SC 97385

IN THE MISSOURI SUPREME COURT

DELORES HENRY

Plaintiff,

v.

PAUL PIATCHEK, et al.,

Defendants/Respondents.

DARRELL WILLIAMS, SR.,

Proposed Intervenor/Appellant.

Appeal from the Circuit Court of St. Louis City, 22nd Judicial Circuit
The Honorable Rex M. Burlison, Judge

Upon transfer from the Missouri Court of Appeals, Eastern District
Appeal No. ED105742

SUBSTITUTE BRIEF OF RESPONDENTS

ERIC S. SCHMITT
Attorney General
Denise McElvein, #45227
Assistant Attorney General
P.O. Box 861
St. Louis, MO 65188
(314) 340-7861 Telephone
(314) 340-7029 Facsimile
Denise.McElvein@ago.mo.gov
Attorneys for Respondents

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JURISDICTIONAL STATEMENT

Appellant Darrell Williams, Sr. filed a motion to set aside plaintiff's dismissal and to intervene. The trial court denied Appellant's motion. Appellant appealed and the Court of Appeals, in a 2-1 decision ruled that the trial court erred in denying Appellant's motion and reversed and remanded the case for further proceedings. Respondents filed a motion for rehearing and/or transfer that was summarily denied. On November 30, 2018, this Court sustained Respondents' application for transfer; thus this Court has jurisdiction, as described in Article V, Section 10, Missouri Constitution.

STATEMENT OF THE FACTS

In 2010, Delores Henry, ("Grandmother") describing herself as "next of kin" filed this wrongful death cause of action in St. Louis City Circuit Court styled Henry v. Piatchek, et al., No. 1022-CC00155 for the alleged 2009 wrongful death of her grandson ("Decedent"). Legal File ("L.F.") 11-16. Grandmother's lawsuit named as defendants two police officers, the former chief of police, and the Board of Police Commissioners for the St. Louis Metropolitan Police Department "(State Respondents"). L.F. 11. Grandmother's petition did not state that Decedent was survived by anyone besides her as she described herself as "next of kin." L.F. 11-16.

After Grandmother's lawsuit was filed, Appellant Darrell Williams, Sr., proceeding *pro se*, filed letters with the court requesting copies of the docket sheets and copies of the pleadings. L.F. 34-40. The clerk's office sent the copies to Appellant. Id. In 2011, Appellant sent letters to the court clerk asserting that he was Decedent's father, inquiring about filing a lawsuit, and requesting to be added as plaintiff in Grandmother's ongoing wrongful death suit. L.F. 41-42. Appellant did not provide notice to the State Respondents of any of these letters,

nor did Appellant call up any "motion" for a hearing. Id. Appellant never filed a pleading asserting that a "statute of this state" gave him an "unconditional right to intervene" under Rule 52.12(a)(1). As a result, the trial court never ruled on Appellant's motion and he never became a party to Grandmother's lawsuit. Id. The last letter Appellant sent to the court requested the local court rule for filing a lawsuit. L.F. 43. Appellant never filed a lawsuit and took no further action. In 2014, Grandmother dismissed her lawsuit without prejudice. L.F. 47-51.

Three years after Grandmother voluntarily dismissed her lawsuit, in 2017, Appellant, represented by counsel, filed a motion to set aside Grandmother's dismissal and to intervene. L.F. 52-60. State Respondents opposed the motion. L.F. 61-67. The trial court denied Appellant's motion, ruling that when the Grandmother voluntarily dismissed her lawsuit it disposed of the entire case so the trial court lost authority over the case. L.F. 69-71; Suppl. L.F. 1-3.

Appellant appealed and the Court of Appeals, in a 2-1 decision, ruled that the trial court erred in denying Appellant's motion to set aside dismissal and to intervene, and the Court reversed and remanded the case for further proceedings. Appendix ("App.") A 17-40. State

Respondents filed a motion for rehearing and/or transfer that was summarily denied. On November 30, 2018, this Court sustained State Respondents' application for transfer and the cause was ordered transferred.

SUMMARY OF THE ARGUMENT

The trial court properly denied non-party Appellant's motion to set aside Grandmother's voluntary dismissal and intervene, ruling that it lacked authority because Grandmother's dismissal disposed of the entire case and the trial court lacked authority to grant the non-party Appellant's motion to set aside the dismissal and intervene.

No Missouri case supports allowing non-party Appellant to set aside Grandmother's dismissal of her wrongful death cause of action and to intervene to begin the case anew beyond the three-year statute of limitation for bringing a wrongful death action. Appellant never filed a proper motion to intervene as a matter of statutory right prior to Grandmother's dismissal and never obtained an order from the trial court permitting his intervention as of right. Even if he had filed a motion to intervene as of right prior to the 2014 dismissal, parties must file a motion for relief from a judgment or order within one year, Rule 74.06(c), and Appellant did not file until three years later. Finally, the three-year statute of limitation to bring a cause of action for the alleged wrongful death of Decedent expired in 2012.

This Court should affirm the trial court's judgment.

ARGUMENT

I. The trial court lacked jurisdiction to grant non-party Appellant's motion to set aside Grandmother's voluntary dismissal and to intervene, because the effect of the voluntary dismissal was as if the lawsuit had never been brought. – Responding to Appellant's Point Relied on I.

A. Standard of Review

This Court is to determine if, pursuant to Rule 67.02, the trial court had jurisdiction after Grandmother's voluntary dismissal without prejudice of her lawsuit. Mo.R.Civ.P. 67.02. Whether or not the trial court had subject matter jurisdiction over the cause is a question of law which is reviewed *de novo*. Gash v. LaFayette County, 245 S.W.3d 229, 231 (Mo. en banc 2008).

B. The trial court properly determined it had no authority to grant Appellant's motion to set aside Grandmother's dismissal because Rule 67.02 provided Grandmother an absolute right to dismiss her case without prejudice, and once dismissed, the trial court instantly lost jurisdiction over the action.

Appellant argues that Rule 67.02(a) did not authorize Grandmother to dismiss the cause of action because it was not her case to dismiss, but his case to dismiss. (Appellant's brief, p. 34). Contrary to Appellant's argument, Rule 67.02(a) does not afford him any relief because he was not a party to Grandmother's lawsuit.

Rule 67.02 governs voluntary dismissals and it states that an action may be dismissed by a plaintiff without order of the court any time prior to the introduction of evidence at trial. Mo.R.Civ.P. 67.02(a). Grandmother dismissed her action shortly before trial. L.F. 50-51. As the plaintiff, she had an absolute right to dismiss her lawsuit. State ex rel. Fisher v. McKenzie, 754 S.W.2d 557, 559 (Mo. 1988).

When Grandmother voluntarily dismissed the case without prejudice, "it [was] as if the suit were never brought." State ex rel.

Rosen v. Smith, 241 S.W.3d 431, 432 (Mo. Ct. App. 2007)(quoting Liberman v. Liberman, 844 S.W.2d 79, 80 (Mo. Ct. App. 1992)).

The other pending motions do not survive a voluntary dismissal. State ex rel. Rosen, 241 S.W.3d at 433; State ex rel. Fisher, 754 S.W.2d at 560; Atteberry v. Hannibal Reg'l Hosp., 875 S.W.2d 171, 173 (Mo. Ct. App. 1994). After voluntary dismissal, only a counterclaim filed prior to a voluntary dismissal survives the dismissal. Mo.R.Civ.P. 67.05, see also Atteberry, 875 S.W.2d at 173. Here, no counterclaim was filed.

In denying Appellant's motion, the trial court properly concluded that "[w]hen [Grandmother] voluntarily dismissed her suit it disposed of the entire case and was effective upon the date it was filed with the Court." App. A 2 (quoting Applied Bank v. Wenzlick, 344 S.W.3d 229, 231 (Mo. Ct. App. 2011)). The trial court stated that "[o]nce the case is dismissed, any further action by the trial court is viewed as a nullity." Id. "Hence any order by this Court to set aside Plaintiff's voluntary dismissal would be a nullity." App. A 2-3. The trial court followed precedent and correctly concluded that when Grandmother dismissed her case, the trial court instantly lost jurisdiction over the action.

Contrary to Appellant's argument, the Grandmother's dismissal was not a judgment within the meaning of Rule 75.01. Because it was not a judgment, the trial court could not retain control over and could not set it aside as Appellant suggests. Emigh Eng'g Co. v. Rickhoff, 605 S.W.2d 173, 174 (Mo. Ct. App. 1980); Mo.R.Civ.P. 75.01. See, Liberman, 844 S.W.2d at 80.

If this Court determines that the trial court's ruling was correct, there is nothing further for this Court to review.

C. Appellant did not meet the requirements of Rule 52.12(a) for intervention as of right prior to the 2014 dismissal, because he did not properly plead that a state statute conferred an unconditional right to intervene, he never served his "motion" on all parties affected, and he never noticed up his "motion" for a hearing.

Appellant argues that his contact with the trial court "is significant" because he says he is Decedent's father. But he does not explain how, as a non-party, his contact with the court saves the case from Grandmother's dismissal. (Appellant's brief, pp. 28, 31, 32). Appellant says he became a party to Grandmother's case because he

filed a "motion" before the three-year statute of limitation expired for bringing a wrongful death cause of action. (Appellant's brief, p. 32). Appellant urges this Court to "presume" that he is a proper party because he says he is the father, but filing a motion does not make him a party to the original action filed by Grandmother.

Rule 52.12(a) allows for intervention of right, upon timely application:

> (1) When a statute of this state confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Mo.R.Civ.P. 52.12(a).

Appellant's interpretation of intervention of rights is contrary to the court's holding in In re M.M.P., 10 S.W.3d 195, 198 (Mo. Ct. App. 2000) because Appellant's letters in the trial court—even if read to be a motion—did not properly plead that a state statute conferred upon him

an unconditional right to intervene as required by Rule 52.12(a)(1). Appellant never filed a pleading with the trial court asserting that a "statute of this state" gave him an "unconditional right to intervene" as required by Rule 52.12(a)(1).

Even assuming the letters Appellant wrote to the trial court were sufficient to constitute a motion to intervene as a matter of right, Appellant failed to meet the other requirements of the rule. Appellant did not serve the motion "upon all parties affected" as required. Mo.R.Civ.P. Rule 52.12(c). In the previous appeal by Decedent's mother, the Court of Appeals found that Appellant herein failed to notify State Respondents of his motion as required by Rule 52.12(c). Love v. Piatchek, 503 S.W.3d 318, 320 (Mo. Ct. App. 2016). Because Appellant never served his letters on the State Respondents he failed to provide them with proper notice. This lack of notice was prejudicial to the State Respondents because they had no notice that Appellant's letters would be treated as a motion to intervene under Rule 52.12(a). State Respondents never had an opportunity to respond to the motion to intervene. The Court of Appeals has already determined that Appellant did not "call up" his motion for a hearing. Love, 503 S.W.3d at 320.

Because Appellant never called up his motion for a hearing it was never ruled upon. Thus, State Respondents never had the opportunity to present their position at a hearing and Appellant failed to meet the requirements of Rule 52.12(a) for intervention as of right.

Allowing Appellant to avoid the rules would disadvantage State Respondents, who would have to defend a wrongful death case where the statute of limitations expired in 2012. As the appeals court has said "delay by a litigant should not be allowed to unfairly inconvenience or disadvantage another." State ex rel. Transit Cas. Co. v. Holt, 411 S.W.2d 249, 253 (Mo. Ct. App. 1967).

Appellant's brief cites Martin v. Busch, 360 S.W.3d 854 (Mo. Ct. App. 2011) in support of his motion to set aside the Grandmother's dismissal, however, it is not applicable. In Martin, the motion to intervene was filed within 21 business days of the filing of the original petition and before the settlement had been approved by the circuit court. Id. Here, Appellant seeks to intervene four years after Grandmother's voluntary dismissal. There is no authority that supports allowing non-party Appellant to set aside the dismissal and become a party to begin the case anew.

Appellant's reliance on Judge Van Amburg's concurrence in Love, 503 S.W.3d at 320 is unavailing. As the concurring opinion acknowledges in a footnote, "[t]he original case cannot be revived for further prosecution at this juncture because the judgment became final after Grandmother dismissed her petition." The concurrence suggests, however, that "[a] party may collaterally attack a final judgment only through Rule 74.06." Love, 503 S.W.3d at 320 fn. 1.

D. Rule 74.06 does not apply to Appellant because the provisions for relief under the rule are limited to parties and Appellant was not a party, and even if Appellant had been a party, his motion would have been untimely.

Appellant cites Rule 74.06(b) in support of his argument that the trial court should have relieved him of the effects of Grandmother's dismissal. (Appellant's brief, p. 33). The rule, by its express terms, is specifically limited to parties. "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order …." Mo.R.Civ.P. 74.06(b). No relief can be afforded Appellant under the rule because the provisions for relief from the order are limited to parties and Appellant was not a party.

Additionally, Rule 74.06 contemplates "mistake" that leads to the judgment from which the movant seeks relief. Nothing in the rule suggests that it applies to this factual situation. See Nandan v. Drummond, 5 S.W.3d 552, 556 (Mo. Ct. App. 1999).

Even if Appellant had been a party, his motion to set aside the voluntary dismissal would have been untimely under Rule 74.06 because the rule requires that a motion for relief from an order or judgment be filed within a reasonable time and not more than one year after the judgment or order was entered. See Mo.R.Civ.P.74.06(b)(4),(c). Appellant's motion was filed in 2017, three years after the voluntary dismissal.

The cases cited in Appellant's brief are inapposite and provide no authority for this Court to reverse the trial court's judgment. Appellant cites Juenger v. Brookdale Farms, 871 S.W.2d 629 (Mo. Ct. App. 1994), Anderson v. Cent. Missouri State Univ., 789 S.W.2d 41, 44 (Mo. Ct. App. 1990), and Cook v. Birmingham News, 618 F.2d 1149, 1152 (5th Cir. 1980), stating that Rule 74.06(b)(5) gives the trial court the authority to relieve him of the dismissal on the ground that it is no longer equitable that the dismissal remain in force. (Appellant's brief,

p. 33). But these cases are not on point because they were all brought by parties and Appellant was not a party to the Grandmother's lawsuit. Further, in Juenger, the Court of Appeals characterized the defendant's argument not as having an equitable basis as the defendant characterized it, but as seeking relief because of "mistake, inadvertence, surprise, or excusable neglect." Juenger, 871 S.W.2d. at 631. The court ruled that to set aside a final judgment on these grounds, it must have been brought within a reasonable time, not to exceed one year from the entry of judgment. Id. at 631. Because the defendant failed to file a timely motion, the Court of Appeals ruled that the trial court "did not err in refusing to set aside the judgment." Juenger, 871 S.W.2d at 631. In Anderson, the Court of Appeals found that the plaintiff was not entitled to relief from summary judgment on the grounds that it was "no longer equitable that judgment remain in force" under Rule 74.06(b)(5). Anderson, 789 S.W.2d at 44. In Cook, 618 F.2d 1149, the plaintiff and other employees, acting individually and as representatives of the plaintiff class that had instituted the Title VII employment discrimination case, appealed the district court's order that entered the consent decree. The Fifth Circuit Court of Appeals held

that because the consent decree could not be read as having any prospective effect, and contained no language reserving jurisdiction, the court had no authority three years after entry of the consent decree to reconsider the decree. Cook, 618 F.2d at 1153. In so holding, the Fifth Circuit noted that "courts must also take account of a competing policy also embodied in the rule and the need to achieve finality in litigation." Id. (citing 7 Moore's Federal Practice P 60.27(1) at 340 (1979)). The Fifth Circuit concluded that "[b]ecause the decree cannot reasonably be read to have any prospective effect, the district court had no jurisdiction to clarify or modify the decree under rule 60(b)(5)." Id.

E. Appellant is not entitled to equitable relief.

Throughout Appellant's brief, he repeatedly mentions that he initially proceeded pro se in 2010. This fact, however, does not entitle him to a lower standard of diligence because he voluntarily chose to proceed pro se in the Grandmother's case. Courts have always recognized that pro se litigants are held to the same standard as those represented by counsel. Missouri courts have found a party proceeding pro se "is bound by the same rules as a party represented by counsel." Roberts v. Johnson, 836 S.W.2d 522, 525 (Mo. Ct. App. 1992) (citing

Williams v. Shelter Ins. Co., 819 S.W.2d 781, 782 (Mo. Ct. App. 1991); Snelling v. Jackson, 787 S.W.2d 906, 906–907 (Mo. Ct. App. 1990). The *Roberts* court further held "[w]e cannot allow a pro se litigant a lower standard of performance." Roberts, 836 S.W. 2d at 525 (citing Corley v. Jacobs, 820 S.W.2d 668, 671 (Mo. Ct. App. 1991)); Arenson v. Arenson, 787 S.W.2d 845, 846 (Mo. Ct. App. 1990)). Pro se parties are not entitled to indulgences they would not have received if represented by counsel. Manning v. Fedotin, 64 S.W.3d 841, 846 (Mo. Ct. App. 2002). Enhancing the public's trust and confidence in the justice system is not obtained by allowing one to circumvent the rules. The judicial system must be fair to all parties. "[E]quity will not relieve against a mistake when the party complaining had within his reach the means of ascertaining the true state of facts, and without inducement by the other party, neglects to avail himself of his opportunities of information." Cozart v. Mazda Distributors (Gulf), Inc., 861 S.W.2d 347, 353 (Mo. Ct. App. 1993) (quoting S. G. Payne & Co. v. Nowak, 465 S.W.2d 17, 20 (Mo. Ct. App. 1971)).

Exempting Appellant from compliance with the rules would only encourage future litigants to seek exemptions too. This would lead to

uncertainty and confusion regarding the stability of the court rules and legal precedent of orders and judgments. Perhaps the court could have, in its discretion, treated Appellant's letters as a motion to intervene *at the time*. But to treat the letters that way retroactively years later, after dismissal of the case, undermines important finality and jurisdictional principles.

A primary goal of the judicial system is judicial impartiality and fairness to all parties. It has been over seven years since Grandmother filed her lawsuit. It would be highly prejudicial to Respondent police officers Piatchek and Karnowski, the former Chief of Police, Dan Isom, and the former Board of Police Commissioners for this Court to reverse the trial court, when the trial court lacked authority to grant any relief and there is no authority allowing it and equitable considerations do not permit changing the rules. State ex rel. Wolfner v. Dalton, 955 S.W.2d 928, 930 (Mo. 1997).

F. Even if the trial court had authority to grant Appellant's motion to set aside and to intervene, Appellant's cause of action for the wrongful death of Decedent is barred by the three-year statute of limitation for bringing such an action.

Appellant argues that because he had contact with the trial court during Grandmother's case, he automatically became a party and thus, his cause of action relates back to Grandmother's original timely filed wrongful death petition brought under Section 537.080. (Appellant's brief, pp. 28, 32). This subjective presumption about Appellant's automatic intervention of right and the applicability of the wrongful death statute to avoid application of the three-year statute of limitation under Section 537.080.1 is not supported by any Missouri case.

As the Court of Appeals previously determined in the Decedent's mother's case, Grandmother was not in the statutorily designated classes set out in the wrongful death statute and thus, had no cause of action. Love, 503 S.W.3d at 320. The Decedent died on November 18, 2009 so Appellant had until November 18, 2012 to bring a cause of action for the death. RSMo. § 537.100. The belated efforts of Appellant in 2017 to set aside the 2014 dismissal and intervene to make himself

the plaintiff fail because, as stated in Section B. supra., the trial court had no authority to act to grant such a motion and even if it did, the three-year statute of limitation had already expired. As the Court of Appeals explained in Love, "it is also well settled that, if the party filing the original petition is a 'stranger to the suit' and lacks a legal or beneficial interest in the cause of action, then substitution of the proper plaintiff after expiration of the statute of limitations will not relate back." Love, 503 S.W.3d at 320(citing Thorson v. Connelly, 248 S.W.3d 592 (Mo. 2008) and Forehand v. Hall, 355 S.W.2d 940 (Mo. 1962)). Because Grandmother was a stranger to the lawsuit, any substitution of Appellant now will not relate back.

Appellant cites Denton v. Soonattrukal, 149 S.W.3d 517 (Mo. Ct. App. 2004) in support of his argument but it is not applicable. (Father's brief, p. 29). In Denton, the decedent's sister filed the first lawsuit, and later dismissed it without prejudice. A different sister filed the second lawsuit and she filed it within the one-year savings statute under Section 537.100. In Denton, this Court approved this use of the saving statute because both sisters were within a class of persons entitled to bring the claim under the wrongful death statute. Although "the

wrongful death statute should be interpreted in a light which broadly grants the greatest number of beneficiaries" it is still limited by the statutorily designated classes set out in Section 537.100. Id. at 523. Appellant's attempt to enlarge the time period to bring his own wrongful death action must fail.

In a footnote, the Court of Appeals panel decision stated "notwithstanding the result in Love, Mother remains a first-class plaintiff with standing to join Appellant's cause of action and/or to share in any eventual recovery." App. 31, fn. 12. But Mother was not a party to Appellant's motion and not a party to this appeal. The decision is in conflict with Love. Neither Appellant or Mother have a right to proceed with a wrongful death action that does not comply with the requirements of the Missouri Rules of Civil Procedure, the wrongful death statute for bringing such actions and does not comply with the statute of limitations for filing such actions. Allowing Appellant to begin the case anew effectively eliminates the power of the rules and statutes. Therefore, Appellant's appeal must fail.

CONCLUSION

For the foregoing reasons, the trial court's judgment should be affirmed.

Respectfully Submitted,

ERIC S. SCHMITT
Attorney General

/s/*Denise McElvein*
Denise McElvein
Mo. Bar #45227
P.O. Box 861
St. Louis, MO 65188
(314) 340-7861 (Telephone)
(314) 340-7029 (Facsimile)
Denise.McElvein@ago.mo.gov
Attorneys for Respondents,
police officers Piatchek and
Karnowski, former police chief Isom,
and the former Board of Police
Commissioners for the St. Louis
Metropolitan Police Department

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on the 29th of January, 2019, to:

Matthew C. Casey
Matthew J. Devoti
124 Gay Avenue
St. Louis, Mo 63105

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 3,732 words.

/s/ *Denise McElvein*
Assistant Attorney General

APPENDIX

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