IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel. ATTORNEY GENERAL CHRIS KOSTER and THE MISSOURI PETROLEUM STORAGE TANK INSURANCE FUND BOARD OF DIRECTORS,	)
Plaintiffs-Respondents,	) Circuit Court No. 1322- CC00929
v.	) Court of Appeals No. ED102505
CONOCOPHILLIPS COMPANY and PHILLIPS 66 COMPANY,	) Supreme Court No. SC95444
Defendants-Respondents,	) Court of Appeals, Eastern District
and	) Circuit Court for the City of St. Louis
CORY WAGONER,	)
Proposed Intervenor-Appellant.	)

SUBSTITUTE BRIEF OF DEFENDANTS-RESPONDENTS CONOCOPHILLIPS COMPANY AND PHILLIPS 66 COMPANY

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JURISDICTIONAL STATEMENT

This Court cannot exercise its jurisdiction over the merits of this appeal because Wagoner lacks standing. "Standing is a necessary component of a justiciable case that must be shown to be present prior to adjudication on the merits." Schweich v. Nixon, 408 S.W.3d 769, 774 (Mo. 2013). Wagoner's standing is a prerequisite to the Court's authority to substantively address this appeal and must be established before considering any other issue. Mannering Condo. Ass'n v. Schulte, 462 S.W.3d 830, 833 (Mo. Ct. App. 2015).

Wagoner lacks standing to appeal because he was not a party to the action below and has not been aggrieved by the judgment from which he attempts to appeal. Wagoner claims to appeal from "the order and judgment…entered November 13, 2014…denying a motion to intervene as of a matter of right [("Intervention Order")]." App. Br., p. 1. Wagoner did not appeal from the Intervention Order; rather, he appealed from the Final Judgment dated December 11, 2014. L.F. 587; see also id., 591 (attaching Final Judgment). Because he was not a party to the action below, Wagoner cannot appeal the Final Judgment. To avoid this, Wagoner attempts to recast the Intervention Order as an after-the-fact "judgment" entered on May 7, 2015. See Supp. Resp. to Order to Show Cause, Ex. A. That "judgment" is void because the trial court lost jurisdiction four months earlier on January 10, 2015; a void judgment cannot be appealed on the merits.

Additionally, Wagoner failed to appeal the Intervention Order and, instead, appealed only from the Final Judgment. L.F. 587, 591. The Notice of Appeal must specify the order appealed from; yet Wagoner only identified the Final Judgment as the

subject of his appeal. This Court is thus precluded from reviewing matters outside of the Final Judgment, such as the Intervention Order.

Wagoner cannot substantively appeal the Intervention Order and he lacks standing to appeal the Final Judgment. As a result, the appeal should be dismissed.

STATEMENT OF FACTS

The Missouri Petroleum Storage Tank Insurance Fund ("Fund") reimburses voluntary participants for certain eligible costs incurred in remediating leaking underground storage tanks ("UST"). See 10 C.S.R. § 100-4.010(1); see also Mo. Rev. Stat. § 319.133. The Fund acts as an insurance policy; it is funded by transport load fees (based upon the amount of petroleum product shipped in the state) and participation fees (akin to a premium paid to obtain coverage). If a covered leak occurs, and if certain prerequisites are satisfied, Fund participants may seek reimbursement of eligible remediation costs from the Fund. See Mo. Rev. Stat. § 319.138. Phillips 66 remediated a number of UST sites in Missouri; as a result it applied for reimbursements and was paid less than $3 million.[1] L.F. 473.[2]

[1] This represents less than half of its total remediation expenses incurred by Phillips 66 in Missouri since 2002. Since 2003, Phillips 66 has paid nearly $55 million in transport load fees into the Fund. L.F. 473.

[2] The Fund reimburses only those remediation expenses expressly provided for under applicable statutes and rules. See Mo. Rev. Stat. § 319.129. No statute or rule disqualifies

In mid-2012 the State of Missouri, including representatives of the Missouri Attorney General's Office, Department of Natural Resources, and the Fund (collectively, the "State"), sought to recover the reimbursements paid to Phillips 66. The State demanded repayment, claiming the funds were fraudulently obtained, and negotiations to resolve the matter without need for litigation began. L.F. 461. Before the parties could reach agreement, Wagoner – a private citizen – sued Phillips 66. Wagoner, purportedly on behalf of the Fund,[3] made the same allegations and sought the same relief as the State – return of the reimbursements to the Fund. L.F. 93.[4]

Fund participants for obtaining reimbursement for any other, *i.e.*, non-eligible, remediation expenses from other sources, such as private insurance.

[3] The Fund has not authorized Wagoner to bring claims on its behalf; Wagoner's counsel does not represent the Fund nor is the Fund a named party in Wagoner's action. See L.F. 134-158.

[4] Wagoner's suit ("Wagoner I") was removed to federal court, L.F. 302. Wagoner voluntarily dismissed the suit after his motion for remand was denied and just as the District Court was preparing to take up Phillips 66's motion to dismiss. Wagoner filed a second lawsuit in Greene County ("Wagoner II") five months after the State filed the action below. L.F. 277. The order denying remand found the removal was timely and proper; Wagoner failed to appeal this order and cannot collaterally attack it here. See, e.g., Application for Transfer, p. 3 (characterizing the federal court's actions as "improper").

Wagoner is a stranger to the reimbursement transactions between the Fund and Phillips 66. See L.F. 256 (see, e.g., Interrogatory Response 9); L.F. 267 (Request Response 6). Wagoner has suffered no injury in fact. See L.F. 144; L.F. 257 (Interrogatory Response 17); S.L.F. 53(Wagoner testifying he does not know whether he suffered financial loss). Wagoner has not alleged, and cannot allege, that he suffered a petroleum leak, incurred remediation costs, or requested reimbursement from the Fund. See L.F. 134-158. Wagoner speculates that the Fund's ability to provide him coverage has been "*potentially* jeopardize[ed]." See L.F. 144 (¶ 39) (emphasis added).

Wagoner has not alleged, and cannot allege, that the Fund is insolvent, nearing insolvency, or otherwise unable to reimburse Wagoner should he someday make a claim. L.F. 144 (¶ 39). The United States Environmental Protection Agency found that the Fund is financially sound. L.F. 270. The Fund's "end of year balances are consistently over 300% of its annual spending." L.F. 271. "There are no unpaid claims due to lack of funds." Id. "Fund financial resources appear stable and more than adequate to address the trending work load [and] an increase in work load." Id. at L.F. 275. The Fund's Executive Director averred that, even if Wagoner filed a claim in the future, the "Fund's ability to pay that claim will not be dependent upon a recovery from [Phillips 66] as the Fund's board of trustees, as a matter of policy, ensures there is always enough money in the Fund to cover all potential insured claims at any point.... In its twenty-five year history, the Fund has never denied or delayed payment of an insured claim due to a lack of available cash." L.F. 400–403.

The State, *ex relatione* Attorney General Chris Koster and the Fund's Board of Trustees, filed suit against Phillips 66 on the Fund's behalf – resulting in the action below. L.F. 11–40. Wagoner's motion to intervene in the State's case was denied in a 12-page Memorandum and Order by Judge Dierker, dated Nov. 13, 2014 ("Intervention Order"). L.F. 415-426. The trial court held, among other things, that Wagoner: (i) lacked the requisite interest in the subject matter to warrant intervention, L.F. p 420; (ii) lacked a private right of action, L.F. 420; (iii) lacked taxpayer standing, L.F. 424; and (iv) as a purported beneficiary was precluded from bringing a suit to recover Fund assets, L.F. 422.[5] Id.

The State and Phillips 66 settled the action below which included a significant monetary payment to the State in exchange for a complete release of claims against Phillips 66. L.F. 465-471. The Settlement Agreement was approved by the trial court and the action was dismissed with prejudice by Final Order and Judgment, dated December 11, 2014 ("Final Judgment"). L.F. 499-500.

[5] The Intervention Order is consistent with the rulings of the District Court in denying Wagoner's motion for remand. Compare: L.F. 420 with L.F. 312 (Wagoner lacks a private cause of action); L.F. 422 with L.F. 311 (Wagoner cannot assert a claim on behalf of the Fund against a third-party); L.F. 422 with L.F. 312 (because the Fund pays the reimbursement claims, the "Fund is the party actually entitled to recover any overpayment of claims").

Based upon the Settlement below, the Wagoner II court entered summary judgment dismissing all claims against Phillips 66 because: "(1) the Fund has been compensated for the allegedly improper reimbursements…; and (2) the Fund broadly released all claims against Phillips 66 relating to the subject matter of the Fund case, which encompasses the claims in this litigation." See Respondent Phillips 66's Supplemental Suggestions in Support of Motion to Dismiss Appeal, filed May 28, 2015; see also Id., Ex. A (further noting that Wagoner's claims were barred because "Wagoner asserts claims only on the Fund's behalf (not his own behalf) and the Fund released all such claims.").

No party filed an after-trial motion in the action below, causing the trial court to lose jurisdiction – and the Intervention Order to become final – on January 10, 2015. See Mo. R. Civ. P. 75.01, 81.05(a)(1). On January 15, 2015, Wagoner filed the Notice of Appeal, which attached, and identified issues to be raised on appeal related to, solely the Final Judgment. L.F. 587.

The Missouri Court of Appeals entered an Order to Show Cause on April 28, 2015, stating that Wagoner might not have standing to appeal from the Final Judgment because he was not a party to the underlying case. The Order to Show Cause further stated that, while the denial of a motion to intervene is appealable, the Intervention Order was not denominated a "judgment" and it was "unclear" whether such a denomination was necessary subsequent to entry of the final judgment. Id. The trial court, on Wagoner's motion, denominated the Intervention Order a "judgment" on May 7, 2015. See Appellant's Supplemental Response to Order to Show Cause (filed May 11, 2015).

Phillips 66 filed a Response to Order to Show Cause and Motion to Dismiss Appeal dated May 12, 2015, arguing that Wagoner lacked standing to appeal, the Intervention Order was no longer appealable, and the trial court lacked jurisdiction to denominate the Intervention Order a judgment four months after the court lost jurisdiction over the matter. The Eastern District dismissed the appeal on November 3, 2015 because Wagoner lacked standing to appeal the Final Judgment and failed to properly appeal the Intervention Order. See State ex rel. Koster v. ConocoPhillips Co., ED 102505, 2015 WL 6688212 (Mo. Ct. App. 2015). Wagoner filed motions for rehearing and for transfer, which were denied by the Court of Appeals on December 14, 2015. This Court accepted transfer on January 26, 2016.

ARGUMENT

I. THIS APPEAL IS NOT JUSTICIABLE AND SHOULD BE DISMISSED

A. Wagoner Lacks Standing to Appeal.

Wagoner lacks standing because he was not a party to the action below and was not aggrieved by the judgment from which he attempts to appeal. See In re C.A.C., 282 S.W.3d 862, 864 (Mo. App. W.D. 2009); Mo. Rev. Stat. § 512.020.[6] Wagoner must have

[6] See also Underwood v. St. Joseph Bd. of Zoning Adjustment, 368 S.W.3d 204, 207 (Mo. App. W.D. 2012) (standing is a "precursor to the right to appeal" and granting motion to dismiss); F.W. Disposal S., LLC v. St. Louis Cnty. Council, 266 S.W.3d 334, 338 (Mo. App. E.D. 2008) ("[w]ithout standing, a court has no power to grant relief."); Singer v. Siedband, 138 S.W.3d 750, 752 (Mo. App. E.D. 2004) (same).

either been named as a party in the case below or been later added as a party by an appropriate trial court order. See Wieners v. Doe, 165 S.W.3d 520, 522 (Mo. App. S.D. 2005). Wagoner was neither named as a party nor subsequently added; his motion to intervene was denied. [Docket, L.F. 1-9; Petition, 11-40; Intervention Order, 415-426]. "Where a movant's motion to intervene is denied, the movant lacks standing to appeal from any subsequent order or judgment in the proceeding." Eckhoff v. Eckhoff, 242 S.W.3d 466, 468-69 (Mo. App. W.D. 2008); see also F.W. Disposal, 266 S.W.3d at 337-38 (finding court lacked jurisdiction over appeal where appellant was denied intervention and, therefore, lacked standing to appeal). This Court should thus dismiss the appeal on this basis alone. See Ring v. Metro. St. Louis Sewer Dist., 41 S.W.3d 487, 491 (Mo. App. E.D. 2000), cert denied, 534 U.S. 893 (2001) (granting motion to dismiss appeal for lack of standing where motion to intervene was denied).

Wagoner also lacks standing because he has not been aggrieved. As this Court has noted, "A party is aggrieved by a judgment when the judgment appealed will operate directly and prejudicially on the party's personal or property rights or interests with immediate effect." Tupper v. City of St. Louis, 468 S.W.3d 360, 375 (Mo. 2015). "The right to appeal is purely statutory and, where a statute does not give a right to appeal, no right exists." Id; see also State ex rel. Parsons v. Bd. of Police Comm'rs of Kansas City, 245 S.W.3d 851, 854 (Mo. App. W.D. 2007) (judgment must "operate directly and prejudicially on the party's personal or property rights or interests and the effect must be immediate, not merely a possible remote consequence."). Wagoner has failed to identify a direct, actual, or even threatened injury. He has suffered no injury by Phillips 66's

alleged conduct or by entry of the Final Judgment. The mere possibility that Wagoner may suffer some unidentified impact at "some unspecified point in the future is insufficient to confer standing upon [him] in the present case." Stockman v. Safe-Skin, Corp., 36 S.W.3d 447, 449 (Mo. App. E.D. 2001); see also Rocking H. Trucking, LLC v. H.B.I.C., LLC, 463 S.W.3d 1, 10-11 (Mo. App. W.D. 2015) (recognizing that, to have standing to appeal, the judgment appealed must have an immediate effect that operates "directly and prejudicially" on the party's personal or property rights or interests, "not merely a possible remote consequence"). Likewise, being "interested in the question litigated," or possibly being a party in interest to some other suit due to the determination of the question litigated, is also insufficient. Stockman, 36 S.W. 3d at 449. As recognized by the trial court in denying intervention, Wagoner has failed to identify any interest that could or would be impacted by the Final Judgment:

> the Court finds that the movant, *Wagoner, does not have an interest in the subject matter of this lawsuit*. The Court further finds that the *disposition of this action will not impede Wagoner's ability to protect his own interest.* Wagoner's interest is his ability to make a potential future claim against the [Missouri] Fund. As noted above, *Wagoner has no pending claim against the Fund, has not been denied a claim based on a lack of funds or for any other reason, and there is no evidence to suggest that the PST Fund will be unable to pay claims against the Fund in the future*. To the contrary, Phillips 66 has presented evidence from the EPA Final Annual Soundness Snapshot and Assessment that the PST Fund is sound ... the Court finds that

> *Wagoner's interests are, on this record, adequately represented by the existing parties*.... Wagoner and the Attorney General seek the same outcome – reimbursement of Fund monies, and *there is no evidence that the Attorney General and the trustees are not able and willing to pursue the claim in this case*.

[Intervention Order, L.F. 415-426, pp. 10-11 (emphasis added)]. On appeal, Wagoner appears to claim only that he could have recovered more funds on behalf of the State than the State did on its own. The record does not support this supposition. [Intervention Order, L.F. 415-426]. Regardless, the record demonstrates that Wagoner would not be impacted by any recovery, irrespective of amount. [Phillips 66's Supp. to Obj. to Mot. to Intervene, L.F. 406-414, p. 2-3, n.3 (quoting transcript in which Wagoner admits he would not be directly impacted by the Fund's ability – or inability – to recover from Phillips 66)]. Thus, Wagoner's purported interest is too remote and speculative to be sufficiently "aggrieved" by the Final Judgment for standing purposes.[7]

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[7] Additionally, because Wagoner had no right to intervene, he was not aggrieved by the Final Order dismissing the underlying action. See Allen v. Bryers, WD 77905, 2015 WL 5439944, at *5 n.7 (Mo. App. W.D. Sept. 15, 2015) (recognizing proposed intervenor lacked standing to appeal order entered subsequent to denial of intervention); Lewis v. Barnes Hosp., 685 S.W.2d 591, 594 (Mo. App. E.D. 1985) (finding appellant was not an aggrieved party, and therefore lacked standing to appeal, where his motion to intervene was denied); compare In re C.A.C., 282 S.W.3d at 864 (finding appellants lacked

Because Wagoner lacks standing the appeal should be dismissed with prejudice. "Regardless of the merits of appellants' claims, without standing, the court cannot entertain the action." Underwood, 368 S.W.3d at 212-13.

B. Wagoner Twice Failed to Timely Appeal the Intervention Order.

Wagoner had two opportunities to appeal the Intervention Order, but failed both times. First, Wagoner could have immediately appealed the order upon its entry – but he did not. Second, Wagoner could have appealed the Intervention Order once the Final Judgment was entered. Failure to appeal denial of intervention before final judgment does not prejudice an intervenor's ability to seek review of the denial after final disposition of the case. See Mo. Rev. Stat. § 512.020(5); Eckhoff, 242 S.W.3d at 469 ("failure to appeal the order denying their motion to intervene before final judgment does not prohibit them from appealing the denial of their motion to intervene after final judgment in this case"). Wagoner neglected, however, to mention let alone include the Intervention Order in the Notice of Appeal.

The Notice of Appeal must specify the order appealed from. See Mo. R. Civ. P. 81.08. Because Wagoner only specified the Final Judgment, the Court is precluded from reviewing matters outside of the Final Judgment, such as the Intervention Order. Burton v. Klaus, 455 S.W.3d 9, 12-13 (Mo. Ct. App. 2014) ((citing Schrader v. QuikTrip Corp., 292 S.W.3d 453, 456 (Mo. Ct. App. 2009) (where notice of appeal only referred to entry

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standing to appeal where, even though they were permitted to intervene, they had not identified rights that were affected by the lower court judgment).

of summary judgment and not subsequent dismissal of another claim, court of appeals was limited to a review of the entry of summary judgment)).[8] Accordingly, Wagoner cannot attack the Intervention Order via this appeal.

Wagoner's Response to the Order to Show Cause below does not demonstrate that his failure to include the Intervention Order in the Notice of Appeal was not due to culpable negligence. Indeed, Wagoner recognized in his Motion to Set Aside the "Order and Final Judgment" entered by the trial court [L.F. 501-545] that "Denial of a motion to intervene is an appealable order." Id. at ¶ 10. Rather than appeal the Intervention Order, Wagoner sat on his rights to the prejudice of the parties – who proceeded with (and concluded) negotiations to resolve the claims between them. Wagoner should not be permitted to belatedly jeopardize the finality of the parties' settlement via this appeal. See F.W. Disposal, 266 S.W.3d at 340 ("Generally, Missouri courts will not allow intervention at a late stage if the parties will be prejudiced by the applicants' intervention;" "There is a considerable reluctance on the part of the courts to allow

[8] See also Erickson v. Pulitzer Pub. Co., 797 S.W.2d 853, 858 (Mo. Ct. App. 1990) (court of appeals was confined to reviewing judgment referred to in notice of appeal); Sutton v. Schwartz, 808 S.W.2d 15, 23 (Mo. App. E.D.1991) (court of appeals lacked jurisdiction to consider issue of attorney fees when appellant's notice of appeal said she was appealing from a different order that did not address attorney fees); Maskill v. Cummins, 397 S.W.3d 27, 32 (Mo. Ct. App. 2013) ("The appellate court is confined to review the decision identified in the notice of appeal").

intervention after the action has gone to judgment and a strong showing will be required of the applicant").

Wagoner is time barred from filing a separate notice of appeal of the Intervention Order. The Intervention Order became final on January 10, 2015 because no party filed an after-trial motion. See Mo. R. Civ. P. 81.05(a)(1). Thus, any notice of appeal of that order had to be filed no later than January 20, 2015.[9] Mo. R. Civ. P. 81.04(a), 81.08. Wagoner filed the Notice of Appeal of the Final Judgment on January 15, 2015 – after the Intervention Order became final and appealable per Mo. Rev. Stat. § 512.020(5). The Notice of Appeal was not, as Wagoner claims, premature for purposes of Mo. R. Civ. P. 81.05(b). Rather, Wagoner simply neglected to include an appealable order in the Notice of Appeal. Accordingly, the jurisdictional deadline to appeal bars this Court from reviewing the Intervention Order regardless of its recasting as a "judgment."

Wagoner claims in his Application for Transfer (but not in his briefing) that: "The circumstances relative to the ruling of the Missouri Court of Appeals dismissing the

[9] An appeal is not effective unless the notice of appeal is filed within 10 days after the judgment or order becomes final. See Mo. R. Civ. P. 81.04(a). Thus, the notice of appeal had to be filed on January 20, 2015 because: (1) the trial court lost jurisdiction over the underlying action on January 10, 2015, making the Intervention Order final per Rules 75.01 and 81.05(a)(1); and/or (2) the Intervention Order could have been appealed per Section 512.020(5) when the Final Judgment became final on January 10, 2015. Eckhoff, 242 S.W.3d at 469.

appeal is contrary to and in conflict with Weller v. Hayes Truck Lines, 197 S.W.2d 657 (Mo. 1946); L.J.B. v. L.W.B., 908 S.W.2d 349 (Mo. 1995); City of Lake Winnebago v. Sharp, 652 S.W.2d 118 (Mo. 1983); and Wills v. Whitlock, 139 S.W.3d 643 (Mo.App. W.D. 2004)." These cases are distinguishable because Wagoner did not make a good faith effort to appeal the Intervention Order. At the time he filed his Notice of Appeal, both orders were final and fully appealable. Yet Wagoner attached only the Final Judgment; he neither attached the Intervention Order, nor identified any issues related to intervention under the "Issues Expected to Be Raised on Appeal" in the Civil Case Information Form, filed January 15, 2015. A "reasonable person" could not "readily discern" an intent to appeal the Intervention Order from Wagoner's Notice of Appeal. Lake Winnebago, 652 S.W.2d at 121-22 (cited by Wagoner). Appellate review of the Intervention Order should thus be denied.[10]

[10] See, e.g., Powell v. City of Kansas City, 472 S.W.3d 219, 229 (Mo. App. W.D. 2015) (finding appellant failed to preserve issue for appellate review by failing to state in her notice of appeal that she was challenging the denial of her motion for new trial and failing to attach the order to her notice); Burton, 455 S.W.3d at 13 (finding appellate court was precluded from reviewing issues related to attorneys' fees motion where notice of appeal expressly limited the substantive issue to the grant of summary judgment); Rea v. Moore, 74 S.W.3d 795, 801 (Mo.App. S.D. 2002) ("Missouri appellate courts have not shown such leniency [with respect to the failure to specify the order appealed from as required by Mo. R. Civ. P. 81.08] when the notice of appeal only listed one judgment or

C. The Trial Court Lacked the Authority to Amend the Intervention Order After it Lost Jurisdiction.

Wagoner attempts to recast the Intervention Order as an after-the-fact "judgment" entered on May 7, 2015, which merely reiterated the Court's denial of intervention entered nearly six months earlier. See Supp. Resp. to Order to Show Cause, Ex. A. Entry of the so-called "judgment" is void and of no moment because *the trial court lost jurisdiction four months earlier* on January 10, 2015. See Mo. R. Civ. Proc. 75.01; 81.05(a)(1); Carson v. Brands, 7 S.W.3d 576, 579 (Mo. Ct. App. 1999) (requiring court to expunge order entered after it lost jurisdiction).[11]

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order, but the points on appeal referred to more than one judgment or order"); Velder v. Cornerstone Nat. Ins. Co., 243 S.W.3d 512, 522 (Mo. App. W.D. 2008) (Appellate courts may only reverse the judgments that have been appealed, and will only examine the claims raised in the notice of appeal); Green Hills Prod. Credit Ass'n v. R & M Porter Farms, Inc., 716 S.W.2d 296, 300 (Mo. App. W.D. 1986) (finding court was precluded from reviewing order that was not identified as the order appealed from or described as the issue on appeal in the notice of appeal); Charles v. Ryan, 618 S.W.2d 220, 224 (Mo. App. W.D. 1981) (finding court could not review order that was not referenced in the notice of appeal or accompanying jurisdictional statement).

[11] In his Application for Transfer, Wagoner incorrectly suggests the trial court "refused" to denominate the order denying intervention as a "judgment." Wagoner never requested that the trial court denominate the order until after the trial court lost jurisdiction. See

Any action taken by the trial court after it lost jurisdiction – including entry of the erstwhile "judgment" – is void. See Spicer v. Donald N. Spicer Revocable Living Trust, 336 S.W.3d 466, 468-69 (Mo. 2011) ("After the expiration of the 30 days provided by Mo. R. Civ. P. 75.01, the trial court is divested of jurisdiction.... Following divestiture,

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Appellant's Supplemental Response to Order to Show Cause (filed May 11, 2015); Mo. R. Civ. P. 75.01; 81.05(a)(1). When he did so, the trial court obliged. Id. Further, Wagoner did not make this argument in his Court of Appeals brief and is precluded by Mo. R. Civ. P. 83.08(b) from raising the issue here. See Dupree v. Zenith Goldline Pharmaceuticals, Inc., 63 S.W.3d 220, 222 (Mo. 2002). Regardless, the denomination did not preclude Wagoner from appealing because the Intervention Order became a final appealable judgment on January 10, 2015. Wagoner's reliance on Mo. R. Civ. P. 78.06 to extend the lower court's jurisdiction to 90 days, instead of 30 days, is misplaced. "Sup. Ct. R. 78.06 must be read in conjunction with Sup. Ct. R. 75.01, 78.07(d), and 81.05(a)(2) and (c)." See 17 Mo. Prac., Civil Rules Practice § 78.06:1 (2014 ed.); Carson, 7 S.W.3d at 579; see also State ex rel. Wolfner v. Dalton, 955 S.W.2d 928 (Mo. 1997) (trial court lost jurisdiction to provide relief to proposed intervenors 30 days after consent judgment and voluntary dismissal). Rule 78.06 only extends the Court's jurisdiction for 90 days if a timely authorized after-trial motion is filed by a *party*. Because no after-trial motion was filed by a party, the court lost jurisdiction after 30 days. Thus, the lower court lost jurisdiction on January 10, 2015, making the Intervention Order final and appealable on January 10, 2015 – five days prior to Wagoner's filing of the Notice of Appeal.

any attempt by the trial court to continue to exhibit authority over the case, whether by amending the judgment or entering subsequent judgments, is void."); Richardson v. Jallen Investment Group, Inc., 140 S.W.3d 112, 114 (Mo. App. E.D. 2004) (recognizing action taken more than 30 days after judgment was void where no party made a motion that would extend jurisdiction under Mo. R. Civ. P. 81.05); see also L.F. 605 (order striking Wagoner's notice of hearing stating: "No further actions may be taken in the matter as the case is closed.").[12] The trial court cannot, via an *ultra vires* act, resuscitate Wagoner's deadline to appeal the Intervention Order.

Because the May 7, 2015 "judgment" is void, it cannot be appealed on the merits. Williston v. Missouri Dep't of Health & Senior Services, 461 S.W.3d 867, 870 (Mo. App. W.D. 2015) (recognizing that party cannot appeal an order entered after the trial court is divested of jurisdiction because the order is void); Allen, 2015 WL 5439944, at *5 (dismissing appeal related to denial of intervention where appellant failed to timely appeal the initial denial, moved to intervene after entry of the final judgment, and appealed the order denying intervention entered after the trial court lost jurisdiction); Cramer v. Carver, 125 S.W.3d 373, 375 (Mo. App. W.D. 2004) ("[A] judgment entered

[12] Entry of the "judgment" on May 7, 2015 was well beyond the time provided by Rules 75.01 and 81.05, respectively. Wagoner could have requested the trial court denominate the Intervention Order a "judgment" while it still had jurisdiction, or could have appealed the Intervention Order when it became final upon entry of the Final Judgment –Wagoner did neither and cannot appeal a void order here.

beyond the jurisdiction of the trial court is void, and an appellate court has no jurisdiction to review on the merits."); AGC Ins. Fund v. Jetco Heating & Air Conditioning, Inc., 815 S.W.2d 141, 142 (Mo. App. E.D. 1991) ("Here no timely motion was filed and the amended judgment, made eighty-six days after entry of the original judgment, is therefore void. When a trial court's judgment is void for lack of jurisdiction, then the court of appeals has no jurisdiction to review.").[13] Accordingly, the appeal should be dismissed.

[13] An appellate court has no jurisdiction to consider the merits of a void judgment. See, e.g., In re Marriage of Noles, 343 S.W.3d 2, 6 (Mo. App. S.D. 2011) (amended judgment entered one day too late was a nullity and appeal dismissed because original judgment contained no issues from which appellant appealed); Residential & Resort Associates, Inc. v. Wolfe, 274 S.W.3d 566, 568-69 (Mo. App. W.D. 2009) (appellate court has no jurisdiction to consider merits of a void judgment); In re Estate of Pittsenbarger, 136 S.W.3d 558, 560-61 (Mo. App. W.D. 2004) (same). The appellate court can only determine whether the judgment is invalid and, if so, remand to circuit court to be vacated. Haun v. Macon Cnty. Sheriff's Dep't, 30 S.W.3d 212, 214-15 (Mo. App. W.D. 2000). The May 7, 2015 "judgment" should therefore be vacated by the trial court. Noles, 343 S.W.3d at 6 (remanding with instructions to vacate amended judgment and reinstate original judgment); see also Evans v. Director of Revenue, State of Mo., 119 S.W.3d 671, 674 (Mo. App. S.D. 2003) (remanding for reinstatement of original judgment after the trial court improperly amended the judgment by a nunc pro tunc order).

II. THE TRIAL COURT PROPERLY DENIED INTERVENTION BECAUSE WAGONER HAS NO INTEREST IN THE SUBJECT MATTER AND LACKED STANDING BELOW.

A. Applicable Standard of Review.

A trial court's decision regarding intervention as a matter of right will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Johnson v. State, 366 S.W.3d 11, 20 (Mo. banc 2012); D.S.K. ex rel. J.J.K. v. D.L.T.., 428 S.W.3d 655, 657 (Mo. App. W.D. 2013) (same); Ring, 41 S.W.3d at 491 (same); see also Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976) (applying same standard and directing that appellate courts should set aside orders of the trial court "with caution and with a firm belief that the decree or judgment is wrong.").

B. Substantial evidence demonstrates that Wagoner has no interest in the subject matter and lacked standing below.

The trial court properly denied intervention because Wagoner failed to carry his burden of establishing each element required for intervention as a matter of right. "The proposed intervenor carries the burden of establishing the presence of all three elements required for intervention as a matter of right ... a motion to intervene as of right under Mo. R. Civ. P. 52.12(a)(2) may properly be denied if *even one of these three elements is not established*." Allred v. Carnahan, 372 S.W.3d 477, 481 (Mo. App. W.D. 2012) (emphasis added). Wagoner was required, but failed, to establish the three elements required for intervention as of right: (1) an interest relating to the property or transaction

that is the subject of the action; (2) the movant is so situated that the disposition of the action may impair or impede the movant's ability to protect that interest; and (3) the movant's interest is not adequately represented by existing parties. Matter of Missouri-Am. Water Co. v. Hall, 470 S.W.3d 761, 764 (Mo. App. W.D. 2015); McDaniel v. Park Place Care Ctr., Inc., 861 S.W.2d 179, 180 (Mo. App. W.D. 1993).

> A movant's interest necessary to warrant intervention must be a:
>
> legal right which *will be directly affected* … or a legal liability which will be directly enlarged or diminished by the judgment or decree in such action ... [and] *not a mere consequential, remote or conjectural possibility* of being in some manner affected by the result of the original action; the "interest" *must be such an immediate and direct* claim upon the very subject matter of the action that *intervener [sic] will either gain or lose by the direct operation of the judgment* that may be rendered therein.

McDaniel, 861 S.W.2d at 181 (citing State ex rel. Farmers Mutual Auto. Ins. Co. v. Weber, 273 S.W.2d 318 (Mo. 1954)) (emphasis added); see also In Matter of Adoption of C.T.P., 452 S.W.3d 705, 712 (Mo. App. W.D. 2014) (quoting the same long-standing rule governing intervention as of right); In re Clarkson Kehrs Mill Transp. Dev. Dist., 308 S.W.3d 748, 753 (Mo. App. E.D. 2010)("To intervene in an action as a matter of right, the intervenor's interest in the action must be a direct and immediate claim to, and have its origin in, the demand made ... by one of the parties to the original action."). The trial court correctly applied the law, and that ruling is supported by substantial evidence.

Wagoner has made no claim for reimbursement from the Missouri Fund, nor has he had any claim denied by the Fund. His only purported interest is the ability to make a potential claim in the future and to have that claim paid by the Fund, assuming it is covered. L.F. 517. Wagoner made no allegation and presented no evidence that he is likely to make a claim or that the Missouri Fund would be unable to satisfy any such claim (if made). Instead, he merely speculates that the alleged fraudulently induced payments to Phillips 66 "*potentially* jeopardize[es] the ability of the Fund to provide coverage and protection to the plaintiff…." L.F. 144 (¶ 39) (emphasis added). Such speculation is insufficient to warrant intervention. McDaniel, 861 S.W.2d at 181; Griffitts v. Campbell, 426 S.W.3d 684, 688 (Mo. App. S.D. 2014) (recognizing that a "potential" claim for indemnity was insufficient to permit insurer to intervene as of right).

Wagoner has proffered no interest sufficient to warrant intervention. By contrast, the trial court's detailed ruling that Wagoner lacked an interest in the subject matter is supported by substantial evidence, for example:

- Wagoner never submitted a claim to the Missouri Fund, nor has he had a claim denied by the Missouri Fund – whether by lack of funds or otherwise. L.F. 513, 517-18.
- There is no evidence to suggest the Missouri Fund will be unable to pay claims and, instead, the record evidence demonstrates that the Missouri Fund is financially sound and could satisfy claims, L.F. 518 ("The funds at issue in this case, about $2.6 million, is a small fraction of the

existing balance in the Fund of about $66 million."); see also L.F. 269; L.F. 402.

- Wagoner admits that he is only seeking the return of the reimbursements on behalf of the Fund – he is not seeking individual damages. See S.L.F. 59-60, 129 (pp. 49:19-50:10, 118:14-118:24).[14]

At bottom, Wagoner can only speculate as to the possibility that the Fund might not have enough money to satisfy its obligations. His sworn deposition testimony is telling:

> Q: So you're speculating that maybe at some point in time, the Fund might not have enough money to satisfy its obligations?
>
> A: It's possible, yes.
>
> ***
>
> Q: Do you have any facts to suggest that the Missouri Tank Insurance Fund couldn't pay you on a claim, should you submit one?
>
> A: No.

S.L.F. 55-56 (pp. 45:21-46:7, 46:16-20).

The substantial evidence relied upon by the trial court demonstrates that Wagoner has no interest in the subject matter of this lawsuit and, on that basis alone, his motion to

[14] Wagoner's deposition transcript was filed with the trial court on October 6, 2014. Because Wagoner did not include the transcript in the Legal File, a Supplemental Legal File ("S.L.F.") was filed with the Eastern District Court of Appeals on July 13, 2015.

intervene was properly denied.[15] The trial court, moreover, made three independent findings relating to Wagoner's lack of standing to bring claims on behalf of the Missouri Fund against Phillips 66, each of which support the denial of Wagoner's motion to

[15] The other two requisites for intervention as of right were similarly not present, and are briefly mentioned here. First, disposition of the case below has no impact on any purported interest of Wagoner as the Missouri Fund is solvent such that he can make a claim in the future should his service station experience a covered petroleum release L.F. 518 ("The funds at issue in this case, about $2.6 million, is a small fraction of the existing balance in the Fund of about $66 million."); see also L.F. 269; L.F. 402. Second, to the extent he had any interest, it was adequately protected by the Attorney General and Fund Trustees who achieved a recovery of nearly half the reimbursements at issue without assuming the risk, uncertainty and high-cost of a trial – thereby adding to the Fund's solvency while avoiding unnecessary risk and expense. Ring, 41 S.W.3d at 491 (finding that intervention was not required where proposed intervenor was advocating the same position as a party to the suit and that the proposed intervenor was adequately represented by that party seeking the same benefit despite a disagreement regarding the acceptable amount for settlement); Bachman v. A.G. Edwards, Inc., 344 S.W.3d 260, 268 (Mo. App. E.D. 2011) (finding proposed intervenor's rights were adequately represented even though proposed intervenor felt the settlement was unfair).

intervene. Although Wagoner fails to identify error in any of them,[16] they warrant brief mention here.

First, the trial court concluded that "Wagoner does not have a private right of action to seek reimbursements for the Fund." L.F. 420.[17] Instead, the court recognized that the controlling statute, Section 319.127, expressly authorizes the Department of Natural Resources to "request either the attorney general or a prosecuting attorney to bring any action authorized in this section in the name of the people of the State of Missouri." Id.[18] The trial court relied upon the Missouri Supreme Court's ruling in

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[16] By failing to address these rulings, Wagoner has waived the ability to challenge them on appeal. See Schleicher v. State, 483 S.W.2d 393, 394 (Mo. 1972) (failure to properly raise and preserve a point waives the right to address the issue on appeal); see also Rule 78.07(c).

[17] The United States District Court for the Western District of Missouri similarly found that Wagoner did not have a private right of action when denying his motion for remand in Wagoner I. See L.F. 96-97 ("the legislature clearly did not intend for a private right of action to exist. Thus, Wagoner is not the proper party to bring such claims").

[18] Wagoner argues that the trial court erred in denying intervention because the State of Missouri and the Attorney General were "disqualified" from instituting suit to obtain remedy for wrongful or fraudulent payments obtained by ConocoPhillips from the Fund. App. Br., p. 26. Wagoner is wrong. Missouri statute expressly authorizes the Attorney General to bring an action in the name of the people of the State of Missouri to pursue

Johnson v. Kraft Gen. Foods, Inc., 885 S.W.2d 334, 336 (Mo. 1994) for the proposition that "[w]hen the legislature has established other means of enforcement, we will not recognize a private civil action unless such appears by clear implication to have been the legislative intent." Id., L.F. 421. There is no express legislative intent for private citizens to bring claims for recovery on behalf of the Missouri Fund. The trial court therefore correctly concluded that "Wagoner does not have an independent cause of action for the reimbursement of PST Fund monies." Id., L.F. 422. Because of this, intervention was properly denied.

Second, the trial court applied long-standing Missouri law that the property of a trust can only be recovered by the trustee, and the beneficiaries have no legal capacity to sue for its recovery. L.F. 422-423 (discussing cases).[19] The court rejected Wagoner's

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violations of the UST statutes. See Mo. Rev. Stat. § 319.127. Because Phillips 66 was alleged to have violated a condition of the reimbursements provided for under Section 319.131.4, see L.F. 22, 27-28, the Attorney General has authority to bring this action. Moreover, the Fund's Board of Trustees is party to the suit – a fact overlooked by Wagoner. The Board of Trustees is undeniably charged with the fiduciary management of the Fund, including pursuing litigation on the Fund's behalf. See Mo. Rev. Stat. § 319.129.10.

[19] The District Court also found that Wagoner, as a purported trust beneficiary, could not bring an action for the recovery of trust property. L.F. 96-97 (Wagoner is "not the right

claim to the contrary as "without merit." Id., L.F. 422. Because Wagoner cannot bring claims against a third party for recovery of trust property, his motion to intervene was properly denied.

Third, the trial court correctly rejected Wagoner's claim of taxpayer standing. Wagoner failed to identify which of the three grounds formed the basis of his claim of taxpayer standing. Regardless, the trial court properly evaluated each prong of the governing legal standard and concluded that – because the Missouri Fund does not collect or spend taxes and as there was no evidence that Wagoner suffered a pecuniary loss – Wagoner did not have taxpayer standing.[20] L.F. 424 (citing Reidy Terminal, Inc. v. Dir.

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party to bring claims on behalf of the PST Fund, the trust, against ConocoPhillips, a third party. Rather, that right belongs solely to the PST Fund.").

[20] Wagoner incorrectly claims the St. Louis Circuit Court Intervention Order was "directly contrary to two prior orders entered by the Circuit Court of Greene County, Missouri finding that Wagoner had standing to proceed with the suit against ConocoPhillips." See App. Br., p. 7; see also App. Br., pp. 4, 15, 19, 20, 21, 23, 30 and 31. These orders, rendered in separate actions (i.e., Wagoner I and Wagoner II), did not hold that Wagoner had standing and do not include findings that contradict the Intervention Order. Even if they did, the St. Louis Court was not bound by the interlocutory rulings of a sister court. See, e.g., Kuntzman v. Kuntzman, 724 S.W.2d 331, 333 (Mo. App. E.D. 1987) (rejecting claim that decision by one circuit court judge on a motion to dismiss could not be overturned by a second judge at the trial court level);

Of Revenue, 898 S.W.2d 540, 542 (Mo. 1995) for proposition that yearly premium paid for insurance coverage under the Fund is not a tax); see also Airport Tech Partners, LLP v. State, 462 S.W.3d 740, 746 (Mo. 2015) (rejecting taxpayer standing claim; "it is even more speculative to suggest that the county's tax levy will be raised in the future to make up for the alleged deficiency in assessment of the airport property in the future . . . No one can state now what the levy will be in future years or whether it would increase or decrease as a result of any particular property's assessment").

The Intervention Order states: (1) Wagoner lacks the interest required for intervention as no evidence suggests he was or will be denied Fund reimbursement; (2) Wagoner lacks a private right of action; (3) Wagoner cannot sue a third-party for trust res recovery; (4) Wagoner lacks taxpayer standing; and (5) Wagoner's interests are adequately represented. See L.F. 415–426. The lower court's findings are consistent with the last order entered in Wagoner I, which held:

Richey v. Meter Investments, Inc., 680 S.W.2d 381, 384 (Mo. App. W.D. 1984) (recognizing circuit court judge had authority to act on a motion that had been previously ruled upon by another circuit court judge); Williams v. Ford Motor Co., No. 1:12-CV-108 SNLJ, 2013 WL 3874751, at *2 (E.D. Mo. July 25, 2013) (Interlocutory orders entered by a state court may be reconsidered by the federal court at any time after removal); Myers v. Moore Eng'g, Inc., 42 F.3d 452, 454-55 (8th Cir. 1994) (finding that, after removal, district court was not required to follow state trial court's denial of defendants' motion for summary judgment).

- Wagoner is "not the right party to bring claims on behalf of the PST Fund, the trust, against ConocoPhillips, a third party." See L.F. 96.
- "[T]hese statutes do not permit a private right of action . . . . Thus, Wagoner is not the proper party to bring such claims." Id. at L.F. 97.
- "[B]ecause the PST Fund pays participants' claims, it follows that the PST Fund is the party actually entitled to recover any overpayment of claims." Id.

No orders issued by the lower court, Wagoner I, or Wagoner II directly contradict these findings.

C. The trial court correctly denied permissive intervention, which cannot be appealed here.

Wagoner also claims that permissive intervention should have been granted. He is wrong. Generally, there is no right of appeal from a denial of permissive intervention:

> Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability....

State ex rel. Reser v. Martin, 576 S.W.2d 289, 290-91 (Mo. 1979) (internal citations to U.S. Supreme Court opinions omitted); compare Johnson, 366 S.W.3d at 21 (applying abuse of discretion standard to appeal of order granting intervention). Even if Wagoner could appeal the denial of permissive intervention, from the above-discussed record, it is clear that the trial judge did not abuse his discretion in doing so.

Proposed intervenors are not entitled to permissive intervention if they have no "interest unique to themselves" and will simply reassert the same defenses. Comm. for Educ. Equal. v. State, 294 S.W.3d 477, 487 (Mo. 2009); Johnson, 366 S.W.3d at 21. In Committee for Educational Equality, three taxpayers sought to join the State's defense of a school funding formula. Id. at p. 486. This Court found the lower court abused its discretion in *granting* permissive intervention because the taxpayers "merely reasserted the State's defenses [and] asserted no claim, defense, or interest unique to themselves." Id. at 487. No public policy was served by the intervention – the intervenors "could have sought leave to express their views in an amicus brief, rather than through intervention." Id.

Here, too, permissive intervention is improper because Wagoner fails to assert a unique interest or claim. Instead, he seeks the same relief under substantially similar claims as the Missouri Fund. See S.L.F. 59-60, 129 (pp. 49:19-50:10, 118:14-118:24) (admitting he is seeking the same relief as Plaintiff here); L.F. 64 (admitting this action is "premised upon the same claims and facts" as his separate action). Wagoner's lack of a unique interest, claim, or knowledge of the allegations is exposed in his sworn testimony.

Q: Have you ever participated in any written or verbal communication between the Missouri Tank Insurance Fund and ConocoPhillips?

A: No.

Q: So you've never been a party to any telephone calls, any e-mails, any meetings between ConocoPhillips and the Missouri Tank Insurance Fund?

A: No.

Q: You have no idea what the contents of the conversations or correspondence between the Tank Fund and ConocoPhillips would be, correct?

A: Correct.

Q: Did ConocoPhillips ever make any statement directly to you about whether or not it had insurance coverage for any service stations in Missouri?

A: No.

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Q: So you are unaware of the contents of any reimbursement application form submitted by ConocoPhillips to the Missouri Insurance Fund?

A: Correct.

Q: So, not being aware of the contents of those application forms, you couldn’t take any action in reliance upon those forms, correct?

***

A: Correct. I'm relying on my lawyer.

***

Q: And … you have absolutely no knowledge as to what transpired between ConocoPhillips and Missouri Tank Insurance Fund?

A: No, not firsthand knowledge, no.

S.L.F. 35-37, 100 (pp. 26:3-6; 26:23–27:8; 27:13–28:3; 89:15-18). Wagoner fails to establish an interest sufficiently unique for permissive intervention.

The trial court correctly applied controlling Missouri law and found, based upon substantial evidence, that Wagoner lacked standing and failed to carry his burden of demonstrating entitlement to intervention. In the event this Court reaches the merits of the appeal, it should affirm the Intervention Order in all respects.

III. WAGONER MISCONSTRUES THE PENDING ACTION DOCTRINE WHICH DID NOT IMPLICATE SUBJECT MATTER JURISDICTION NOR PRECLUDE JURISDICTION OF THE TRIAL COURT BELOW.

A. The Pending Action Doctrine Does Not Implicate Subject Matter Jurisdiction.

Wagoner incorrectly claims that the court below lacked subject matter jurisdiction "because of Wagoner's prior action pending at the time" the instant action was filed. App. Br., p. 19. "[I]t is incorrect to describe [the pending action doctrine's goal of avoiding inconsistent judgments] as a matter of jurisdiction, which is the power to hear a particular type of case. Rather, it is an error of law." Kelly v. Kelly, 245 S.W.3d 308, 315

(Mo. App. W.D. 2008). This Court has recognized that the term "jurisdiction" has been "overused and misused to describe situations where it was simply legally erroneous to enter a conflicting judgment while another action was pending or a judgment involving the same issue [is] still in effect." Id. "The tendency to call matters 'jurisdictional' that are really only assertions of legal error greatly confuses the notion of jurisdiction in civil cases." Id. Thus, classifying the pending action doctrine as a "jurisdictional" defect is a misnomer and it did not preclude the trial court's jurisdiction over the matter below.[21]

That subject matter jurisdiction is not implicated is further supported by Mo. R. Civ. P. 78.07, which provides the pending action doctrine defense may be waived for failure to timely assert. "The pendency of a prior action is not ground for dismissal with prejudice, but ground only to stay or abate the later action." U.S. Bank, N.A. v. Coverdell, SD 32844, 2015 WL 7251405, at *9 (Mo. App. S.D. Oct. 30, 2015). "A plea in abatement is essentially a request, not that an action be terminated, but that it be continued until such time as there has been a disposition of the first action or that allowance of this defense be equivalent to a dismissal without prejudice of the abated action." Id. Where the party (such as Wagoner) fails to request abatement of the later filed action, the ability to request a stay is waived.

[21] If Wagoner was correct and subject matter jurisdiction was implicated, then the Wagoner II court would lack jurisdiction because Wagoner I was pending when Wagoner II was filed and the two cases remained simultaneously pending for four days.

At the time the State filed the underlying action (April 23, 2013), Wagoner I was pending in federal court. While federal courts have "exclusive jurisdiction" over removed actions, they do not have exclusive subject-matter jurisdiction over the controversy. Krueger v. Chicago & A. Ry. Co., 84 Mo. App. 358, 363 (Mo. 1900). Thus, the State was not precluded from pursuing the underlying action in state court while Wagoner I was pending in federal court.

B. Wagoner Waived the Pending Action Defense.

Wagoner waived the pending action defense by failing to assert it while Wagoner I was pending. The pending action doctrine, also known as the abatement doctrine, is waived unless made via a Mo. R. Civ. P. 55.27 motion or included in a responsive pleading. See Mo. R. Civ. P. 55.27(g)(1)(F). Wagoner failed to do either while Wagoner I was pending and, therefore, waived the ability to raise it now. Kelly, 245 S.W.3d at 314 (recognizing pending action doctrine may be waived).[22] Moreover, arguments presented for the first time in a Mo. R. Civ. P. 78.07 motion are waived as untimely. Bray v. Bi-

[22] See also Benchmark Healthcare of Wildwood, LLC v. Whispering Oaks Residential Care Facility, LLC, 417 S.W.3d 767, 771 (Mo. App. E.D. 2013) (party waived abatement defense by failing to raise it); E.A.U., Inc. v. R. Webbe Corp., 794 S.W.2d 679, 684 (Mo. App. E.D. 1990) (abatement defense waived where not asserted until trial); State ex rel. Kansas City v. Harris, 212 S.W.2d 733, 735 (Mo. banc 1948) (abatement "is waived if not pleaded"); Butts v. People's Storage & Transfer Co., 272 S.W. 998, 999 (Mo. App. 1925) (abatement issue waived where not raised until after trial).

State Development Corp., 949 S.W.2d 93, 97 (Mo. App. E.D. 1997). Thus, Wagoner waived the argument because he did not raise it until he filed his Mo. R. Civ. P. 78.07 motion.

C. The Wagoner I Court's Jurisdiction Terminated When Wagoner Voluntarily Dismissed That Action.

Any jurisdiction of the court in Wagoner I was relinquished when Wagoner voluntarily dismissed that action. See Dye, v. Missouri Dep't of Soc. Services, 476 S.W.3d 359, 363 (Mo. App. W.D. 2015) (trial courts lose jurisdiction when a voluntary dismissal is filed and any further steps as to the dismissed action are viewed as a nullity); Hart v. Impey, 382 S.W.3d 918, 921-22 (Mo. App. S.D. 2012) (recognizing that voluntary dismissal revokes the court's jurisdiction); Richman v. Coughlin, 75 S.W.3d 334, 338 (Mo. App. W.D. 2002) (recognizing voluntary dismissal deprives the trial court of "any jurisdiction"). Thus, when Wagoner voluntarily dismissed Wagoner I, he lost his place in line and the Fund's action gained priority. See Lawyers Co-op. Pub. Co. v. Sleater, 130 S.W.2d 192, 194 (Mo. App. 1939) (where the prior action is dismissed before the trial court determines applicability of the abatement doctrine, "the action is no longer pending, and is therefore no ground for the abatement of the subsequent action"); State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 612 (Mo. 1936) (abatement issue mooted by dismissal of other suit); Nelson v. Massman Const. Co., 91 S.W.2d 623, 629 (Mo. 1936), cert. denied, 299 U.S. 569 (1936) (refusal to instruct regarding abatement doctrine warranted where other action was dismissed); Martin v. Richmond Cotton Oil Co., 184 S.W. 127, 129 (1916); State ex rel.

Ostmann v. Hines, 128 S.W. 250, 252 (Mo. App. 1910) ("a subsequent suit between the same parties on the same cause of action will not be abated merely on the ground that a prior suit was pending at the time the subsequent suit was instituted, if it appears the prior action was dismissed before the hearing is had on the plea in abatement in the subsequent suit").

Wagoner's voluntary dismissal extinguished not only the jurisdiction asserted by the court in Wagoner I, but also Wagoner's ability to assert the pending action doctrine below.[23] Thus, the pending action doctrine did not deprive the trial court of jurisdiction or otherwise provide a basis for permitting intervention.

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[23] Wagoner mischaracterizes Wagoner II as a refiling of Wagoner I. The federal court divested the Greene County Circuit Court of jurisdiction over Wagoner I. See 28 U.S.C. § 1446(d); Turner v. Healthcare Servs. Grp., Inc., 156 S.W.3d 431, 433 (Mo. App. E.D. 2005) ("The law is clear that once removal to the federal court has been effected, the state court shall proceed no further unless and until the case is remanded"). Such jurisdiction cannot be restored unless or until the Western District's order denying remand (L.F. 93–104) is reversed. Turner, 156 S.W.3d at 433. The window to appeal that order has closed and Wagoner cannot collaterally attack it here. Upon Wagoner's voluntary dismissal, Wagoner I became a nullity – voluntarily dismissing a removed action and refiling in state court is the "same as though no previous suit had been brought." McPherson v. Swift, 130 N.W. 768, 769-70 (S.D. 1911) aff'd, 232 U.S. 51 (U.S. 1914). Indeed, where a district court finds a second suit filed in state court after removal is an attempt to subvert

The cases cited by Wagoner are distinguishable on the basis that the pending action doctrine was raised while the first filed action was still pending. See, e.g., Planned Parenthood of Kansas v. Donnelly, 298 S.W.3d 8 (Mo. App. W.D. 2009) (finding court properly dismissed action where it was duplicative of a pending action that was filed first); State ex rel. Palmer v. Goeke, 8 S.W.3d 193 (Mo. App. E.D. 1999) (issuing peremptory writ of prohibition in paternity action to judge presiding in mother's action where putative father's pending action was filed first); State ex rel. Kincannon v. Schoenlaub, 521 S.W.2d 391 (Mo. 1975) (discharging provisional rule in prohibition in wife's divorce action where husband's pending action was filed first). None of Wagoner's cases suggests that once a court has jurisdiction over a claim, it indefinitely holds jurisdiction over that claim, even after the suit is dismissed. The purpose of the doctrine is to reduce duplication and inconsistent judgments, not to permit the first-filed plaintiff to forever trump subsequent suits. Courts look as between *pending* actions to determine which was filed first. Any right bestowed upon the first filed action is lost when that action is dismissed. These cases, cited by Wagoner, support a finding that Wagoner II should have been dismissed in deference to the previously filed underlying action here.

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the purposes of the removal statute, the district court may enjoin the second suit. Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Associates, Inc., 77 F.3d 1063, 1069 (8th Cir. 1996), cert. denied, 519 U.S. 948 (1996). Wagoner II cannot be considered a continuation of Wagoner I.

CONCLUSION

For the reasons stated above, this appeal should be dismissed. Should the appeal not be dismissed and this Court reaches the merits, then the Intervention Order and the Final Judgment should be affirmed in all respects.

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**Pro Hac Vice Application Pending*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the page limits of Special Rule 360. This brief complies with Mo. R. Civ. P. 84.06(b) and does not exceed 13,950 words. This brief contains **9,648** words. The document complies with the information required by Mo. R. Civ. P. 55.03(a) and certifies as true the representations in Mo. R. Civ. P. 55.03(c). The undersigned attorney signed the original brief, and the original will be maintained by the filer for a period of not less than the maximum allowable time to complete the appellate process.

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**Pro Hac Vice Application Pending*

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2016, I filed the Respondent's Substitute Brief electronically using the Missouri eFiling System, which provided service to the following counsel of record:

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