

IN THE SUPREME COURT OF MISSOURI

NO. SC88606

SHARON L. PEYTON,

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 REPLY BRIEF OF PLAINTIFF-APPELLANT

NEWTON G. MCCOY
Newton G. McCoy, # 26182
621 North Skinker Blvd.
St. Louis, MO 63105
(314) 862-0200
(314) 862-3050 (Telecopier)
nmccoy@621skinker.com

Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
Defendant’s Argument That The Original Petition Sought Recovery Solely for Peyton and Not for Williams, the Substituted Plaintiff In the Second Amended Petition, Is Incorrect. The Original Petition, Which Pleaded Section 537.095 and Which Alleged Facts That Showed Williams Was A Person Who Was Entitled to Sue and Gave Actual Written Notice to the Court Thereof, Sought Recovery for Both Peyton, the Named Plaintiff in the Original Petition, and Williams.	1
The Cases Defendant Cites As “Dispositive” Differ from this Case Because In Those Cases the Original Pleading Did Not Show That It Sought Recovery for the Benefit of or in the Interest of the Real Party In Interest and Because None of those Cases Involved Section 537.095	6
Defendant’s Interpretation of Rule 55.33 (c) Is Incorrect	12
The Durable Power of Attorney	18
Conclusion	22
Certificate of Compliance	23
Certificate of Service	24

Table of Authorities

Error! No table of authorities entries found.**Error! No table of authorities entries found.****Error! No table of authorities entries found.**RSMo. 537.095

passim

Missouri Rules of Civil Procedure

Rule 55.33 (c)

passim

Federal Rules of Civil Procedure

Rule 15 (c) passim

Missouri Approved Jury Instructions (Civil)

MAI 5.01 3

Other Authorities

Wright & Millers, 6A Fed. Prac. & Proc. Civ. 2d § 1501 16

Defendant's Argument That The Original Petition Sought Recovery Solely for Peyton and Not for Williams, the Substituted Plaintiff In the Second Amended Petition, Is Incorrect. The Original Petition, Which Pleaded Section 537.095 and Which Alleged Facts That Showed Williams Was A Person Who Was Entitled to Sue and Gave Actual Written Notice to the Court Thereof, Sought Recovery for Both Peyton, the Named Plaintiff in the Original Petition, and Williams.

Plaintiff's opening Brief reviewed Missouri case law prior to adoption of Rule 55.33 (c), beginning with *Lily v. Tobbein*, 103 Mo. 477, 15 S.W. 618 (Mo. 1891), through *Webster v. Joplin Waterworks Co.*, 352 Mo. 327, 177 S.W.2d 447 (1944), and extending through more recent cases, including *Rotella v. Joseph*, 615 S.W.2d 616 (Mo.App.S.D. 1981), that stands for the proposition that the real party in interest may be substituted as plaintiff for an improperly named original plaintiff after the expiration of the statute of limitations when the original petition discloses the action was being prosecuted in the interest of the proposed substituted plaintiff. In such a case, an amendment substituting the real party in interest as plaintiff will relate back to the filing of the original petition even though the original petition did not state a claim for the improperly named original named plaintiff.

Four elements are important to whether such a substitution of plaintiff will relate back. First whether the original petition was filed within the limitations period when the claim was lawfully vested in the substituted plaintiff. Second,

whether defendant was served with the original petition. Defendant does not argue that either one of these elements is not satisfied in this case. Third, whether the original petition set forth facts showing a cause of action then vested in the substituted plaintiff. It is clear the original Petition specifically referred to Mary Jo Williams and alleged facts sufficient to show a cause of action on her behalf and her entitlement to sue. She is a natural person who was living and in existence when the original Petition was filed. The last element is whether the original petition discloses that it seeks recovery on behalf of, or in the interest of, the substituted plaintiff. *See Rotella*, 615 S.W.2d at 622-23.

Defendant's Brief appears to accept Plaintiff's reading of *Webster v. Joplin Waterworks Co.*, 352 Mo. 327, 177 S.W.2d 447 (1944) - that an amendment substituting the real party in interest will relate back to the original pleading when the original pleading shows that it was being prosecuted in the interest of the substituted plaintiff - on this very point. See Defendant's Brief at p.10.

Defendant's argument is that the original Petition here does not disclose that it sought recovery on behalf of and in the interest of Williams, the proposed substituted plaintiff. In making this argument, however, Defendant relies solely on those parts of the original Petition that mistakenly allege that Peyton herself was in the wrongful death class and entitled to recover, and completely fails to address the substance of Plaintiff's argument based on Section 537.095, RSMo. The original Petition, as Defendant points out, alleged Peyton was a "class member entitled to damages." Defendant's Brief at p.12. Or, as Defendant puts it, "Peyton

thought she was a class member entitled to damages.” Defendant’s Brief at p.12. But 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 v. Soonattrukal*, 149 S.W.3d 517, 524 (Mo.App. S.D. 2004). Instead Section 537.095 provides that any “recovery shall be for the use and benefit of those who sue or join, or those who are entitled to sue or join, and of whom the court has actual written notice.”

Here the original Petition indisputably set forth facts that showed Williams had a cause of action and was entitled to sue, as provided for in Section 537.095, and those allegations in the original Petition also gave the court actual written notice that she was a person entitled to sue, as provided for in Section 537.095. The original Petition specifically pleaded Section 537.095 when it referred to Williams. If one simply looks at the four corners of the original Petition and at nothing else, therefore, the original Petition sought recovery for both Peyton *and* Williams. Under Section 537.095, evidence of Williams’ damages would have been relevant and admissible at trial under the allegations of the original Petition. Under Section 537.095, the jury would have been instructed to determine the total damages of the “survivors” of the decedent, including Williams, rather than just those of the named plaintiff, Peyton. MAI 5.01, Notes on Use 1 (1996 Revision). And in the event of a verdict against Defendant on the original Petition, Williams would have been entitled to recovery of an award apportioning to her a part of the total damages assessed by the jury in proportion to her losses as determined by the

trial 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).

Defendant's argument that the Second Amended Petition attempts to "change the nature of the action from one brought by Peyton for Peyton to one brought by Williams for Williams" Defendant's Brief at.p.17-18, is thus based on a false premise. What the Second Amended Petition is really attempting to do is to change the action from one brought by Peyton for Peyton *and* Williams to one brought by Williams for Williams. The cause of action asserted in the Second Amended Petition is identical to that asserted in the original Petition with the sole exception that any attempt to recover damages for Peyton is deleted, leaving *only* an attempt to recover for Williams, and Williams' name is moved from the body of the original Petition to the caption of the Second Amended Petition. The Second Amended Petition did not add to the original Petition; it subtracted from it. The Second Amended Petition does not assert any cause of action that was not set forth by the allegations of the original Petition. The allegations as to the death of Ruby Lane and the negligence of Defendant are identical in the original Petition and the Second Amended Petition, and thus the evidence at trial as to the death and Defendant's alleged negligence would have been the same. The relevant evidence as to William's damages under the original Petition and the Second Amended Petition would again be identical. Indeed, the only difference would be that evidence as to damage to Peyton would simply not be needed under the

Second Amended Petition. Again, the Second Amended Petition subtracts from, and does not add to, the cause of action asserted in the original Petition.

Because the point here is whether the original Petition shows that it sought recovery for the benefit of and in the interest of Williams, it does not matter whether Peyton could have obtained a judgment for herself personally based on the original Petition in which she was the only named plaintiff. The point is the nature of the relief and recovery that was being sought by the original Petition, and the fact that recovery was being sought for the benefit of and in the interest of Williams, at least in part. It does not make any difference that the original Petition failed to state a claim on behalf of Peyton; it still showed that it was attempting to recover damages for the use and benefit of Williams, the substituted Plaintiff in the Second Amended Petition. In this, the instant case parallels *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967), in which the substitution of a proper plaintiff by amendment was held to relate back to the original complaint. In *Crowder*, the named plaintiff in the original complaint was the widow suing as administratrix. Just as in the instant case, the widow was not entitled to damages personally and had no right to sue personally or as administratrix at the time the original complaint was filed. The cause of action for wrongful death was then vested solely in her two minor sons. Because the original complaint sought recovery on behalf of the widow *and* the two minor children, the court held it made no difference that the named plaintiff erroneously sought damages for herself personally in the original complaint. The court explicitly

stated that “the fact that more damages were claimed in the original complaint than were permitted by Missouri law is not a fatal defect. *Crowder*, 387 F.2d at 419. *See* the discussion of *Crowder* at p. 64 to 65, and at p. 52 to 54, of Plaintiff’s Substitute Brief.¹

Defendant’s argument on this point is therefore without merit.

The Cases Defendant Cites As “Dispositive” Differ from this Case Because In Those Cases the Original Pleading Did Not Show That It Sought Recovery for the Benefit of or in the Interest of the Real Party In Interest and Because None of those Cases Involved Section 537.095

Plaintiff’s Substitute Brief distinguished two cases, *State ex rel. Jewish Hosp. of St. Louis v. Buder*, 540 S.W.2d 100 (Mo.App. E.D. 1976), and *Henderson v. Fields*, 68 S.W.3d 455 (Mo.App. W.D. 2001), in part on the ground that in both of those cases the original petition did not show that it sought to recover for the benefit of or in the interest of the real party in interest, who was sought to be substituted as plaintiff by amendment. In each of those cases, the real party in interest was an appointed personal representative or plaintiff *ad litem*. There was

¹ Due to a proofreading error, the text of Plaintiff’s Substitute Brief at p.77 erroneously refers the reader to a discussion of *Crowder* at “p.28-29 and 35-36” in the Substitute Brief. The page references shown in the text above in this Reply Brief are correct. Counsel apologizes to the Court and opposing for Defendant for any confusion caused by this error.

no appointment of a personal representative or plaintiff *ad litem* until after the expiration of the statute of limitations. The original petition in both cases made no reference to a personal representative or plaintiff *ad litem*, the real party in interest, and did not in any way seek appointment for the named plaintiff in the original petition as such personal representative or plaintiff *ad litem*. Hence, in both cases the original petition did not show the suit was being prosecuted for the benefit of or in the interest of the real party in interest, the proposed substituted plaintiff. They could not possibly do so because the real party in interest was not even mentioned or referred to in the original petition. See Plaintiff's Substitute Brief at p.65-68. *Buder* and *Henderson*, as well as all of the other cases Defendant cites as being "dispositive," Defendant's Brief at p.15-16, are completely distinguishable and inapplicable to the instant case for this same reason.

As set forth in Plaintiff's Substitute Brief, *Forehand v. Hall*, 355 S.W.2d 940 (Mo. 1962), *Fair v. Agur*, 345 Mo. 394, 133 S.W.2d 402 (Mo. 1939), and *Goldschmidt v. Pevely Dairy Co.*, 341 Mo. 982, 111 S.W.2d 1 (Mo. 1937), all differ from the instant case in this respect – the original petition in those cases did not mention or refer to the real party in interest, who was sought to be substituted as plaintiff by amendment, or seek recovery for the benefit of or in the interest of the real party in interest. This was the expressly stated basis for distinguishing *Forehand* in *Rotella v. Josph*, 615 S.W.2d 616, 621-622 (Mo.App.S.D. 1981). See the discussion of *Forehand* in *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413, 415-416 n. 2 (8th Cir. 1967). This was also the expressly stated basis for

distinguishing *Fair* and *Goldschmidt* in *Slater v. Kansas City Terminal Railway Co.*, 271 S.W.2d 581, 583-584 (Mo. 1954). See discussion in Plaintiff's Substitute Brief at p.48-52.

In *Caldwell v. Lester E. Cox Medical Centers-South, Inc.*, 943 S.W.2d 5,8 (Mo.App.S.D. 1997), the original petition stated a claim for wrongful death with the surviving parents of the decedent as the named plaintiffs. More than a year after the original petition was filed the plaintiff parents filed a second amended petition in which they asserted for the first time a claim for lost chance of survival. More than a year after that, the plaintiff parents filed a third amended petition seeking damages for a lost chance of survival and for the first time naming the father as a plaintiff *ad litem* as to that claim. It was not until more than two weeks after the third amended petition was filed that the father was actually appointed plaintiff *ad litem*. The court held the lost chance of survival claim did not relate back to the original petition for wrongful death. The only proper party plaintiff in a lost chance of survival claim would have been an appointed personal representative or plaintiff *ad litem*. It is apparent that the original petition did not seek recovery on a lost chance of survival claim for any one and that the original petition did not mention or in any way seek recovery on behalf of an appointed personal representative or plaintiff *ad litem*. It should also be noted that the lost chance of survival claim in *Caldwell* would have been barred regardless of the court's view of the relation back issue because the applicable two year medical

malpractice statute of limitations had already expired before the original petition for wrongful death was ever filed. *See Caldwell*, 943 S.W.2d at 8-9.

Smith v. Tang, 926 S.W.2d 716 (Mo.App.E.D. 1996) (“*Smith v. Tang*”), and the related decision in *State ex rel. Tang v. Steelman*, 897 S.W.2d 202 (Mo.App. S.D. 1995), also involved a claim for lost chance of survival. The proper party plaintiff was either the personal representative of the decedent’s estate or an appointed plaintiff *ad litem*. The decedent’s daughter filed suit before the expiration of the statute in her individual capacity as daughter and also claimed to file as the “prospective personal representative.” However, she did not file her application to be named personal representative until after the statute expired, and was not in fact appointed as personal representative until more than a year after the statute ran. *Smith v. Tang*, 926 S.W.2d at 718; *State ex rel. Tang v. Steelman*, 897 S.W.2d at 202-203.² In *Smith v. Tang*, which involved a second separate suit, she

² This was the explicitly stated basis upon which *Smith v. Tang* was distinguished in *Mikesic v. Trinity Lutheran Hospital*, 968 S.W.2d 68, 72 n.5 (Mo.App.W.D. 1998). In *Mikesic*, the petition seeking appointment as next friend was filed simultaneously with the original petition for damages. *Thorson v. Connelly*, No. SC88594, now under submission to this Court, presents a related but somewhat different issue in a wrongful death case. In *Thorson* the only proper party plaintiff was an appointed plaintiff *ad litem* under Section 537.080.1 (3). The petition was timely filed within three years of the death, but no plaintiff *ad*

argued, inter alia, that her appointment as personal representative should “relate back” to the date of her father’s death. The cause of action was not lawfully vested in the personal representative when original petition in the first suit was filed within the limitations period because the personal representative had not yet been appointed and did not yet exist as a legal entity. The original petition did not seek appointment of the plaintiff as either plaintiff *ad litem* or personal representative. The original petition did not therefore disclose an intent to seek recovery for the real party in interest because the real party in interest, an appointed personal representative, did not yet exist.

Smith v. Tang is also different from the case before the Court because it really involved two separate lawsuits. In the first suit filed by the decedent’s daughter, she filed suit in her individual capacity as daughter and also claimed to file suit as the “prospective personal representative.” Yet, even after she was appointed as personal representative, she made no attempt to amend the petition in

litem had been appointed by the court as of the filing of the petition. In the petition, the plaintiff identified herself as the plaintiff *ad litem*, and plaintiff has argued in part that the petition in effect was an application for such an appointment. Defense motions for summary judgment were filed after the statute of limitations expired. The trial court granted the summary judgment motions, and denied a request, filed after the summary judgment motions were filed, that explicitly asked the court to appoint plaintiff as plaintiff *ad litem*.

the first suit to substitute herself as the personal representative as the plaintiff. In *State ex rel. Tang v. Steelman*, 897 S.W.2d 202 (Mo.App.S.D. 1995), the court directed the trial court to take no action on the petition in the first suit other than to dismiss, but in a footnote seemed to invite the filing of an amended petition substituting the personal representative as the party plaintiff. 897 S.W.2d at 203, n.2.³ However, when the trial court later denied leave to amend, the plaintiff daughter did not appeal that denial (as Plaintiff has in this case). Thus, the Southern District was therefore never presented with the opportunity to determine whether such an amendment would have related back to the original petition. Instead, the plaintiff allowed the dismissal in the first suit to become final, and then filed a second new and completely separate lawsuit for the same cause of action: her father's lost chance of survival, in which she was the named plaintiff as the personal representative. The separate second suit was first commenced after the statute of limitations had expired. That second separate suit was the subject of the Eastern District's decision in *Smith v. Tang*. In this case, Plaintiff did not permit the dismissal of the original Petition to become final, and then file a

³ In this the court referred to language from *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo.banc 1992), directing on remand that leave to file such an amended petition should be granted, if the plaintiff "has or can qualify as" the personal representative, even though the statute had already expired. 828 S.W.2d at 686.

completely new and separate lawsuit on the same cause of action. She filed her Motion for Leave to File Second Amended Petition to substitute Williams as the named party plaintiff, and has appealed the denial of that motion. These points distinguish *Smith v. Tang* from the present case.

In the instant case, the original Petition showed that it sought recovery on behalf of and in the interest of the proposed substituted plaintiff, Williams, who is a natural person who was in existence when the original petition was filed. As discussed above, the original Petition here stated facts that showed Williams was a person entitled to sue at the time the original Petition was filed and pleaded Section 537.095. This is another important point of distinction between the instant case and all of the decisions relied upon by Defendant. None of the cases relied on by Defendant dealt with or considered Section 537.095 or its effect on the relation back issues presented by the instant case.

Defendant's Interpretation of Rule 55.33 (c) Is Incorrect

Defendant also attempts to suggest that that Rule 55.33 (c) is not applicable to amendments to substitute a plaintiff. Defendant argues that Rule 55.33 (c) applies “only to amendments changing the party against whom the claim is asserted, not to amendments that seek to add or substitute a party.” Defendant’s Brief at p.18. However, review of the only decision of this Court cited by Defendant on this point, *State ex rel. Hilker v. Sweeney*, 877 S.W.2d 624 (Mo. banc 1994), and the prior decision of this Court in *Windscheffel v. Benoit*, 646 S.W.2d 354, 357 (Mo. banc 1983), the primary authority on which *Hilker* relies,

reveals that neither case involved the substitution of a plaintiff or the application of Rule 55.33 (c) to the proposed substitution of a plaintiff. Both cases involved only an attempt to add a new *defendant* after the statute of limitations had expired, rather an attempt to change or substitute a defendant due to misnomer or mistake. Both cases hold a change in the named defendant is permitted when there has been a mistake in selecting the proper party to sue; in such a case the remedy is a change in the party defendant. That result is no more than an application of the express requirement of the text of the Rule itself with respect to an amendment changing the party against whom the claim is presented is asserted. When an amendment seeks to change the party against whom the claim is asserted, it is not sufficient, as it is with other amendments, to show that 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.” Rule 55.33 (c) provides in part that:

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.

Both *Hikler* and *Windscheffel* hold that the concept of adding a new defendant in addition to the original named defendant is inconsistent with the text and the concept of Rule 55.33 (c), that a mistake was made in selecting the proper party to sue and the plaintiff therefore commenced suit against the wrong party in the first instance. Nothing in the text of the Rule 55.33 (c) suggests that an amendment changing the plaintiff is not proper under the Rule so long as the claim asserted in the amendment “arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading,” as required by the Rule. Indeed, it is implicit in the text of the rule that amendments changing parties are proper under the rule but that an additional and more stringent test must also be met when an amendment seeks to change the defendant after the statute has expired. No such additional requirement is imposed for an amendment substituting or changing the plaintiff. It has long been recognized that amendments substituting plaintiffs are different from those substituting or attempting to add defendants after the statute has expired. As this Court stated in *Lily v. Tobbein*, 103 Mo. 477, 15 S.W. 618 (Mo. 1891),

It is doubtless true, as many of the authorities cited hold, that an amendment bringing in a new party defendant will not relate back so as to prevent the bar of the statute as to the new party defendant; but there is a vast difference between substituting a

competent for an incompetent plaintiff and bringing in a new defendant. Substituting 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.”

15 S.W. at 621.

For purposes of Rule 55.33 (c), there is a difference between adding a defendant after the limitations period has expired and adding or substituting a plaintiff. *See State ex. rel. Stephens v. Henson*, 772 S.W.2d 706, 712-713 (Mo.App.S.D. 1989) (Rule 55.33 (c) is the counterpart to Federal Rule 15 (c); federal courts generally hold an amendment adding a *plaintiff* may relate back under Rule 15 (c), even though some federal courts also hold, as do Missouri courts, that Rule 15 (c) does not apply to an attempt to add a *defendant*). *Rotella v. Joseph*, 615 S.W.2d 616 (Mo.App.S.D. 1981), directly held that Rule 55.33 (c) allows a substitution of plaintiff under circumstances similar to the instant case. *Rotella*, as explained in the Plaintiff’s opening Brief, sets forth the rationale for allowing amendments changing or adding plaintiffs under both Rule 15 (c) and Rule 55.33 (c), as explained in Wright and Miller, *Federal Practice and Procedure*, Vol. 6, § 1501: if the defendant is fully apprised of a claim arising from specified conduct within the limitations period, his ability to protect himself is not prejudicially affected by the amendment, and “he should not be permitted to

invoke a limitation defense.” See *Rotella*, 615 S.W.2d at 623, n. 8 and accompanying text, and Plaintiff’s opening Brief at 78-79. The language from Wright and Miller quoted and relied upon in *Rotella* is set forth in Plaintiff’s opening Brief at 46-47, and remains exactly the same in the current version of Federal Practice and Procedure. 6A Fed. Prac. & Proc. Civ.2d § 1501. Plaintiff’s Substitute Brief also cited *Link Aviation, Inc. v Downs*, 325 F.2d 613 (D.C. Cir. 1963), for an example of an early case involving 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. More recently *Plubell v. Merck & Co., Inc.*, 434 F.3d 1070 (8th Cir. 2006), which relied on *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967), recognized that both Rule 15 (c) and Rule 55.33 (c) allow for the relation back of an amendment changing or substituting the party plaintiff.

Caldwell v. Lester E. Cox Medical Centers-South, Inc., 943 S.W.2d 5, 8 (Mo.App.S.D. 1997), also cited by Defendant, did involve an attempt to add a new plaintiff, but its statements about Rule 55.33 (c) were *dictum*, and were not supported by the cases it cited. All of the cases cited by *Caldwell*, 943 S.W.2d at 8, for the proposition that Rule 55.33 (c) applies only to amendments changing the party against whom the claim is asserted, not to an amendment which seeks to add a party, dealt solely with attempts to add a new defendant after expiration of the statute of limitations, just as in *Hilker* and *Windscheffel* as discussed above.

Caldwell’s brief discussion of Rule 55.33 (c) was unnecessary to the decision in

any event because the court's ultimate holding was that the claim at issue was barred by the applicable statute of limitations before the original petition in that case was ever filed. The Western District subsequently refused to follow *Caldwell* on this point, citing a number of the considerations discussed above. *Thompson v. Brown & Williamson Tobacco Corporation*, 207 S.W.3d 76, 114-117 (Mo.App. W.D. 2006). And *Caldwell* made no attempt to reconcile its statement concerning Rule 55.33 (c) with the holding in *Rotella*, even though both were decisions of the Southern District.

Harting v. City of Black Jack, 768 S.W.2d 633 (Mo.App.E.D. 1989), and *Don Roth Development Co., Inc. v. Missouri Highway and Transp. Commission*, 668 S.W.2d 177 (Mo.App.E.D.1984), also cited by Defendant, do not even mention Rule 55.33 (c) and do not purport to interpret that Rule. And, consistent with the other decisions relied on by Defendant, the original petition in both of the those cases did not show that the suit sought recovery for the benefit of or in the interest of the proposed substituted plaintiff, who was the real party in interest.

This Court has recognized that both Rule 55.33 (c) and Federal Rule 51 (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 limitations are intended to afford." *Koerper & Company v. Unitel International, Inc.*, 739 S.W.2d 705, 706 (Mo. banc 1987). This Court has twice specifically disapproved the case law that existed prior to adoption of Rule 55.33 (c) that held that an amendment would not relate back if the proof necessary to support the

pleading as amended is different from the proof necessary to support the original pleading⁴ and that, as the text of the Rule 55.33 (c) states, the amendment will relate back if “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.” *Koerper & Company v. Unitel International, Inc.*, 739 S.W.2d 705, 706 (Mo. banc 1987); *Koenke v. Eldenberg*, 733 S.W.2d 931 (Mo. banc 1988) (applying Rule 55.33 (c) to a wrongful death claim). This case falls directly within the plain language of Rule 55.33 (c).

Defendants’ claim that Rule 55.33 (c) does not apply to amendments to substitute a plaintiff is therefore inaccurate and misstates the law. Defendant’s argument should be rejected by this Court.

The Durable Power of Attorney

The existence and the role of the durable power of attorney, whereby Peyton is the attorney in fact for Williams, has created the potential for some

⁴ As discussed above and in Plaintiff’s Substitute Brief, the evidence needed to support the Second Amended Petition is the same and no broader than that which would have been needed to support the original Petition. The sole difference would be that evidence as to damage to Peyton would no longer be needed to support the Second Amended Petition. Thus, the facts in this case would satisfy even this superseded but more stringent test for relation back.

misunderstanding of the issues presented in this appeal. Some clarification may be helpful to in avoid such misunderstanding.

The durable power of attorney is obviously relevant to Peyton's status as a party aggrieved by the judgment of the trial court, as described in the Jurisdictional Statement in Plaintiff's Substitute Brief. It is also difficult to explain the facts and procedural history of the case without referring to the durable power of attorney and the arguments made by Plaintiff prior to filing her Motion for Leave to File the Second Amended Petition: that an attorney in fact, suing on behalf of her principal, is authorized by Section 507.010, to file suit in her own name, without joining her principal, and that Peyton could therefore file this action for Williams in her own name rather than in name of Williams. The Second Amended Petition was intended to remove that issue, mentioned by the trial court in denying leave to file the First Amended Petition and in denying reconsideration, as a possible reason for denying leave to file the Second Amended Petition.

But Plaintiff's two primary arguments on the merits - that the substitution of Williams as the named party plaintiff in the Second Amended Petition relates back to the original Petition - do not depend in any way on the durable power of attorney and would be the same regardless of whether the durable power of attorney did or did not exist. Both of those arguments focus on the four corners of the original Petition. The first of these two primary arguments are, as set forth above, is that the amendment substituting Williams as the named party plaintiff relates back to the original under the law existing prior to adoption of Rule 55.33

(c) in 1973, because the original Petition was timely filed within the statute of limitations at a time when the claim was lawfully vested in Williams and when she had a right to sue, Defendant was served with the original Petition, the original Petition set forth facts referring to Williams and showing a cause of action in Williams, and the original Petition showed that it sought recovery, at least in part, on behalf of and in the interest of Williams. The second of these two arguments is that the amendment substituting Williams as the party plaintiff relates back to the original Petition 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.” To support the first argument Plaintiff has shown that the original Petition, in stating facts showing that Williams was entitled to sue when the original Petition was filed and in pleading Section 537.095, sought recovery for both Peyton and Williams and therefore showed the original Petition sought recovery on behalf of and in the interest of Williams, the proposed substituted plaintiff. Plaintiff has also shown that the evidence as to the death of Ruby Lane, the alleged negligence of Defendant, and as to Williams’ damages would have been the same under both the original Petition and the Second Amended Petition. To support the second argument, Plaintiff has shown that the Second Amended Petition arises “out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading,” as provided for in Rule 55.33 (c). Both of these arguments necessarily rely and depend on the allegations and language used in the four corners of the original Petition itself and a comparison of

those allegations with the language and allegations set forth in Second Amended Petition. Because the durable power of attorney was not mentioned or pleaded in the original Petition, it plays no role in either of these two primary arguments. Nor do either of these two arguments rest on a theory related to capacity to sue as suggested by Defendant.

The durable power of attorney relates to the merits of the relation back issue only with regard to a third and alternative argument set forth at p. 68-69 of Plaintiff's Substitute Brief. At the time the original Petition was filed, Peyton had already been appointed as Williams' attorney in fact, and had the authority and right to file suit on behalf of Williams for the death of Ruby Lane and could have properly done so in Williams' name. The record in the trial court shows that the original Petition and the First Amended Petition were premised on the assumption that under the durable power of attorney Peyton could sue for Williams in her own name under Section 507.010, without joining Williams as a party plaintiff, and that Plaintiff explicitly and consistently relied on and asserted this argument in the trial court until the filing the Motion for Leave to File Second Amended Petition. Under these unique factual circumstances the failure to designate Williams as a named plaintiff in the original Petition may be considered a misnomer or error in the designation of the named party plaintiff and real party in interest that was not prejudicial to Defendant. *See City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 193-94 (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).

For all of the reasons set forth in Plaintiff's Substitute Brief and above in this Substitute Reply Brief, Plaintiff submits that her primary two arguments on the merits, which do not involve the durable power of attorney, demonstrate the trial court erred in holding that the substitution of Williams as the name plaintiff in the Second Amended Petition would not relate back to the original Petition. If so, there will be no occasion or need for this Court to reach or consider this third and alternative argument.

CONCLUSION

For all of the reasons set forth above and in Plaintiff's Substitute Brief, the trial court erred in denying Plaintiff's Motion for Leave to File Second Amended Petition, and in entering judgment in favor of Defendants. Plaintiff most respectfully prays that this Honorable Court reverse judgment of the trial court, and remand with directions to grant Plaintiff's Motion for Leave to File Second Amended Petition.

Respectfully submitted,

NEWTON G. MCCOY

Newton G. McCoy, MBE # 26182
621 North Skinker Blvd.
St. Louis, MO 63130
Telephone: (314) 862-0200
Telecopier: (314) 862-3050
nmccoy@621skinker.com

Attorney for Plaintiff-Appellant

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 6185 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 Reply Brief and a copy in electronic format on a 3 ½" disk were sent U.S. Mail, postage prepaid, to the following parties on this 24th day of January, 2008:

Susan Ford Robertson
Attorney at Law
Ford, Parshall & Baker, LLC
3210 Bluff Creek Drive
Columbia, MO 65201-8154

Attorneys for Defendants-Respondent Bellefontaine Gardens Nursing & Rehab
