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IN THE SUPREME COURT OF MISSOURI

SC96649

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 SUBSTITUTE REPLY BRIEF

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ARGUMENT

In *Mickels v. Danrad*, this Court announced a new cause of action. *Mickels v. Danrad*, 486 S.W.3d 327 (Mo. *banc* 2016); see also *Estate of Mickels*, No. 104985, 2017 WL 3597203, *1 (Mo.App. E.D. Aug. 22, 2017) (recognizing that this Court "broke new ground" in *Mickels* and that appellant seeks to "pursue the claim announced by the Missouri Supreme Court, when this case was previously on appeal."). While Danrad[1] now argues otherwise, in the past he agreed with this point. Because *Mickels* announced a new cause of action, equity requires appellant be given the opportunity to pursue that new claim.

In his substitute brief, Danrad raises the medical malpractice statute of limitation as a defense. This issue was not before the probate court. Following remand and appointment of appellant as personal representative of the estate, Danrad is free to raise that affirmative defense with the trial court. Until that time, the issue should be reserved for the trial court in which the underlying case remains pending. Should this Court wish to consider Danrad's argument, it fails because the cause of action announced in *Mickels* did not accrue until that opinion was issued.

[1] For the sake of clarity, appellant will refer to Dr. Danrad, who has been referenced as both "intervenor" and "respondent," simply as "Danrad." This is not meant to convey familiarity or a lack of respect.

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I. In *Mickels v. Danrad*, this Court announced a new cause of action.

No Missouri case before *Mickels* recognized a cause of action for the deprivation of the opportunity to delay death. On the contrary, this claim had previously been rejected by our Courts. *See e.g. Morton v. Mutchnick*, 904 S.W.2d 14, 17 (Mo.App. W.D. 1995)("It appears that plaintiffs are arguing that they should be allowed to recover damages for Mr. Morton's lost chance to have his life extended by an unknown period of time until his ultimate death as a result of AIDS-related illness. Unfortunately, Missouri does not recognize such a cause of action.")

Nevertheless, Danrad argues that *Mickels* "did not articulate a new cause of action." Danrad's Substitute Brief, p. 16. This is a drastic departure from Danrad's prior position. Before this Court in the underlying case, Danrad took the following positions:

> Missouri does not recognize a cause of action for loss of chance of extended survival or the failure to prolong an individual's life when the action or omission complained of is the failure to diagnose a terminal illness.
>
> ***
>
> Changing the causation standard in the manner requested by Appellants would create a new cause of action in Missouri for loss of chance of extended survival or for the failure to prolong an individual's life when the action or omission complained of is the failure to diagnose a terminal illness. Such a cause of action does not comport with prior precedent of any court in this state.

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> [T]here is no legal precedent [in Missouri] that allows a cause of action based upon the failure to prolong life.

Danrad's Substitute Response Brief, SC94844, pp. A10, A21, A28-29. And during oral argument before this Court, counsel for Danrad stated that "I think that what the plaintiffs are asking the Court to do here is to create a new cause of action for the loss of extended life."[2]

Ultimately, this Court adopted the cause of action which Danrad said did not exist, to wit: "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." *Mickels v. Danrad*, 486 at 329. In reaching this holding, this Court did not rely on Missouri cases, but instead acknowledged that "this is the approach taken in [two Florida cases.]" *Id.*, at 330.

Nor does Danrad point to any prior Missouri case where a plaintiff was permitted to pursue a claim for deprivation of the opportunity to delay death. This is because there is no such case and, as mentioned, such cause of action had been rejected in Missouri.

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[2] The audio recording of the oral argument is available through the Missouri Courts website, with the quoted statement beginning at the 22:55 mark: http://www.courts.mo.gov/SUP/index.nsf/fe8feff4659e0b7b8625699f0079eddf/6265bf9555aed0bd86257eab00819c8b/$FILE/SC94844.mp3.

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Morton, *supra*. And if such cases had previously been recognized, surely there would have been attorneys pursuing them on behalf of plaintiffs.

Danrad's extended discussion of survival actions misses the point. The issue is not whether Missouri recognizes that claims survive death; quite obviously it does. The issue is what claims does Missouri recognize. Until *Mickels*, Missouri did not recognize a claim for being deprived of the opportunity to delay death. And it is axiomatic that until a claim has been recognized there is nothing to survive. Because none of the survival action cases discussed by Danrad[3] involved a newly recognized cause of action, they are of no use here.

Moreover, while the cause of action set forth in *Mickels* falls under the umbrella of personal injury actions, that does not mean it is not new. For example, a claim for lost chance of surivial is also a claim for personal injury, but *Wollen* – like *Mickels* –

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[3] *Long v. F.W. Woolworth Co.*, 153 S.W.2d 88 (Mo.App. W.D. 1941)(premises liability); *Long v. F.W. Woolworth Co.*, 159 S.W.2d 619 (Mo. 1942)(same); *Plaza Exp. Co. v. Galloway*, 280 S.W.2d 17 (Mo. *banc* 1955)(automobile collision); *Small v. American Tel. & Tel. Co.*, 759 F.Supp. 1427 (W.D. Mo. 1991)(employment discrimination); *Carter v. Pottenger*, 888 S.W.2d 710 (Mo.App. S.D. 1994)(medical malpractice); *Sauter v. Schnuck Markets, Inc.*, 803 S.W.2d 54 (Mo.App. E.D. 1990)(premises liability); *State ex. rel. Cunningham v. Wiggins*, 156 S.W.3d 473 (Mo.App. 2005)(automobile collision); *Bamberger v. Freeman*, 299 S.W.3d 684 (Mo.App. E.D. 2009)(automobile collision); *Howell v. Murphy*, 844 S.W.2d 42 (Mo.App. W.D. 1992)(intentional wrongful death).

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announced a new cause of action. *See*, Robert S. Bruer, *Loss of a Chance as a Cause of Action in Medical Malpractice Cases*, 59 Mo. L. Rev. 969, 991 (1994)("As with the recognition of any new cause of action, *Wollen* raises important issues of both policy and practicality.") *See also*, Robert H. Dierker & Richard J. Mehan, M*issouri Practice Personal Injury and Torts Handbook*, 34 Mo. Prac. § 28:2 (2016)(recognizing only *Mickels* for the proposition that "[a] variation of the theory of failure to diagnose appears to arise in the context of failure to diagnose a terminal illness, resulting in a shortening of life.").

II. Equity requires that appellant be appointed personal representative.

Will equity witness this Court announce a new cause of action in appellant's underlying case, yet stand by idly while appellant is barred from pursuing that new claim?

Danrad argues that appellant seeks "a pass by this Court" because she "failed to understand the nature and extent of [her] cause of action." Danrad's Substitute Brief, p. 14. While this is a predictable defense against equity, it rings hollow here. As discussed above, Danrad was clear when he represented to this Court that "Missouri does not recognize a cause of action for loss of chance of extended survival…" Danrad's Substitute Response Brief, SC94844, A10. Now Danrad argues that appellant should be punished for failing to file a claim which Danrad argued did not exist before *Mickels*.

Appellant does not seek a pass from this Court. Appellant wants only the opportunity to pursue a claim that no one – not appellant, not Danrad, not even the Court of Appeals – could have known would be announced by this Court. If appellant is not

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allowed that opportunity, our courts should dispense with the maxim that equity will not permit a wrong to be suffered without a remedy.

Along the same lines, Danrad's reliance on *Vestin Realty* is misplaced. There, a creditor purchased property at auction under a full credit bid and subsequently sought to exercise other rights under a note. *Vestin Realty Mortg. I, Inc. v. Pickwick Partners, L.L.C.*, 279 S.W.3d 536, 537 (Mo.App. W.D. 2009). But "[u]nder general principles of law, when the creditor makes a 'full credit bid' at the foreclosure sale, the creditor completely extinguishes the indebtedness of the debtor." *Id.*, at 538. The creditor sought to have the foreclosure sale set aside using equitable doctrines, but both the trial and appellate courts denied such relief. *Id.*

The difference between *Vestin Realty* and our case is straightforward. There, the creditor made a mistake regarding the "general principles of law." That is not the case here. Appellant did not fail to abide a prerequisite of a recognized cause of action because her cause of action arose during the litigation.

Danrad fails in his attempt to distinguish *Myers' Estate* as simply involving the tracing of funds. *In re Myers' Estate,* 376 S.W.2d 219 (Mo. *banc* 1964). In fact, Danrad agrees that *Myers' Estate* stands for the proposition that "the legislature intended to allow the probate court to exercise equitable jurisdiction." <u>Danrad's Substitute Brief, p. 12.</u> But whether a probate court orders the tracing of funds – as in *Myers' Estate* – or tolls a deadline, the court is invoking equity. And our statutes are absolutely clear that probate courts have those equitable powers. RSMo. §472.030; see also *Estate of Cantonia v. Sindel*, 684 S.W.2d 592 (Mo.App. E.D. 1985)(affirming the probate court's application of

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doctrine of equitable conversion); *Estate of Goslee*, 807 S.W.2d 552 (Mo.App. S.D. 1991)(affirming the probate court's setting aside of a deed).

Danrad also argues that applying equity will lead to complex problems in the future. Danrad's Substitute Brief, p.13. But the scenarios described by Danrad – will contests, filing of claims – are routine matters. The case at bar involves the rare occurrence of a newly announced cause of action. In the medical malpractice arena, such an occurrence appears to have last happened in 1992 with *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo. *banc* 1992). Applying equity under these unique circumstances will not cause the probate courts to devolve into anarchy.

III. RSMo. § 473.020 does not bar appointment of a personal representative in this case.

In his Point III, Danrad argues that equity cannot override RSMo. § 473.020. But this argument, focused on special statutes of limitations, completely ignores that *Mickels* announced a new cause of action. By not addressing that issue, Danrad's argument fails.

Several of the cases on which Danrad relies describe fundamental principles which make clear that the announcement of a new cause of action is determinative here. In *Boland*, this Court acknowledged that "a cause of action accrues, and the limitation period begins to run, when the right to sue arises." *Boland v. St. Luke's Health System, Inc.*, 471 S.W.3d 703, 710 (Mo. *banc* 2015), citing *Hunter v. Hunter*, 237 S.W.2d 100 (Mo. 1951). In *Franzee*, this Court held that a "cause of action accrues the moment the right to commence an action comes into existence, and the statute of limitations

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commences to run from that time." *Franzee v. Partney*, 314 S.W.2d 915, 920 (Mo. 1958).

Before *Mickels* announced a cause of action for being deprived of the opportunity to live longer, there was no such claim available in Missouri. *Morton*, 904 S.W.2d at 17. Only after Mickels did that right arise and only then did the statute of limitation begin to run.

None of the cases on which Danrad relies involved a statute of limitation barring a newly announced cause of action.[4] On the contrary, many of those cases involved well-

[4] *Boland*, 471 S.W.3d at 705 (statute of limitation barred wrongful death claims despite the tortious nature of the decedents' deaths being intentionally and fraudulently concealed); *Franzee*, 314 S.W.2d at 916-7 (statute of limitation barred wrongful death claim despite defendant's concealment of his identity); *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. *banc* 1968) (statute of limitation barred medical malpractice claim involving foreign object prior to adoption of discovery rule); *Milgram v. Jiffy Equipment Co.*, 247 S.W.2d 668, 676 (Mo. 1952) (following statutory mandate to distribute corporate assets to shareholders); *Hunter v. Hunter*, 237 S.W.2d 100 (Mo. 1951)(refusing to toll statutes of limitation during period of imprisonment); *Kuenzle v. Mo. State Highway Patrol*, 865 S.W.2d 667 (Mo. *banc* 1993) (refusing to permit equitable expungement of arrest record); *Leggett v. Mo. State Life Ins.*, 342 S.W.2d 833 (Mo. *banc* 1960) (applying statutorily prescribed interest rate); *State ex rel. Bier v. Bigger*, 178 S.W.2d 347 (Mo. *banc* 1944) (statute of limitation barred application for probate of will

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settled areas of law. See e.g. *Boland*, 471 S.W.3d at 711 ("Frazee remains good law and is directly on point in this case."); *Milgram*, 247 S.W.2d at 676 ("established rules and precedents are equally binding upon both law and equity courts."). But this case did not arise within the realm of well-established precedent or where there was good law directly on point. This case arose under new and unique circumstances.

In *Boland*, this Court observed that the issue of fraudulent concealment is best left to the General Assembly. *Boland*, 471 S.W.3d at 712. The same cannot be said of the issue here. Prior to *Mickels*, the General Assembly was presumed to be aware that Missouri did "not recognize a cause of action" for damages for "lost chance to have [] life extended." *Morton*, 904 S.W.2d at 17. As such, there was no reason for the General Assembly to consider when an estate should be opened under our circumstances. Danrad argues that ruling in Appellant's favor "is in effect vetoing the legislature's balance of considerations." Danrad Substitute Brief, p.50. But this wrongly supposes that the General Assembly performed such balancing before *Mickels*. Because the *Mickels* cause of action was announced by this Court, the issue of when this estate was required to be opened should be decided by this Court.[5]

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despite concealment of will); *Stowe v. Stowe*, 41 S.W. 951 (Mo. 1897) (statute of limitation barred will contest despite fraudulent inducement of will).

[5] It is possible that a different result will be reached for cases in which the conduct giving rise to a claim for lost opportunity to live longer occurred after *Mickels*. But this Court

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IV. The statute of limitations is not an issue on appeal, nor a bar to the underlying action.

Danrad prematurely raises the statute of limitations as a defense, arguing that this Court can affirm the probate court's ruling because RSMo. §516.105 would bar the underlying suit. But that affirmative defense is not one which would be raised in the probate court; it would be raised before the trial court in the underlying case. As such, it is not an issue here.

The issue on appeal is whether appellant should be appointed personal representative of her late husband's estate. Once that occurs and appellant has amended the underlying suit to assert the cause of action announced in *Mickels*, Danrad can raise whatever affirmative defenses he chooses in the trial court. At this stage, however, Danrad is asking this Court to decide the matter without the trial court even having the opportunity to consider it. And it should be noted that the underlying case remains pending before the trial court.

Even if the Court decides to consider the statute of limitations argument, Danrad fails to meet his acknowledged burden on this affirmative defense. It is fundamental that a suit cannot be maintained until a cause of action accrues. Here, the cause of action which appellant intends to pursue in the underlying case did not accrue until the *Mickels*

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can limit its holding to the unique facts of this case. See e.g., *O'Grady v. Brown*, 654 S.W.2d 904, 911 (Mo. *banc* 1983).

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opinion was issued. Prior to that time, April 19, 2016, she could not have a pursued a cause of action which was not recognized in Missouri.

Danrad relies heavily on *Caldwell*. In that case, the Southern District found the statute of limitations for lost chance of survival to have expired two years after plaintiff ad litem's minor child died. *Caldwell v. Lester E. Cox Medical Centers-South, Inc.*, 943 S.W.2d 5, 9 (Mo.App. S.D. 1997). But that claim was not asserted by a plaintiff ad litem for over four years after the death. *Id.*

Danrad's reliance on *Caldwell* is misplaced, as there are at least two significant differences from our case. First, the plaintiff ad litem in *Caldwell* was not trying to assert a claim which had been announced in his case. The *Caldwell* plaintiff was attempting to assert the claim announced in *Wollen*. Here, the claim appellant is pursuing was announced in her case. Second, the plaintiff ad litem in *Caldwell* did not file a lost chance claim for over two years after *Wollen* was announced. Here, appellant sought to be appointed personal representative to pursue the underlying action within six months of the *Mickels* opinion being handed down.

CONCLUSION

This Court announced a new cause of action in *Mickels*. It would be inequitable for appellant to be deprived her pursuit of that new cause of action because she did not seek appointment as personal representative before that cause of action even existed.

This Court should reverse the probate court's order and judgment so that appellant can pursue the new cause of action.

Respectfully Submitted,

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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 3,310 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 October, 2017, to:

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