact language as used in the original Petition. With the exception of the foregoing paragraphs and the caption, the proposed Second Amended Petition and the claims set forth therein were substantially identical to the original Petition. Compare LF 6-17; A-21 to A-32 with LF 89-102; A-55 to A-68.

Both ¶ 5 of the original Petition (LF 7; A-22) and ¶ 1 (LF 89; A-55) of the Second Amended Petition specifically identify Williams as the surviving adult natural daughter of decedent Ruby Lane, and both thus identify her as a person entitled to sue under the wrongful death statute.

In her Motion for Leave to File Second Amended Petition or, in the Alternative, To Enter Final Judgment, Peyton stated that the proposed Second Amended Petition sought to formally substitute Williams as the named party plaintiff, in light of the statements in the prior orders of the trial court that an action brought by the attorney in fact for the principal should be filed in the name of the principal or grantor of the power of attorney, and that this issue could be addressed by amendment (LF 85-86; A-51 to A-52). The Motion For Leave to File Second Amended Petition further stated that the Durable Power of Attorney had already been executed and was in effect and existence on the date of the timely filing of the original Petition, that the original Petition had in substance

been brought by Williams or had in substance been brought for the use and benefit of Williams, and that leave to file the proposed Second Amended Petition should therefore be granted under Rule 55.33 of the Missouri Rules of Civil Procedure (LF 85-86; A-51 to A-52). The Motion for Leave to File further stated that the trial court had jurisdiction to grant leave to file the Second Amended Petition because none of the prior orders of the trial court had been denominated as a judgment (LF 86-87; A-52 to A-53). In the alternative, Plaintiff prayed that if the trial court denied the Motion for Leave to File Second Amended Petition, that the trial court should then enter final judgment, denominated as such, to permit an appeal to this Honorable Court. In her Suggestions filed in support of the Motion for Leave to File Second Amended Petition, Plaintiff further stated that the Second Amended Petition would properly relate back to the original Petition (LF 144-149).

The Order and Judgment of August 2, 2006

On August 2, 2006, the trial court, the Honorable John J. Riley, entered an Order and Judgment (LF 162-164; A-1 to A-3).¹³ Judge Riley stated that Peyton did not have standing to bring a wrongful death suit for the death of Ruby Lane, and that granting leave to file the Second Amended Petition, substituting Williams as the named party plaintiff, would be futile because, in Judge Riley's view, the Second Amended Petition was filed more three years after the death of Ruby Lane

¹³ The Order and Judgment of August 2, 2006 is included in the Appendix at A-1.

and would not relate back to the original Petition. Accordingly, Judge Riley denied the Motion for Leave to File Second Amended Petition, and granted Plaintiff's alternative motion to enter final judgment. The trial court entered judgment "in favor of Defendants and against Plaintiff for lack of Standing." (LF 163; A-2).

Notice of Appeal was thereafter timely filed in the trial court on September 8, 2006 (LF 165; A-73).

POINT RELIED ON

The trial court erred and abused its discretion in denying Plaintiff's Motion for Leave to File Second Amended Petition, and thereby also erred in entering judgment in favor of Defendant, because the basis of the denial of leave was the trial court's conclusion that granting leave to amend would be futile because the proposed Second Amended Petition substituting Mary Jo Williams as the named plaintiff would not relate back to the timely filed original Petition. The trial court's conclusion that the proposed Second Amended Petition would not relate back erroneously declared and applied the law in that the proposed Second Amended Petition would properly relate back to the original Petition because:

- (a) (1) a cause of action for the wrongful death of Ruby L. Lane was lawfully vested in Mary Jo Williams for which Williams was entitled to file suit when the original Petition was timely filed less than three years after the date of death; and
- (2) the original Petition was served on Defendant; and
- (3) the original Petition stated facts that identified Mary Jo Williams as a person entitled to sue, stated facts sufficient to state a cause of action for Mary Jo Williams for wrongful death, and disclosed an intent to seek recovery on behalf of and for the use and benefit of Mary Jo Williams; and because

(b) the proposed Second Amended Petition “arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in original” Petition, the wrongful death of Ruby L. Lane due to the negligence of Defendants, and thus would properly relate back to the original Petition under Rule 55.33 (c), Missouri Rules of Civil Procedure.

Rotella v. Joseph, 615 S.W.2d 616 (Mo.App.S.D. 1981)

Slater v. Kansas City Terminal Railway Co., 271 S.W.2d 581 (Mo. 1954)

Crowder v. Gordons Transports, Inc., 387 F.2d 413 (8th Cir. 1967)

State ex rel. Research Medical Center v. Peters, 631 S.W.2d 938 (Mo.App.W.D. 1982)

Rule 55.33 (c), Missouri Rules of Civil Procedure

Rule 55.33 (a), Missouri Rules of Civil Procedure

Section 537.095, RSMo.

Section 537.100, RSMo.

Article V, Section 5, Missouri Constitution

Rule 41.02, Missouri Rules of Civil Procedure

Rule 52.06, Missouri Rules of Civil Procedure

ARGUMENT

The trial court erred and abused its discretion in denying Plaintiff's Motion for Leave to File Second Amended Petition, and thereby also erred in entering judgment in favor of Defendant, because the basis of the denial of leave was the trial court's conclusion that granting leave to amend would be futile because the proposed Second Amended Petition substituting Mary Jo Williams as the named plaintiff would not relate back to the timely filed original Petition. The trial court's conclusion that the proposed Second Amended Petition would not relate back erroneously declared and applied the law in that the proposed Second Amended Petition would properly relate back to the original Petition because:

- (a) (1) the cause of action for the wrongful death of Ruby L. Lane was lawfully vested in Mary Jo Williams when the original Petition was timely filed less than three years after the date of death; and
- (2) the original Petition was served on Defendant; and
- (3) the original Petition identified Mary Jo Williams as a person entitled to sue and disclosed an intent to seek recovery on behalf of and for the use and benefit of Mary Jo Williams; and because
- (b) the proposed Second Amended Petition "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in original" Petition, the wrongful death of Ruby L. Lane due to the negligence of Defendant, and thus would properly relate back to the

original Petition under Rule 55.33 (c), Missouri Rules of Civil Procedure.

Standard of Review and Introduction

The trial court denied Plaintiff's Motion for Leave to File Second Amended Petition. The trial court's stated reason for doing so was that allowing the amendment would be futile because the Motion for Leave to File Second Amended Petition was filed after the expiration of the statute of limitations and that, in the trial court's view, the proposed Second Amended Petition would not relate back to the filing of the original Petition. The trial court therefore entered final judgment in favor of Defendants.

Under *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), the appellate court reviews whether the trial court has erroneously declared or applied the law. "Questions of law are matters reserved for de novo review by the appellate court," and "no deference" is given "to the trial court's judgment in such matters." *H & B Masonry Co., Inc. v. Davis*, 32 S.W.3d 120, 124 (Mo. App. E.D. 2000). See also *Blakely v. Blakely*, 83 S.W.3d 537, 540 (Mo. banc 2002).

A trial court's denial of a motion for leave to amend is reviewed for abuse of discretion. *Asmus v. Capital Region Family Practice*, 115 S.W.3d 427, 432 (Mo.App.W.D. 2003). See *Pender v. Foeste*, 329 S.W.2d 656, 659 (Mo. 1959). The exercise of the trial court's discretion must be informed by the standards governing leave to amend in Rule 55.33 (a) of the Missouri Rules of Civil Procedure. Rule 55.33 (a) provides in pertinent part:

(a) Amendments. A pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the pleading may be amended at any time within thirty days after it is served. Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires.*

(emphasis supplied). The mandate of Rule 55.33(a) that leave to amend “shall be freely given when justice so requires” is “to be heeded.” *Asmus v. Capital Region Family Practice*, 115 S.W.3d 427, 433 (Mo.App.W.D. 2003), (*quoting Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962), discussing Rule 15 (a) of the Federal Rules of Civil Procedure). In *Asmus*, the court reversed the denial of leave to amend to add a bankruptcy trustee as a plaintiff, when original plaintiff was not real party in interest and had no standing to bring action in his own name due to his bankruptcy, because the trustee had sole right to sue on behalf of bankruptcy estate.

The Motion for Leave to File Second Amended Petition and the Trial Court’s Order and Judgment of August 2, 2006

The intent of the proposed Second Amended Petition was to substitute as the formally named plaintiff in this action Mary Jo Williams, the surviving adult

daughter of the decedent, acting by and through her Attorney in Fact, Sharon L. Peyton, for the original named plaintiff, Sharon L. Peyton, who had attempted to sue in her own name on behalf the grantor of the durable power of attorney, Mary Jo Williams.¹⁴ There is no dispute that the original Petition, filed on July 15,

¹⁴ Both the First and Second Amended Petitions state the durable power of attorney was in effect when the original Petition was filed. Peyton thereby had the authority and legal right to file this action on behalf of Williams when she filed the original Petition. The arguments in made in the Memorandum in Opposition to the Motion to Dismiss (LF 39; A-33) and the Motion to Reconsider (LF 61-62; A-49 to A-50), show that both the original Petition and the First Amended Petition assumed Peyton was thereby authorized to file on behalf of Williams in her own name without naming Williams as a party plaintiff under Section 507.010, the real party in interest statute. The trial court explicitly based its prior orders in whole or in part on the view that an action filed on behalf of the principal by the attorney in fact should instead be filed in the name of the principal. In light of the trial court's expressed views, the proposed Second Amended Petition, in designating the named plaintiff as "MARY JO WILLIAMS, by and through SHARON PEYTON, her attorney in fact," was intended to remove this issue as a reason to deny leave to amend. *See City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 193-194 (Mo. banc 2006) (error in failing to bring action in the name of the real party in interest may be avoided by amendment of the pleadings).

2005, was filed within three years of the death of Ruby L. Lane on July 26, 2002, and was therefore timely. There is no dispute that the original Petition identified Williams as the surviving daughter of Ruby L. Lane, as did both the proposed First Amended Petition and the proposed Second Amended Petition, and therefore showed on its face that she was a person who entitled to sue for the wrongful death of Ruby Lane as a Class I beneficiary under Section 537.080. There is no dispute that Williams is a natural person who was in existence on the date of the filing of the original Petition. Comparison of the original Petition, the proposed First Amended Petition, and the proposed Second Amended Petition makes it clear that each of them arises from the same conduct, transaction, and occurrence – the death of Ruby L. Lane on July 26, 2002 as a result of the alleged negligence of the Defendants - and that the allegations as to the liability and negligence of the Defendants were exactly the same in each of them.

The heart of the trial court's Order and Judgment of August 2, 2006, denying Plaintiff's Motion for Leave to File Second Amended Petition, is contained in the following passage:

Under § 537.100 RSMo, 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 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 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 Hosp. of St. Louis v. Buder, 540 S.W.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.

(LF 163; A-2).

In this, the trial court was in error. As will be discussed below, an amendment substituting a proper plaintiff for an original improperly named plaintiff will relate back to a timely filed original petition when (1) the original petition stated facts sufficient to show a cause of action in the substituted plaintiff, (2) disclosed an intent to seek recovery on behalf of or for the use or in the interest of the substituted proper plaintiff, and (3) was filed at a time when the cause of action was lawfully vested in that proper substituted plaintiff. When, as in this case, these factors are present, the amendment will properly relate back to the original petition, and it is not fatal that the named plaintiff in the original petition was not a proper party plaintiff. Additionally, under Rule 55.33 (c), Missouri Rules of Civil Procedure, the proposed Second Amended Petition relates back to the original Petition. To the extent that there is inconsistency in the case law in

this area, it is submitted that this is the approach to the relation back question that should be applied in this case.

By contrast, under the view expressed in the trial court's Order and Judgment and relied upon by Defendants, if the named plaintiff in the timely filed original petition was not a person entitled to sue and recover damages under the language of the statute at the time the original petition was filed, that factor, standing alone, is fatal, and means that an amendment substituting or adding the proper party plaintiff will not relate back to the original petition, regardless of whether the factors set forth above are satisfied.

Consideration of the decided cases in this area should therefore include the following factors: Was the named plaintiff in the original timely filed petition a proper party plaintiff? Did the original petition identify or refer to the proposed substituted plaintiff and allege facts that would support the conclusion that he or she was a proper plaintiff? Did the original petition allege facts that showed a cause of action lawfully vested in the proposed substituted plaintiff? Did the original petition show an intent to seek recovery on behalf of or for the use and benefit of the proposed substituted plaintiff? To what extent, if any, would the issues or the evidence admissible at trial on liability or damages under the proposed amendment differ from the issues or the evidence that could have come in under the original petition?

It is respectfully submitted that under both Rule 55.33 (c), Missouri Rules of Civil Procedure, and Missouri law prior to the adoption of Rule 55.33 (c) in

1973, the proposed Second Amended Petition in this case does properly relate back to the original Petition. If the proposed Second Amended Petition properly relates back to the original Petition, the trial court erred in its finding that granting leave to file the proposed Second Amended Petition would be futile. As a result, the trial court thereby also erred in denying Plaintiff's Motion for Leave to File Second Amended Petition, when judged by the standards set forth in Rule 55.33 (a). Rule 55.33(a) provides that leave "shall be freely given when justice so requires." The decision of the Court of Appeals in *Rotella v. Joseph*, 615 S.W.2d 616 (Mo.App.S.D. 1981), illustrates the application of both of these points in a wrongful death case.

The Decision in *Rotella v. Joseph*

In *Rotella v. Joseph*, 615 S.W.2d 616 (Mo.App.S.D. 1981), the court reversed a summary judgment in favor of defendant in a wrongful death case. The named plaintiff in the petition was the Connecticut administrator of the estate of the decedent. Decedent was unmarried but had a surviving two month old daughter. Under facts and the Missouri wrongful death statute at that time, the minor daughter was the *only* party entitled to sue under the wrongful death statute by way of an action brought in her name by a next friend. The original petition was evidently filed under the mistaken assumption that Connecticut law that gave the administrator the entitlement to sue would apply. The administrator did not in fact have any authority whatsoever to file a wrongful death action under the applicable Missouri wrongful death statute. The administrator did not therefore

have a legal interest in the wrongful death claim, nor did the administrator have a “beneficial interest” in the subject matter of the claim in the sense of having a claim to personally receive any of the proceeds of the claim, if successful.¹⁵ The administrator was not a relative of the decedent, and had no right to damages in his personal capacity. The administrator’s petition for wrongful death was filed within the time allowed by the statute of limitations for the surviving minor daughter to file.

While the administrator had no legal or beneficial interest in the subject matter of the suit, and was not a person entitled to file the action under the Missouri wrongful death statute, the body of the petition showed that the administrator was attempting to recover damages for the benefit of and on behalf of the surviving minor daughter. After the statute of limitations expired, the defendants sought summary judgment on the ground that the administrator did not have standing to file the action, and that the statute of limitations had expired. The trial court granted the motion but the Court of Appeals reversed. The Court of Appeals held that an amendment to the petition to name the surviving daughter as

¹⁵ The administrator of the decedent mother’s estate would have had a fiduciary duty to the minor daughter, a beneficiary of the mother’s estate, just as Peyton has a fiduciary duty to Williams because she is Williams’ attorney in fact. In this sense, neither the administrator in *Rotella* nor Peyton were complete “strangers” to the causes of action at issue.

the plaintiff would relate back to the filing of the original petition for purposes of the statute of limitations, inasmuch as the body of the petition disclosed an intent to recover on behalf of the surviving daughter, and the petition was filed within the time allowed under the statute for the surviving daughter to file. The Court of Appeals noted that the purposes of the statute of limitations had been satisfied, because the petition had given the defendants notice of the relevant facts concerning the claim within the limitations period, that defendants would therefore not be prejudiced by an amendment to substitute the surviving daughter (and to thereafter appoint a next friend to sue on her behalf), and that “the drastic relief of summary judgment should not be granted where the defect is so easily corrected without prejudice to the defendants.” *Rotella*, 615 S.W.2d at 623, and accompanying footnotes.

Rotella reasoned that the decisive issue was not whether the administrator was a stranger to the action who had no legal or beneficial interest in its subject matter. Instead the court focused on the whether the original petition “was in legal contemplation” filed by the surviving minor child. Because the petition disclosed an intent to seek damages on behalf of the surviving minor daughter, the court concluded that it was. The critical circumstances in *Rotella* were that the original petition was filed at a time when the claim for wrongful death was lawfully vested in the surviving minor daughter and prior to the expiration of the statute of limitations on her claim, that the defendants were served with the petition, and that the body of the petition stated facts that identified the surviving minor daughter as

such (thereby showing her right to sue) and that the action was being brought to recover on her behalf. *Rotella*, 615 S.W.2d at 622-23. See *Mikesic v. Trinity Lutheran Hospital*, 980 S.W.2d 68, 72-73 (Mo.App.W.D. 1998) (describing the holding in *Rotella*).

Rotella also held that the surviving minor daughter could be substituted by amendment as plaintiff for the original named plaintiff, the administrator, under Rule 55.33 (c), Missouri Rules of Civil Procedure, and that such an amendment would relate back to the filing of the original petition because it would arise “out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” Rule 55.33 (c).

Substitution of Plaintiffs and Relation Back Under Missouri Law Prior to the Adoption of Rule 55.33, Missouri Rules of Civil Procedure

The principle that an amendment, substituting a proper plaintiff for an improperly named original plaintiff, will relate back to a timely filed original petition for limitations purposes when the original petition stated facts sufficient to state a claim in favor of the substituted plaintiff, disclosed an intent to seek recovery on behalf of or for the use or in the interest of the substituted proper plaintiff, and was filed at a time when the cause of action was lawfully vested in the that proper substituted plaintiff, was recognized by a number of decisions of this Court prior to the adoption of Rule 55.33 (c) in 1973.

This Court has long held that amendments “[s]ubstituting the party having the legal right to sue for the claim for which the action was brought instead of

another party improperly named as plaintiff is not the commencement of a new action, and in such a case the amendment relates back to the commencement of the action.” *Lily v. Tobbein*, 103 Mo. 477, 15 S.W. 618, 621 (1891).¹⁶ Such amendments may be allowed “for the very purpose of saving the cause from the statute of limitations.” *Id.* at 620.

That principle was applied in *Drakopulos v. Biddle*, 288 Mo. 424, 231 S.W. 924 (1921). This Court reversed the trial court’s action in striking the fifth amended petition, which substituted a plaintiff entitled to sue for one who was not, and this Court did so in order to prevent the claim from being barred by the statute of limitations. The claim was under the Kansas wrongful death statute because the decedent died in the state of Kansas. The fifth amended petition sought to substitute the decedent’s widow (Sotero Drakopulos) as the party plaintiff for the administrator of the decedent’s estate (Strother), the only named plaintiff in the fourth amended petition. The amendment was sought because the widow was a proper party plaintiff, but the administrator of the decedent’s estate evidently was

¹⁶ It is generally recognized that a new action is not commenced by substituting a plaintiff with a legal right to sue for another plaintiff who was improperly named, especially when the subject matter and issues to be tried remain the same. *E.g.*, *Asmus v. Capitol Region Family Practice*, 115 S.W.3d 427, 433-434 (Mo.App. W.D. 2003). *See City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 194 n. 9 and accompanying text (Mo. banc 2006)

not, inasmuch as the petition in which he was the sole named plaintiff was dismissed and a judgment of dismissal entered when the fifth amended petition was stricken. Just as Peyton was not personally entitled to damages in this case, the administrator in *Drakopoulos* was not a person who was entitled to benefit individually from any recovery; he had no beneficial interest in the claim for decedent's wrongful death. Under the statute, any recovery was exclusively for the benefit of the widow and children. The administrator's petition had alleged the existence of the widow and three children and prayed for recovery on their behalf. The fifth amended petition, which sought to substitute the widow as the party plaintiff, also sought recovery on behalf of the widow and children. The administrator's petition and the fifth amended petition, substituting the widow as plaintiff, were substantially the same except as to the averments regarding the identity of the respective named plaintiffs, and the statutory provisions and facts related to the right to sue.

In holding the amendment substituting the widow as plaintiff should have been granted, this Court emphasized three points. First, the widow, the substituted plaintiff in the fifth amended petition, was not a stranger to the original cause of action because the administrator's petition had pleaded that she was the widow, set forth the names of the minor children, and sought recovery on behalf of the widow and children. Second, the proof that would have been required under both petitions was similar. Both petitions were based upon the same subject matter and claim as to liability, the death of the decedent due to the negligence of the

defendants. Both petitions sought recovery for the benefit of the widow and children. Proof of the existence of the widow and the children and their damages would have been substantially the same under both petitions. Third, recovery under the fifth amended petition, with the widow substituted as the named party plaintiff, would have been a bar to the fourth amended petition with the administrator as the named plaintiff, and vice versa. This Court expressly stated that “[t]he only concern of the defendants as to parties plaintiff is that whoever prosecutes the action shall be competent to maintain it in such a way as to bar any other action for the same injury.” *Drakopoulos*, 231 S.W. at 926. In reversing the trial court, this Court further stated that “we regard the exercise of the court’s power as unwise and unsound, where its action finally closed the door to relief in plaintiff’s face. The statute of limitations is a complete bar to the prosecution of a new suit.” *Drakopoulos*, 231 S.W. at 927.

In *Webster v. Joplin Waterworks Co.*, 352 Mo. 327, 177 S.W.2d 447 (1944), this Court stated:

Our review of the Missouri cases leads to the conclusion, perhaps not too precisely stated: One having a joint interest may be added as a party and the joinder will relate back to the original institution of the action or (more to the instant case) in extreme situations, accompanied by peculiar facts, *the real party in interest may be substituted with like effect where the pleading discloses that the action was in fact being prosecuted*

*in the interest of the said substituted plaintiff; but such real party in interest may not be substituted as plaintiff to avoid limitations where the pleading shows that the original plaintiff is 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 said real party in interest.*

Webster, 352 Mo. at 341, 177 S.W.2d at 453 (all emphasis supplied). The first part of this passage is set forth in the disjunctive. That is, the addition of a party having a joint interest in the cause of action with the original plaintiff will relate back **or** the real party interest may be substituted and the amendment will relate back when the original pleading discloses that the action was being prosecuted in the interest of the substituted plaintiff. It should be noted that by contrast the last phrase of this passage is set forth in the conjunctive, as shown by the emphasized word “**and**.” Thus, the real party in interest may not be substituted as the party plaintiff to avoid limitations when **both** parts of this conjunctive phrase are satisfied: first, that the pleading shows the original plaintiff is a stranger to and could have no interest in the cause of action **and** second, that the original petition fails to show that the action was being prosecuted in the interest of said real party in interest.

In *Webster*, this Court specifically noted that the original petition did not allege that a cause of action had ever existed for any party other than the original named plaintiff (who was later determined in fact not to have a cause of action)

and that the original petition did not plead and the action was not instituted on the theory that a cause of action did or ever had existed in the proposed substituted plaintiff. *See Webster*, 352 Mo. at 337, 177 S.W. at 450-451. Both conditions were present, and relation back was not permitted.

In *Slater v. Kansas City Terminal Railway Co.*, 271 S.W.2d 581, 583-584 (Mo. 1954), an action under the Missouri wrongful death statute, this Court cited *Webster* on this point and described the holding of *Webster* as follows:

In that case, however, this court [with regard to the substitution of a party plaintiff (and with regard as to adding parties plaintiff) and the relation back of the substitution to defeat the bar of limitations] drew a conclusion from the Missouri cases which conclusion, generally and broadly stated, is that the real party in interest may be substituted where the pleading discloses that the action in fact was being prosecuted in the interest of the substituted plaintiff, 'but such real party in interest may not be substituted as plaintiff to avoid limitations 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 said real party in interest.'

Slater, 271 S.W.2d at 584 (material in quotation marks from *Webster*; brackets and parentheses by the Court in *Slater*). Thus, even if the original named plaintiff

was a “stranger” to and could have no interest in the cause of action, a substitution of the real party in interest as the plaintiff will nevertheless relate back if the original petition shows that the action was being prosecuted in the interest of the real party in interest.

In *Slater*, plaintiff originally filed an action for the death of her husband as administratrix of his estate, under the Federal Employers’ Liability Act. The FELA, however, was not applicable, and under the Missouri statute the plaintiff, as administratrix, did not have the right to sue; the cause of action was vested solely in the widow. The court held an amended petition substituting as plaintiff the widow in her capacity as widow related back to the original petition filed by her as administratrix because the original petition attempted to state a claim in her interest as the widow. Prior cases cited by the defendants in which relation back was not permitted were distinguished by this Court on the ground that, with respect to the original petition filed in those cases:

In these cases, apparently, there was no intendment disclosed by the plaintiff’s pleadings that the respective actions were in the interests of those in whom the respective claims were vested.

Slater, 271 S.W.2d at 584.¹⁷ The overall reasoning of the Court in *Slater* was based primarily on this factor: whether the original petition disclosed an intent to seek recovery on behalf of the real party in interest (in whom the claim was vested when the original petition was filed) and who was to be substituted as plaintiff in the proposed amended petition. This Court further placed emphasis on whether the original petition contained allegations that would in substance show a claim for the substituted plaintiff and enable the substituted plaintiff to maintain the action.

Forehand v. Hall, 355 S.W.2d 940 (Mo. 1962), also implicitly acknowledged this factor, and its result was consistent with the case law as described above. In rejecting the claim on appeal that the original plaintiff administratrix (who had no standing) was attempting in the original petition seeking to act as the trustee of an express trust on behalf of a surviving minor child

¹⁷ Those cases were *Goldschmidt v. Pevely Dairy Co.*, 341 Mo. 982, 111 S.W.2d 1 (Mo. 1937); *Fair v. Agur*, 345 Mo. 394, 133 S.W.2d 402 (Mo. 1939); and *Merservey v. Pratt-Thompson Construction Co.*, 291 S.W. 174 (Mo. App. 1927). This was also the case in *Russell v. Nelson*, 317 Mo. 148, 295 S.W. 118 (Mo. 1927), and, as will be shown below, *Forehand v. Hall*, 355 S.W.2d 940 (Mo. 1962). These cases were later among the primary decisions relied on by *State ex rel. Jewish Hosp. of St. Louis v. Buder*, 540 S.W.100, 107 (Mo.App. E.D. 1976). *Buder*'s discussion of *Slater* did not acknowledge that these three cases had been distinguished by *Slater* on this basis. See *Buder*, 540 S.W.2d at 107-108.

(the only person in whom the cause of action was vested and the proposed substituted plaintiff in the amendment), the Court observed that the original petition did not manifest any intent to sue on behalf of the surviving minor child, and that the minor child was not a beneficiary of the estate to whom any amount recovered by the administratrix or administrator d.b.n. could have been distributed.

The Court, in characterizing the original petition, stated that:

Her petition revealed no intent to maintain the action in the interests of the minor child David, in whom the claim was vested on October 5, 1960. The administratrix ignored his existence, not referring to him by name and not alleging that the deceased left a minor child surviving him. Furthermore, minor child David was not a beneficiary of the estate under 537.080 to whom any amount received by the administratrix or administrator d.b.n. could have been distributed.

Forehand, 355 S.W.2d at 944. Again, later in the opinion, the Court based its holding that the amended petition in that case would not relate back in part on the fact that:

“. . . the proposed amendment would not enable the next friend to “sustain the action for the claim for which it was intended to be brought,” because there was no expressed intention on the part of the administratrix to bring the original action for the minor child.”

Forehand, 355 S.W.2d at 946.

The result in *Forehand* was thus completely in accord in with both the result and the reasoning of *Drakopoulos*, *Webster* and *Slater*, as described above. The original petition in *Forehand* did not mention the proper plaintiff or express an intent to recover in his interest. Relation back was therefore not permitted.

In dictum, however, *Forehand* suggested that if “the original action is improperly filed by a stranger to the action who had no legal or beneficial interest in its subject matter, the substitution of the proper party plaintiff” will not relate back but will instead be regarded “as a new action, which is barred by the statute of limitations.” *Forehand*, 355 S.W.2d at 945. This statement was unnecessary to the decision, and disregarded the rule as stated in *Webster*, *Slater* and *Drakopoulos*, that even if the original named plaintiff was a “stranger” to and could have no interest in the cause of action, a substitution of the real party in interest as the plaintiff will nevertheless relate back if the original petition shows that the action was being prosecuted in the interest of the real party in interest. This statement also disregarded the manner in which the cases relied on by *Forehand*¹⁸ were distinguished in *Slater*, as set forth above, that:

In these cases, apparently, there was no intendment disclosed by the plaintiff’s pleadings that the respective actions were in

¹⁸ *Goldschmidt v. Pevely Dairy Co.*, *Fair v. Agur*, and *Merservey v. Pratt-Thompson Construction Co.* See n.49 and accompanying text at p.48-49, above.

the interests of those in whom the respective claims were vested.

Slater, 271 S.W.2d at 584. .

The discussion of *Forehand* in *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967), emphasized the fact that the original petition in *Forehand* did not even mention the real party in interest and did not show an intent to recover in the interest of the real party in interest. *Crowder* was a diversity action based upon the Missouri wrongful death statute. The case was filed at a time when the Missouri wrongful death statute gave the surviving spouse six months after the date of death to file an action for wrongful death and thereby “appropriate” the claim. If the surviving spouse did not file an action within six months then the exclusive right to maintain an action for wrongful death was then in the surviving child or children, subject to the requirement that any action be commenced within one year after the date of death. The surviving widow filed a wrongful death action in U.S. district court as administratrix of the estate of her deceased husband more than six months but less than a year after the date of the husband’s death. In the original complaint, she sought damages for herself as the surviving spouse and for funeral expenses, as well as damages for the deceased’s two surviving minor sons. Because at the time the original complaint was filed six months had already expired, the time within which the surviving spouse could file a wrongful death action had already expired and the cause of action for wrongful death was already vested solely in the two surviving minor sons. The

surviving spouse administratrix was not entitled to sue for wrongful death under the Missouri statute in any capacity at the time the original complaint was filed, and no longer had any right to damages as an individual. More than a year after the date of death, plaintiff surviving spouse sought leave to file an amended complaint on behalf of the two surviving minor sons, substituting herself as mother and next friend of the two surviving sons as the party plaintiff. By that time the statute of limitations had expired on the claims of the surviving sons as well.

In discussing whether the amended complaint substituting a proper party plaintiff would relate back to the original complaint under Missouri law, the *Crowder* court noted that the original complaint expressed an intent to obtain a recovery for the surviving minor sons, the and discussed *Forehand* as follows:

In *Forehand v. Hall*, Mo., 355 S.W.2d 940, the widow as administratrix filed a wrongful death action more than six months but less than twelve months after the wrongful death. A motion to substitute a minor child not mentioned in the original complaint as plaintiff was denied and the action was dismissed. The court correctly held that the widow had no cause of action either as widow or administratrix at the time of the filing of the complaint. The court in its opinion indicates that the administratrix ‘did not purport to sue as a representative of the minor child or manifest any intent to sue in such capacity,’ and

later, that ‘there was no expressed intention on the part of the administratrix to bring the original action for the minor child.’

In our present case, the complaint manifests an intent to obtain a recovery for the minors. Such factual difference could be of significance to the Missouri court in deciding the issue before us. The recent federal rule changes and supporting comments might also be persuasive. . . .

Crowder, 387 F.2d at 415-416, n. 2 (emphasis supplied). *Crowder* ultimately held the relation back issue was a procedural matter governed by the Federal Rules of Civil Procedure, and that that the amended complaint substituting the proper plaintiff related back to the original complaint.

Rotella specifically cited and relied upon *Slater*, *Crowder* and the language from *Forehand* quoted above (that emphasized the original petition in *Forehand* did not even mention, much less show an intent to recover in the interest of, the proposed substituted plaintiff), in determining that the minor surviving child in *Rotella* could be substituted as plaintiff for the original plaintiff, the administrator, after the expiration of the statute of limitations. The key factors in this analysis, as set forth in *Rotella*, were (1) whether the original petition was filed at a time when the claim for wrongful death was lawfully vested in the proposed substituted plaintiff and prior to the expiration of the statute of limitations on the substituted plaintiff’s claim, (2) whether the defendant was served with the petition, and (3) whether the body of the original petition identified the proposed substituted

plaintiff, alleging facts showing a cause of action then vested in the substituted plaintiff, and disclosed an intent to seek recovery on behalf of or in the interest of the proposed substituted plaintiff. *Rotella*, 615 S.W.2d at 622-23.¹⁹ The fact that the administrator was not a proper party plaintiff and had no individual interest in the cause of action was not viewed as decisive; the fact that the original petition satisfied the three conditions set forth above instead indicated that the original petition, in “legal contemplation” was filed by the real party in interest.

To the extent that there is inconsistency in the case law, it is respectfully submitted that this Court should apply the relation back rules as set forth in *Webster, Slater, Drakopoulos, and Rotella* as set forth above. As noted in *Mikesic v. Trinity Lutheran Hospital*, 980 S.W.2d 68, 73 (Mo.App.W.D. 1998), “statutes of limitations were never intended to be used as swords. Rather, they are shields, primarily designed to assure fairness to defendants by prohibiting stale claims, . . . However, where a plaintiff pleads a specific set of facts in trying to enforce a claim within the statutory period, and defendant had notice of such claim from the date of its filing, the reasons for the statute of limitations cease to exist” (citations and quotation marks omitted). This Court has recognized that “a party who is notified of litigation concerning a given occurrence or transaction has been given all the notice that statutes of limitations are intended to afford.” *Koerper &*

¹⁹ *Rotella* noted that the body of the petition, rather than simply the caption, determines the nature of the action and the parties. 615 S.W.2d at 621.

Company v. United International, Inc., 739 S.W.2d 705, 706 (Mo. banc 1987) (discussing policy of relation back rules under Rule 15 (c) of the Federal Rules of Civil Procedure and Rule 55.33 (c) of the Missouri Rules of Civil Procedure).

Here, there is no dispute that the original Petition was filed at a time when the cause of action was lawfully vested in Williams, and that it was filed prior to the expiration of the three year statute of limitations. The original Petition was filed on July 15, 2005, and the date of Ruby L. Lane’s death was July 26, 2002. There is no dispute that Defendant Bellefontaine Gardens was served with the original Petition (LF 2).²⁰ The original Petition unequivocally alleges that the death of Ruby Lane was due to the negligence of the Defendants.

The original Petition identified Williams and alleged facts sufficient to show that the cause of action for wrongful death was then vested in Williams, and that she was therefore a person with proper standing. See ¶ 5 of the original Petition, stating that Mary Williams is the adult natural daughter of decedent Ruby L. Lane (LF 7, ¶ 5; A-22). It was this very same allegation in the original Petition that formed the basis for Defendant’s Motion to Dismiss (LF 20-21, 25-26).

Defendants, having argued in their Motion to Dismiss, based on the allegations of the original Petition, that Williams is *the* party with a cause of action for the death

²⁰ The return of service as to Defendant Bellefontaine Gardens was filed on July 26, 2005 (LF 1-2). The defense motion to quash service as to the additional “John Doe” defendants was granted by consent (LF 55).

of Ruby Williams, are scarcely in a position to deny that the original Petition contains sufficient facts to show a cause of action for the wrongful death of Ruby Lane vested in Williams.

Under Section 537.095, the Original Petition Showed An Intent to Seek Recovery on Behalf of Williams

It is respectfully submitted that the original Petition also disclosed an intent to seek recovery on behalf of Williams. In construing the original Petition, the Court should assume that all of plaintiff's allegations are true, and liberally grant to plaintiff all reasonable inferences from the plaintiff's allegations, without attempting to weigh any facts alleged as to whether they are credible or persuasive. *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993).²¹ Additionally, public statutes are subject to judicial notice to “supply the interstices of a petition with assumptions of ultimate fact essential to the theory

²¹ When a statute of limitation is asserted as a defense, dismissal is not proper unless the plaintiff's pleadings clearly establish on their face and without exception that claim is barred, and the court must allow the pleading its broadest intendment, treat all facts alleged as true, and construe the allegations favorably to the plaintiff. *Sheehan v. Sheehan*, 901 S.W.2d 57, 59 (Mo banc 1995).

of an action based upon the enactment but not pleaded.” *Newson v. City of Kansas City*, 606 S.W.2d 487, 490 (Mo.App.W.D. 1980).

¶ 5 of the original Petition stated:

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

(LF 7; A-22).

Section 537.095,²² was enacted in its present form as part of the 1979 revision of the wrongful death statute. Section 537.095.1 was first added by the 1979 amendment, and provides as follows:

1. Except as provided in subsection 2 of this section, 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, provided that the claimant or petitioner shall satisfy the court that he has

²² Section 537.080 sets forth the various classes of persons entitled to sue for and recover damages under the statute.

diligently attempted to notify all parties having a cause of action under section 537.080. *Any settlement or recovery by suit shall be for the use and benefit of those who sue or join, or who are entitled to sue or join, and of whom the court has actual written notice.*

(emphasis supplied). Pursuant to Section 537.095.3, the court will apportion any judgment or approved settlement among the persons entitled to recover in such proportions as determined by the court.

Under Section 537.095, when a wrongful death case is tried, and there are beneficiaries who are not joined as plaintiffs, the jury (or trier of fact) determines the total damages for “those sue or join, or who are entitled to sue or join.” Note 1 and Note 4 of the Notes on Use to the applicable MAI damage instruction, MAI 5.01, specifies when all beneficiaries are not joined as plaintiffs the jury must be instructed to determine the damages of the “survivors” of the decedent, rather than the just the damages of the named plaintiff. That is so jury will be instructed to assess the damages of all those who were entitled to sue and join, but who did not, as well as those who actually did sue and are named as plaintiffs. Note 1 states that:

1. In the case where not all beneficiaries are joined as plaintiffs in the claim for wrongful death or the plaintiff is a plaintiff ad litem, substitute for the word “plaintiff[s]” the phrase “the survivor[s] of (*insert name of decedent*).”

MAI 5.01, Notes on Use (1996 Revision), Note 1 (brackets, parentheses and italics in original). A wrongful death claim is divided into two stages. If the jury returns a verdict and assesses the total damages in the first stage, then, in a second stage, the trial court enters a judgment for damages apportioning them among all those who sued, or who were entitled to sue, in proportion to the losses suffered by each as determined by the court. *O'Neal v. Pipes Enterprises, Inc.*, 930 S.W.2d 416, 422 (Mo.App.W.D. 1995); *Denton v. Soonattrukal*, 149 S.W.3d 517, 520 (Mo.App. S.D. 2004). Damages suffered solely by Williams would therefore have properly been an issue and part of the evidence at trial on the allegations of the original Petition. Had a verdict been returned against Defendants on the original Petition, Williams would have been entitled to an award apportioning part of the total damages assessed by the jury to her in proportion to her losses as determined by the trial court in its final judgment.

Section 537.095 has been interpreted broadly. In *Denton v. Soonattrukal*, 149 S.W.3d 517 (Mo.App. S.D. 2004), the court held that the filing and voluntary dismissal of a wrongful death petition by one surviving sibling (in which her sister was not named as a plaintiff) permitted the sister omitted from the first timely filed suit to file a second wrongful death action after expiration of the three year statute of limitations but within the time allowed by the savings clause in Section 537.100, even though she was not a party to the original suit and even though the sibling who filed the first suit did *not* join the second suit as a plaintiff. The court explained that under Section 537.095:

. . . . it is clear that a “plaintiff” does not bring his or her action solely for the benefit of herself when there are other possible beneficiaries.

Denton, 149 S.W.3d at 524 (quotation marks in original by the court). The court further explained that in this sense, the requirement that every civil action be prosecuted in the name of the real party in interest is not completely applicable to a wrongful death action. Any recovery “shall be for the use and benefit” of not only those who sue and join – that is those named as plaintiffs and in whose name the action is prosecuted - but of also those who “are entitled to sue or join,” Section 537.095, but who do not sue or join and are not *named* as plaintiffs, and of whom the court has actual written notice. *Denton*, 149 S.W.3d at 524. In the event of a recovery by suit or settlement, the court still allocates to them an amount proportional to their losses from any recovery.

In construing Section 537.095, *Denton* also addressed the topic of construction of the wrongful death statute. Despite the often repeated claim that because there was no cause of action for wrongful death at common law that all of the provisions of the wrongful death statute must be strictly construed, *Denton* noted that this Court in *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S.W.2d 920, 925 (Mo. banc 1933), stated that the provisions of the wrongful death act “relating to the remedy should be liberally construed.” *Denton*, 146 S.W.3d at 522, *quoting Cummins*, 66 S.W.2d at 925. That includes the provisions designating those entitled to recover. *Denton*, 149 S.W.2d at 522, *quoting*

Cummins, 66 S.W.2d 925. The “construction of statutes is not to be hyper-technical but instead is to be reasonable and logical and to give meaning to the statutes.” *Denton*, 149 S.W.3d at 524 (citation omitted). The “manifest purpose of the wrongful death statute is to provide compensation” for the losses of the designated relatives of a decedent killed by the negligence of another, as well as “to ensure that tortfeasors pay for the consequences of their actions and to generally deter harmful conduct which might lead to death.” *Id.* (citations omitted). To deny relation back of the substitution of Williams in this case would be to “diminish by mere procedural hyper-technicality,” these purposes of the wrongful death statute. *Denton*, 149 S.W.3d at 524.

The original Petition in this action gave the trial court actual written notice of the existence of Williams, as provided for in Section 537.095.1, and actual written notice that she was a person who was entitled to sue or join in a suit for the death of Ruby L. Lane. Thus, by specifically alleging that Mary Jo Williams was the natural adult daughter of Ruby L. Lane, thereby also alleging facts showing that Mary Jo Williams was a person entitled to sue or join, and specifically referring to Section 537.095, the original Petition discloses an intent to seek the recovery of damages, at least in part, on behalf of Williams, the proposed substituted plaintiff.

The allegations of the original Petition as to the liability of the Defendants for the death of Ruby Lane due to the alleged negligence of the Defendants are exactly the same in the proposed Second Amended Petition as they were in the

timely filed original Petition. The evidence to support those claims would be the same under the Second Amended Petition as under the timely filed original Petition. As shown above, evidence as to the damages of Williams under the proposed Second Amended Petition would also have been admissible at trial under the timely filed original Petition under Section 537.095 because the jury determines the total damages of all those who actually sued *and* of those who were entitled to sue and join. The proof to sustain Second Amended Petition at trial thus not have varied from the proof to sustain the original Petition, other than damages evidence as to Peyton that would have been required on the original would simply have become unnecessary under the Second Amended Petition. All of the evidence as to liability and damages needed to support the Second Amended Petition, with Williams as the named plaintiff, would have been admissible and proper under the timely filed original Petition. The Second Amended Petition does not state a cause of action any different than that alleged in substance as to Williams in the original Petition.

Because both the original Petition and the Second Amended Petition assert the very same substantive claim for the wrongful death of Ruby Lane due to the negligence of the Defendants, and because a judgment against Defendants on either Petition would have properly included any damages suffered by Williams, a judgment against Defendants on the Second Amended Petition would have barred the original Petition, and, conversely, a judgment against Defendants on the original Petition would have effectively barred the Second Amended Petition,

This would also be the case because the statute provides that “[o]nly one action may be brought under this section against any one defendant for the death of any one person. Section 537.080, RSMo.; *Davis v. Wilson*, 804 S.W.2d 392 (Mo.App. W.D. 1991).

The allegations of the original Petition erroneously assumed that the original named plaintiff, Sharon L. Peyton, was also entitled to damages because she was the surviving grandchild of Ruby Lane, but that does not negate the fact that the original Petition showed an intent to recover damages for the use and benefit of Williams as well. Peyton is not named as a plaintiff or a person entitled to recover damages in the caption or the body of the proposed Second Amended Petition. But the *deletion* of claimants from the timely filed original Petition cannot possibly prejudice or harm Defendants. The sole plaintiff in the proposed Second Amended Petition is the substituted plaintiff Mary Jo Williams, suing in her own name, by and through her attorney in fact. In this, the instant case is precisely like *Crowder*. In *Crowder*, the court noted that the original complaint improperly included a claim for the widow individually and as administratrix. She had no claim as a widow or any right to sue as administratrix and the time the original complaint was filed. Both of those claims had been eliminated from the amended complaint, leaving only the claims of the minor children who were proper plaintiffs. The court addressed this point explicitly and stated that the “fact that more damages were claimed in the original complaint than were permitted by the Missouri statute is not a fatal defect.” *Crowder*, 387 F.2d at 419. *Rotella*, in

following *Crowder* in finding a substitution of the proper plaintiff would relate back to the original petition, also specifically noted and acknowledged this aspect of the original complaint in *Crowder. Rotella*, 615 S.W.2d at 622, n.6. In *Rotella*, as in *Crowder*, and as in the instant case, the original named plaintiff, the administrator, had no right of his own to recover and no right to sue as administrator when the original petition was filed. It does not matter whether Peyton would have been unable to obtain a judgment on the original Petition as filed on the ground that she was not a proper plaintiff or entitled to sue in her own name. The original Petition still showed an intent to recover on behalf of and in the interest of Williams as well.

The trial court in its Order and Judgment of August 2, 2006, cited and relied upon *State ex rel. Jewish Hosp. of St. Louis v. Buder*, 540 S.W.100, 107 (Mo.App. E.D. 1976), and *Henderson v. Fields*, 68 S.W.3d 455, 467 (Mo.App. W.D. 2001). In light of the case law discussed above, both are readily distinguishable from the case now before this Court. In *Buder*, the decedent's adult daughter would have had an interest in a recovery, but the only proper plaintiff with the right to commence a suit under the statute was the administratrix of the decedent's estate. The named plaintiff in the original petition was instead the decedent's adult daughter as an individual. It was not until after the expiration of the statute of limitations that the adult daughter first sought and obtained appointment as administratrix. See *Buder*, 540 S.W.2d at 102, n. 2. It was only then that an amended petition was filed substituting the administratrix, suing in

that capacity, as the party plaintiff. In terms of the factors discussed in *Rotella*, as reviewed above, the original petition did not mention or refer to an administratrix and did not disclose an intent to attempt to recover on behalf of the administratrix, who was the real party in interest. The original petition did not indicate that the original plaintiff intended to seek appointment as administratrix, it did not request appointment as administratrix, and its substance did not seek recovery as or on behalf of the administratrix.

Fields, which cited and relied upon *Buder*, is distinguishable for similar reasons. In *Fields*, one of the claims asserted was by the named plaintiffs suing as individuals, who were the grandparents of a minor decedent, seeking to recover for her death.²³ On the facts of the case and under the statute, the only proper plaintiff on that claim would have been a plaintiff ad litem, with the recovery, if any, to be distributed according to the laws of descent. After the case was tried to a verdict, and judgment, defendant filed a motion for judgment notwithstanding the verdict on the ground that plaintiffs were not the proper parties to bring the action. It was only after this that the plaintiffs sought to have themselves appointed as plaintiffs ad litem. The trial court appointed them as plaintiffs ad litem *nunc pro tunc*. On appeal, the Court of Appeals held this was not a proper use of a *nunc pro tunc*

²³ These individuals were proper parties entitled to recover for the wrongful death of their own children, who were the parents of the decedent granddaughter, and the verdict and judgment in their favor as to those claims was affirmed.

order. It also could not be said that the pleadings could be amended to conform to the evidence in this regard because there was no evidence at trial of the appointment of any plaintiff ad litem - the appointment was not made until after verdict and judgment. The Court of Appeals held that judgment notwithstanding the verdict should have been entered as to this claim. In terms of the factors from *Rotella*, discussed above, the original petition did not mention or disclose an intent to seek recovery for or on behalf of a plaintiff ad litem. No such intent was ever expressed until after verdict and judgment when the issue had then become the sufficiency of the evidence at trial to submit the case to the jury.

In both *Buder* and *Fields*, the cause of action was not vested in the proper plaintiffs (the administratrix or plaintiff ad litem) when the original petitions were filed, because they had not yet been appointed and did not yet exist, and the original petitions did not seek such appointment for the original named plaintiffs, respectively as administratrix or plaintiff ad litem, or state an intent to seek such appointment.²⁴ In both *Buder* and *Fields*, what was really sought was a relation

²⁴ In *Mikesic*, the original plaintiff was the wife of the proper plaintiff (who was incompetent). The wife had not been appointed as next friend and did not have right to sue on her husband's behalf when the original petition was filed with the named plaintiff shown as "Mary Bruce Mikesic, as the wife of Anthony Mikesic, an incompetent individual, and Mary Bruce Mikesic, individually." However, the body of the original petition identified her as the next friend, and she filed a

back of the *appointment* as administratrix or plaintiff ad litem to the date of the original petition, even though such appointments were not in fact even sought or made until after the expiration of the statute of limitations or until after verdict and judgment, in addition to the relation back of an amended pleading. In the case now before the Court, the original Petition showed an intent to recover on behalf of the proposed substituted plaintiff, Williams, who is and was a natural person in existence when the original Petition was filed.

Buder and *Fields* are also distinguishable because Peyton had already been appointed as Williams' attorney in fact, and thereby had the legal right and authority to file suit on behalf of Williams, when the original Petition was filed. It cannot be said, as it was in *Buder*, that Peyton was totally without any capacity to file suit on Williams' behalf when the original Petition was filed, even though the original Petition did not plead the durable power of attorney. The original Petition did show an intent to recover on behalf of Williams, as demonstrated above.

Defendant Bellefontaine Gardens was on notice of the claim for the wrongful death of Ruby Lane based on the negligence of the defendants, of the fact that Williams was a person who was entitled to recover, and that the original Petition

petition to be appointed as next friend at the same time she filed the original petition. On these facts, the court held that her later appointment as next friend, as requested as the time the original petition was filed, related back to the original petition. In this, the *Mikesic* court relied upon *Rotella* and *Crowder*.

sought recovery on her behalf. The facts of the death, the allegations of negligence and William's status as a person entitled to recover were fully set forth in the original Petition. The record in the trial court shows that both the original Petition and the First Amended Petition were premised on the assumption that Peyton could sue for Williams in her own name, rather than in Williams' name, without joining Williams as a party. Under these unique factual circumstances, the filing of the original Petition in Peyton's name rather than in Williams' name, acting through Peyton, her attorney in fact, may be considered a misnomer in the designation of the named party plaintiff and real party in interest that was not prejudicial to Defendants. *E.g., Board of Regents of Southwestern Missouri State University v. Harriman*, 792 S.W.2d 388 (Mo.App.S.D. 1990). Williams' claim should not be barred, and relation back should not be denied, under such circumstances. *See also City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 193-194 (Mo. banc 2006) (error in failing to bring action in the name of the real party in interest may be avoided by amendment of the pleadings).

**The Substitution of the Williams as the Named Party Plaintiff Properly
Relates Back to the Original Petition Under Webster, Slater, and
Drakopulos, As Applied in Rotella and Crowder**

For all of the reasons set forth above, the substitution of Williams as the named party plaintiff relates back to the original Petition filed in this action under the law as set forth in cases such as *Webster, Slater, and Drakopulos*, and as applied in *Rotella and Crowder*. The original Petition here was filed at a time

when the wrongful death claim was lawfully vested in Mary Jo Williams and prior to the expiration of the three year statute of limitations on her claim. The Petition was served on Defendant Bellefontaine Gardens. The body of the original Petition disclosed that it was filed, at least in part, for the use and benefit of Williams and to recover damages on her behalf. The subject matter of both the original Petition and the Second Amended Petition is exactly the same: the death of Ruby Lane due to the alleged negligence of the defendants. The same evidence as to liability and negligence, and the same evidence as to Williams' damages, would have been proper under both the original and the Second Amended Petition. The Second Amended Petition would have done no more than change the name in the caption to include a name that was in the body of the original Petition as a person entitled to recover because the cause of action set forth in the Second Amended Petition otherwise remained exactly the same as that set forth in the original Petition.

Under the foregoing authorities, the trial therefore erroneously declared and applied the law in concluding that the proposed substitution of Mary Jo Williams as the plaintiff in the Second Amended Petition would not relate back to the original Petition to avoid the bar of the statute of limitations. The trial court's conclusion that the proposed amendment would be futile therefore erroneously declared and applied the law, and the trial court abused its discretion and erred in denying the Motion for Leave to File Second Amended Petition.

The Proposed Second Amended Petition Properly Relates Back to the Original Petition In This Case Under Rule 55.33 (c) Because It Arises

“Out of the Conduct, Transaction, or Occurrence Set Forth or Attempted To Be Set Forth in the Original Pleading.”

The proposed Second Amended Petition in this case would also properly relate back to the timely filed original Petition under Rule 55.33 (c), Missouri Rules of Civil Procedure. This was also a second basis for the decision in *Rotella*, in which the court stated that “Rule 55.33 (c) would lead to the same result” as the case law discussed above, relation back of the substitution of proper party plaintiff, the surviving minor child, to the timely filed original petition. *Rotella*, 615 S.W.2d at 623.

Rule 55.33 (c) of the Missouri Rules of Civil Procedure expressly addresses the subject matter of relation back of amendments to pleadings. Rule 55.33 (c) was first adopted in 1973. Prior to 1973 there was no Missouri statute or Supreme Court rule that governed the issue of relation back of amended pleadings, and the matter was addressed only through the case law. Rule 55.33 (c) was based upon and substantially tracked the language of the first paragraph of Rule 15 (c) of the Federal Rules of Civil Procedure as adopted in 1966. Rule 55.33 (a), setting forth the general standards related to amendments was similarly based upon and substantially tracked the language of Rule 15 (a) of the Federal Rules of Civil Procedure. Rule 55.33 (a) provides in pertinent part:

(a) Amendments. A pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is

permitted and the action has not been placed upon the trial calendar, the pleading may be amended at any time within thirty days after it is served. Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

Rule 55.33 (c) provides:

(c) Relation Back of Amendments. *Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.* An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and within the period provided by law for commencing the action against the party and serving notice of the action, the party to be brought in by amendment: (1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(emphasis supplied).

The Court's attention is also invited to Missouri Rule of Civil Procedure 52.06, which provides:

Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

See *City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 194 (Mo. banc) (“Rule 52.06 clearly permits substitution of the proper plaintiff where suit has been brought in the wrong name, whenever the issue becomes known”).

In *Koerper & Company v. Unitel International, Inc.*, 739 S.W.2d 705, 706 (Mo. banc 1987), the Court stressed that both Rule 15 (c) and Rule 55.33 (c) are “based on the concept that a party who is notified of litigation concerning a given transaction or occurrence has been given all the notice that statutes of limitation are intended to afford.” *Koerper*, 739 S.W.2d at 706, quoting *Hawkins v. Hawkins*, 533 S.W.2d 634, 638 (Mo.App.1976). Rule 55.33 (c) was specifically intended to change the prior case law in Missouri that held an amended pleading did not relate back if it was based on different theory than the original pleading or if the proof necessary to support the amended pleading was different from the proof necessary to support the original pleading. *Koenke v. Eldenburg*, 753 S.W.2d 931, 932 (Mo. banc 1988); *Koerper*, 739 S.W.2d at 706.

Both decisions emphasized that this prior case law was abrogated by Rule 55.33 (c) in favor of the “conduct, transaction or occurrence” test. *Koenke*, 753

S.W.2d at 932; *Koerper*, 739 S.W.2d at 706. *Koenke* applied the relation back rules of Rule 55.33 (c) to an action under the wrongful death statute.

Rule 55.33 (a) and Rule 55.33 (c) were promulgated by this Court pursuant to its constitutional authority under Article V, Section 5, of the Missouri Constitution, and as such, they “supersede all statutes and existing court orders inconsistent therewith.” Rule 41.02, Missouri Rules of Civil Procedure. *See Ostermueller v. Potter*, 868 S.W.2d 110, 111 (Mo. banc 1993) (“Supreme Court rules govern over contradictory statutes in procedural matters unless the General Assembly specifically annuls or amends the rules in a bill limited to that purpose”). As a result of the 1979 amendments to the wrongful death statute,²⁵ the

²⁵ The 1979 amendments eliminated the feature of Section 537.080 in the 1967 version, and in prior versions, of the wrongful death statute, that gave persons in the first class the exclusive right to “appropriate” the cause of action within six months or a year (depending on the version of the statute at issue). If they failed to do, members of the next class then had the exclusive right to pursue the cause of action. Under the 1979 amendments, the two year limitation contained in Section 537.100 was extended to three years and Section 537.080 vested the cause of action in the members of the first class for the entire three years. The claim vested in members of the second class only if there was no person in the first class, or in the third class only if there also was no person in the second class. In that event,

three year statute of limitations contained in Section 537.100 is considered to be a procedural statute and not substantive. It is a statute of repose that bars only the remedy rather than a substantive condition precedent to suit that is part of the right itself and extinguishes the right as well as barring the remedy. The leading case on this point is *State ex rel. Research Medical Center v. Peters*, 631 S.W.2d 938 (Mo.App.W.D. 1982). *Peters* contains a detailed, extensive and scholarly discussion of this precise point, and concludes that, regardless of the character of any of its statutory predecessors, the three year statute of limitations in Section 537.100 after the 1979 amendment is a procedural statute, a statute of repose.²⁶

they too would then have the entire three years within which to commence an action. As discussed above, the 1979 amendments also amended Section 537.095.

²⁶ Prior to the 1979 amendments, the cases applying the various prior versions of the wrongful death statute were not consistent on this point. One line of authority held that the statute of limitations in the wrongful death statute was a statute of repose, relating only to the remedy, in which case it would be procedural in nature.

Another line stated that the statute of limitations in the prior versions of the wrongful death statutes was a condition precedent, a part of the right itself and substantive in nature. As noted by *Peters*, this inconsistency not definitively resolved by this Court prior to the 1979 amendments to the wrongful death statute. *See, Peters*, 631 S.W.2d at 942-944, n. 4 and n.5 and accompanying text. The reasoning of *State ex rel. Jewish Hosp. of St. Louis v. Buder*, 540 S.W.100, 107

Peters has since been followed by all three districts of the Court of Appeals. *Robinson v. Heath*, 633 S.W.2d 203 (Mo.App. S.D.1982); *Wilkins v. Drummon*, 637 S.W.2d 273 (Mo.App.W.D. 1982); *Bremson v. Moore*, 646 S.W.2d 863 (Mo.App.W.D. 1982); *Keller v. Crown Pest Control Supplies*, 646 S.W.2d 868, 869 (Mo.App.E.D. 1982).

Because the three year statute of limitations in Section 537.100 as amended in 1979 is a procedural statute, a statute of repose, and not substantive part of the right itself that bars the right and not merely the remedy, Rule 55.33 (a) and Rule 55.33 (c), including its provisions as to relation back of amendments, promulgated by this Court pursuant to its constitutional authority, are fully applicable to the case before this Court under the wrongful death statute. See also *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967) (relation back of proposed amended petition in wrongful death diversity action under Missouri statute held to be a procedural matter governed by the Federal Rules of Civil Procedure); *Bowling v. Webb County Gas Company, Inc.*, 505 S.W.2d 39 (Mo. 1974) (applying Supreme Court Rule 44.01 to statute of limitations in a Missouri wrongful death action).

(Mo.App. E.D. 1976), is based in large part of the view that the statute of limitations under the wrongful death statute is substantive and part of the right itself. See *Buder*, 540 S.W.2d at 104.

Rule 55.33 (c) was based on Federal Rule 15 (c). The court in *Rotella* noted that Rule 15 (c) itself was simply a statement of the standard already being applied by the federal courts before Rule 15 (c) was adopted. *Rotella*, 615 S.W.2d at 623, n.7. As discussed above, both Rule 15 (c) and Rule 55.33 (c) are “based on the concept that a party who is notified of litigation concerning a given transaction or occurrence has been given all the notice that statutes of limitation are intended to afford.” *Koerper*, 739 S.W.2d at 706, quoting *Hawkins v. Hawkins*, 533 S.W.2d 634, 638 (Mo.App.1976).

In *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967), the Eighth Circuit held under Rule 15 (c) the proposed amendment substituting as plaintiff the widow as the next friend of the two surviving minor sons (who were the only two persons entitled to recover at the time the original complaint was filed) for the administratrix (the plaintiff improperly named in the original complaint) properly related back to the filing of the original complaint. The relevant procedural facts of *Crowder*, as set forth above at pp. 28-29 and 35-36, are quite similar to those in the instant case for purposes of the relation back issue. In *Crowder*, the defendant was given notice of the filing of the original complaint. The original complaint disclosed that damages were being sought for the two surviving minor sons, and the subject matter of the both the original and proposed amended complaints was the death of the father due to the negligence of the defendants. The defendant therefore would not in any way be prejudiced by the substitution as plaintiff of the mother as the next friend suing on behalf of the two

minor sons. The proposed amended complaint arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original complaint, and thus related back to the date of the original complaint. *Crowder* was recently discussed and relied upon by Judge Benton in *Plubell v. Merck & Co., Inc.*, 434 F.3d 1070 (8th Cir. 2006). *See also Link Aviation, Inc. v Downs*, 325 F.2d 613 (D.C. Cir. 1963), for an example of relation back under Rule 15 (c), when the only real party in interest, who was not mentioned in the original complaint, was substituted as plaintiff after the statute of limitations had expired. The court held the original complaint had in effect been brought by the original plaintiff for the use of the real party in interest, and was not therefore a nullity.

Rotella, relying in part on *Crowder*, held that under Rule 55.33 (c), a substitution of the surviving minor child as plaintiff for the administrator, the named plaintiff in the original petition, would relate back to the filing of the original petition. The discussion at page 623 in footnote 8 explains the court's reasoning with respect to the application of Rule 55.33 (c) to the substitution of plaintiffs as follows:

"Although (Federal) Rule 15(c) does not expressly apply to a new pleading adding or dropping plaintiffs, the Advisory Committee Note to the 1966 amendment of the rule indicates that the problem of relation back generally is easier to resolve in this context than when it is presented by a change in defendants and that *the approach adopted in Rule 15(c) toward*

amendments affecting defendants extends by analogy to amendments changing plaintiffs. As long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action against him, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitation defense. This seems particularly sound inasmuch as the courts will require the scope of the amended pleading to stay within the ambit of the conduct, transaction, or occurrence set forth in the original pleading." Wright and Miller, Fed.Prac. and Proc., Vol. 6, § 1501, p. 523.

615 S.W.2d at 623, n.8 (emphasis supplied).

Rotella regarded the application of Rule 55.33 (c) to permit the substitution of the surviving minor daughter as plaintiff to relate back to the original petition to be consistent and in full compliance with the provisions of the wrongful death statute because the body of the original petition reflected the action was brought on her behalf at a time when the claim was vested in her. *Rotella*, 615 S.W.2d at 623-624.²⁷ As the court stated, the “drastic relief of summary judgment should not

²⁷ The court thus perceived no conflict between its holding under Rule 55.33 (c) and the wrongful death statute. *Rotella* was decided under the 1967 wrongful death statute. Because the statute of limitations after the 1979 amendments is

be granted when the defect is so easily corrected without prejudice to the defendants.” *Rotella*, 615 S.W.2d at 623.²⁸

The case before the Court falls within the plain language of Rule 55.33 (c). The claim asserted in the proposed Second Amended Petition “arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original” Petition: the death of Ruby L. Lane due to the alleged negligence of the Defendants. With the exception of the opening paragraphs of the proposed Second Amended Petition, referring to the durable power of attorney and specifically designating Williams as the named party plaintiff, the proposed Second Amended Petition sets forth the same factual allegations concerning the death of Ruby L. Lane and the same allegations of negligence as the original

procedural, Rule 55.33 (c) would now control in the event of any conflict. See discussion at p. 74-76, of this Brief, including n. 26 and accompanying text.

²⁸ See also *Asmus v. Capital Region Family Practice*, 115 S.W.3d 427 (Mo.App. W.D. 2003) (no apparent reason justified the trial court’s denial of motion to add bankruptcy trustee as plaintiff with standing to prosecute malpractice case after expiration of statute of limitations, even though bankrupt who filed original petition had no standing to do so in his own name due to bankruptcy and original petition did not refer to bankruptcy or trustee in any way; relying on Rule 55.33 and Rule 52.06).

Petition, using substantially the same exact language verbatim as used in the original Petition. With the exception of these opening paragraphs and the caption, the proposed Second Amended Petition and the claims set forth therein was substantially identical to the original Petition. Compare LF 6-17; A-21 to A-32 with LF 89-102; A-55 to A-68.

Both ¶ 5 of the original Petition (LF 7; A-22) and ¶ 1 (LF 89; A-55) of the Second Amended Petition specifically identify Mary Jo Williams as the surviving adult natural daughter of decedent Ruby Lane, and both thus identify her as a person entitled to sue under the wrongful death statutes.

The original Petition was filed within three years of the death of Ruby L. Lane and Defendant Bellefontaine Gardens was served with the original Petition. Defendant Bellefontaine Gardens was thereby fully apprised of the claim arising from its alleged negligence in connection with the death of Ruby L. Lane, and that Williams was among the persons for whose use and on whose behalf the original Petition sought to recover damages. Accordingly, Defendant's ability to protect itself is not prejudicially affected by the substitution of Williams as the named party plaintiff. For these reasons, the proposed Second Amended Petition relates back to the original Petition under Rule 55.33 (c). *Rotella*, 615 S.W.2d at 623, n.8 and accompanying text. See also *Koerper & Company v. Unitel International, Inc.*, 739 S.W.2d 705, 706 (Mo. banc 1987); *Koenke v. Eldenburg*, 753 S.W.2d 931, 932 (Mo. banc 1988).

This Court's attention is also invited to the recent decision of the Eighth Circuit in *Plubell v. Merck & Co., Inc.*, 434 F.3d 1070 (8th Cir. 2006) (per Benton, J.) (construing Missouri Rule 55.33 (c) and Federal Rule 15 (c)). In *Plubell*, a Missouri trial court gave leave to amend the petition in a class action prior to certification of the class to substitute a new plaintiff class representative for the original representative (who had been shown to have no cause of action of her own because she had not used the drug in question). The Missouri trial court granted leave to so amend, and denied a defense motion (filed prior to the motion for leave to amend) to dismiss the class action because the original class representative could not state a claim. The Court of Appeals held that a new action was not commenced when the trial court granted leave to amend by substituting the new plaintiff class representative, and that the amendment related back to the filing of the original Petition under Rule 55.33 (c).²⁹

The trial court in its Order and Judgment of August 2, 2006, cited and relied upon *State ex rel. Jewish Hosp. of St. Louis v. Buder*, 540 S.W.100, 107 (Mo.App. E.D. 1976). *Buder*, however, was based on the 1967 version of the wrongful death statute and its reasoning was premised on the assumption that the statute of limitations in the wrongful death statute was a substantive part of the right of action that barred the right as well as the remedy. This is evident from the

²⁹ The question of whether the federal court or the Missouri state court would have jurisdiction turned on the relation back issue.

statement in *Buder* that because wrongful death is a statutory action unknown at common law the “various provisions of the statute are deemed to be substantive law,” 540 S.W.2d at 104, as well as its repeated citation to *Wessels v. Gipfels*, 522 S.W.2d 653, 654 (Mo.App.1975) (and cases cited therein) for the proposition that only the persons described in the wrongful death statute may recover and then only “*in such time and in such manner*” as the “letter” of the statute provides. *Buder*, 540 S.W.2d at 104 and 107 (emphasis supplied). The statement that “the breath of life cannot, by judicial hands, be instilled into a petition devoid of life,” *Buder*, 540 S.W.2d at 107, also shows that *Buder*’s reasoning presumed that the statute of limitations in the wrongful death statute was a substantive part of the right itself, that barred the right as well as the remedy, a statute of extinction rather than one of repose. The idea that the generally applicable rules as to relation back do not apply in wrongful death cases or that the rules of civil procedure promulgated by this Court under its constitutional authority do not apply to relation back issues under the wrongful death statute, are in the end based upon this view that that the statute of limitations in the wrongful death was a substantive part of the right of action that barred the right as well as the remedy. See, e.g., *Forehand v. Hall*, 355 S.W.2d 940, 946 (Mo. 1962), decided long before the 1979 amendments, and its statement that the civil rules may not be read apart from the statute of limitations in the wrongful death statute. This statement makes sense only if the statute of limitations is regarded as a substantive part of the cause of action that bars the right as well as the remedy, and therefore not a procedural

matter within the scope of this Court's constitutional authority to promulgate rules of procedure.

It is respectfully submitted that this premise of the reasoning in *Buder*, as well as the statement in *Forehand* referred to above, have both been superseded by the effect of the 1979 amendments of the wrongful death statute and the holding in *State ex rel. Research Medical Center v. Peters*, 631 S.W.2d 938 (Mo.App.W.D. 1982), that after the 1979 amendments the statute of limitations in Section 537.100 is a procedural statute of repose, that bars only the remedy and is not a matter of substance or a condition precedent to the right to sue. To the extent that *Buder* relies on narrow reading of the relation back rule of Rule 55.33 (c) it is inconsistent with the interpretation of Rule 55.33 (c) set forth in the later decisions of the Supreme Court in *Koerper & Company v. Unitel International, Inc.*, 739 S.W.2d 705, 706 (Mo. banc 1987) and *Koenke v. Eldenburg*, 753 S.W.2d 931, 932 (Mo. banc 1988). And because the three year statute of limitations in Section 537.100 is a procedural statute, a statute of repose, Rule 55.33 (c) and its rule of relation back controls in the event of any claimed inconsistency between the Rule and the statute. Article V, Section 5, Missouri Constitution; Rule 41.02, Missouri Rules of Civil Procedure. *Buder* is also factually distinguishable from the instant case for the reasons set forth above at p. 65-69 of this Substitute Brief.

Henderson v. Fields, 68 S.W.3d 455, 467 (Mo.App. W.D. 2001), also cited by the trial court, involved the attempt to have an amendment substituting an plaintiff ad litem as plaintiff and an appointment as plaintiff *ad litem* relate back to

the time of the original petition after verdict and judgment, and addressed whether the defendant in that case was entitled to judgment notwithstanding the verdict, a matter that necessarily went to the sufficiency of the evidence introduced at trial to support the judgment. Because no attempt was made to appoint a plaintiff *ad litem* prior to the verdict, the evidence presented to the jury at trial could not possibly show the appointment or existence of a plaintiff *ad litem* as a proper party, and the evidence was thus insufficient to support the jury verdict. That is very different from the facts in this case. *Fields* also cited and relied on *Buder* without any examination of the impact of the 1979 amendments to the wrongful death statute.

For these reasons, and based upon the other factors discussed above distinguishing *Buder* and *Fields*, those cases are distinguishable and do not support the trial court's Order and Judgment in this case.

For all of the foregoing reasons, it is respectfully submitted that the proposed Second Amended Petition would relate back to the original Petition for limitations purposes under Rule 55.33 (c) and *Rotella*. The trial court's conclusion that granting leave to file the Second Amended Petition would be futile therefore erroneously declared and applied the law.

The Trial Court Erred In Denying Plaintiff's Motion for Leave to File

Second Amended Petition

The mandate of Rule 55.33(a) that leave to amend "shall be freely given when justice so requires" is "to be heeded." *Asmus v. Capital Region Family Practice*, 115 S.W.3d 427, 433 (Mo.App.W.D. 2003), quoting *Foman v. Davis*,

371 U.S. 178, 182, 83 S.Ct. 227 (1962) (discussing Rule 15 (a) of the Federal Rules of Civil Procedure).

With respect to the factors to be considered by the trial court in ruling on a motion for leave to amend:

In the absence of any apparent or declared reason such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. the leave sought should, as the rules require, be "freely given".

Asmus, 115 S.W.3d at 433, quoting *Forman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962). "Other factors to be considered include: hardship to the moving party if not granted; reasons the new matter was not included in earlier pleadings; timeliness of the motion; and whether the amendment would cure the deficiency in the pleading." *Asmus*, 115 S.W.3d at 433.

The trial court's declared reason for denying leave to file the Second Amended Petition was that it would be futile because the Second Amended Petition would not relate back to the original Petition. As shown above, this conclusion was erroneous. The fact that the Defendant will lose the benefit of the statute of limitations does not demonstrate prejudice to Defendant that justifies the denial of leave to file the Second Amended Petition. See *Asmus*, 115 S.W.3d at

433-435. The hardship to Williams if leave is not granted is apparent – her cause of action will be lost. Leave to amend is to be granted freely when justice so requires. Rule 55.33 (a). That description very aptly describes this case. The trial court therefore erred and abused its discretion in denying the Motion for Leave to File Second Amended Petition. The judgment dismissing this action was therefore also erroneous.

CONCLUSION

For all the foregoing reasons, the proposed Second Amended Petition, substituting Williams as the named party plaintiff, would properly relate back to the original timely filed Petition in this action. As the court in *Rotella* stated, the “drastic relief” of dismissal “should not be granted where the defect is so easily corrected without prejudice to the defendants.” *Rotella*, 615 S.W.2d at 623. The trial court erred in denying the Motion for Leave to File Second Amended Petition. It is therefore most respectfully requested and prayed that this Honorable Court reverse the judgment of the trial court, and the order denying the Motion for Leave to File Second Amended Petition, and remand to the trial court with directions to grant leave to file the Second Amended Petition.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 24,808 words, as calculated by Microsoft Word, and was prepared using Microsoft Word in 13 point Times New Roman font;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk served with the briefs filed to the Court and the disks served with the briefs to the Respondents have been scanned for viruses by counsel's anti-virus program and is free of any virus.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Substitute Brief of Plaintiff-Appellant and a copy in electronic format on a 3 ½" disk were sent U.S. Mail, postage prepaid, to the following parties on this 10th day of December, 2007:

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