IN THE SUPREME COURT OF MISSOURI

DOROTHY SZRAMKOWSKI,	)	
	)	
Respondent/Cross-Appellant,	)	
	)	
vs.	)	Supreme Court No.: SC91108
	)	
JOSEPH SZRAMKOWSKI,	)	
	)	
Appellant/Cross-Respondent.	)	

RESPONDENT/CROSS-APPELLANT DORTHY SZRAMKOWSKI'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

APPELLANT'S REPLY BRIEF FAILS TO REFUTE RESPONDENT'S ARGUMENT REGARDING HER CROSS-APPEAL, AND APPELLANT CITES NO ADDITIONAL CASE AUTHORITIES ON THIS ISSUE.

Appellant's Brief fails to justify his position regarding Respondent's request to amend her petition to effectuate a substitution of parties[1]. Respondent continues to believe that the issues raised in her cross- appeal may be moot, because the trial court in fact found that Respondent did not lack the capacity to file her Petition for Dissolution, and also found that Respondent did not lack the capacity to testify. (LF 138-46). It appears clear from its Judgment that the trial court denied Respondent's request only because the court believed it was moot in light of the court's findings regarding Respondent's capacity. Id. However, in the event this Court finds that Respondent

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[1] Respondent must clarify certain statements made in her Substitute Brief. Respondent previously stated that the body of her December 2008 Motion for Leave to Amend specifically requested substitution of the parties. Such motion requested that the caption be changed, while the proposed Amended Petition attached thereto included the guardian, the conservator and the guardian ad litem in the caption. Respondent believes this was sufficient to effectuate a substitution. Moreover, Respondent's post-trial motion(s) as well as her oral motion at trial specifically requested substitution.

should have made a substitution of parties, then it should also reverse the trial court's denial of Respondent's request to do so. See, City of Wellston v. SBC Communications, Inc., 203 S.W.3d 189, 193 (Mo. 2006); In Rep. Trustees Indian Springs v. Greeves, 277 S.W.3d 793, 797-99 (Mo.App. 2009); Preston v. State, 33 S.W.3d 574 (Mo.App. 2000). As discussed in Respondent's earlier Briefs, her motions were only filed in an abundance of caution in the event the trial court found that necessary. It was reasonable of Respondent to submit all three persons listed in the caption to the trial court and allow the trial judge to choose from among them a proper substitute, if indeed any was needed at all. The trial court decided to hear Respondent's Motion for Leave to File Amended Petition, with the substituted party, with the case. (See, LF 1-10, 138-46).

Appellant continues to point to alleged errors in the captions of certain of Respondent's pleadings. (See, Appellant's Substitute Reply Brief 25). However, any alleged errors in bringing a lawsuit in the name of an improper party would not result in dismissal. See, City of Wellston, 203 S.W.3d at 193; Greeves, 277 S.W.3d at 797-99; Preston, 33 S.W.3d 574. Such captions are arguably irrelevant, because the capacity in which a party sues should be determined from the content of the pleadings rather than from their captions or titles. See, Singer v. Siedband, 138 S.W.3d 750, 754 (Mo.App. 2004); Nye v. Gerald Harris Const., Inc., 28 S.W.3d 905, 908 (Mo.App. 2000).

Appellant next cites Sections 475.078.2 and 475.078.3 RSMo, then states, "therefore, it is clear that this matter should not have proceeded with [Respondent] as the party in interest . . ." (See, Appellant's Substitute Reply Brief 26). Appellant seems to be arguing in such portion of his Brief that Respondent needed to substitute parties,

which does nothing to refute Respondent's argument that the trial court should have permitted such substitution as requested by Respondent in a timely manner prior to trial, by oral argument immediately before trial, in her Motion to Amend the Pleadings to Conform to the Evidence at the end of trial and in her Motion for Substitution of Parties. (See, Id.; Respondent's Substitute Brief 79-83).

Appellant does not adequately explain why Section 475.078 leads to any conclusion of the sort offered by Appellant. In fact, such statute only creates a *presumption* of incompetence, and any such presumption in this case was fully rebutted by Respondent, as confirmed by the trial court's findings. Section 475.078 RSMo; Clark v. Reeves, 854 S.W.2d 28, 30 (Mo.App. 1993); (LF 138-46).

Next, Appellant discusses the trial court's appointment of a guardian ad litem pursuant to Missouri Rule 52.02(k), and argues that such guardian ad litem lacked standing "to proceed with the pending Petition." (Appellant's Substitute Reply Brief 27). Again, as with Appellant's discussion of Section 475.078, such argument does nothing to undercut Respondent's request to file an amended petition that included her guardian in the caption. Appellant also cites no case authority holding that the guardian ad litem would lack standing in the manner suggested by Appellant.

Appellant next states that "no effort was made prior to trial to substitute the guardian" as a party for Respondent. (Appellant's Substitute Reply Brief 27). As discussed above, Respondent sought prior to trial, at trial and after trial for leave to substitute parties. However, as discussed in Respondent's Substitute Brief, Respondent continued to believe that she retained the necessary mental capacity and that substitution

was unnecessary. The trial court in fact found that Respondent did not lack the capacity to file her Petition for Dissolution, and also found that Respondent did not lack the capacity to testify. (LF 138-46). Thus, Appellant's argument regarding the timing of Respondent's request lacks merit.

Appellant discusses the alleged requirements of Section 452.314 RSMo regarding abuse and neglect. (Appellant's Substitute Reply Brief 28). Appellant incorrectly asserts that the only information available to the guardian regarding abuse would have come from Respondent who, Appellant asserts, was incapacitated at the time. Id. However, Respondent's guardian, her conservator and other witnesses specifically testified to evidence of abuse and neglect within their personal knowledge. (Tr. 37-38, 85, 89-90; Fowler Deposition 21; Vincent Deposition 24-25; Jeanette Deposition 12, 24-25).

Appellant asserts that Section 452.314 RSMo allegedly prevents the guardian from proceeding with a dissolution claim on behalf of Respondent. (Appellant's Substitute Reply Brief 28). However, Appellant ignores the plain language of such statute, which pertains to the **filing** of the initial petition. See, Section 452.314 RSMo. Moreover, Section 452.314 would not support Appellant regarding Respondent's request to add allegations of abuse to Respondent's claim. See, Id.; (LF 40-45). Appellant misses the mark in claiming that a substitution of parties would itself prejudice appellant, or create a higher standard of proof for Respondent. In this case, the guardian did not originally file Respondent's Petition for Dissolution.

The requirement of abuse indicated by 452.314 RSMo is only applicable where the guardian initially files the Petition for Dissolution on behalf of the ward. See,

452.314 RSMo. Respondent only sought leave to amend her Petition to show abuse out of an abundance of caution in the event the trial court erroneously found that proof of abuse was necessary, while all the evidence relevant to abuse was nevertheless admissible on the issue of whether the parties' marriage was irretrievably broken. Therefore, even an amendment to allege abuse or neglect would not prejudice Appellant because Appellant knew his actions toward Respondent were already a core issue in the case due to his denial that the marriage was irretrievably broken. § 452.320.2(1)(b) RSMo. Appellant made that section an issue by denying that the marriage was irretrievably broken and, therefore, put the burden on Respondent to prove that Appellant behaved in such a manner that Respondent could not reasonably be expected to live with him.

Lastly, Appellant asserts that the requested amendment to allege abuse and neglect would prejudice Appellant. (See, Appellant's Substitute Reply Brief 29). However, Respondent presented significant evidence of abuse and neglect, and such testimony occurred without any objection at trial from Appellant to the relevance or subject matter of the evidence. (Tr. 37-38, 60-63, 67, 68, 69, 72, 85, 89-90; Fowler Deposition 21; Vincent Deposition 24-25; Jeanette Deposition 12, 24-25). In fact, not only did Appellant fail to object to such evidence, but Appellant raised the issue of abuse in his own questioning of witnesses. (Tr. 101). Even if Appellant had not raised the issue and had objected to such testimony as allegedly beyond the pleadings, such argument would fail because the testimony remains relevant to the issues of whether the marriage is irretrievably broken, and whether Appellant behaved in such a way that Respondent

cannot reasonably be expected to live with him. § 452.320.2(1) RSMo. Appellant has made no claim of any prejudice whatsoever that would result from permitting Respondent to substitute of parties. Even if Respondent needed to substituted her guardian prior to trial, it would have changed nothing with respect to the prosecution of the dissolution action, the evidence adduced at trial or the Judgment. This Court should hold in favor of Respondent on her cross-appeal. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574.

CONCLUSION

Appellant's Reply Brief makes duplicative arguments and presents no additional case authorities regarding Respondent's cross-appeal. Appellant's arguments do not undercut Respondent's request to amend her Petition prior to trial, at trial and after trial to substitute either the guardian, the guardian ad litem or the conservator. There is no sound argument that Appellant would suffer prejudice regarding the evidence of abuse and, because the applicable statutes do not require any showing of abuse where a petitioner files for her own dissolution, there would be no prejudice resulting from any substitution of parties. If this Court finds that the trial court erred regarding Respondent's legal capacity to proceed with her action for dissolution, and erred in denying the requested substitution, then this Court should hold in favor of Respondent on her cross-appeal.

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CERTIFICATE PURSUANT TO RULE 84.06

COMES NOW Steve Wolf, Attorney for Respondent and, pursuant to Rule 84.06(c), hereby certifies:

1. That Respondent's Brief complies with the information required by Rule 55.03, and is within the Rule 84.06(b) limitations by containing 1,590 words;

2. That Respondent's Brief was saved on a CD-ROM and labeled with the case caption and is hereto attached;

3. That such CD has been scanned and is virus free;

4. That the word processing program utilized to create the brief was Microsoft Word 2008 for Mac, Version 12.0.0. However, the version of the brief on the attached CD has been converted to a Word 97-2004 "doc" format compatible with Windows.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true and accurate copies of the foregoing, as well as a copy of the CD-ROM with electronic copy of the foregoing, were served this January 7, 2011, via:

☒	U.S. Mail	☐	Federal Express
☐	U.S. Certified Mail	☐	UPS Next Day Air
☐	Facsimile	☐	UPS Second Day Air
☒	E-mail	☐	UPS Ground

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