SC88594

IN THE MISSOURI SUPREME COURT

ELEANORE THORSON,

Appellant,

vs.

ELIZABETH CONNELLY and
RONALD PALMER and
BETTY PALMER,

Respondents.

Appeal from the Circuit Court of Dent County, Missouri
Forty-Second Judicial Circuit
The Honorable Sanborn N. Ball, Judge

APPELLANT'S SUBSTITUTE BRIEF, STATEMENT AND ARGUMENT

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JURISDICTIONAL STATEMENT

The Appellant, Eleanore Thorson, appeals from a judgment and decision by the Circuit Court of Dent County, Missouri, granting summary judgment in favor of defendants and dismissing the underlying suit for lack of jurisdiction under RSMo. 537.080. Because this appeal did not fall within the exclusive jurisdiction of the Supreme Court of Missouri, jurisdiction of this appeal initially lied with the Missouri Court of Appeals, Southern District. Article V, Section 3, Missouri Constitution (as amended effective 1982). On May 11, 2007, the Court of Appeals, Southern District handed down its decision. Appellant on May 25, 2007, timely filed in the Appellate Court a motion for rehearing and an application to transfer. The Appellate Court denied the motion and application to transfer on June 1, 2007, and appellant then timely filed her Application for Transfer before this Court on June 15, 2007. This Court granted said application on August 21, 2007. This Court therefore has jurisdiction over this appeal pursuant to Article V, Section 3, Missouri Constitution (as amended effective 1982) and the Missouri Rules of Civil Procedure.

STATEMENT OF THE FACTS

On August 25, 2005, Appellant, Eleanore Thorson, filed a verified petition as Plaintiff Ad Litem for the wrongful death of her granddaughter, Heather Thorson. (LF 8) That petition alleged that decedent, Heather Thorson, had died on August 29, 2002, as a result of a gunshot wound fired by Defendant, Elizabeth Connelly. The petition set out that at the time of her death, the decedent was unmarried, without any children, siblings or surviving parents so that no person was available to bring suit under RSMo. 537.080(1)(i). (LF 9) The petition further set out that the decedent was survived by several aunts and two grandmothers, one of which was the Plaintiff Ad Litem, Eleanore Thorson. (LF 9) The petition alleged that Eleanore Thorson had been the decedent's guardian and conservator up to the time of her death and could adequately represent the interests as Plaintiff Ad Litem, of all persons entitled to share in the proceeds, if any, of the case. (LF 9) The lawsuit alleged that Defendant Connelly was negligent in causing the death of the decedent by either firing the gun at decedent; or by pointing the gun at the decedent when it discharged; or furnishing a deadly weapon to decedent; or by failing to use the highest degree of care with the loaded gun; or by negligently grabbing the gun while it was pointed at the decedent causing it to discharge. (LF 10) The lawsuit further alleged that Defendants, Betty Palmer and Ronald Palmer, negligently furnished the handgun to Defendant Connelly or negligently allowed her access to said gun or failed to provide protective steps to prevent her access to said handgun. (LF 12)

The suit sought damages arising from the decedent's death for all the heirs as set out above including Plaintiff Ad Litem, Eleanore Thorson. (LF 10)

On August 26, 2005, summons was issued by the Circuit Clerk. Defendants Palmers were served on September 8, 2005, and Defendant Connelly was served on September 27, 2005. (LF 1) Defendants Palmers filed their answer on October 6, 2005, and Defendant Connelly filed a Motion for More Definite Certain Pleadings on October 12, 2005. (LF 1). On January 10, 2006, Defendants Palmer filed their Motion for Summary Judgment. On January 18, 2006, Defendant Connelly filed her Motion for Summary Judgment. On January 30, 2006, Eleanore Thorson filed a Petition for Appointment of Plaintiff Ad Litem and her consent thereto which reincorporated the allegations made in the original petition and maintained that the allegations contained in original petition constituted her application to proceed as Plaintiff Ad Litem. (LF 44) Plaintiff requested that the court enter its formal order appointing her retroactively as Plaintiff Ad Litem as the petition had been filed, the Court had issued service of summons and service was obtained upon the various defendants. (LF 44) On February 14, 2006, Plaintiff filed her Reply to Defendants' Palmer Motion for Summary Judgment and on February 17, 2006, Plaintiff filed her Reply to Defendant's Connelly Motion for Summary Judgment. (LF 74). Defendants Palmer then filed a Motion in Opposition to Thorson's Petition for Appointment as Plaintiff Ad Litem. (LF 58) The case was then assigned to Honorable Sanborn Ball and the Motion for Summary Judgment was heard on April

26, 2006. The court then entered its order granting the defendants' request for summary judgment on July 5, 2006, and this appeal timely followed. (LF 77-81)

POINTS RELIED ON

I.

THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT PLAINTIFF LACKED STANDING THUS DEPRIVING THE COURT OF JURISDICTION BECAUSE THE ACTION WAS TIMELY COMMENCED WITHIN THREE YEARS OF THE DECEDENT'S DEATH IN THAT ELEANORE THORSON TIMELY INSTITUTED SUIT AS PLAINTIFF AD LITEM AND SOUGHT RECOVERY OF DAMAGES FOR THE BENEFIT OF DECEDENT'S HEIRS AND NOT HERSELF INDIVIDUALLY AND THUS HAD STANDING TO INITIATE THE SUIT

CASES:

Asmus vs. Capital Region Family Practice, 115 S.W.3d 427, (Mo. App. W.D. 2003)

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Mikesic vs. Trinity Lutheran Hospital, et al, 980 S.W.2d 68 (Mo. App. W.D. 1998)

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

STATUTES:

SECTION 537.080, RSMo.

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MISSOURI RULE OF CIVIL PROCEDURE 52.01

II.

THE COURT ERRED BY DISMISSING THE CASE WITH PREJUDICE AND BY NOT ENTERING ITS ORDER FORMALLY APPOINTING A PLAINTIFF AD LITEM RETROACTIVELY TO THE DATE OF FILING, BECAUSE PLAINTIFF'S PETITION AND HER SECOND "PETITION TO BE APPOINTED PLAINTIFF AD LITEM" CONSTITUTED AN APPLICATION UNDER RSMo. 537.080 TO BE APPOINTED IN SUCH CAPACITY

CASES:

Denton vs. Soonattrukal, 149 S.W.3d 517 (Mo. App. S.D. 2004)

Henderson vs. Fields, 68 S.W.3d 455 (Mo. App. W.D. 2001)

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

State of Kansas vs. Briggs, 925 S.W.2d 892 (Mo. App. W.D. 1996)

STATUTES:

Section 537.080 RSMo.

ARGUMENT I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT PLAINTIFF LACKED STANDING THUS DEPRIVING THE COURT OF JURISDICTION BECAUSE THE ACTION WAS TIMELY COMMENCED WITHIN THREE YEARS OF THE DECEDENT'S DEATH IN THAT ELEANORE THORSON TIMELY INSTITUTED SUIT AS PLAINTIFF AD LITEM AND SOUGHT RECOVERY OF DAMAGES FOR THE BENEFIT OF DECEDENT'S HEIRS AND NOT HERSELF INDIVIDUALLY AND THUS HAD STANDING TO INITIATE THE SUIT.

In reviewing a grant of Summary Judgment, the Appellate Court "review[s] the record in the light most favorable to the party against whom judgment was entered and the non-movant is given the benefit of all reasonable inferences from the record." ITT Commercial Fin. Corp. Vs. Mid-Am Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The Circuit Court shall enter Summary Judgment only if "the motion, the response, [and] the 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." Rule 74.04(c)(6). The Appellate Court reviews the grant of Summary Judgment essentially de novo. Id.

Missouri does not recognize a common law cause of action for wrongful death. "Wrongful death is a statutory action." Denton vs. Soonattrukal, 149 S.W.3d 517 (Mo. App. S.D. 2004). The statute itself is silent to the issue of standing and

therefore Missouri courts have been left to decide whether a particular Plaintiff has standing to institute the action. In fact standing is "a question of law that [courts] review de novo. 'Standing is the requisite interest that person must have in a controversy before the court. It is not related to a person's capacity to sue, but is an adversary's interest in the subject of the suit as an antecedent to the right of relief.'" State ex rel. Stewart vs. Civil Service Commission of the City of St. Louis, 120 S.W.3d 279, 284 (Mo. App. E.D. 2003). RSMo. 537.080 provides a framework for determining who can bring a wrongful death action. In the instant case, it is undisputed that no persons exist under RSMo. 537.080(1) or 537.080(2) to bring such an action. Instead 537.080(3) provides 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:... (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.."

In the instant case, Plaintiff within three years of the decedent's death, filed a verified lawsuit as a Plaintiff Ad Litem seeking damages for herself and the

decedent's heirs for the death of her granddaughter in her capacity as a Plaintiff Ad Litem. However, despite the suit being filed and served upon the Defendants, no order was ever signed making such an appointment. After the three years statute had run, a document entitled "Petition for Appointment of Plaintiff Ad Litem" was filed on January 25, 2006, seeking the entry of an order retroactively appointing Ms. Thorson as Plaintiff Ad Litem. In this pleading, Ms. Thorson as Plaintiff Ad Litem, reiterated her belief that the original petition constituted her "application" within the meaning of RSMO. 537.080(3) to be treated as a Plaintiff Ad Litem but now more formally asked for such appointment to take place. No such order was ever signed by the court.

A. Judicial Determination of Standing in Missouri

As stated above, Missouri Courts have wrestled repeatedly with the issue of standing and who has jurisdiction to institute a lawsuit. One line of cases typified by the holding in Mikesic vs. Trinity Lutheran Hospital, et al, 980 S.W.2d 68 (Mo. App. W.D. 1998) holds that a person lacking the legal right to sue but having a beneficial interest in the outcome of the litigation has standing and therefore jurisdiction to institute a lawsuit. In Mikesic vs. Trinity Lutheran Hospital, et al., 980 S.W.2d 68 (Mo. App. W.D. 1998) the court was faced with a situation similar to the instant case. In Mikesic,, an incompetent had originally filed the lawsuit. Two years later, after the expiration of the statute of limitations, however, a Next Friend was finally sought to be appointed for the incompetent person. The Defendants

argued that because no Next Friend had been appointed before the expiration of the statute of limitations, the Plaintiff lacked standing to sue as Next Friend and any attempt to recast the parties and appoint a Next Friend was a nullity and the court lacked jurisdiction to do so. The Appellate Court disagreed and found that the "appointment as Next Friend with standing to sue on his behalf, relates back to the filing of the Petition for Damages on June 28, 1996." Mikesic vs. Trinity, 980 S.W.2d 68, 73. The court further noted that the Defendants suffered no prejudice or surprise as the body of pleadings indicated the nature of the relief being requested and that to hold otherwise would effectively shorten the statutory period in which an incompetent person could file suit. Id. At 73.

Likewise, in Rotella vs. Joseph, 615 S.W.2d 616 (Mo. App. S.D. 1981) the court dealt with a wrongful death claim filed by an administratrix of an estate on behalf of a two-month old girl. The statute in effect at that time vested the right to initiate the wrongful death action in the girl's individual capacity only. The Defendants alleged that the administratrix was a person who lacked standing. The Defendants argued that the administratrix had no beneficial interest in the litigation and the action was a nullity because only the child could pursue the claim. The Appellate Court disagreed and instead looked to the body of the petition and determined that the relief being requested was actually for the benefit of the minor and therefore an action had been commenced on her behalf. The court citing, Forehand vs. Hall, 355 S.W.2d 616 (Mo. 1962) noted as follows:

> "The rule in this state is that where a suit for wrongful death is instituted within the one-year period of limitation by one who has no legal right to maintain the suit in the

> capacity in which suit is filed but who has a beneficial interest in the subject matter of the action, which interest plaintiff alleges by intendment, or is filed by some, but not all, of the persons entitled to bring such action, the substitution by amendment of the plaintiff suing in the proper capacity, or the joinder of the necessary additional parties plaintiff, after the lapse of the one-year period, will relate back to the time of filing the original action and the intervening running of the statute of limitations will not bar the maintenance of the suit by the substituted plaintiff; but where the original action is improperly filed by a stranger to the action who has no legal or beneficial interest in its subject matter, the substitution of a proper party plaintiff after the statute of limitations has run will not relate back, but will be treated as a new action, which is barred by the statue of limitations." Rotella, supra, 616 S.W.2d at 622. (cites omitted)

In Asmus vs. Capital Region Family Practice, 115 S.W.3d 427 (Mo. App. W.D. 2003) a Plaintiff who had filed bankruptcy instituted a malpractice action in his name alone. The defense filed a Motion to Dismiss claiming the Plaintiff lacked standing to bring the litigation because such right was vested in the bankruptcy Trustee and the statue of limitations had run.

The Appellate Court then discussed the issue of standing. The Appellate Court noted "it is clear from an unbroken line of Missouri decisions 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 of the original action and the action will not be barred by the statute of limitations. Asmus, supra, 115 S.W.3d 427, 435 cites omitted. Thus there are two ways of establishing standing either through a purely legal interest, or alternatively, if the Plaintiff has a beneficial interest. Id. at 435.

"[I]f the original plaintiff has a beneficial interest, though not necessarily a legal interest, then substitution of a proper party will relate back so as to avoid the statute of limitations. A beneficial interest is a 'right or expectancy in something as opposed to

legal title to that thing'. Asmus, supra, at 435. The plaintiff has a beneficial interest in this litigation and her filing as plaintiff ad litem commenced the action within the three years of the decedent's death.

A second line of cases typified by the Southern District's opinion in Thorson vs. Connelly, Henderson vs. Fields, 68 S.W.3d 455 (Mo. App. W.D. 2001) and State ex rel Jewish Hospital of St. Louis vs. Buder, 540 S.W.2d 100 (Mo. App. 1976), holds that the beneficial interest of the person is irrelevant to standing and standing only exists when that person had a legal right to institute the lawsuit. These decisions seem to create an entirely different standard for determining standing in wrongful death cases. See, Thorson vs. Connelly, et al., __ S.W.3d __, Mo. App. S.D,. 2007 WL 1378089, page 6. As such the Thorson decision by adopting the doctrine expressed in Henderson vs. Fields, supra, and Buder, supra, essentially created two different methods for determining standing: one for wrongful death actions and another for all other cases. In Henderson, the grandparents erroneously filed suit in their individual capacity. The case went to trial based upon such pleadings and a judgment entered. After trial, the defense filed a motion notwithstanding the judgment stating that the grandparents were not entitled to file such litigation in their individual capacity and the suit was therefore a nullity. The Plaintiffs then sought leave to file amended pleadings wherein they were to bring suit as Plaintiffs Ad Litem and not in their individual capacity. The court held that because the Plaintiffs had filed suit individually and not as Plaintiffs Ad Litem, then they were separate legal entities and their attempt to recharacterize their pleadings after entry of judgment was improper.

B. Inconsistent reasoning and an unjust result

These two lines of cases, which decide the same issue of standing end in totally different results. Under the opinion expressed by the Southern District in Thorson , a person only has jurisdiction to file a third tier wrongful death once they have been appointed "Plaintiff Ad Litem". As stated in the Buder case, this is jurisdictional and the "breath of life cannot, by judicial hands be instilled into a petition devoid of life." Buder, supra, at 107. If that holding is correct then the appointment of a Plaintiff Ad Litem is a condition precedent for a person to have jurisdiction to even file a third tier wrongful death lawsuit. If that holding is correct and the appointment of a plaintiff ad litem does not relate back, then only those wrongful death petitions filed after the appointment of a plaintiff ad litem would be jurisdictionally sound. Under the rationale expressed in both Thorson and Buder, a wrongful death petition filed simultaneously with an application for appointment of plaintiff ad litem would be jurisdictionally void because no plaintiff ad litem existed when the lawsuit was filed. Following that rationale, the subsequent appointment of a plaintiff ad litem can not relate back to "breathe life" into a jurisdictionally dead action. According to these cases, it is only the actual appointment of a Plaintiff Ad Litem which confers jurisdiction. An application for a Plaintiff Ad Litem confers no jurisdiction because that person was not the Plaintiff Ad Litem at the time the filing was made. Under this premise and line of reasoning, it is only the existence of the Plaintiff Ad Litem that confers any jurisdiction whatsoever. If this is in fact the case, only those wrongful death actions filed **after** the appointment of a Plaintiff Ad Litem would be jurisdictionally sound. Those wrongful death

actions filed simultaneously with or alternatively before the actual appointment of a Plaintiff Ad Litem would be without jurisdiction because those individuals lacked the legal ability to even institute such an action. Therefore, an order appointing a Plaintiff Ad Litem in such a case would be without jurisdiction because the court would appoint a Plaintiff Ad Litem in cases that lacked jurisdiction and was "jurisdictionally dead".

If the rationale set out in Thorson is correct, it raises a whole range of issues involving the application for Plaintiff Ad Litem without the presence of a underlying lawsuit and in the absence of a case in controversy. Further, this would also conflict with the provisions of Civil Rule 52.01 which requires civil actions to be prosecuted in the name of the real parties in interest. Mo. Civil R. 52.01. Additionally, following the holding in Thorson, Henderson and Buder raises a whole list of issues including: (1) who would be served with the application for the appointment of a plaintiff ad litem; (2) what would constitute the proper application and what actual filing should be made; and (3) should the Circuit Court treat the application as a separate action from the wrongful death petition which will follow it, etc.

It may be tempting to believe that under Thorson the mere application of a plaintiff ad litem and not just the actual appointment confers standing and therefore jurisdiction. That however runs contrary to the very essence of these cases because Thorson, Henderson and Buder all hold that standing and jurisdiction is conditioned only upon the actual appointment of a plaintiff ad litem.

Further, following this rationale would also effectively shorten the statute of

limitations for third tier wrongful death claimants by imposing the additional requirement that a judge order the appointment within the three year statute of limitations. The wrongful death statute provides that the court can make an inquiry into the suitability of the Plaintiff Ad Litem to represent the interests of the heirs. If for whatever reason, the court is unavailable, out of town, or on vacation, under the doctrine expressed in Buder and its progeny, jurisdiction still would not exist because prior to the three year anniversary, no Plaintiff Ad Litem was actually appointed. If the appointment of a Plaintiff Ad Litem is simply perfunctory, then it constitutes an unreasonable limitation on a person's ability to file a lawsuit for the wrongful death of their loved one.

C. A Reasonable Solution to Standing

In the final analysis, it seems that the narrow interpretation of standing as set out in Thorson, Henderson and Buder is akin to deciding how many angels can dance on the head of a pin. There is no compelling reason why standing should be treated differently for wrongful death actions compared to all other civil actions in Missouri. The rational and consistent harmonization of the standing issue should be adoption of the doctrine expressed in Mikesic, Rotella, and Asmus. This would lead to a clear understanding that only one doctrine pertaining to standing exists. There is simply no reason to continue the dichotomy between standing in wrongful death cases and standing as it applies to all other type of cases.

However, even if this Court chooses to treat standing in wrongful death cases differently than in all other civil cases , those cases are distinguishable from the facts at hand. In the instant case, the pleadings demonstrate that Plaintiff Thorson is proceeding only as a

Plaintiff Ad Litem and not in her individual capacity. This case is factually dissimilar from the Henderson matter in that the instant action was properly plead. Plaintiff Thorson is seeking recovery for the wrongful death of her granddaughter as a Plaintiff Ad Litem and not solely in her individual capacity. Likewise, the cases cited by the Henderson decision are not applicable because they all involve Plaintiffs who filed suit in their individual capacity and then sought to amend those pleadings to bring suit as a Plaintiff Ad Litem. In each of those cases, the Plaintiff sought leave of court, after the statute ran, under Civil Rule 55.33 to recast their pleadings as Plaintiffs Ad Litem. In Henderson and its predecessors the courts engaged in a lengthy discussion to determine in which capacity plaintiffs had filed the litigation, either individually or as plaintiffs ad litem. Presumably, those courts had some reason to distinguish between those persons suing in their individual capacity or in a Plaintiff Ad Litem capacity. If both capacities were to be treated the same, it is unreasonable to conclude that the Appellate Courts would devote so much time to discussing the capacity in which the particular Plaintiff at issue had filed their lawsuit. Henderson and the other related cases simply stand for the proposition that the role as a surviving claimant and the role of Plaintiff Ad Litem are legally distinct and filing a petition in an individual capacity is not the same as filing as a Plaintiff Ad Litem.

In the instant case, Plaintiff's petition sought relief for the entire class of the decedent's heirs as a Plaintiff Ad Litem. Plaintiff Thorson did apply to be Plaintiff Ad Litem. First, her petition itself by the terms of the relief requested seeks her appointment and second, by a more formal pleading, filed on or about January 25, 2006, wherein Plaintiff

reinstates her request for such appointment. Nowhere in the Wrongful Death Statute or in the Missouri Rules of Civil Procedure are the requirements for this "Application" set forth. In Missouri, a pleading is not judged by its title but by its substance and its content. State of Kansas vs. Briggs, 925 S.W.2d 892, (Mo. App. W.D. 1996)

"Generally, the body of the pleading and not the caption determines the parties necessary to prosecute the action." Rotella, supra, at 621. In Denton vs. Soonattrukal, 149 S.W.3d 517, (Mo. App. S.D. 2004) the court discussed how the wrongful death statute was to be construed by Missouri courts:

"Recently, our Supreme Court declared that the 'construction of statutes is not to be hyper-technical but instead is to be reasonable and logical...It is a fundamental consideration that the manifest purpose of the wrongful death statute is to provide compensation for the loss of the companionship, comfort, instruction, guidance and counsel etc., to statutorily designated relatives.'" Denton, supra at 524. The court held that a technical reading of the statute would "tend to diminish by mere procedural hyper-technicality two additional objectives behind the wrongful death statutes, that is 'to ensure that tortfeasors pay for the consequence of their actions, and generally to deter harmful conduct which might lead to death." Id. In the instant case, both the body of the petition and the caption themselves indicate that Plaintiff is seeking to proceed as Plaintiff Ad Litem and not in any individual capacity. The court should allow Plaintiff to be appointed as Plaintiff Ad Litem and that appointment should be retroactive to the date of filing. Any other interpretation would simply be a hyper-technical, draconian, and erroneous interpretation of the wrongful death

act which would act to prevent the act's manifest purpose from being fulfilled. Based upon the holdings in Asmus, Rotella, and Mikesic, Plaintiff's action was timely commenced within the three years of the decedent's death and any order appointing Plaintiff as Plaintiff Ad Litem should be deemed retroactive to the date of filing.

ARGUMENT II

THE COURT ERRED BY DISMISSING THE CASE WITH PREJUDICE AND BY NOT ENTERING ITS ORDER FORMALLY APPOINTING A PLAINTIFF AD LITEM RETROACTIVE TO THE DATE OF FILING, BECAUSE PLAINTIFF'S PETITION AND HER SECOND "PETITION TO BE APPOINTED PLAINTIFF AD LITEM" CONSTITUTED AN APPLICATION UNDER 537.080 RSMo. TO BE APPOINTED IN SUCH CAPACITY.

As stated in the above argument, 537.080(1)(3) RSMo. allows prosecution of a wrongful death action by a Plaintiff Ad Litem. A review of Ms. Thorson's petition demonstrates that she filed suit and sought recovery of any damages as a Plaintiff Ad Litem for the benefit of the decedent's heirs set out in the petition. RSMo. 537.080(3) states that "such a person shall be appointed upon application of some person entitlted to share in the proceeds of such action." In Missouri, a pleading is judged not by its title but by its substance and its content. State of Kansas vs. Briggs, 925 S.W.2d 892 (Mo. App. W.D. 1996) Likewise, in Rotella, the court stated that "[g]enerally, the body of the pleadings and not the caption determines the parties necessary to prosecute the action." Rotella, supra at 621. It should be noted, that Section 537.080 RSMo. only requires an "application" of some person entitled to share to require the court to appoint a Plaintiff Ad Litem. It does not require a separate petition in order to trigger such appointment. In this case, the

Plaintiff's petition, signed by her as Plaintiff Ad Litem, seeks recovery for the "[damages] Plaintiff and others entitled to compensation under RSMo. 537.080 have sustained." (L.F. 10, Paragraph 9 of Plaintiff's Petition). In the prayer itself, damages are sought for not simply Ms. Thorson but the entire class of beneficiaries by use of the word "their". Given the plain reading of Plaintiff's petition, this constitutes an "application" under the requirements of RSMo. 537.080 which necessitates the appointment of a Plaintiff Ad Litem.

Once the issued was raised by the defendants' motion for summary judgment, on January 25, 2006, the Plaintiff filed a second more formal request to be formally appointed as Plaintiff Ad Litem. This pleading was entitled "Petition for Appointment of Plaintiff Ad Litem" and by its terms incorporated the language of the original petition, reiterated the request and asked for such appointment to be made. (L.F. 43). Nowhere, in 537.080 RSMo. does the statute require a Petition for the Appointment of a Plaintiff Ad Litem to be filed. The only statutory requirement required to trigger the appointment of a Plaintiff Ad Litem is an application by a person who is entitled to compensation. Under RSMo. 537.080, plaintiff's petition should have triggered an appointment of a Plaintiff Ad Litem. This, however, was not done as presumably the trial court decided the appointment was unnecessary given it was going to sustain the Defendants' Motion for Summary Judgment. As stated by the court in Denton vs. Soonattrukal, 149 S.W.3d 517 (Mo. App. S.D.

2004) , “we discern the thread that runs through the foregoing opinions is that the wrongful death statute should be interpreted in a light which broadly grants the greatest number of beneficiaries as limited by the statutorily designated classes the right to seek compensation for losses suffered as a result of the death of a relative.” As stated in Mikesic, the appointment of a next friend relates back to the filing of a petition and the same reasoning should apply to the retroactive appointment of a Plaintiff Ad Litem. This Court has found that the manifest purpose of the wrongful death statute is to provide compensation for the loss of a family member. Denton, supra at, 524. If the appointment of a Plaintiff Ad Litem is unable to retroactively relate back to the filing of the petition, the court effectively shortens the statute of limitations for those persons who are suing under the third class for the wrongful death of their relative. For instance, a person under class one or class two has a full three years to file suit and a lawsuit filed one minute before the Circuit Court’s office closes and on the third anniversary of death would be within the statute. However, if a person under class three attempted to file such a petition at the same time and place, their claim would be barred because no judge signed an order appointing a Plaintiff Ad Litem within the three years. One can imagine another scenario where a lawsuit is filed within the three years but the judge to whom the case is assigned is sick, absent or in another county, or as in the instant case, has a conflict of interest because he was the same judge who heard an underlying criminal case. As such, he is unable to sign the order appointing the Plaintiff Ad Litem within

the three years and once again despite filing the petition and the application within the three year statute, the case would be barred by the statute of limitations. All of these inconsistent and unjust results could be avoided if the court adopts the reasoning set forth in the Asmus, Rotella and Mikesic cases, which is to have the order appointing the Plaintiff Ad Litem relate back to the filing of the petition. Although it is difficult to reconcile the disparate holdings between the Rotella line of cases and the Henderson line of cases, it is necessary to point out that Henderson and its predecessors are distinguishable from the instant case. In the Henderson decision and its predecessors, the Plaintiffs initially filed suit in their individual capacity when they should have filed as Plaintiff Ad Litem. In fact, the Henderson case goes into great length to discuss the capacity in which the grandparents had filed either as Plaintiff Ad Litem or in their own individual capacity. Presumably the court had reasons for discussing these two different capacities. If in the end, it made no difference as to which capacity the Plaintiff filed the case either individually or as a Plaintiff Ad Litem, it would have been a waste of time for the court to engage in that analysis. In this case, it is clear from the petition and even the Defendants own motion of uncontroverted facts, that Ms. Thorson is preceding as a "Plaintiff Ad Litem" and not on her own behalf. Henderson and the cases cited by it simply hold that a Plaintiff cannot recast their pleadings under 55.33 to change from an individual to a Plaintiff Ad Litem. That is not the request in this case, as the petition was properly filed by Ms. Thorson as a Plaintiff Ad Litem. The only request, which

was denied, is that Plaintiff be formally appointed as Plaintiff Ad Litem retroactive to the date of filing of the petition.

CONCLUSION

For the foregoing reasons, the decision of the Circuit Court dismissing the action should be reversed. That the matter be remanded to the Circuit Court of Dent County, Missouri for appointment of a Plaintiff Ad Litem and for such other and further relief as the Court deems just and proper.

Respectfully Submitted,

By:_____

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06 of this Court and contains 5,978 words, excluding the cover, and this certification as determined by WordPerfect 12 software; and

2. That the labeled disk, simultaneously filed with the hard copies of this brief, has been scanned for viruses and is virus-free; and

3. That two and correct copies of the attached brief, and a labeled disk containing a copy of this brief, were mailed, postage prepaid, this 20th day of September, 2007, to:

Mr. Mark Turley Attorney at Law P.O. Box 860 Rolla, Mo 65402	And	Mr. Dan L. Birdsong Attorney at Law P.O. Box 248 Rolla, Mo 65402

BY:
Stephen K. Paulus

APPENDIX

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