

**Appeal No: ED105742**

**IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT**

<b>DELORES HENRY and</b>	)	
<b>DARRELL WILLIAMS, SR.,</b>	)	
	)	
Appellants,	)	
	)	Case No: ED105742
v.	)	
	)	
<b>PAUL PIATCHEK, ET AL.,</b>	)	
	)	
Respondents.	)	

---

**APPELLANT'S BRIEF**

**On Appeal from the Circuit Court of the City of St. Louis  
22<sup>nd</sup> Judicial Circuit, State of Missouri**

**CASEY & DEVOTI, P.C.**

**Matthew C. Casey #49662  
[mcc@caseydevoti.com](mailto:mcc@caseydevoti.com)  
Matthew J. Devoti #47751  
[mjd@caseydevoti.com](mailto:mjd@caseydevoti.com)  
124 Gay Avenue  
St. Louis, MO 63105  
(314) 421-0763  
(314) 421-5059 (Fax)  
*Attorneys for Appellant  
Darrell Williams, Sr.***

## **TABLE OF CONTENTS**

Table of Contents	Page 2
Table of Authorities	Page 3
Jurisdictional Statement	Page 6
Statement of Facts	Page 10
Procedural History	Page 18
Point Relied on I	Page 20
Argument	Page 21
A. Standard of Review	Page 21
B. Wrongful Death Statute	Page 23
C. Supreme Court Rule 74.06	Page 26
D. Analysis	Page 26
Conclusion	Page 36
Certificate of Compliance	Page 38
Certificate of Service	Page 39
Appendix	Page 40

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Anderson v. Central Missouri State Univ.,</u> 789 S.W.2d 41, 44 (Mo.App. 1990).....	33
<u>Applied Bank v. Wenzlick,</u> 344 S.W.3d 229, 231 (Mo. App. E.D. 2011).....	34
<u>Cook v. Birmingham News,</u> 618 F.2d 1149, 1152 (5th Cir. 1980).....	33
<u>Courtin v. McGraw Constr. Co.,</u> 639 S.W.2d 286, 288 (Mo. App. E.D. 1982).....	31
<u>Denton v. Soonattrukal,</u> 149 S.W.3d 517, 523 (Mo. App. S.D. 2004).....	29
<u>Juenger v. Brookdale Farms,</u> 871 S.W.2d 629, 631 (Mo.App. 1994).....	33,34
<u>Love vs. Piathek,</u> 503 S.W.3d 318 (Mo. App. E.D. 2016) .....	6,15,16,19,27,29,30,31,35,36
<u>Manning v. Fedotin,</u> 64 S.W.3d 841, 846 (Mo. App. W.D. 2002).....	30,31
<u>Martin v. Busch,</u> 360 S.W.3d 854, 856 (Mo. App. E.D. 2011).....	29
<u>Meadowbrook Country Club v. Davis,</u> 384 S.W.2d 611 (Mo. 1964).....	31
<u>State v. Hawkins,</u> 950 S.W.2d 613, 615-615 (Mo. App. S.D. 1997).....	22
<u>State ex rel. Nixon v. American Tobacco Co., Inc.,</u> 34 S.W.3d 122, 127 (Mo. 2000).....	29,33

## **CASES**

## **PAGE**

<u>Summer Chase Second Addition Subdivision Homeowners Ass'n v. Taylor-</u> <u>Morley</u> , 146 S.W.3d 411, 415 (Mo. App. E.D. 2004).....	22
<u>Thorson</u> , 248 S.W.3d at 596.....	32
<u>Watters vs. Travel Guard Intern</u> , 136 S.W.3d 100, 111 (Mo. App. E.D. 2004).....	21

## **CONSTITUTION**

Mo. Const. Art. V § 3.....	9
----------------------------	---

## **RULES**

Rule 52.12(a).....	29,33
Rule 52.12(c).....	30,31
Rule 67.02(a).....	34
Mo.Sup.Ct.R. 74.01(a).....	7,8
Supreme Court Rule 74.06.....	26,32,33,34

## **STATUTES**

§477.050 RSMo.....	9
§512.020 RSMo.....	8
§537.080 RSMo.....	6,7,8,10,15,16,20,21,23,24,25,26,27
§537.090 RSMo.....	6,8,10,23
§537.095 RSMo.....	24,27,28

**STATUTES**

**PAGE**

§537.100 RSMo.....	15,29
--------------------	-------

## **JURISDICTIONAL STATEMENT**

On November 18, 2009, Darrell Williams [hereinafter referred to as “Darrell”] was shot and killed by officers of the Police Department of Metropolitan St. Louis [hereinafter referred to as “Respondents”]. Darrell was survived by his parents, Darrell Williams, Sr. [hereinafter referred to as “Father”] and Kathryn Love [hereinafter referred to as “Mother”]. On January 20, 2010, Delores Henry, Darrell’s grandmother [hereinafter referred to as “Grandmother”] filed a petition for wrongful death damages against Respondents pursuant to §537.080 and §537.090 RSMo. Grandmother’s petition alleged that she was Darrell’s “next of kin;” and she did not mention that Darrell was survived by his Father and Mother. However, Father filed a timely pro se petition to intervene as a plaintiff in Grandmother’s case.

On April 14, 2014, Grandmother filed a motion to dismiss her cause of action voluntarily; and the trial court therefore disposed of Father’s wrongful death claim without his consent. Father filed a “Motion to Set Aside Judgment and to Intervene.” Father’s motion requested that the trial court (1) vacate and set aside the judgment of April 14, 2014; and (2) allow him to prosecute his claim for wrongful death damages pursuant to his timely filed petition to intervene. Father’s motion specifically reminded the trial court that he filed his petition to intervene

before the expiration of the statute of limitations and before the judgment of April 14, 2014.

On June 26, 2017, the trial court entered an order denying Father's motion to set aside the judgment of April 14, 2014, thus denying Father's right to proceed pursuant to his timely filed petition to intervene. Father then filed an appeal of that order with the Missouri Court of Appeals, Eastern District.

On September 12, 2017 the Court of Appeals notified Father that the trial court's order of June 26, 2017 was not appealable because it was not denominated a judgment as required under rule 74.01(a). On September 18, 2017 the trial court entered a judgment denying Father's motion, thus perfecting the trial court's order of June 26, 2017.

This is an appeal of the trial court's judgment of September 18, 2017, which perfected the trial court's order of June 26, 2017. The question presented is whether the trial court erred in failing to grant Father's "Motion to Set Aside Judgment and to Intervene." Father contends: (1) that he filed a timely petition to intervene and was therefore a party to the case with a right to prosecute his claim for wrongful death benefits; and (2) that the trial court erred in failing to vacate and set aside the judgment of April 14, 2014.

Pursuant to §537.080.1 RSMo. Father had first class standing to file his petition referable to the wrongful death of his son, Darrell. Father argues that he

was entitled to intervene as a matter of right; that he timely filed his petition before the expiration of the statute of limitations; that he filed his petition 35 months before the judgment of April 14, 2014; that Grandmother did not have the statutory authority to dismiss his wrongful death case; that the trial Court erred in dismissing his case; and that the April 14, 2014 judgment should be set aside because it forever disposed of his right to prosecute a claim for wrongful death damages. See §537.080 and §537.090 RSMo.

§512.020 RSMo. provides, in relevant part, that “any party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited by the constitution, nor clearly limited in special statutory proceedings, may take his or her appeal to a court having appellate jurisdiction from any: . . . (5) final judgment in the case.” Here the judgment entered by the trial court on September 18, 2017, perfecting the order of June 26, 2017, disposed of all issues referable Father’s case and forever disposed of his rights. Further, the judgment is set forth in a formal written document denominated “Judgment,” as required by Mo.Sup.Ct.R. 74.01. Father timely filed his Notice of Appeal and Civil Case Information Form and paid the prescribed docket fee on July 5, 2017. The Missouri Court of Appeals, Eastern District, has jurisdiction to hear this matter because the Circuit Court of the City of St. Louis, Missouri is within the territorial jurisdiction of the Missouri Court of Appeals, Eastern



District. §477.050 RSMo. This appeal is not one in which the Missouri Supreme Court has exclusive appellate jurisdiction. Therefore, the Court of Appeals, Eastern District, has general appellate jurisdiction. Mo. Const. Art. V § 3.

## **STATEMENT OF FACTS**

On November 18, 2009, Darrell was shot and killed by officers of the Police Department of Metropolitan St. Louis. *LF 11-16 and SLF1*. Darrell was survived by Father, Mother and Grandmother. *LF 41 and 52; and SLF 1*.

On January 20, 2010, Grandmother filed a petition for wrongful death damages against Respondents. *LF 10 and 11-18*. Her petition was filed in the Circuit Court of the City of St. Louis and was identified as Cause 1022-CC00155, which, hereafter, may be referred to as the “original” case or the “original” petition. *LF 10 and 11-18*. In summary, Grandmother’s petition alleged that Darrell was driving a vehicle; that police officers threw spikes on the road in front of the vehicle; that the spikes flattened the tires; that the vehicle eventually flipped over and onto its side; that Darrell was trapped in the vehicle and helpless; that police officers surrounded the vehicle and fired guns into the vehicle; that Darrell was shot and killed; that deadly force was unnecessary and excessive; and that the officers involved were inadequately trained and supervised. *LF 11-18*.

Paragraph 1 of Grandmother’s petition<sup>1</sup> specifically stated she was Darrell’s next of kin; and that she was bringing this suit pursuant to §537.080 and §537.090

---

<sup>1</sup> Grandmother’s petition was filed by attorney MacArthur Moten, who withdrew from the case on February 26, 2013. *LF 44*.

RSMo. *LF 12*. Grandmother's petition did not say that Darrell was survived by Father and Mother. *LF 11-18*. Grandmother's petition also failed to mention that Father and Mother were incarcerated at that time. *LF 11-18*.

Respondents filed an answer to Grandmother's petition on March 16, 2010 through the Office of the Missouri Attorney General. *LF 19*. Thereafter, the parties litigated the original wrongful death action for more than 4 years. *LF 1-11*. As detailed in the minutes of the trial court file, the parties conducted discovery, answered interrogatories, compelled the production of documents, took depositions and filed various discovery related motions. *LF 1-11*. However, Respondents never challenged Grandmother's standing or authority to prosecute a wrongful death claim. *LF 1-11*.

Father moved to intervene in Grandmother's wrongful death action on multiple occasions prior to the expiration of the statute of limitations. *LF 41-43*. As detailed in the Court minutes, Father filed approximately thirteen (13) pleadings and/or letters with the Court. *LF 1-11*.

On August 20, 2010 the trial court received a letter from Father, who was incarcerated at the United States Penitentiary in Coleman, FL, requesting a copy of the docket sheet. *LF 7 and 34*. On August 30, 2010, the trial court sent docket sheets to Father. *LF 7-8*. On November 12, 2010, the trial court received another letter from Father. *LF 6 and 36*.

On November 22, 2010, the trial court made the following entry into the case minutes:

"Letter from inmate Mr. Darrell Williams, Sr., U.S. P., Post Office Box 1000, Lewisburg, PA 17837 requesting to be a plaintiff on the case (pro se). Request for a copy of the petition filed on January 20, 2010, all exhibits including the crime scene pictures filed with the petition, defendants' answer to the plaintiff's petition dated March 16, 2010 and a copy of the protective order filed by the defendant's dated July 8, 2010. Sent to Judge Dowd and Certified Copy."

*LF 6.*

Father's letter of November 22, 2010 read in pertinent part as follows:  
"The above mention [sic] cause no is in regard to a wrongful death suit regarding my son [Darrell Williams Jr]. I am currently incarcerated in PA in federal prison. I have attempted to become a plaintiff in the suit but everything is being kept a secret to me.

Sir how can I become a plaintiff, and proceed pro se?"

*LF 36.*

On November 24, 2010, the trial court again mailed documents to Father at his penitentiary address.<sup>2</sup> *LF 6*. On December 29, 2010, the trial court again prepared documents for Father. *LF 6*.

On May 16, 2011, the trial court made the following entry in the case minutes:

"Motion filed

Mr. Darrell Williams Sr. motion to be added as a party plaintiff filed.

Offender Mail Received

A letter from Darrell Williams was received requesting a copy of the docket sheet. The letter was filed in the legal file and a post card was sent to the Darrell Williams with instructions for copies from the legal file."

*LF 5*.

Father's petition, which was filed on May 16, 2011, reads as follows:

"Comes now, Plaintiff Darrell Williams, pro se, requesting to become a plaintiff in cause #1022-CC00155, for the following reason:

- 1) Plaintiff Darrell Williams Sr. is the father of the deceased Darrell Williams Jr.

---

<sup>2</sup> The trial court's minute entries repeatedly refer to Father as "inmate" and "offender." *LF 1-11*.

Wherefore Plaintiff request [sic] that this motion be granted.”

*LF 41.*

The trial court failed to issue an order granting Father’s petition to intervene. *LF 1-11.* The trial court never denied Father’s petition to intervene. *LF 1-11.* The trial court simply failed to acknowledge it. *LF 1-11.*

The parties were scheduled for trial on April 21, 2014. *LF 3.* However, on April 14, 2014, just one week before trial, Grandmother dismissed “her” case without prejudice. *LF 47.* Grandmother’s motion to dismiss reads as follows:

“COME NOW Plaintiff Delores Henry, through counsel and hereby dismisses her cause of action against Defendants without prejudice.”

*LF 47.*

On April 14, 2014, the trial court “so ordered” Grandmother’s motion to dismiss, which referenced “her” cause of action only. *LF 47 and 50.* Grandmother’s motion to dismiss made no mention of Father’s cause of action. *LF 47 and 50.* There is no indication in the legal file that Father was provided with prior notice of Grandmother’s motion to dismiss. *LF 1-11.*

On August 12, 2014, Mother filed a subsequent petition for wrongful death damages in Father’s stead. *LF 78.* Mother’s petition was filed in the Circuit Court of the City of St. Louis; it was identified as Cause 1422-CC09419-01; and it was

commenced within one (1) year from the date the original wrongful death action was dismissed. *LF 72-77; 78-87.*

Respondents then filed a motion to dismiss Mother's wrongful death action, which was granted by the trial court on the ground that Mother's petition was barred by the statute of limitations. *LF 97, 112, 147, and 154.* The trial court's judgment read as follows:

"Plaintiff Kathryn Love, Decedent's mother, is within the class of persons eligible to bring a suit under 537.080, but she failed to bring her lawsuit within the three-year statute of limitations. Her claim is not saved by 537.100 because the language of the statute necessarily presupposes that the previous lawsuit had been filed by one of the persons eligible to do so under 537.080.1. Here the previous lawsuit was filed by a person not eligible to do so under 537.080.1. Thus Section 537.100 does not apply to extend the time allowed for Kathryn Love to file her wrongful death claim." *LF 147 and 154.*

Mother then appealed to the Missouri Court of Appeals for the Eastern District of Missouri. *LF 93.* However, on November 8, 2016, the Missouri Court

of Appeals, Eastern District, affirmed<sup>3</sup> the trial court's dismissal of Mother's petition. *Love vs. Piatchek*, 503 S.W.3d 318 (Mo. App. E.D. 2016).

On January 17, 2017, Father filed a "Motion to Set Aside Judgment and to Intervene" in the original case, Cause 1022-CC00155. *LF* 52. Father's motion requested that the trial court (1) vacate and set aside the judgment of April 14, 2014, and (2) and allow him to prosecute his claim for wrongful death damages pursuant to his timely filed petition to intervene. *LF* 52. Father's motion specifically reminded the trial court that he filed his petition to intervene before the expiration of the statute of limitations and before the judgment of April 14, 2014. *LF* 52. Father's motion cited *Love vs. Piatchek*.

Respondents replied by filing suggestions in opposition, arguing that Father "was not a party so no relief can be afforded him because the provisions for relief from judgment are limited to parties." *LF* 65.

---

<sup>3</sup> In so ruling, the Court of Appeals stated that because Mother and Father were superior plaintiffs as members of the first class under §537.080 RSMo, Grandmother's original petition was never viable. Therefore, Mother's subsequent petition could not relate back to Grandmother's original petition.



On September 18, 2017, the trial court entered a judgment denying Father's "Motion to Set Aside Judgement and to Intervene" on the ground that "this Court lacks authority to grant the motion." *SLF 1-3*.

## **PROCEDURAL HISTORY**

The Statement of Facts thoroughly details the Procedural History of the case. However, the pertinent Procedural History is as follows.

Grandmother filed her original petition on January 20, 2010, cause number 1022-CC00155. *LF 11.*

Respondents filed their answer on March 16, 2010. *LF 19.*

Father filed his petition to intervene on May 16, 2011. *LF 41.*

Grandmother filed her voluntary motion to dismiss on April 14, 2014. *LF 47.*

The trial court “so ordered” grandmother’s motion to dismiss on April 14, 2014. *LF 50.*

Mother filed her petition on August 13, 2014, cause number 1422-CC09419. *LF 78.*

Respondents removed Mother’s case to Federal Court on October 29, 2014. *LF 88.*

Mother’s case was remanded to state court, and the trial court reopened its file on February 23, 2014 under cause number 1422-CC09419-01. *LF 96.*

Mother filed an amended petition on April 13, 2015. *LF 103.*

Respondents filed a motion to dismiss Mother’s case on April 23, 2015. *LF 112.*

On December 14, 2015, the trial court entered a judgment granting Respondent's motion to dismiss Mother's case. *LF 154*.

On November 8, 2016, the Missouri Court of Appeals affirmed the trial court's dismissal of Mother's case. *Love vs. Piatchek, 503 S.W.3d 318 (Mo. App. E.D. 2016)*.

On January 17, 2017, Father filed his Motion to Set Aside Judgment and Intervene, cause number 1022-CC00155. *LF 52*.

On June 26, 2017, the trial court entered an order denying Father's Motion to Set Aside Judgment and Intervene. *LF 69*.

On July 5, 2017, Father filed his Notice of Appeal. *LF 161*.

On September 18, 2017, the trial court entered its "judgment" to perfect its order of June 26, 2017. *SLF 1*.

**POINT RELIED ON**

**I**

The trial court erred by entering its judgment of September 18, 2017, denying Father's motion to set aside the original judgment of April 14, 2014, thus denying Father's right to prosecute his claim for wrongful death damages, because it is not equitable for the original judgment to remain in force in that Father was entitled by §537.080.1 to intervene in the original case as a matter of right; Father filed his petition to intervene before the expiration of the statute of limitations; Father filed his petition 35 months before the judgment of April 14, 2014 dismissed his cause of action; Grandmother did not have the standing or statutory authority to dismiss Father's wrongful death action; Father did not consent to the dismissal of his wrongful death action; Father did not voluntarily dismiss his wrongful death action, and the dismissal judgment of April 14, 2014 forever denied Father of his right to prosecute a claim for wrongful death damages.

## **ARGUMENT**

**The trial court erred by entering its judgment of September 18, 2017, denying Father's motion to set aside the original judgment of April 14, 2014, thus denying Father's right to prosecute his claim for wrongful death damages, because it is not equitable for the original judgment to remain in force in that Father was entitled by §537.080.1 to intervene in the original case as a matter of right; Father filed his petition to intervene before the expiration of the statute of limitations; Father filed his petition 35 months before the judgment of April 14, 2014 dismissed his cause of action; Grandmother did not have the standing or statutory authority to dismiss Father's wrongful death action; Father did not consent to the dismissal of his wrongful death action; Father did not voluntarily dismiss his wrongful death action, and the dismissal judgment of April 14, 2014 forever denied Father of his right to prosecute a claim for wrongful death damages.**

### **A. Standard of Review.**

This appeal rests on the interpretation of Missouri Revised Statutes and Missouri Supreme Court Rules, and, therefore, is a question of law. Appellate review of questions of law are de novo with no deference to the trial court's decision on the issues. *Watters vs. Travel Guard Intern*, 136 S.W.3d 100, 111 (Mo. App. E.D. 2004). Appellate review of a trial court's grant of a motion to

dismiss is de novo. *Summer Chase Second Addition Subdivision Homeowners Ass'n v. Taylor-Morley*, 146 S.W.3d 411, 415 (Mo. App. E.D. 2004). In reviewing the trial court's dismissal of a petition, facts are viewed in the light most favorable to the plaintiff, treating the facts alleged as true, to determine whether the facts pleaded and the inferences reasonably drawn therefrom state any ground for relief. *Id.*

It is the function of the courts to construe and apply the law, and not to make it. *State v. Hawkins*, 950 S.W.2d 613, 615-615 (Mo. App. S.D. 1997). In construing statutes, the court's primary responsibility is to ascertain legislative intent from the language used, to give effect to that intent if possible, and to consider their words in ordinary meaning. *Id.* The General Assembly is presumed to have intended what the statute says; consequently, when the legislative intent is apparent from the words used and no ambiguity exists, there is no room for construction. *Id.*

A section of a statute should not be read in isolation from the context of the whole act. *Id.* In interpreting legislation, the court must not be guided by a single sentence, but should look to the provisions of the whole law, and its object policy. *Id.* Courts look beyond the plain and ordinary meaning of a statute when, as here, its meaning is ambiguous. *Id.* Where there is genuine uncertainty concerning the application of a statute, it is fitting that the court consider the statute's history,

surrounding circumstances, and examine the problem in society to which the legislature addressed itself. *Id.*

## **B. Wrongful Death Statute.**

In pertinent part, §537.080 *RSMo.* states that a wrongful death action may be brought by the following classes of people:

- “(1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;
- (2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants;
- (3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad-litem.”

§537.090 *RSMo.* states in pertinent part:

“In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by

reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued... .”

§537.095 *RSMo.* states:

“1. Except as provided in subsection 2 of this section, if two or more persons are entitled to sue for and recover damages as herein allowed, then any one or more of them may compromise or settle the claim for damages with approval of any circuit court, or may maintain such suit and recover such damages without joinder therein by any other person, provided that the claimant or petitioner shall satisfy the court that he has diligently attempted to notify all parties having a cause of action under section 537.080. Any settlement or recovery by suit shall be for the use and benefit of those who sue or join, or who are entitled to sue or join, and of whom the court has actual written notice.

2. When any settlement is made, or recovery had, by any plaintiff ad litem, the persons entitled to share in the proceeds thereof shall be determined according to the laws of descent, and any settlement or recovery by such



plaintiff ad litem shall likewise be distributed according to the laws of descent unless special circumstances indicate that such a distribution would be inequitable, in which case the court shall apportion the settlement or recovery in proportion to the losses suffered by each person or party entitled to share in the proceeds and, provided, that any person entitled to share in the proceeds shall have the right to intervene at any time before any judgment is entered or settlement approved under this section.

3. In any action for damages under section 537.080, the trier of the facts shall state the total damages found, or upon the approval of any settlement for which a petition or application for such approval has been filed, the court shall state the total settlement approved. The court shall then enter a judgment as to such damages, apportioning them among those persons entitled thereto in proportion to the losses suffered by each as determined by the court.

4. The court shall order the claimant:

- (1) To collect and receipt for the payment of the judgment;
- (2) To deduct and pay the expenses of recovery and collection of the judgment and the attorneys' fees as contracted, or if there is no contract, or if the party sharing in the proceeds has no attorney representing him before the rendition of any judgment or settlement, then the court may award the attorney who represents the original plaintiff such fee for his services, from such persons

sharing in the proceeds, as the court deems fair and equitable under the circumstances;

(3) To acknowledge satisfaction in whole or in part for the judgment and costs;

(4) To distribute the net proceeds as ordered by the court; and

(5) To report and account therefor to the court. In its discretion the court may require the claimant to give bond for the collection and distribution.”

### **C. Supreme Court Rule 74.06.**

Rule 74.06(b) states in pertinent part:

“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 for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;.....or (5) the judgment has been satisfied, release, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment remain in force.”

### **D. Analysis.**

Father and Mother were the only members of the class of persons entitled to prosecute a claim referable to the wrongful death of their son, Darrell. §537.080.1 *RSMo*. When Father timely filed his petition to intervene in Grandmother’s original wrongful death action, his petition was either overlooked or forgotten by

the trial court. When Grandmother filed her motion to dismiss the original wrongful death action on April 14, 2014, without standing or statutory authority to do so, the trial court dismissed Father's rights without his consent.

§537.080.1 *RSMo* states that spouses, siblings and parents of the deceased are in the first class of persons entitled to prosecute a wrongful death claim. §537.095 *RSMo* states that "two or more persons" are entitled to sue for or join in a wrongful death suit, which means that in many wrongful death cases there are multiple plaintiffs because the decedent is survived by multiple first-class family members. If one family member wishes to drop from the case and files a voluntary dismissal, that is his or her choice. But the voluntary dismissal by one family member does not dispose of the other family members who have exercised their right to join in the suit in court. This is not what the General Assembly intended; this is not what the statute says, and Missouri law does not say or even suggest that the wrongful death action of a first-class plaintiff can be dismissed by a person who is not an eligible plaintiff under the statute.

In Mother's case before the Missouri Court of Appeals for the Eastern District of Missouri, Presiding Judge Lisa Van Amburg wrote a concurring opinion which specifically addresses the failures in Father's case. *Love vs. Piatchek*, 503 S.W.3d 318, 320-323 (*Mo. App. E.D. 2016*). "I concur in the holding of the majority," she wrote, "but write separately to shed light on the fact that

Mother's claim would have been timely but for apparent systemic and collective failures in the original case.” *Id.*

The legislative mandate of the wrongful death statute is clear: “Any settlement or recovery by suit *shall* be for the use and benefit of those who sue or join, or who are *entitled to sue or join, and of whom the court has actual written notice.*” *Id. citing §537.095 RSMo.* Though Grandmother was not an eligible plaintiff under the statute, Darrell’s Father was, and he attempted to assert a claim as a first-class plaintiff in the original case well before the statute of limitations expired. *Id.* “In August 2010, Darrell Williams, Sr. (Father), acting *pro se* from a federal penitentiary, revealed his status and inquired about the case. *Id.* The docket sheet contains multiple filings by Father stating his legal and beneficial interest in the case, several of which expressly assert his claim by seeking intervention as a party plaintiff.” *Id.*

Judge Van Amburg further noted that in November 2010 Father filed letters asking to be named a plaintiff and requesting copies of various documents in the court file. *Id.* The trial court sent the documents but did not address Father's request to be named a plaintiff. *Id.* Then in May 2011, Father filed a formal motion to be added as a party plaintiff, but the trial court never ruled on it. *Id.* Father

was entitled to intervene as a matter of right under *Rule 52.12(a)*.<sup>4</sup> *Id.* A first-class plaintiff has an absolute right to intervene in a wrongful death suit. *Id.* citing *Martin v. Busch*, 360 S.W.3d 854, 856 (Mo. App. E.D. 2011). When a statute confers an unconditional right of intervention, the proposed intervenor is entitled to intervene as a matter of right, the right to intervene is absolute, and *the motion must be approved.*" *Id.* citing *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 127 (Mo. 2000). (emphasis added by concurring opinion)

Judge Van Amburg also stated:

"Had the trial court granted Father's motion to intervene as was Father's right, Mother's subsequent petition would have been timely under the saving statute. §537.100; *Denton v. Soonattrukal*, 149 S.W.3d 517, 523 (Mo. App. S.D. 2004). Instead, the record in the original case leaves the impression that the justice system<sup>5</sup> turned a deaf ear to Father's timely and persistent pleas because of his *pro se* status and incarceration." *Love at 320-323.*

---

<sup>4</sup> "After a full year of repeated attempts to participate in the case, all to no avail, Father evidently threw up his hands, as the docket sheet contains no other references to Father after July 2011." *Love at 323.*

<sup>5</sup> ".....a total of eight different judges appear in the trial court's minutes corresponding to various orders and trial settings over the four-year period that

The record reflects that Father properly filed a timely motion to intervene but failed to notify Respondents pursuant to *Rule 52.12(c)*. *Id.* Father did not "call up" the motion for a hearing, but Judge Van Amburg stated "I am not persuaded that a hearing was necessary given that he was entitled to intervene as a matter of right." *Id.* It is well-settled that *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. App. W.D. 2002). This principle is necessitated by the requirement of judicial impartiality, judicial economy, and fairness to all parties. *Love* at 320-323. Here, however, Judge Van Amburg explained "that the failure to acknowledge Father's pleadings offends those very ideals;" and that "addressing Father's motion would not have constituted an 'indulgence' unavailable to represented parties.'" *Id.* Quite the contrary, if Father had been represented by counsel, the court could not have ignored his motion. *Id.* Moreover, court clerks routinely assist new lawyers and *pro se* litigants appearing in person with

---

the original case was pending, undoubtedly due to the 22<sup>nd</sup> circuit's docketing system under local rule 1.2. The record does not always reflect whether Father's requests and pleadings were brought to the attention of the judge to which the case was then assigned. Regardless, vis-à-vis the public, the court is a single institution." *Love* at 323.

procedural mechanics such as notifying parties and calling up motions. *Id.* Father's *pro se* status and incarceration should not have dictated the outcome of his motion and ultimately the dismissal of Mother's case.<sup>6</sup> *Id.*

Respondents may claim to have lacked notice of Father's motion as directed under *Rule 52.12(c)*, but Father's oversight in this regard supplies Respondents no valid excuse on the present record. *Id.* Judge Van Amburg explained that a party has a continuing duty to monitor a case from the filing of the case to final judgment. *Id. citing Manning v. Fedotin, 64 S.W.3d 841, 846 (Mo. App. W.D. 2002).* Generally, a party who has been properly summoned is charged with notice of all subsequent proceedings in the case even if no actual notice was received. *Courtin v. McGraw Constr. Co., 639 S.W.2d 286, 288 (Mo. App. E.D. 1982); Meadowbrook Country Club v. Davis, 384 S.W.2d 611 (Mo. 1964).* Here, the trial court minutes contain thirteen separate entries related to Father. *Love at 320-323.* “Even absent formal notice pursuant *Rule 52.12(c)*, Respondents had undeniable constructive notice through Father's multiple, unambiguous, and conspicuous filings.” *Id.* “Moreover, as a practical matter, the notion that Respondents failed

---

<sup>6</sup> “Regrettably, although this is a civil case in which Father sought recourse for the alleged wrongful death of his own son, the clerk’s minutes repeatedly refer to Father as ‘offender,’ defendant’ and ‘inmate.’” *Love at 323.*

to ascertain the status of Darrell's parents over the course of four years of discovery simply defies belief.” *Id.*

Despite Father's repeated attempts to assert his rights as a first-class plaintiff in the original case, the trial court and the parties and their counsel continued to accept Grandmother's deficient standing for four years of pre-trial litigation. *Id.* Respondents pivoted to reject her standing only *after* the statute of limitations expired. *Id.* "Statutes of limitation were never intended to be used as swords." *Id. Citing Thorson, 248 S.W.3d at 596.*

In footnotes, Judge Van Amburg stated that “[t]he original case cannot be revived for further prosecution at *this juncture* because the judgment became final after Grandmother dismissed her petition,” but suggested a remedy by stating that a party may collaterally attack a final judgment through *Rule 74.06. Id. (emphasis added).*

Father then filed his “Motion to Set Aside Judgment and to Intervene,” citing Judge Van Amburg’s concurring opinion in detail. Respondents replied by filing suggestions in opposition, arguing that Father “was not a party so no relief can be afforded him because the provisions for relief from judgment are limited to parties.” However, Father absolutely was party to this case because he filed a petition to intervene as a plaintiff well before the expiration of the statute of limitations. Father was not required to “call up” his petition for hearing because



*Supreme Court Rule 52.12(a)* does not require a hearing for a person who has an unconditional right to intervene. Because his right of intervention was unconventional, his petition should have been granted automatically. *State ex rel. Nixon at 127*. The trial court should have written the words “so ordered” at the bottom of Father’s petition as Missouri courts do hundreds of times or more every day. But even without the words “so ordered,” Father was a party to this case. It doesn’t matter whether we refer to him as “intervenor” or “plaintiff” or “intervening plaintiff.” He filed his petition; he was party to the case; and he had rights.

*Rule 74.06(b)(5)* gives the trial court the authority to relieve the effects of a final judgment on the ground that it is no longer equitable that the judgment remain in force. *Juenger v. Brookdale Farms*, 871 S.W.2d 629, 631 (Mo.App. 1994); *Anderson v. Central Missouri State Univ.*, 789 S.W.2d 41, 44 (Mo.App. 1990). This component of the rule is based on traditional equity practice which limits its application to judgments that have a prospective effect, as contrasted to those that offer a present remedy for a past wrong. *Juenger*, 871 S.W.2d at 631; *Cook v. Birmingham News*, 618 F.2d 1149, 1152 (5th Cir. 1980). It addresses the situation in which a subsequent circumstance makes enforcement of such a judgment inequitable. *Id.* A judgment may be set aside on equitable grounds more

than one year after its entry. *Juenger v. Brookdale Farms*, 871 S.W.2d 629, 631 (Mo. Ct. App. 1994). *Rule 74.06(b)(5)* provides no specific time limitations.

The trial court's judgment of September 18, 2017, citing *Rule 67.02(2)* and *Applied Bank v. Wenzlick*, 344 S.W.3d 229, 231 (Mo. App. E.D. 2011), suggests that the dismissal of Father's wrongful death claim cannot be set aside because it was not a judgment. Rather, the trial court suggests, it was a "voluntary" dismissal which "disposed of the entire case effective upon the date it was filed." However, the trial court erred because the April 14, 2014 dismissal of Father's case absolutely was a judgment.

Father did not voluntarily dismiss his case. It was Grandmother who filed the motion to dismiss, and *Rule 67.02(a)* did not authorize Grandmother to dismiss Father's cause of action because it was not hers to dismiss. Moreover, the trial court should not have allowed the dismissal of Father's case because his petition was secure in the court file. The trial court had actual notice of Father's rights. The trial court knew Grandmother was not an eligible plaintiff under the statute, and *Applied Bank v. Wenzlick* does not say that the wrongful death action of a first-class plaintiff can be dismissed by a person who is not an eligible plaintiff under the statute. *Id.*

The trial court failed to denominate the dismissal of Father's case as a judgment because it failed recognize it as a judgment, not because it wasn't a

judgment. Judge Van Amburg, who referred to the dismissal as a “judgment” in her footnotes, explained that it was a “civil death” because it “proved fatal to both parents’ wrongful death claim.” *Love at 320-323*. Mother subsequently filed a petition in Father’s stead, in the same trial court<sup>7</sup>, but it too was dismissed because the trial court failed to acknowledge Father’s pleadings in the original case. But for the trial court’s error in the original case, Mother’s subsequent petition would have been timely under the saving statute. In the end, the trial court’s failure was fatal to both parents because it forever extinguished their right to prosecute their wrongful death claim against Respondents. Therefore, it is no longer equitable that the judgment of April 14, 2014 to remain in force. The judgment of April 14, 2014 should be set aside because Father and Mother deserve to be relieved of the “systematic and collective failures” to date.

---

<sup>7</sup> Both cases were file in the Circuit Court of the City of St. Louis.

## **CONCLUSION**

“In 2009 - the year Darrell Williams, Jr. was fatally shot by the Respondent officers - Chief Justice Stith articulated a strategic mission of our legal system: to enhance the public's trust and confidence in the justice system and the whole government. Again this year, Chief Justice Breckenridge reiterated the mandate that citizens ‘must have faith and trust that, in our courts, they will be treated respectfully and fairly, and that their cases will be decided impartially according to the law.’ These aspirations cannot be reconciled with the underlying record in the original case.” *Love at 322-323*.

WHEREFORE, Appellant/Intervenor Darrell Williams, Sr., Father of the decedent, Darrell H. Williams, prays that the Court reverse the trial court’s judgment of September 18, 2017; that the Court vacate and set aside the judgment of April 14, 2014; that the Court revive Father’s cause of action; that the Court allow Father to prosecute the wrongful death claim against Respondents; and for any other relief the Court deems to be just and appropriate.

**Respectfully submitted,**

**CASEY & DEVOTI, P.C.**

/s/ Matthew C. Casey

**Matthew C. Casey #49662**

**mcc@caseydevoti.com**

**Matthew J. Devoti #47751**

**mjd@caseydevoti.com**

**124 Gay Avenue**

**St. Louis, MO 63105**

**(314) 421-0763**

**(314) 421-5059 (Fax)**

***Attorneys for Appellant***

***Darrell Williams, Sr.***

## **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that:

1. This brief complies with the information required by Rule 55.03.
2. This brief complies with the limitations contained in Rule 84.06(b).
3. This brief complies with the page limits of Rule 360.
4. The word count of this brief is 6,256 words and the line count is 570.
5. This brief was prepared using Times New Roman, 14-point font, Microsoft Word 2016.
6. This brief was filed through the electronic filing system in a portable document format or PDF pursuant to Rule 103.04.

**CASEY & DEVOTI, P.C.**

/s/ Matthew C. Casey

**Matthew C. Casey #49662**

**mcc@caseydevoti.com**

**Matthew J. Devoti #47751**

**mjd@caseydevoti.com**

**124 Gay Avenue**

**St. Louis, MO 63105**

**(314) 421-0763**

**(314) 421-5059 (Fax)**

***Attorneys for Appellant***

***Darrell Williams, Sr.***

## **CERTIFICATE OF SERVICE**

A copy of the foregoing Appellant's Brief was electronically filed and hand delivered with the Clerk of the Missouri Court of Appeals – Eastern District, and mailed via U.S. Mail, postage pre-paid, to the following, this 10<sup>th</sup> day of October, 2017:

Denise McElvein  
**[denise.mcelvein@ago.mo.gov](mailto:denise.mcelvein@ago.mo.gov)**  
Missouri Attorney General's Office  
P.O. Box 861  
St. Louis, MO 63188  
***Attorney for Respondents***

### **CASEY & DEVOTI, P.C.**

**/s/ Matthew C. Casey**  
**Matthew C. Casey #49662**  
**[mcc@caseydevoti.com](mailto:mcc@caseydevoti.com)**  
**Matthew J. Devoti #47751**  
**[mjd@caseydevoti.com](mailto:mjd@caseydevoti.com)**  
**124 Gay Avenue**  
**St. Louis, MO 63105**  
**(314) 421-0763**  
**(314) 421-5059 (Fax)**  
***Attorneys for Appellant***  
***Darrell Williams, Sr.***