

Summary of SC89177, *Bernardo O. Costa v. Arthur E. Allen*

Appeal from the circuit court of Boone County, the Hon. Gene Hamilton.

Attorneys: Costa, an inmate at the Crossroads Correctional Center in Cameron, is representing himself. The state is represented by James R. McAdams and Maureen C. Beekley of the attorney general's office in Jefferson City.

This summary is not part of the opinion of the Court. It has been prepared by the 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: The circuit court dismissed an inmate's motion for postconviction relief without granting him an opportunity to amend the motion. In a 7-0 decision written by Judge Daniel E. Scott, a judge of the Missouri Court of Appeals, Southern District, who was sitting by special designation in place of Judge Breckenridge, the Supreme Court of Missouri vacated the circuit court's decision and remanded (sent back) the case for further proceedings. Although the inmate failed to assert a claim against his trial attorney for breach of fiduciary duty, the circuit court should have afforded him time in which to file an amended pleading to attempt to correct the insufficiencies.

Facts: Assistant public defender Arthur Allen represented Bernardo Costa in an action for postconviction relief. The circuit court denied Costa relief. He subsequently filed a petition he titled "Civil Action for Breach of Fiduciary Duties (Constructive Fraud)." He alleged that he instructed Allen to obtain and secure certain witnesses for the evidentiary hearing on Costa's postconviction relief motion and that Allen said he would call those witnesses but then did not. He also alleged that Allen thereby breached his fiduciary duty to Costa and doomed Costa's otherwise valid postconviction relief claim. Allen moved to dismiss, and, without elaboration, the circuit court dismissed Costa's petition with prejudice (preventing him from refileing it). Costa appeals.

VACATED AND REMANDED.

Court en banc holds: Costa's petition alleges no violation of Allen's basic fiduciary duties of undivided loyalty and confidentiality under *Klemme v. Best*, 941 S.W.2d 493 (Mo. banc 1997). It does not allege that Allen breached client confidences, placed the interests of other clients above Costa's interests or otherwise divided his loyalty to Costa. Accordingly, Costa asserts no claim for breach of fiduciary duty, constructive fraud or otherwise. A remand is necessary, nonetheless, because Rule 67.06 affords a party that has filed an insufficient pleading time to file an amended pleading. Here, Costa is a *pro se* (representing himself, without an attorney) plaintiff in prison who has had no meaningful opportunity to respond to the motion to dismiss, which was filed and granted within two days.