
IN THE MISSOURI SUPREME COURT

NO. SC88594

ELEANOR THORSON,

Appellant

vs.

**ELIZABETH CONNELLY,
RONALD PALMER AND BETTY PALMER**

Respondents.

**APPEAL FROM THE CIRCUIT COURT OF DENT COUNTY, MISSOURI
42nd JUDICIAL CIRCUIT
The Honorable Sanborn N. Ball, Judge
Case No. 05CF-CC00084-01**

**SUBSTITUE BRIEF OF RESPONDENTS
RONALD PALMER and BETTY PALMER**

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JURISDICTIONAL STATEMENT

The respondents, Ronald Palmer and Betty Palmer, make no comment concerning the sufficiency of appellant, Eleanor Thorson's, jurisdictional statement.

STATEMENT OF FACTS

On August 29, 2002, Heather Thorson died as a result of a self-inflicted gunshot wound. (L.F. 32, 47, 10) Appellant, Eleanor Thorson, is Heather Thorson's grandmother. (L.F. 32, 47)

On August 25, 2005, appellant filed a civil action for the wrongful death of Heather Thorson. (L.F. 33, 47) Respondent, Elizabeth Connelly, Heather Thorson's friend, respondent, Betty Palmer, Elizabeth Connelly's mother, and respondent, Ronald Palmer, Betty Palmer's husband, were named as defendants in the case. (L.F. 8-9) The court never appointed appellant to serve as plaintiff ad litem in the civil action. (L.F. 33, 47)

On January 10, 2006, respondents Ronald and Betty Palmer, filed a motion for summary judgment. (S.R. 1) On January 18, 2006, respondent, Elizabeth Connelly, filed a motion for summary judgment. (L.F. 35) On January 30, 2006, more than three years after Heather Thorson's death, appellant filed a "Petition for Appointment of Plaintiff Ad Litem." (L.F. 55)

On April 26, 2006, a hearing was held on the motions for summary judgment. (Tr. 2) On July 5, 2006, the trial court entered summary judgment in favor of respondents and an appeal followed. (L.F. 77-81)

On May 11, 2007, the Missouri Court of Appeals, Southern District, handed down its decision affirming the trial court's entry of summary judgment and applications for transfer followed. This Court granted appellant's application for transfer on August 21, 2007.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS IN THAT SUCH JUDGMENT NEITHER ERRONEOUSLY DECLARES OR APPLIES THE LAW SINCE THERE IS NO DISPUTE AS TO ANY MATERIAL FACT AND RESPONDENTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE APPELLANT LACKED STANDING TO BRING AN ACTION FOR THE DEATH OF HER GRANDDAUGHTER, HEATHER THORSON, BECAUSE SHE WAS NOT A PLAINTIFF AD LITEM APPOINTED BY THE COURT AND ANY CAUSE OF ACTION FOR THE DEATH OF HEATHER THORSON HAS EXPIRED UNDER MISSOURI’S WRONGFUL DEATH ACT.

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II. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS IN THAT SUCH JUDGMENT NEITHER ERRONEOUSLY DECLARES OR APPLIES THE LAW SINCE THERE IS NO DISPUTE AS TO ANY MATERIAL FACT AND RESPONDENTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE APPELLANT’S PETITION WAS NOT AN APPLICATION FOR THE APPOINTMENT OF A PLAINTIFF AD LITEM, NO ACTION WAS COMMENCED BY A PERSON ENTITLED TO BRING SUCH AN ACTION FOR THE DEATH OF HEATHER THORSON WITHIN THE TIME PROVIDED BY MISSOURI’S WRONGFUL DEATH ACT AND APPELLANT’S “PETITION FOR APPOINTMENT OF A PLAINTIFF AD LITEM”, FILED AFTER ANY CAUSE OF ACTION FOR THE DEATH OF HEATHER THORSON HAD EXPIRED UNDER MISSOURI’S WRONGFUL DEATH ACT DID NOT RELATE BACK TO THE DATE APPELLANT’S PETITION WAS FILED.

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STANDARD FOR REVIEW

When considering an appeal of a summary judgment, the court should “review the record in the light most favorable to the party against whom judgment was entered.” ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). As the trial court’s judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court’s granting summary judgment. Id. Facts set forth in support of a party’s motion, however, are taken as true unless contradicted by the non-moving party’s response to the summary judgment motion. Id.

The criteria on appeal for testing the propriety of summary judgment are no different from those that should be employed by the trial court to determine the propriety of sustaining the motion initially. Id. Accordingly, summary judgment is appropriate where the moving party demonstrates that there is “no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” (Rule 74.04(c)(6)) A defending party may establish the right to summary judgment by showing either “facts that negate any one of the claimant’s elements or that the non-moving party, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find existence of any one of the claimant’s elements.” Id. at 381.

ARGUMENT I

I. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS IN THAT SUCH JUDGMENT NEITHER ERRONEOUSLY DECLARES OR APPLIES THE LAW SINCE THERE IS NO DISPUTE AS TO ANY MATERIAL FACT AND RESPONDENTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE APPELLANT LACKED STANDING TO BRING AN ACTION FOR THE DEATH OF HER GRANDDAUGHTER, HEATHER THORSON, BECAUSE SHE WAS NOT A PLAINTIFF AD LITEM APPOINTED BY THE COURT AND ANY CAUSE OF ACTION FOR THE DEATH OF HEATHER THORSON HAS EXPIRED UNDER MISSOURI'S WRONGFUL DEATH ACT.

A. Issue Presented

Does a grandparent's attempt to bring a civil action for the wrongful death of a deceased grandchild without being appointed by the court as a plaintiff ad litem toll the statute of limitation under Missouri's Wrongful Death Act?

B. Introduction

In point I of her argument, appellant contends that the trial court erred in finding that appellant lacked standing to bring an action for the death of her granddaughter. The trial court correctly found that appellant lacked standing to bring an action for the death of her granddaughter because she was not a plaintiff ad litem appointed by the court.

Any cause of action that could have been brought for the death of appellant's granddaughter has expired under Missouri's Wrongful Death Act.

C. Missouri's Wrongful Death Act

The Wrongful Death Act is set out in Chapter 537 of the Revised Statutes of Missouri. Sections 537.080 et seq. Section 537.080.1 R.S.Mo. describes the classifications of persons who have standing to bring a cause of action for wrongful death as follows:

1. Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured, which damages may be sued for:

(1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;

(2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;

(3) *If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem. Such plaintiff ad litem shall be appointed by the court having jurisdiction over the action* for damages provided in this section upon application of some person entitled to share in the proceeds of such action. Such plaintiff ad litem shall be some suitable person competent to prosecute such action and whose appointment is requested on behalf of those persons entitled to share in the proceeds of such action. Such court may, in its discretion, require that such plaintiff ad litem give bond for the faithful performance of his duties. (Section 537.080.1 R.S.Mo.) (special emphasis added)

Section 537.100 R.S.Mo., the statute of limitation for wrongful death actions, states, in pertinent part:

Every action instituted under section 537.080 shall be commenced within three years after the cause of action shall accrue ... (Section 537.100 R.S.Mo.)

D. Appellant Lacked Standing to Sue for Wrongful Death Without Appointment of a Plaintiff Ad Litem

Appellant correctly points out that “Missouri does not recognize a common law cause of action for wrongful death. Wrongful death is a statutory cause of action.” (Appellant’s brief 10) Statutes contained within Missouri’s Wrongful Death Act must be strictly construed. State ex rel. Griffin v. Belt, 941 S.W.2d 570, 557 (Mo. App. WD

1997) Lack of capacity to sue is jurisdictional rather than procedural and precludes suit. Id. at 572.

In the petition she filed on August 25, 2005, appellant claims that there are no persons entitled to bring an action for the death of Heather Thorson in class (1) or (2) of Section 537.080.1 R.S.Mo. (L.F. 8-9) Despite this fact, appellant did not file an application for the appointment of a plaintiff ad litem until January 30, 2006. (L.F. 55) A plaintiff ad litem was never appointed by the court. (L.F. 33, 47) Consequently, appellant lacked standing to bring this action for the death of Heather Thorson.

In her brief, appellant cites Rotella v. Joseph, 615 S.W. 2d 616 (Mo. App. SD 1981) for the proposition that appellant had standing to sue. In Rotella, the administrator of the estate of a resident of the State of Connecticut who died in a motor vehicle collision in Missouri, filed a petition for the decedent's minor child under Missouri's Wrongful Death Act. The trial court sustained defendant's motion for summary judgment because the wrongful death act required that an action be brought by the decedent's minor child. Id. at 617. In reversing the trial court, the court of appeals examined the body of the petition and determined that the decedent's minor child had, in fact, brought the action through the administrator of the decedent's estate. Id. at 622-623.

Appellant also cites Mikesic v. Trinity Lutheran Hospital, et al., 980 S.W.2d 68 (Mo. App. WD 1998) as support for her contention that she had standing to sue. In Mikesic, the guardian of an incompetent ward who resided in Kansas filed a petition for her ward for personal injury the ward suffered as a result of medical treatment he

received in Missouri. At that same time, the guardian also filed a petition to be appointed as the ward's next friend in the lawsuit. Id. at 70.

Although the lawsuit and the petition for appointment of next friend were both timely filed within the applicable two year statute of limitation, the trial court did not act on the petition for appointment of next friend until a short time after the two year period had elapsed. Id. at 70. The petition was amended to substitute the ward's guardian and next friend as plaintiff for the ward. Thereafter, the trial court granted defendants' motion to dismiss the amended petition on the grounds that it was barred by the statute of limitations. Id. at 70.

In reversing the trial court, the Court of Appeals, Western District, relied upon Rotella, ruling that the ward, through his guardian, had timely filed the action and the appointment of the ward's next friend related back to the date of the filing of the original petition. Id. at 73.

Rotella and Mikesic do not apply to this case. In this case, the wrongful death act requires that an action be brought by a plaintiff ad litem appointed by the court. Although appellant called herself a plaintiff ad litem in the caption of her petition, a plaintiff ad litem has never been appointed in this case. (L.F. 33, 47) The statute requires that a plaintiff ad litem must "be appointed by the court having jurisdiction over the action." R.S.Mo. § 537.080.1(3). Appellant's statement in the caption of her petition that she is the plaintiff ad litem does not make the statement true. Appellant lacks standing to bring an action for the death of Heather Thorson.

E. The Statute of Limitation Ran

Section 537.100 R.S.Mo. requires that “(e)very action instituted under Section 537.080 shall be commenced within three years after the cause of action shall accrue...” (Section 537.100 R.S.Mo.) A cause of action under the Wrongful Death Act “accrues” at the time of the decedent’s death. Deming v. Williams, 321 S.W.2d 720, 723 (Mo. App. WD 1959) Any claim that may have existed for the wrongful death of Heather Thorson expired because no action was validly commenced within three years of her death.

F. Appellant’s Application for Appointment of a Plaintiff Ad Litem Did Not Relate Back to her Original Petition

Appellant argues that “if a suit is brought by one who has a beneficial interest in the subject matter, the substitution of the proper party will relate back to the filing of the original action and the action will not be barred by the statute of limitations.” Thus, argues appellant, “there are two ways of establishing standing either through a purely legal interest or alternatively if the plaintiff has a beneficial interest.” (Appellant’s brief, page 15). Appellant’s argument misstates the law of standing and the so-called “relation back” doctrine concerning wrongful death actions.

In her brief, appellant references a quote from the Missouri Supreme Court’s decision in Forehand v. Hall, 355 S.W.2d 940 (Mo. 1962). (Appellant’s brief, pages 13-14) In Forehand, a wrongful death case, the deceased was survived by his wife and minor child. The statute then in effect authorized the wife to sue within six months after the deceased’s death. The statute provided that if the wife failed to sue within six months, the minor child could sue and, if there was no wife or minor child, then suit

could be brought by the deceased's administrator provided that the suit was commenced within the one year statute of limitation. Id. at 943.

In Forehand, the widow did not bring suit within six months of the deceased's death and the minor child did not sue either. After six months, but within one year, the deceased's wife, as administrator of the deceased's estate, filed suit. After a year had lapsed, the administrator d.b.n. moved to withdraw as plaintiff and substituted herself as the natural mother and next friend of the minor child. Id. at 943. The Supreme Court affirmed the trial court's dismissal of the action holding that the theory of relation back had no application and the cause of action had lapsed under the statute of limitation. Id. at 944.

In her brief, appellant cites Asmus v. Capital Region Family Practice, 115 S.W.3d 427 (Mo. App. WD 2003) for the general proposition that "if a suit is brought by one who has a beneficial interest in the subject matter, the substitution of the proper party will relate back to the filing of the original action and the action will not be barred by the statute of limitations." (Appellant's brief 14-15)

In Asmus, a bankrupt plaintiff initially filed a medical malpractice action without joining the trustee. The trial court dismissed the action and the court of appeals reversed and remanded with instructions to the trial court to exercise its discretion as to the plaintiff's motion to amend which was pending at the time of dismissal. Id. at 437. In Asmus, the court made special note to distinguish its ruling from wrongful death cases like State ex rel. Jewish Hospital of St. Louis v. Buder, 540 S.W.2d 100 (Mo. App. ED 1976), Henderson v. Fields, 68 S.W.3d 455 (Mo. App. WD 2001), and this case which

involve “ a statutorily created claim that must be technically and strictly construed.” Id. at 435.

In State ex rel. Jewish Hospital of St. Louis v. Buder, 540 S.W.2d 100 (Mo. App. ED 1976), a wrongful death case, the deceased, Ida Peters, was survived by her adult child, Sara Peters. Under the statute then in effect, suit could be brought within two years of the deceased’s death by the spouse or minor child of the deceased, but if there was no surviving spouse or minor child, then the administrator of the estate of the deceased. Id. 104-105. Within two years of Ida Peters’ death, Sara Peters brought suit for her wrongful death. Five months after the two year anniversary of Ida Peters’ death, Sara Peters, as administrator of the estate of Ida Peters, was substituted as plaintiff in an amended petition. The trial court overruled the defendant’s motion to dismiss and the defendant sought a writ of mandamus. Id. at 102-103.

In Buder, the Court of Appeals, Eastern District, reversed the trial court’s ruling and made absolute its writ of mandamus holding that an amended petition for wrongful death filed after the expiration of the statute of limitation by a proper party does not relate back to a petition filed before the expiration of the statute of limitation by a party who had no standing to sue. The court held that this is true even though the actual person filing both petitions is the same and had a beneficial interest in the action when the capacity of the person filing the petitions is legally separate. Id. at 107-108.

In Buder, the court analyzed cases construing the “relation back” doctrine under Missouri’s Wrongful Death Act and pointed out that:

The principle which we deduce from the various decisions may fairly be said to be that where the original plaintiff has, under the wrongful death statute, a right to institute an action or is a proper and legally authorized party under the strict provisions of the statute to do so, an amendment substituting a proper party or adding additional parties will relate back to the original petition; but where the original party plaintiff has no right to maintain an action, has no standing to sue under the statute and is not a party authorized to sue under the strict wording of the statute, an amendment which adds or substitutes a proper party does not relate back to the original petition so as to save the action from the running of the statute of limitations. Id. at 107.

In Buder, the court ruled:

At the time of filing the original petition in February, 1975, Sara Peters, as the adult child of the deceased, was not a person authorized or designated by § 537.080 to sue, nor did she have a right to maintain an action for wrongful death under the statute; only the administratrix had such a right, and only the administratrix was authorized to sue under the statute. There being no right in the adult child to maintain suit, an amendment substituting the proper party could not relate back to the original petition because “there was nothing to relate back to.”...

The original petition filed by the adult child in her capacity as such did not and could not state a cause of action under the language and authorization

of § 537.080. An adult child has no right or standing, under the circumstances here, to maintain suit under the wording of the statute, and an amendment substituting an authorized and designated party cannot therefore relate back to the original petition. The breath of life cannot, by judicial hands, be instilled into a petition devoid of life.

Under the circumstances here, we hold, therefore, that the amended petition filed by Sara in her capacity as administratrix, after the statute of limitations had expired, did not relate back to the original petition filed by her in her capacity as the adult child of Mrs. Ida Peters; hence her claim is barred. Id. at 107.

The Buder court also recognized that:

While it is true that Sara may have had a beneficial interest as an heir in the amount of recovery under the wrongful death action when she filed her petition in her capacity as an adult child, she had no legal standing or right under the strict wording of the statute to maintain an action other than in her capacity as administratrix.... Sara was totally without capacity to maintain an action at the time she instituted her action; she was in legal effect a stranger to the action. Id. at 108.

The rule in Buder has been approved and followed by the Court of Appeals for both the Southern and Eastern Districts. State ex rel. Tang v. Steelman, 897 S.W.2d 202 (Mo. App. SD 1995); Smith v. Tang, 926 S.W.2d 716 (Mo. App. ED 1996) and; Caldwell v. Lester E. Cox Medical Center-South, 943 S.W.2d 5 (Mo. App. SD 1997).

In Henderson v. Fields, 68 S.W.3d 455 (Mo. App. WD 2001), the grandparents of a four month old baby girl who was killed in a motor vehicle accident, filed a wrongful death action for the death of their granddaughter. As in this case, the grandparents did not file an application and had not been appointed as plaintiffs ad litem. In Henderson, the grandparents proceeded to trial and, after a jury verdict, judgment was entered in their favor. Thereafter, the defendant filed a motion for judgment notwithstanding the verdict claiming that the grandparents lacked standing to bring the action. Shortly thereafter, the grandparents filed a motion for nunc pro tunc seeking an order appointing them as plaintiffs ad litem which was sustained by the trial court. The grandparents claimed that the order should relate back to the filing of the original petition. The trial court agreed and overruled the defendant's motion for judgment notwithstanding the verdict. Id. at 465. The Court of Appeals, Western District, reversed the trial court's order overruling defendant's motion for judgment notwithstanding the verdict. In reversing the trial court, the court of appeals recognized that the grandparents "did not have the statutory authority to bring a wrongful death action for the death of" their granddaughter without first being appointed as plaintiffs ad litem in accordance with Section 537.080.1(3) R.S.Mo. Id. at 467. The court of appeals also recognized that:

...the trial court's appointment of plaintiffs ad litem in this case could not be deemed to relate back to the original petition. "An amendment will relate back to the original petition [under Rule 55.33(c)]...only when the original plaintiff had the legal right to sue and stated a cause of action at the time the suit was filed." (Citations

omitted) “(W)here the original plaintiff has, under the wrongful death statute, a right to institute an action or is a proper and legally authorized party under the strict provisions of the statute to do so, an amendment substituting a proper party or adding additional parties will relate back to the original petition; but where the original party plaintiff has no right to maintain an action, has no standing to sue under the statute and is not a party authorized to sue under the strict wording of the statute, an amendment which adds or substitutes a proper party does not relate back to the original petition so as to save the action from the running of the statute of limitations.” (Citation omitted) Id. at 466-467.

In this case, appellant did not make application or receive the appointment of the court as plaintiff ad litem. Consequently, she has no standing to bring this action. As in Henderson, appellant cannot be appointed as plaintiff ad litem because any cause of action for the death of Heather Thorson has expired under the statute of limitation.

ARGUMENT II

II. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS IN THAT SUCH JUDGMENT NEITHER ERRONEOUSLY DECLARES OR APPLIES THE LAW SINCE THERE IS NO DISPUTE AS TO ANY MATERIAL FACT AND RESPONDENTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE APPELLANT’S PETITION WAS NOT AN APPLICATION FOR THE APPOINTMENT OF A PLAINTIFF AD LITEM, NO ACTION WAS COMMENCED BY A PERSON ENTITLED TO BRING SUCH AN ACTION FOR THE DEATH OF HEATHER THORSON WITHIN THE TIME PROVIDED BY MISSOURI’S WRONGFUL DEATH ACT AND APPELLANT’S “PETITION FOR APPOINTMENT OF A PLAINTIFF AD LITEM”, FILED AFTER ANY CAUSE OF ACTION FOR THE DEATH OF HEATHER THORSON HAD EXPIRED UNDER MISSOURI’S WRONGFUL DEATH ACT DID NOT RELATE BACK TO THE DATE APPELLANT’S PETITION WAS FILED.

A. Issue Presented

When a person who does not have standing to bring a civil action under Missouri’s Wrongful Death Act, files a petition, will a later application and appointment of a plaintiff ad litem relate back to the original petition to save the action from the expiration of the Wrongful Death Act’s statute of limitation?

B. Introduction

In point II of her argument, appellant contends that the trial court erred in failing to appoint appellant as plaintiff ad litem retroactively to the date of filing of her petition. The trial court correctly dismissed the action because appellant did not make application or receive the appointment of the court as plaintiff ad litem before any cause of action under Missouri's Wrongful Death Act had expired under its statute of limitation. Consequently, appellant had no standing to bring the action and any amendment which would add or substitute a proper party does not relate back to the original petition so as to save the action from the running of the statute of limitations.

C. Appellant is Not Entitled to Retroactive Standing

Point II of appellant's argument is a reiteration of her argument in point I that a person with a beneficial interest who lacks standing to bring a wrongful death action may file suit, acquire legal standing to sue later and have her standing "relate back" to the date when the original action was filed. The same argument and authorities contained in point I of respondents' brief also apply here. See Forehand v. Hall, 355 S.W.2d 940 (Mo. 1962); State ex rel. Jewish Hospital of St. Louis v. Buder, 540 S.W.2d 100 (Mo. App. ED 1976); Henderson v. Fields, 68 S.W.3d 455 (Mo. App. WD 2001); State ex rel. Tang v. Steelman, 897 S.W.2d 202 (Mo. App. SD 1995); Smith v. Tang, 926 S.W.2d 716 (Mo. App. ED 1996) and Caldwell v. Lester E. Cox Medical Center-South, 943 S.W.2d 5 (Mo. App. SD 1997). Respondents incorporate by reference all arguments and authority set out in point I of their brief at pages 12 through 23, as if fully set out here.

Appellant lacked standing to bring an action for the death of Heather Thorson. Under Missouri's Wrongful Death Act, such an action could only be brought by a plaintiff ad litem appointed by the court. Section 537.080.1(3) R.S.Mo. A plaintiff ad litem was never appointed by the court. (L.F. 33, 47) The statute of limitation ran.

A petition filed by a person with a beneficial interest but no legal standing to sue for wrongful death cannot be amended after the statute of limitation has run so as to relate back to the original petition to save the claim from extinction, even though the same person has filed both of the petitions when the capacity of the person filing the petitions is legally separate. State ex rel. Jewish Hospital of St. Louis v. Buder, 540 S.W.2d 100 (Mo. App. ED 1976).

CONCLUSION

There is no genuine issue as to any material fact. The trial court correctly entered summary judgment in favor of respondents. Appellant lacked standing to sue for wrongful death without appointment of a plaintiff ad litem. The statute of limitation ran. Appellant's application for appointment of a plaintiff ad litem did not relate back to her original petition. Appellant is not entitled to retroactive standing. For these reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06**

Pursuant to Rule 84.06 of Missouri Court Rules, Volume I, the undersigned certifies that, to the best of his knowledge and belief:

1. Respondents' Brief is in compliance with the limitations contained in Rule 84.06(b);
2. Respondents' Brief contains 5,357 words with the exception of the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix as determined by Microsoft Word software used to prepare the brief and;
3. The CD-rom upon which the electronic copy of Respondents' Brief has been filed has been scanned for viruses and is virus free.

Mark Turley

CERTIFICATE OF SERVICE

The undersigned certifies that two copies and a labeled CD-Rom containing a copy of Brief of Respondents Ronald Palmer and Betty Palmer were served upon the following counsel of record by placing the same in an envelope with first class postage affixed thereto addressed as set forth below and by then placing said envelope in a U.S. Mail Receptacle in Rolla, Missouri, on the 4th day of October, 2007, addressed to:

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APPENDIX

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74.01. Judgment

(a) **Included Matters.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment is rendered when entered. A judgment is entered when a writing signed by the judge and denominated "judgment" or "decree" is filed. The judgment may be a separate document or entry on the docket sheet of the case. A docket sheet entry complying with these requirements is a judgment unless the docket sheet entry indicates that the court will enter the judgment in a separate document. The separate document shall be the judgment when entered.

(b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may enter a judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(Adopted May 22, 1987, eff. Jan. 1, 1988. Amended Feb. 22, 1994, eff. Jan. 1, 1995; Sept. 10, 1997, eff. July 1, 1998; May 26, 2000, eff. Jan. 1, 2001.)

74.02. Order

Every direction of a court made or entered in writing and not included in a judgment is an order. (Adopted May 22, 1987, eff. Jan. 1, 1988.)

Committee Note—1959

This Rule is the same as Section 506.050, RSMo 1959.

74.03. Notice of Entry of Orders and Judgments

Immediately upon the entry of an order or judgment, the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 43.01 upon each party who is not in default for failure to appear and who was not present in court in person or by attorney at the time of the entry of such order or judgment. If such notice is not given, the order or judgment shall be set aside for good cause shown upon written motion filed within six months from the

entry of the order or judgment. This Rule 74.03 shall not preclude relief under Rule 74.06.

(Adopted May 22, 1987, eff. Jan. 1, 1988. Amended Sept. 26, 1995, eff. July 1, 1996.)

74.04. Summary Judgment

(a) **For Claimant.** At any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, a party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment upon all or any part of the pending issues.

(b) **For Defending Party.** At any time, a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment as to all or any part of the pending issues.

(c) Motions and Proceedings Thereon.

(1) *Motions for Summary Judgment.* A motion for summary judgment shall summarily state the legal basis for the motion.

A statement of uncontroverted material facts shall be attached to the motion. The statement shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts.

Attached to the statement shall be a copy of all discovery, exhibits or affidavits on which the motion relies.

Movant shall file a separate legal memorandum explaining why summary judgment should be granted.

(2) *Responses to Motions for Summary Judgment.* Within 30 days after a motion for summary judgment is served, the adverse party shall serve a response on all parties. The response shall admit or deny each of movant's factual statements in numbered paragraphs that correspond to movant's numbered paragraphs.

A denial may not rest upon the mere allegations or denials of the party's pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.

Attached to the response shall be a copy of all discovery, exhibits or affidavits on which the response relies.

A response that does not comply with this Rule 74.04(c)(2) with respect to any numbered paragraph is

movant's statement is an admission of the truth of that numbered paragraph.

The response may also set forth additional material facts that remain in dispute, which shall be presented in consecutively numbered paragraphs and supported in the manner prescribed by Rule 74.04(c)(1).

The response may include a legal memorandum explaining the legal or factual reasons why summary judgment should not be granted.

(3) *Replies in Support of Motions for Summary Judgment.* Within 15 days after service of the response, the movant may file a reply memorandum of law explaining why summary judgment should be granted.

Within the same time, if the adverse party's response sets forth additional material facts that remain in dispute, movant shall file a statement admitting or denying each such fact. Any such denial shall be supported in the manner prescribed by Rule 74.04(c)(2).

Within the same time, the movant may file a statement of additional material facts as to which movant claims there is no genuine issue. The statement shall be presented in consecutively numbered paragraphs and supported in the manner prescribed by Rule 74.04(c)(1).

Attached to the supplemental statement shall be a copy of any additional discovery, exhibits or affidavits on which the supplemental statement relies.

(4) *Sur-replies in Opposition to Motions for Summary Judgment.* Within 15 days of service, if movant files a statement of additional material facts pursuant to Rule 74.04(c)(3), the adverse party shall file a sur-reply admitting or denying each such factual statement. The sur-reply shall be in the form and shall be supported in the manner prescribed by Rule 74.04(c)(2).

Attached to the sur-reply shall be a copy of any additional discovery, exhibits or affidavits on which the sur-reply relies.

A sur-reply that does not comply with Rule 74.04(c)(2) with respect to any numbered paragraph in movant's statement of additional material facts is an admission of the truth of that numbered paragraph.

If the movant files a statement of additional material facts, the adverse party may file within the same time a sur-reply memorandum of law explaining the legal or factual reasons why summary judgment should not be granted.

(5) *Additional papers.* No other papers with respect to the motion for summary judgment shall be filed without leave of court.

(6) *Rulings on Motions for Summary Judgment.* After the response, reply and any sur-reply have been filed or the deadlines therefor have expired, the court shall decide the motion.

If the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith.

A summary judgment, interlocutory in character, may be entered on any issue, including the issue of liability alone, although there is a genuine issue as to the amount of the damages.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this Rule 74.04 judgment is not entered upon the whole case or for all the relief asked and a trial is necessary, the court by examining the pleadings and the evidence before it, by interrogating counsel, and by conducting a hearing, if necessary, shall ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavit.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that for reasons stated in the affidavits facts essential to justify opposition to the motion cannot be presented in the affidavits, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavit Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any affidavit presented pursuant to this Rule 74.04 is presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting it to pay to the other party the amount of the reasonable expenses that the filing of the affidavit caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Adopted May 22, 1987, eff. Jan. 1, 1988. Amended June 1, 1993, eff. Jan. 1, 1994; Sept. 28, 1993, eff. Jan. 1, 1994; Feb. 27, 2002, eff. Jan. 1, 2003.)

Missouri Revised Statutes
Chapter 537
Torts and Actions for Damages
Section 537.080

August 28, 2006

Action for wrongful death--who may sue--limitation.

537.080. 1. Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured, which damages may be sued for:

(1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;

(2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;

(3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem. Such plaintiff ad litem shall be appointed by the court having jurisdiction over the action for damages provided in this section upon application of some person entitled to share in the proceeds of such action. Such plaintiff ad litem shall be some suitable person competent to prosecute such action and whose appointment is requested on behalf of those persons entitled to share in the proceeds of such action. Such court may, in its discretion, require that such plaintiff ad litem give bond for the faithful performance of his duties.

2. Only one action may be brought under this section against any one defendant for the death of any one person.

(RSMo 1939 §§ 3652, 3653, A.L. 1955 p. 778 § 537.070, A.L. 1967 p. 663, A.L. 1979 S.B. 368, A.L. 1991 H.B. 236)

Prior revisions: 1929 §§ 3262, 3263; 1919 §§ 4217, 4218; 1909 §§ 5425, 5426

Missouri Revised Statutes
Chapter 537
Torts and Actions for Damages
Section 537.100

August 28, 2006

Limitation of action--effect of absence of defendant and nonsuit.

537.100. Every action instituted under section 537.080 shall be commenced within three years after the cause of action shall accrue; provided, that if any defendant, whether a resident or nonresident of the state at the time any such cause of action accrues, shall then or thereafter be absent or depart from the state, so that personal service cannot be had upon such defendant in the state in any such action heretofore or hereafter accruing, the time during which such defendant is so absent from the state shall not be deemed or taken as any part of the time limited for the commencement of such action against him; and provided, that if any such action shall have been commenced within the time prescribed in this section, and the plaintiff therein take or suffer a nonsuit, or after a verdict for him the judgment be arrested, or after a judgment for him the same be reversed on appeal or error, such plaintiff may commence a new action from time to time within one year after such nonsuit suffered or such judgment arrested or reversed; and in determining whether such new action has been begun within the period so limited, the time during which such nonresident or absent defendant is so absent from the state shall not be deemed or taken as any part of such period of limitation.

(RSMo 1939 § 3656, A.L. 1955 p. 778, A.L. 1967 p. 663, A.L. 1979 S.B. 368)

Prior revisions: 1929 § 3266; 1919 § 4221; 1909 § 5429