IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE

CAROLYN HOLMES, Personal Representative for the Estate of ROBERT V. HOLMES,
Appellant,

v.

UNION PACIFIC RAILROAD CO.,
Respondent.

DOCKET NUMBER WD82867

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: June 9, 2020

APPEAL FROM

The Circuit Court of Jackson County, Missouri
The Honorable Bryan E. Round, Judge

JUDGES

Division Two: Pfeiffer, P.J., and Witt, J., CONCURRING. Ahuja, J., DISSENTING IN SEPARATE OPINION.

ATTORNEYS

J. Clayton Schaeffer, Kirkwood, MO, and Jonathan Sternberg, Kansas City, MO, Attorneys for Appellant.

Anne Marie O'Brien and Daniel J. Hassing (Pro Hac Vice), Omaha, NE, and David A. Dick, St. Louis, MO, Attorneys for Respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

CAROLYN HOLMES, Personal Representative for the Estate of ROBERT V. HOLMES, Appellant,
v.
UNION PACIFIC RAILROAD CO., Respondent.

WD82867 **Jackson County**

Before Division Two Judges: Mark D. Pfeiffer, Presiding Judge, and Alok Ahuja and Gary D. Witt, Judges

Mr. Robert Holmes ("Mr. Holmes") died on July 3, 2015. On April 29, 2018, his widow, Ms. Carolyn Holmes ("Ms. Holmes"), filed a petition for damages for wrongful death under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, et seq., against Mr. Holmes's former employer, Union Pacific Railroad Company ("Union Pacific"), in the Circuit Court of Jackson County, Missouri ("circuit court"). Ms. Holmes's FELA petition alleged that Mr. Holmes suffered work-related toxic exposure that led to his death from lung cancer.

In the caption and the body of the petition, Ms. Holmes alleged that she was the personal representative for her late husband's estate. It was subsequently discovered during the course of written discovery in December 2018 that Ms. Holmes, though the surviving spouse, had not yet been appointed as the personal representative of her late husband's estate. An estate for the late Mr. Holmes was subsequently opened in March 2019 in the Probate Division of the Circuit Court of Clay County, Missouri ("probate court"), and the probate court issued Letters of Administration in Mr. Holmes's probate estate on April 9, 2019, appointing Ms. Holmes as the personal representative of Mr. Holmes's estate.

On December 21, 2018, Union Pacific moved to dismiss Ms. Holmes's petition "under Mo. R. Civ. Pro. 55.27(a)(1)" (*i.e.*, lack of jurisdiction over the subject matter due to Ms. Holmes's alleged lack of "standing" to maintain the lawsuit) and relied upon stale precedent that inappropriately conflated the concepts of a circuit court's "authority" with its "jurisdiction" over the subject matter. There were numerous disputes between the parties as to the timeliness of Ms. Holmes's response to Union Pacific's motion to dismiss, culminating with the circuit court declaring via order dated March 4, 2019, that all amended pleadings should be filed by April 3, 2019, and that it would take up the motion to dismiss at that time.

Prior to April 3, 2019, Ms. Holmes's counsel notified the circuit court that Mr. Holmes's probate estate had been opened in the probate court and that letters of administration would be forthcoming shortly. On April 9, 2019, the probate court issued the letters of administration and that order of the probate court was presented to the circuit court on the same date along with a proposed amended pleading that did *not* change the nature or substance of the FELA claim against Union Pacific, but rather only attached the procedural documentation (*i.e.*, probate court order) to

confirm Ms. Holmes's status as personal representative of her late husband's estate, confirm that she had complied with the statutory prerequisite to suit, and thereby confirm that she possessed the legal status necessary to proceed with the subject FELA claim.

The circuit court did *not* take up the motion to dismiss until April 29, 2019, some twenty days after the circuit court had *actual* knowledge that Ms. Holmes had, *in fact*, been appointed personal representative of her late husband's estate by the probate court and, thus, possessed the legal capacity to pursue the subject FELA claim on behalf of her late husband. The circuit court refused to grant leave to amend the petition, refused to consider documentation provided by Ms. Holmes confirming her appointment by the probate court as personal representative, instead considered Union Pacific's affidavit attached to its motion to dismiss that presented evidence outside Ms. Holmes's wrongful death petition, and issued its order sustaining Union Pacific's motion to dismiss on the ground that Ms. Holmes "lacks standing to bring this cause of action" and hence concluded that the circuit court lacked "jurisdiction" to permit the cause of action to proceed.

After the circuit court's order dismissing the case due to its perceived pleading deficiency that Ms. Holmes lacked standing, Ms. Holmes immediately repeated her request for relief by seeking leave of the circuit court to file her amended pleading "correcting" the circuit court's perceived pleading deficiency addressed in the circuit court's dismissal ruling, but the circuit court denied Ms. Holmes the opportunity to amend her pleading. Final judgment of dismissal was entered by the circuit court on June 25, 2019, and Ms. Holmes timely appealed.

REVERSED AND REMANDED.

Majority Opinion holds:

Where the trial court possessed *actual* knowledge that Ms. Carolyn Holmes had, *in fact*, been appointed as the personal representative of her late husband's estate well *before* the trial court dismissed the petition for "lack of standing," immediately *after* the trial court's dismissal ruling it was an abuse of discretion for the trial court to refuse to allow Ms. Holmes to file her amended pleading to assert the *fact* that she had been appointed as the personal representative and possessed the legal status necessary to pursue her late husband's FELA claim.

The circuit court should have reviewed the pleading only, rather than considering Union Pacific's affidavit "testimony" that the fact of Ms. Holmes's capacity was untrue. The circuit court also erroneously treated Ms. Holmes's *capacity to sue* as the personal representative of her late husband's estate as an issue of *standing* and compounded that mistake of law by conflating the concept of a circuit court's "authority" versus its "jurisdiction" and ultimately concluded that a statutory prerequisite to suit (*i.e.*, Ms. Holmes's personal representative status) was a matter of subject matter jurisdiction, rather than only impacting her capacity to sue, which was never asserted by Union Pacific as an affirmative defense pursuant to Rule 55.27(g)(1). A claim that a party does not have capacity to sue can be waived or avoided by amendment of the pleadings and misjoinder of parties is not ground for dismissal of an action.

Applying the discretionary factors to the circuit court's refusal to permit Rule 67.06 relief to Ms. Holmes when she provided the circuit court an amended pleading "correcting" what the

circuit court had concluded was a pleading defect both before and immediately after the circuit court's dismissal ruling leads us to conclude that justice is not furthered by permitting the circuit court's ruling, refusing to permit a simple "form not substance" amendment to her pleading upon the circuit court's dismissal ruling, to stand. Because Ms. Holmes's amended pleading and her appointment as personal representative are not equivalent to the commencement of a new cause of action nor do they set up any different state of facts as grounds for the action, but rather constitute a change in form not substance, the amended pleading and Ms. Holmes's appointment as personal representative are not subject to the statute of limitations of FELA, but rather relate back to the original pleading filed in the underlying FELA wrongful death claim.

Majority Opinion by: Mark D. Pfeiffer, Presiding Judge June 9, 2020
Gary D Witt, Judge, concurs

Dissenting Opinion holds:

Judge Ahuja dissents. In his view, the circuit court did not abuse its considerable discretion in refusing to permit Holmes to amend her petition out of time, because she was aware from the inception of the litigation that it was necessary for her to be appointed as personal representative of her deceased husband's estate; she falsely represented on multiple occasions that she was in fact her husband's personal representative; and she failed to act promptly to secure an appointment after Union Pacific first raised the issue. Although the majority justifies reversal on the basis that Union Pacific's motion to dismiss raised an unpleaded "capacity to sue" objection, and that Union Pacific's dismissal motion improperly relied on matters outside the pleadings, Judge Ahuja considers these issues to have been waived, since they were not raised by Holmes either in the circuit court, or on appeal.

Dissenting Opinion by: Alok Ahuja, Judge June 9, 2020

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