Summary of SC98673, *Carolyn Holmes, Personal Representative of the Estate of Robert V. Holmes v. Union Pacific Railroad Company*

Appeal from the Jackson County circuit court, Judge Bryan E. Rounds
Argued and submitted January 20, 2021; opinion issued March 8, 2021

Attorneys: Holmes was represented by Jonathan Sternberg of Jonathan Sternberg, Attorney, PC in Kansas City, (816) 292-7020. Union Pacific was represented by Daniel J. Hassing and Anne Marie O'Brien of Lamson, Dugan & Murray LLP in Omaha, Nebraska, (402) 397-7300; and David A. Dick of Thompson Coburn LLP in St. Louis, (314) 552-6000.

This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A wife appeals from the dismissal of her wrongful death lawsuit against a railroad company, her deceased husband's former employer. In a unanimous decision written by Chief Justice George W. Draper III, the Supreme Court of Missouri affirms the circuit court's judgment. The wife's failure to timely file an amended petition in her capacity as the personal representative of her deceased husband's estate was not the result of an unexpected or unavoidable hindrance, accident, or mishap.

Facts: In 2018, Carolyn Holmes filed a wrongful death action under the federal employers' liability act against Union Pacific Railroad Company alleging her husband's death from lung cancer was the result of exposure to toxic substances and carcinogens during his employment with Union Pacific. Holmes was listed in the petition's caption and prayer for relief as the personal representative of her husband's estate. Union Pacific moved to dismiss the petition in part because Holmes lacked standing (right to sue), arguing Holmes had not officially been appointed the personal representative of her husband's estate. The circuit court stayed the proceeding for 30 days for Holmes to file an amended petition as the actual personal representative of the estate. Holmes opened an estate in the probate division but failed to file an amended petition by the 30-day deadline, instead moving for leave to file an amended petition out of time. The circuit court overruled her motion and sustained Union Pacific's motion to dismiss. Holmes appeals.

AFFIRMED.

Court en banc holds: (1) Holmes' arguments regarding Rule 67.06 are not preserved for appellate review. Holmes never cited or relied on Rule 67.06 in any pleadings before the circuit court as grounds that she was entitled leave to file an amended petition out of time. This Court will not convict a lower court of error on an issue not put before it to decide.

(2) Holmes' failure to file a timely amended petition in her actual capacity as the personal representative of her deceased husband's estate was not the result of an unexpected or unavoidable hindrance, accident or mishap. The record establishes she took no action to be appointed personal representative until almost 11 months after she filed suit, four months after informing Union Pacific's counsel she would seek the appointment, two months after beseeching

the circuit court to grant her leave to seek the appointment and 10 days before the circuit court's deadline expired. These multiple instances show Holmes acted carelessly and with deliberate disregard toward obtaining appointment as the estate's personal representative. Accordingly, the circuit court did not abuse its discretion in denying her leave to file an amended petition out of time and dismissing the lawsuit.