

IN THE SUPREME COURT OF MISSOURI

GORDON F. GOLDSBY,)	
)	
Appellant,)	
)	
vs.)	No. SC96639
)	
GEORGE LOMBARDI,)	
)	
Respondent.)	

SUBSTITUTE REPLY BRIEF OF APPELLANT GORDON F. GOLDSBY

Appeal from the Circuit Court of Cole County
The Honorable Daniel Richard Green, Circuit Judge

Jeffery T. McPherson #42825
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314-621-5070 FAX 314-621-5065

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities.....	3
Argument.....	4
Conclusion.....	17
Certificate of Service and Compliance.....	18

TABLE OF AUTHORITIES

<i>Baird v. State</i> , 512 S.W.3d 867 (Mo. App. 2017)	14
<i>C&F Investments, LLC v. Hall</i> , 149 S.W.3d 557 (Mo. App. 2004).....	4
<i>City of Lake Saint Louis v. City of O’Fallon</i> , 324 S.W.3d 756 (Mo. banc 2010)	8
<i>Houston v. Lack</i> , 487 U.S. 266 (1988)	15
<i>Kilmer v. Mun</i> , 17 S.W.3d 545 (Mo. banc 2000)	8
<i>Kinney v. Department of Corrections</i> , 483 Mich. 944 (2009)	14
<i>Price v. State</i> , 422 S.W.3d 292 (Mo. banc 2014).....	4,9,10,11,15
<i>Sandy v. Schriro</i> , 39 S.W.3d 853 (Mo. App. 2001)	16
<i>Speck v. Union Elec. Co.</i> , 731 S.W.2d 16 (Mo. banc 1987)	5
<i>State ex rel. Cardinal Glennon v. Gaertner</i> , 583 S.W.2d 107 (Mo. banc 1979)	7
<i>State ex rel. JCA Architects v. Schmidt</i> , 751 S.W.2d 756 (Mo. banc 1988)	4,6,7,8
<i>Watson v. State</i> , 520 S.W.3d 423 (Mo. banc 2017)	4,10,11,15
§ 216.355, RSMo 1969	16
§ 546.490, RSMo.....	16
§ 556.031, RSMo 1979	16
§ 559.260, RSMo 1969	16
§ 512.050, RSMo.....	4,6,8,12
§ 512.190, RSMo.....	6
Rule 29.15.....	4,9,10,11
Rule 41.03.....	4,10
Rule 81.04.....	passim

ARGUMENT

The defendant's substitute brief in this Court puts up no real fight on the issue of whether Mr. Goldsby's notice of appeal was timely. The defendant offers no substantive argument as to the clear terms of section 512.050, RSMo, which explicitly declares that all that is required to appeal a judgment is to file a timely notice of appeal, and the failure to take any further steps does not affect the validity of the appeal. The defendant refuses to address or even mention the two key cases cited by Mr. Goldsby, *State ex rel. JCA Architects, Inc. v. Schmidt*, 751 S.W.2d 756 (Mo. banc 1988), and *C&F Investments, LLC v. Hall*, 149 S.W.3d 557 (Mo. App. 2004). The logic of *JCA* and *C&F*, unrebutted by the defendant, makes it clear that Mr. Goldsby's notice of appeal was timely, and this appeal should not have been dismissed by the Court of Appeals.

Similarly, even if the Court disagrees on timeliness, the defendant's substitute brief fails to offer any reasoning as to why the notice of appeal should not be deemed timely under the logic of the Court's recent decisions in *Price v. State*, 422 S.W.3d 292 (Mo. banc 2014), and *Watson v. State*, 520 S.W.3d 423 (Mo. banc 2017). The defendant does not dispute that the limitations on an inmate's ability to comply with Rule 81.04 are the same as the limitations on an inmate's ability to comply with Rule 29.15. This Court's rules, including Rule 81.04, "shall be construed to secure the just, speedy and inexpensive determination of every action." Rule 41.03. Notably, the defendant refuses to address or even mention *Price*, *Watson*, or Rule 41.03.

On the merits, it is clear that the claim for a declaratory judgment was not barred by an unpleaded affirmative defense of res judicata. The dismissal should be reversed.

I. The notice of appeal was timely.

In Point I, Mr. Goldsby explained why his notice of appeal was timely and why the Court of Appeals improperly dismissed his appeal. The defendant's substitute brief does not refute the bases of Point I.

The defendant does not dispute that the right of appeal is purely statutory. *See Speck v. Union Elec. Co.*, 731 S.W.2d 16, 20 (Mo. banc 1987) (superseded by rule change on other grounds).

The defendant does not dispute that this Court lacks the power to issue rules that change the right of appeal: "Although this Court may establish rules relating to practice and procedure for all courts which shall have the force and effect of law, such rules shall not change the right of appeal." *Id.*

The defendant does not dispute that the Missouri Constitution is crystal clear on this point: "The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to . . . the right of appeal." Mo. Const. art. V, § 5.

By the plain terms of the relevant statute, all that is required to appeal a judgment is to file a timely notice of appeal, ***and the failure to take any further steps does not affect the validity of the appeal:***

When an appeal is permitted by law from a trial court and within the time prescribed, a party or his agent may appeal from a judgment or order by filing with the clerk of the trial court a notice of appeal. No such appeal shall be effective unless the notice of appeal shall be filed not later than ten

days after the judgment or order appealed from becomes final. . . . After a timely filing of such notice of appeal, failure of the appellant to take any of the further steps to secure the review of the judgment or order appealed from does not affect the validity of the appeal, but is ground for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

§ 512.050, RSMo.

Respectfully, Rule 81.04 cannot properly attach additional conditions to the right of appeal. A failure to do anything other than file a timely notice of appeal -- like a failure to pay the filing fee, for example -- might be a basis for a subsequent dismissal in a proper case, but payment need not accompany the notice of appeal.

It is undisputed that Mr. Goldsby submitted a timely notice of appeal. Supp. L.F. at 22 (transmittal envelope file-stamped August 5, 2016); Reply Appendix at A1. The notice of appeal was due by August 8, 2016, and the clerk of the circuit court wrote to Mr. Goldsby on August 5, 2016, stating: “This office received your Appeal on August 5, 2016.” Supp. L.F. at 33; Reply Appendix at A2. The Court of Appeals was incorrect in dismissing this appeal.

The defendant concedes that the former requirement to submit a filing fee was removed from section 512.050. He notes that new provisions were enacted for payment of fees in Chapter 488, but he fails to note that this Court addressed the effect of this change in the *JCA* case when addressing a similar change in section 512.190, RSMo.

JCA explains that the filing fee is no longer a jurisdictional requirement:

While the fee is required, payment at any particular time is not made a jurisdictional prerequisite. If it were a jurisdictional prerequisite the legislature would have explicitly so provided, as was done in [the former version of

section 512.050]. Our holding does not preclude the court from imposing sanctions on litigants who do not comply with the statutes and rules. Here, however, the fee had been paid at the time the circuit court took steps to dismiss the appeal.

JCA, 751 S.W.2d at 757.

In this case, it is undisputed that Mr. Goldsby paid the filing fee in full, long before the Court of Appeals acted to dismiss his appeal. Supp. L.F. at 4, 36; Reply Appendix at A6, A8. This dismissal was improper under the logic of the *JCA* case.

JCA is consistent with Rule 84.08(a) on this point. Even if Mr. Goldsby had not paid the fee, it would have been improper to dismiss the appeal without giving him notice and an opportunity to cure the deficiency:

After the timely filing of a notice of appeal, if the appellant fails to take the further steps required to secure review of the appeal within the periods of time allowed or as extended, the clerk shall place the case on a dismissal docket. The clerk shall notify all parties that the appeal will be dismissed unless the appellant remedies the default before a specified date. The date shall not be less than 15 days from the date of the notice. If the default is not remedied by that date, an order of dismissal shall be entered.

Rule 84.08(a). As noted, there is no need to remedy any default in this appeal because Mr. Goldsby has already paid the filing fee.

Imposing a requirement of a contemporaneous filing fee in the context of an action by an inmate against a custodian who controls the inmate's means of payment would raise real issues of due process and access to the courts. In *State ex rel. Cardinal Glennon Memorial Hosp. v. Gaertner*, 583 S.W.2d 107 (Mo. banc 1979) (abrogated by statutory amendment on other grounds), this Court held a statute invalid to the extent it required a plaintiff to submit a medical malpractice claim to a review board before an action could proceed in circuit court.

In *Kilmer v. Mun*, 17 S.W.3d 545, 554 (Mo. banc 2000), this Court struck down a statutory requirement that a dram shop claim could only be maintained if the defendant had been convicted of a crime, holding that the requirement was arbitrary and unreasonable because it depended entirely upon the decision of the elected prosecuting authority to prosecute the defendant.

In *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756 (Mo. banc 2010), this Court reversed prior cases and held that one city could maintain a direct action against another city without having to seek the assistance of a prosecuting authority to maintain an action for quo warranto: "To require a directly affected municipality or other similar public corporation to rely on a third party -- the attorney general or a county prosecutor -- to bring suit over its very boundaries would risk leaving it without a remedy if the attorney general and prosecutor exercise their discretion not to act."

JCA and the plain language of section 512.050 make it clear that a filing fee is not a jurisdictional requirement to commence an appeal. Cases to the contrary should be overruled, and Rule 81.04 should not be interpreted to bar this appeal.

If the Court were to disagree on the issue of section 512.050, then Rule 81.04 would be unconstitutional as contrary to Article V, section 5 of the Missouri Constitution. It would also violate Mr. Goldsby's rights to due process and access to the courts. The keys to the courthouse cannot properly be in the hands of a defendant who controls payment of the appellant's filing fee.

II. Alternatively, the notice of appeal should be deemed to be timely.

Mr. Goldsby is a state prisoner in the custody and control of the defendant. The defendant does not dispute that there are practical limitations on an inmate's ability to control the circumstances that can affect his or her compliance with the Supreme Court Rules. *See Price v. State*, 422 S.W.3d 292, 301 (Mo. banc 2014). The defendant does not dispute that these practical limitations include the inmate's inability to control when payments are made from his or her accounts.

Mr. Goldsby requested payment of the filing fee for this appeal on July 28, 2016, well in advance of the deadline for filing a notice of appeal (August 8, 2016). Supp. L.F. at 34-35; Reply Appendix at A9-A10. On the same date that he requested payment, Mr. Goldsby sent his notice of appeal to the circuit clerk, who received it on August 5, 2016. Supp. L.F. at 23, 33; Reply Appendix at A11-A12. But the circuit clerk only received the payment from the Department of Corrections on August 17, 2016. Supp. L.F. at 4 (docket entry noting "Received check 884914 in the amount of \$70.00 from DOC for filing fee for Appeal"); Reply Appendix at A6. Having done everything in his power to obtain a payment by August 8, 2016, Mr. Goldsby should not suffer dismissal of his appeal solely because he is an inmate.

The defendant does not dispute that Mr. Goldsby's situation with Rule 81.04 in this case is analogous to proceedings under Rule 29.15, in which the Court has recognized exceptions to filing deadlines in light of "the practical reality that an inmate cannot comply with Rule 29.15 without relying on a third party to some extent." *Price*, 422 S.W.3d at 302. Rule 29.15(b) mandates when an inmate "shall file" his or her

motion in the sentencing court, but an inmate by definition “cannot comply with such a requirement on his own. Instead, inmates—unlike nearly every other category of civil litigants—cannot initiate post-conviction proceedings without relying on the assistance of one or more third parties to take the motion from the inmate and deliver it to the circuit clerk for filing. Accordingly, where an inmate writes his initial post-conviction motion and takes every step he reasonably can within the limitations of his confinement to see that the motion is filed on time, a motion court may excuse the inmate’s tardiness when the active interference of a third party beyond the inmate’s control frustrates those efforts and renders the inmate’s motion untimely.” *Id.*

The time limits for filing a Rule 29.15 motion are mandatory, and Rule 29.15 does not carve out exceptions to excuse late filings. *Watson v. State*, 520 S.W.3d 423, 428-429 (Mo. banc 2017). Nevertheless, this Court has recognized exceptions, including situations when post-conviction counsel abandons the movant and when circumstances outside the movant’s control justify late receipt of the motion. *Id.* at 429.

This Court’s rules “shall be construed to secure the just, speedy and inexpensive determination of every action.” Rule 41.03. A just application of Rule 81.04 -- like the Court’s just application of Rule 29.15 -- would recognize an inmate’s limited ability to comply as well as an inmate’s necessary reliance on others. The Court’s decisions on Rule 29.15 should apply equally to the application of Rule 81.04 in prisoner cases.

Notably, the defendant offers no argument to the contrary. He does not address *Price* or *Watson*. He does not even cite them.

The defendant notes that Rule 81.04 provides that a notice of appeal is deemed filed on the date the clerk receives the notice “with a docket fee or with a statement demonstrating no docket fee is required,” or with “a motion to prosecute the appeal in forma pauperis.”

As a private litigant, Mr. Goldsby could not properly claim that no docket fee was required.

As an inmate, Mr. Goldsby could not control the timing of the fee payment. ***The defendant concedes that Mr. Goldsby was required to submit requests to the defendant’s subordinates in order to get the fee paid.*** Respondent’s Substitute Brief at 18-19. This is the exact lack of control, noted in cases like *Price* or *Watson*, that has been held to authorize relief from the requirements of Rule 29.15.

And, when the notice of appeal was filed, the trial court had already denied Mr. Goldsby’s motion for leave to proceed in the litigation in forma pauperis. *See* Supp. L.F. at 6 (motion). On August 3, 2015, the trial court ordered that Mr. Goldsby would be required to pay the full circuit court filing fee in monthly installments. Supp. L.F. at 11.

When judgment was entered, and before the notice of appeal was submitted, the circuit court reinforced Mr. Goldsby’s obligation to pay costs. On June 27, 2016, the court granted the defendant’s motion to dismiss and entered judgment in favor of the defendant. L.F. at 42. Two days later, on June 29, 2016, the court entered a judgment for costs against Mr. Goldsby. Supp. L.F. at 18. Recognizing Mr. Goldsby’s status as

an inmate, the judgment for costs provided that “a copy of this Order be directed to the Financial Officer of The Department of Corrections of the State of Missouri.” Supp. L.F. at 18. The next day, notices of the cost judgment were sent to Mr. Goldsby and the inmate finance officer (a subordinate of the defendant). Supp. L.F. at 19-20.

Thus, when Mr. Goldsby submitted the notice of appeal, he knew he was liable for costs, and the circuit court recognized that Mr. Goldsby did not control the payment of costs. This Court should not fault Mr. Goldsby for failure to comply with Rule 81.04 because (a) he could not control payment of the fee, (b) he could not properly claim to be immune from costs, and (c) he could not properly claim to be able to proceed in forma pauperis.

The defendant is unfair in suggesting that Mr. Goldsby could have gotten relief under Rule 81.07(a) and been allowed to file a “late” notice of appeal (despite the fact that his notice of appeal was timely and no fee was required under section 512.050). Rule 81.07(a) provides that a motion for such relief must be filed “within six months from the date the judgment appealed from became final for purposes of appeal.” It is undisputed that this judgment became final on July 27, 2016. Thus, a motion under Rule 81.07(a) would have been due by January 27, 2017.

As shown by the record in the Court of Appeals, the defendant did not raise any issue as to the timeliness of the appeal until after the deadline for a motion under Rule 81.07(a). *See* No. WD79982. Mr. Goldsby’s brief in the Court of Appeals was filed on October 24, 2016, so the defendant’s brief was due to be filed by November 23,

2016. Rule 84.05(a). The Court of Appeals granted the defendant's request for a sixty-day extension of time and later granted the defendant's request for an additional thirty-day extension. The defendant's brief was filed on February 23, 2017, raising for the first time an argument that the notice of appeal was untimely. After the Court of Appeals dismissed his appeal, Mr. Goldsby filed a motion under Rule 81.07(a), but it was denied. *See* No. WD80873. If the defendant had raised the issue earlier, Mr. Goldsby could have addressed it.

The defendant is incorrect in declaring that, in his motion under Rule 81.07(a), "Goldsby attempted to blame the circuit court and appellate court for his failure to file a timely motion." Respondent's Substitute Brief at 19. Quite to the contrary, Mr. Goldsby blamed the defendant and his subordinates. The motion stated: "Appellant mailed the Notice of Appeal to trial court on July 28th, 2016. Also on July 28th, 2016 Appellant authorized a release of his funds to pay the filing to the clerk of the trial court. [it should be noted that Defendant Lombardi is the Director of MDOC and is the chief over those people who issue checks to the courts]." Motion at ¶ 4 (brackets in original). The motion stated: "The Cole County Circuit Court's Clerk received the 'Notice of Appeal' on or about the 4th of August, 2016. The green check for the filing fee was not received until August 17th, 2016. It took the financial department more than 19 days to mail the check for the filing fee." Motion at ¶ 5. The motion stated: "The notice of appeal was timely filed, however the filing fee was not

received by the clerk of court in a timely fashion because Appellee George Lombardi controls Appellant's monies." Motion at ¶ 6.

The defendant states: "Goldsby shows no misconduct by the Department." Respondent's Substitute Brief at 19. Mr. Goldsby has not asserted *misconduct*, but the undisputed facts recited above show a *delay* on the part of the part of the defendant's subordinates. Regardless of the state of mind of the defendant's subordinates, it is undisputed that Mr. Goldsby was required to depend on them.

Such delays are not uncommon in prisoner litigation. In *Baird v. State*, 512 S.W.3d 867 (Mo. App. 2017), for example, a movant under Rule 24.035 placed his motion in the outgoing prison mailbox six days before the filing deadline, but it was received by the circuit court clerk five days after the deadline.

In *Kinney v. Department of Corrections*, 483 Mich. 944 (2009), the Supreme Court of Michigan granted a prisoner relief from a deadline in an action against prison officials when a filing due by May 3, 2004, was delivered to prison officials on April 14, 2004, but not received by the court until May 10, 2004. The plaintiff was given a new deadline of August 4, 2004. He delivered his filing to prison officials on July 20, 2004, but the court did not record the application as received until August 13, 2004.

In this case, Mr. Goldsby requested payment of a filing fee on July 28, 2016, and the court did not receive it until August 17, 2016. Supp. L.F. at 4, 34-35; Reply Appendix at A6, A9-A10. These facts show that the delay in payment of the filing fee was not caused by Mr. Goldsby, but rather by prison officials.

In similar circumstances, the Supreme Court of the United States adopted the “prison mailbox rule,” providing that an inmate’s filing is considered “filed” the day it enters the prison mail system. *See Houston v. Lack*, 487 U.S. 266 (1988). In *Houston*, the Court noted that a prisoner cannot control a notice of appeal after it has been delivered to prison officials, and prison authorities have incentive to delay a filing beyond the applicable time limit. *Id.* at 270-272.

In this case, relief from a filing deadline is appropriate (to any extent that Rule 81.04 could properly require a payment as a condition to a valid notice of appeal). *See Price; Watson; Houston.*

III. The dismissal should be reversed.

The dismissal of Mr. Goldsby's petition should be reversed. The pleading stated a claim, and it was not barred any unpleaded affirmative defense.

In his brief before this Court, the defendant is incorrect in declaring: "Invoking principles of res judicata and collateral estoppel, respondent filed an answer (LF 19) and a motion to dismiss (LF 31)." Respondent's Substitute Brief at 20. The Court is urged to review the portions of the legal file cited by the defendant, who never asserted any affirmative defenses in his answer and did not invoke "principles of res judicata and collateral estoppel." The defendant's motion to dismiss declared that Mr. Goldsby's claim was "meritless." L.F. at 31. A court cannot properly dismiss a plaintiff's petition for failure to state a claim by finding in favor of respondent on the merits. *Sandy v. Schriro*, 39 S.W.3d 853, 856 (Mo. App. 2001).

In his pleadings, Mr. Goldsby sought a declaration of his rights under sections 556.031, 559.260, and 546.490. L.F. at 5; Supp. L.F. at 13. In his motion to dismiss, the defendant did not mention sections 556.031, 559.260, or 546.490. L.F. at 31-32. The motion provided no basis for dismissal of Mr. Goldsby's claims.

In his pleadings, Mr. Goldsby sought a declaration as to whether the defendant was required to provide him with a calculation of the start and end dates of his current sentence under the cited statutes. L.F. at 8. The materials attached to the motion to dismiss did not address this issue. Exhibit A was an unpublished memorandum from the Court of Appeals relating to an action by Mr. Goldsby to obtain a declaratory judgment that he was entitled to be released under section 216.355, RSMo 1969. L.F. at 34.

Exhibit B was a copy of a judgment dated January 8, 2014, from the Circuit Court of Pike County denying a petition for habeas corpus based on Mr. Goldsby's contention that he should be released "because he has completed his life sentence." L.F. at 40.

Nothing in the defendant's exhibits foreclosed the relief sought in Mr. Goldsby's pleadings -- a calculation of Mr. Goldsby's current release date under other statutes. Even now, in his brief before this Court, *the defendant does not dispute that Mr. Goldsby stated a claim for this relief.* The dismissal was improper.

The defendant is mistaken in repeatedly declaring that Mr. Goldsby has somehow changed his theory in this Court. In the circuit court, Mr. Goldsby responded to the motion to dismiss by noting that he was not seeking to be released in the present action for a declaratory judgment, but rather to be told his calculated release date under the statutes mentioned in his pleadings. Supp. L.F. at 15; Reply Appendix at A13. This is the same argument advanced in this Court.

CONCLUSION

For the foregoing reasons and those set forth in Mr. Goldsby's initial substitute brief, the judgment of dismissal should be reversed, and this action should be remanded for resolution on the merits.

Respectfully submitted,

/s/ Jeffery T. McPherson

Jeffery T. McPherson #42825
jmcpherson@armstrongteasdale.com
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314-621-5070 FAX 314-621-5065

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on March 8, 2018.

This brief includes the information required by Rule 55.03 and complies with Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 4,059, excluding the cover, signature block, appendix, and this certificate.

The electronic copies of this brief were scanned for viruses and found virus-free through the Symantec anti-virus program.

/s/ Jeffery T. McPherson