MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ED104985

In the Estate of: Joseph B. Mickels, Sr.

Ruth Mickels, Appellant

Appeal from the Circuit Court of the County of Marion, Probate Division, Missouri
Cause No. 16MR-PR00175
Judgment dated October 18, 2016
Honorable John J. Jackson

APPELLANT'S BRIEF

Stephen R. Woodley, #36023
Thomas K. Neill, #51959
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101
[314] 241-5620 Office
[314] 241-4140 Fax
swoodley@grgpc.com
tneill@grgpc.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

JURISDICTIONAL STATEMENT

This is an appeal from the October 18, 2016 order and judgment of the Probate Division of the Circuit Court of Marion County, Missouri denying appellant's application for appointment of personal representative in the Estate of Joseph B. Mickels, Sr. A3. As this matter is not within the exclusive jurisdiction of the Missouri Supreme Court, jurisdiction is proper in the Missouri Court of Appeals, Eastern District. Mo. Const. Art. V, §3; Mo. Rev. Stat. § 477.050.

STATEMENT OF FACTS

Appellant returns to this Court in a case which has a lengthy procedural history, beginning with a wrongful death lawsuit ("the underlying suit"). The facts and procedural history of the underlying suit were accurately described by the Missouri Supreme Court:

> On December 8, 2008, Mr. Mickels sought medical attention after experiencing numbness, blurred vision, and headaches. He underwent a magnetic resonance imaging ("MRI") procedure. On December 12, 2008, Dr. Danrad reviewed the MRI but made no diagnosis.
>
> On February 17, 2009, Mr. Mickels underwent a CT scan of his brain after arriving at a hospital in an altered mental state. Dr. Danrad again reviewed the results, but this time he diagnosed Mr. Mickels with a brain tumor that was both terminal and incurable. Despite immediate surgery, Mr. Mickels died of this tumor on June 12, 2009.
>
> On June 7, 2012, Appellants filed a wrongful death action against Dr. Danrad. Appellants presented evidence that—even though Mr. Mickels certainly would have died of his brain tumor with or without Dr. Danrad's alleged negligence—he would not have died on June 12, 2009, had the brain tumor been diagnosed following the initial MRI. Mr. Mickels' treating oncologist, Dr. Carl Freter, testified:

> [The tumor] was incurable when it was found and it would have been incurable at the time ... [of] the original [MRI] ... [however] it is more likely than not that if [the tumor] had been discovered earlier ... [Mr. Mickels] would have lived an additional six months on average.

Dr. Danrad moved for summary judgment on the ground that the Appellants had not pleaded and could not prove facts showing that his alleged negligence resulted in Mr. Mickels' death as required by section 537.080.1. The trial court agreed, entered judgment dismissing Appellants' petition, and this appeal followed.

Mickels v. Danrad, 486 S.W.3d 327, 328 (Mo. banc 2016).[1]

While the Supreme Court agreed with Danrad that appellant could not sue for wrongful death, it did not affirm the judgement. Instead, the Supreme Court held:

> Danrad's alleged negligence did not cause Mr. Mickels' death, but it surely injured him by depriving him of the opportunity to delay his death for up to six months. Mr. Mickels would have been able to sue Dr. Danrad for this negligence while he lived, and his personal representative can bring that action under section 537.020 after his death.

---

[1] A copy of that opinion is included with appellant's appendix for the Court's convenience. A4.

Id., at 329-330 (footnote omitted). As such, the Supreme Court vacated the judgment and remanded the case. *Id.*, at 331.

Following remand, appellant opened a probate matter and filed her application to be appointed personal representative so that she could pursue the claim described by the Supreme Court. A1-2.[2] The probate court denied appellant's application, ruling it to be "untimely [and] barred by §473.020 RSMo." A4. Appellant now appeals the probate court's order and judgment denying her application for appointment of personal representative.

[2] The opening of the estate was briefly before this Court on a writ. *State ex rel. Mickels v. Jackson*, No. ED 104879 (Mo.App. E.D. Oct. 7, 2016). Following the denial of the writ, the estate was opened and the order and judgment issued.

POINT RELIED ON

THE PROBATE COURT ERRED IN DENYING APPELLANT'S APPLICATION FOR APPOINTMENT OF PERSONAL REPRESENTATIVE BECAUSE EQUITY WARRANTS HER APPOINTMENT IN THAT THE SUPREME COURT'S OPINION IN *MICKELS v. DANRAD* ESTABLISHED A NEW CAUSE OF ACTION THAT CAN ONLY BE BROUGHT BY A PERSONAL REPRESENTATIVE.

Mickels v. Danrad, 486 S.W.3d 327 (Mo. banc 2016)

In re Myers' Estate, 376 S.W.2d 219 (Mo. banc 1964)

ARGUMENT

This case arises directly from the order and judgment denying appellant's application for appointment of personal representative. But that judgment can only be viewed in the context of the underlying case, *Mickels v. Danrad*, and the Supreme Court's opinion therein.

While appellant originally prosecuted the underlying case as a wrongful death action, the trial court granted summary judgment for Danrad. *Mickels*, 486 S.W.3d at 328. The Supreme Court agreed that the evidence did not support a wrongful death claim, but it did not affirm. *Id.*, at 331. Instead, it took the opportunity to announce a new cause of action. The Supreme Court did not affirm on other grounds, but instead vacated the judgment and remanded for further proceedings wherein the new action could be pursued by decedent's personal representative. *Id.*, at 331.

On remand, appellant sought to be appointed personal representative of decedent's estate. A1-2. The probate court, however, denied the application as untimely and barred by RSMo. §473.020. A3. If the Supreme Court opinion is to have any meaning for appellant, equity demands that she be appointed personal representative so that she can pursue this new cause of action.

I. Standard of Review

The standard of review in this case is *de novo*. Here, the probate court denied the application as untimely. The procedural posture is therefore akin to the dismissal of a petition. *In re Estate of Austin*, 389 S.W.3d 168, 171 (Mo. banc 2013) ("The proper standard of review for a trial court's grant of a motion to dismiss a petition is *de novo*."). As such,

all of "the facts contained in the petition are treated as true and they are construed liberally in favor of the [petitioner]." *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). If there is any set of facts which, if proven, would entitle relief, the dismissal is improper. *Id.*

The probate court did not try the case, nor even take evidence. As such, no deference under the heightened standard of *Murphy v. Carron* is warranted. *Cf.*, *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976); Mo.R.Civ.Pr. 73.01.

II. In *Mickels v. Danrad*, the Supreme Court announced a new cause of action.

In the underlying case, the Supreme Court held that "[b]ecause [decedent's] death was not caused by [defendant's] negligence, appellants cannot sue for wrongful death under section 537.080." *Mickels*, 486 S.W.3d at 329. It also held that "[decedent] has no claim for 'lost chance of survival' under *Wollen* because all parties concede he could not have survived his brain tumor..." *Id.*, at fn. 3.

Instead, the Supreme Court held that a cause of action exists because the alleged negligence "injured [decedent] by depriving him of the opportunity to delay his death for up to six months." *Id.*, at 329. The Supreme Court went on to describe how "[decedent] would have been able to sue Dr. Danrad for this negligence while he lived, and his personal representative can bring that action under section 537.020 after his death." *Id.*, at 329-330.

This holding announced a new cause of action in Missouri. Before *Mickels*, no Missouri case had recognized a cause of action for the deprivation of the opportunity to delay death. Indeed, when this Court issued its opinion in the underlying case there was

no suggestion that such a cause of action was recognized. *Mickels v. Danrad*, No. ED 101147, 2014 WL 7344250 (Mo.App. E.D. 2014). Instead, this Court suggested that if any remedy existed, it was for lost chance of survival. *Id.*, at fn. 1. It is also telling that neither party in the underlying case argued that such a cause of action applied.

Not surprisingly, the Supreme Court did not rely on any Missouri case in support of this new cause of action. Instead, it looked to the law of other states. When describing the superiority of the new cause of action over a wrongful death claim, as applied to the underlying facts, the Supreme Court observed:

> The approach taken in [two Florida cases] avoids such unintended consequences by properly characterizing this type of claim as a tort claim that survives because the tortfeasor's negligence did not cause the decedent's death. This approach keeps the question of the time and date of the decedent's death out of the causation analysis and confines it to the damages analysis where it belongs.

Id., at 331. The Supreme Court then adopted the Florida model.

Without question, the cause of action described in *Mickels* is a new cause of action for Missourians.

III. Equity requires that appellant be appointed personal representative.

On remand, appellant filed the application for appointment of personal representative which is now at issue. A1-2. The probate court denied that application as untimely. A3.

It is true the probate statutes indicate that, with limited exceptions, an estate must be opened within one year. RSMo. § 473.020. But it is equally true that the Supreme Court's opinion in *Mickels* announced a new cause of action that survives to the personal representative of decedent's estate. If an estate is not opened, appellant will be unable to pursue this newly recognized cause of action. That would be a perversion of justice.

Probate courts have "complete and unrestricted equitable powers 'in probate matters.'" *In re Myers' Estate*, 376 S.W.2d 219, 224 (Mo. banc 1964), citing RSMo. § 472.030 ("The probate division of the circuit court has the same legal and equitable powers to effectuate and to enforce its orders, judgments and decrees in probate matters as circuit judges have in other matters..."). The facts of this case, and the underlying case, demand that those equitable powers be put to use.

It is clear that the Supreme Court intended for relator to pursue the new action. It held that decedent would have been able to file this new cause of action during his lifetime, "and his personal representative can bring that action under section 537.020 after his death." *Id.*, at 330. And the Court recognized that "the allegations in the petition do state a cause of action for negligence that would have been actionable under section 537.020 if brought by Mr. Mickels' personal representative." *Id.*, at 331 (emphasis added). Moreover, the Court instructed that:

> [T]he judgment below is vacated, and the case is remanded. See, *East v. McMenamy*, 266 S.W.2d 728, 732 (Mo.1954) (in "furtherance of justice," dismissal is inappropriate "unless the appellate court is convinced that the [allegations] are such that a recovery cannot be had").

Id., at 331. If the Court had not intended for the case to proceed, it surely could have affirmed on other grounds. Instead, it remanded the case.

The Supreme Court also recognized that dismissal is inappropriate unless it is convinced that no recovery could be had. It is no secret that an estate was not opened; in a wrongful death case there is no need for an estate. And despite the absence of an estate, the Supreme Court did not put an end to the case.

Now, however, the probate court's refusal to appoint appellant as personal representative thwarts the Supreme Court's mandate. If the *Mickels* opinion is to have any meaning for appellant, the probate court's order and judgment must be reversed. It would be the definition of inequity for appellant to have been told she has a new cause of action by one court, only to be denied the right to pursue it by another.

In order for this Court to affirm, it must conclude that appellant should have, within a year of her husband's death, foreseen that the Supreme Court would adopt a new cause of action seven years later. When considering the reasonableness of such a demand, it should not be forgotten that this Court affirmed the grant of summary judgment, rather than recognized a new cause of action. *Mickels v. Danrad*, No. ED 101147, 2014 WL 7344250 (Mo.App. E.D. 2014). If this Court did not anticipate that the Supreme Court would announce a new cause of action, how can it require such foresight from appellant?

"Equity does not demand impossible things." *Mutual Life Ins. Co. of Baltimore v. Burger*, 50 S.W.2d 765, 767 (Mo.App. 1932). Instead, it "regards that as done which

ought to be done." *Id.* Here, equity should regard appellant as the personal representative of the estate for the sole purpose of pursuing the new cause of action.

As discussed above, the Missouri Supreme Court relied exclusively on cases from other states when announcing the new cause of action. One of those cases was *Tappan*, in which the Florida court adopted the same cause of action as did Missouri in *Mickels*. *Tappan v. Florida Medical Ctr., Inc.*, 488 So.2d 630 (Fla.Dist.Ct.App. 1986). In fact, *Mickels* favorably quoted the procedural instructions in *Tappan*:

> "[A]ppellant is entitled to maintain this cause for recovery of such damages as are recoverable in a survivor's action.... [and] should be given an opportunity to file a third amended complaint to state a cause of action under the survival statute."

Mickels, 486 S.W.3d at 330, quoting *Tappan*, 488 So.2d at 631.

While it seems logical that appellant here should be given the same opportunity as the plaintiff in *Tappan*, the laws of the respective states differ regarding who can pursue certain claims. Under Florida law, claims for wrongful death and under the survival statute are each brought by the personal representative of the decedent's estate. Fl.St. §§ 46.021 and 768.20. As such, the Florida court's instruction to allow a third amended complaint faced no procedural impediment. For appellant, however, Missouri's dichotomy of proper parties in wrongful death and survival action now poses an obstacle which can only be cured through equity.

CONCLUSION

The Supreme Court announced a new cause of action which could only be pursued by the personal representative of appellant's late husband's estate. Appellant's attempt to pursue that cause of action has been thwarted by the probate court's order and judgment. Probate courts have "complete and unrestricted equitable powers." That power must be applied here to prevent a miscarriage of justice. This Court should reverse the probate court's order and judgment so that the appellant can be appointed personal representative to pursue the cause of action announced by the Supreme Court in *Mickels v. Danrad*.

Respectfully Submitted,

GRAY, RITTER & GRAHAM, P.C.

By: /s/ Thomas K. Neill
Stephen R. Woodley, #36023
Thomas K. Neill, #51959
701 Market Street, Suite 800
St. Louis, MO 63101
(314) 241-5620
(314) 241-4140 (fax)
swoodley@grgpc.com
tneill@grgpc.com
Attorneys for Appellants-Plaintiffs

CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Mo.R.Civ.Pr. 84.06(c), this brief contains the information required by Mo.R.Civ.Pr. 55.03, complies with the limitations in Mo.R.Civ.Pr. 84.06(b), and contains 2,531 words, exclusive of the material identified in Mo.R.Civ.Pr. 84.06(b), as determined using the word count program in Microsoft Word.

/s/ Thomas K. Neill

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the parties electronically through the Court's electronic filing system, on this 27th day of February, 2017, to:

John B. Morthland
jbmorthland@wasingerlaw.com

Amy L. Ohnemus
alohnemus@wasingerlaw.com

With a paper copied mailed, via first class U.S. mail, to:

Honorable John J. Jackson
Circuit Court of Marion County
Marion County Courthouse
Probate Division
906 Broadway, Room 105
Hannibal, MO 63401

/s/ Thomas K. Neill