SC95444

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.* ATTORNEY GENERAL CHRIS KOSTER AND MISSOURI PETROLEUM STORAGE TANK INSURANCE FUND BOARD OF TRUSTEES,

Plaintiff-Respondent,

v.

CONOCOPHILLIPS COMPANY AND PHILLIPS 66 COMPANY,

Defendants-Respondents,

v.

CORY WAGONER,

Proposed Intervenor-Appellant.

Appeal from the St. Louis City Circuit Court
The Honorable Robert H. Dierker, Jr., Judge

SUBSTITUTE BRIEF OF RESPONDENT STATE OF MISSOURI

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STATEMENT OF FACTS

1. The underlying case was between the State, for the Fund, and ConocoPhillips.

The State of Missouri, by the Missouri Attorney General and Board of Trustees for the Missouri Petroleum Storage Tank Insurance Fund ("the Trustees"), filed this suit against ConocoPhillips Company and Phillips 66 Company (collectively "ConocoPhillips"). L.F. 11-40. The petition alleged that ConocoPhillips wrongfully obtained payments from the Missouri Petroleum Storage Tank Insurance Fund ("the Fund"). *Id.*

The parties entered into a settlement agreement, and on December 11, 2014, the circuit court reviewed and approved that agreement and in an Order and Final Judgment, dismissed the suit with prejudice. L.F. at 465. The settlement agreement resolved claims that the State of Missouri, the Attorney General, and the Trustees alleged against ConocoPhillips. L.F. at 465 and 466. Neither the settlement agreement nor the December 11 Judgment addressed claims any other person or entity might have against ConocoPhillips.

2. Wagoner unsuccessfully tried to intervene.

In June 2014, Appellant Wagoner had filed a motion to intervene. L.F. 63. On November 13, 2014, the circuit court denied that motion. L.F. 415-426.

On December 5, 2014, Wagoner moved to alter or amend the "order and judgment of the court denying motion to intervene." L.F. 427. On December 15, 2014, Wagoner added a motion to set aside the December 11 Judgment. L.F. 501.

On January 12, 2015, Wagoner filed a notice of hearing on both motions, asking that they be heard on February 10. L.F. 578. On January 20, the court struck that notice in response to a motion by the parties, and declared, "No further actions may be taken in this matter as the case is closed." L.F. 605.

3. Wagoner filed a notice of appeal of the judgment as to the parties.

Meanwhile, on January 15, Wagoner filed a Notice of Appeal, stating, "Notice is given that CORY WAGONER, PROPOSED INTERVENOR, appeals from the judgment/decree entered in this action on DECEMBER 11, 2014." L.F. 587 (capitalization in original). He attached a copy of the December 11 Order and Final Judgment. L.F. 591. In the attached Eastern District Civil Case Information Sheet, under "issues expected to be raised on appeal," he asserted that the "Circuit Court of City of St. Louis lacks subject

matter jurisdiction to entertain any claim brought by the Missouri Attorney General ostensibly on behalf [of] the State and the Missouri Petroleum Storage Tank Insurance Fund." L.F. 595.

A notable aspect of Wagoner's statement of facts is what is missing. At no point does Wagoner allege that he has suffered any damage as a result of conduct by ConocoPhillips. At no point does he allege that he has a personal right to recover from ConocoPhillips. And at no point does he allege that any interest of his is affected by the settlement or the order of dismissal.

4. Wagoner had unsuccessfully sought similar relief in federal court.

Instead Wagoner points to two separate suits that he filed against ConocoPhillips. Appellant's Brief ("App. Br.") at 3. He states that he sought "recovery of damages" from ConocoPhillips but does not at any point in his brief assert that he himself was damaged. *Id*.

Wagoner's recitation of the history of those suits has several notable errors and omissions. Wagoner asserts that his initial suit against ConocoPhillips was improperly removed to federal court. App. Br. at 5. He cites no basis for this claim. In fact, as Wagoner notes, the United States District Court for the Western District of Missouri ("the district court") denied his motion to remand. App. Br. at 6. The district court retained jurisdiction, concluding the case was properly removed. L.F. at 104. At the

time the district court denied the motion, it indicated that it would take up a motion to dismiss Wagoner's entire suit and invited Wagoner to respond to the motion to dismiss. L.F. at 104.

Wagoner omits the conclusions the district court made when it refused to remand. The district court examined in detail the claims Wagoner made. L.F. at 93 to 104. The district court found that the Fund was the real party in interest, not Wagoner:

> Finally, because the PST Fund pays participants' claims, it follows that the PST Fund is the party actually entitled to recover any overpayment of claims. Wagoner acknowledges this in his initial Petition, alleging ConocoPhillips fraudulently submitted claims to the PST Fund, thereby damaging its assets, and requesting that ConocoPhillips pay damages the PST Fund sustained. (Doc. 1-1, p. 15, ¶ 34; pp. 18-19.) Wagoner further acknowledges in his subsequent Petitions that the PST Fund will benefit by recovering these damages.
>
> The Court thus concludes that the PST Fund, not Wagoner, is the real party in interest in this case.

L.F. at 97. The district court also stated that "Wagoner is not the proper party to bring such claims." L.F. at 97. As a consequence the district court appeared poised to dismiss Wagoner's case. But as mentioned above, it instead invited Wagoner to respond to the motion to dismiss.

Wagoner states that "[t]he federal district court suit was necessarily thereafter dismissed without prejudice for lack of jurisdiction due to an absence of requisite diversity required by Title 28 U.S.C. § 1332. (L.F. page 320)." App. Br. at 6. This statement is inaccurate. As noted above, the district court retained jurisdiction. Wagoner voluntarily dismissed the case. L.F. at 320 and 322.

Wagoner asserts that he "amended his suit by refiling in the Circuit Court of Green County." App. Br. at 6. This is a non sequitur. The filing of a new case is not the equivalent of amending a pending case. Notably, Wagoner filed his new case in state court at the same time he had a case on the same subject pending in federal court. This is the same kind of act that Wagoner says the State was prohibited from doing. App. Br. at 18, Point II.

ARGUMENT

I. Wagoner cannot proceed on appeal as to the matters in his Points Relied On, which relate to the circuit court's order denying intervention and not the Order and Final Judgment identified in his Notice of Appeal.

A. Wagoner lacked standing to appeal the Order and Final Judgment.

On January 15, 2015, Wagoner gave the following notice: "Notice is given that CORY WAGONER, PROPOSED INTERVENOR, appeals from the judgment/decree entered in this action on DECEMBER 11, 2014." L.F. 587 (capitalization in original). Attached to his Notice of Appeal was the December 11, 2014 Judgment Wagoner identified in the Notice, in which the circuit court dismissed the case with prejudice. L.F. 591-592.

Wagoner was, as he correctly stated in his Notice of Appeal, merely a "proposed intervenor." Having been denied intervention, Wagoner was not a party to the case.

But only a party to a case can appeal a court's final decision. See *In re C.A.C.*, 282 S.W.3d 862, 864 (Mo. App. W.D. 2009); *see also* § 512.020, RSMo. Because Wagoner was never a party to the suit, he lacked standing to appeal the judgment. And his lack of standing is a jurisdictional bar that prevents

this Court from hearing his appeal. *Missouri State Med. Ass'n v. State*, 256 S.W.3d 85, 87 (Mo. 2008).

B. The Court should treat as nonjusticiable Wagoner's claims of error in the prior order—not identified in his Notice of Appeal—denying his motion to intervene.

As noted above, in his Notice of Appeal Wagoner said just that he was appealing from the December 11, 2014 Order and Final Judgment. But in his Points Relied On, Wagoner does not allege error in that judgment. Instead he alleges error in the circuit court's November 13, 2014 Order denying his motion to intervene (L.F. 415). *See* App. Br. at 10-12. His failure to identify the November Order in his Notice of Appeal means that the claims made in his Points Relied On would not be justiciable even if they had been timely raised.

We agree with Wagoner that the November Order denying a motion to intervene was appealable. App. Br. at 1. The Court of Appeals, Western District, recently explained :

> "'[T]he denial of a motion to intervene as a matter of right under Rule 52.12(a) is a final and appealable judgment.'" … That is because, a "'movant cannot appeal from the judgment'" in a

> case where "'the movant asserts that she may be legally bound or prejudiced by'" the judgment "'unless she is allowed to intervene.'" Thus, "'the order denying intervention has the degree of definiteness which supports an appeal therefrom.'"

In Matter of Adoption of C.T.P., 452 S.W.3d 705, 712-13 (Mo. App. W.D. 2014) (citations omitted), quoting *State ex rel. Ideker, Inc. v. Grate*, 437 S.W.3d 279, 283 (Mo. App. W.D. 2014), and *State ex rel. Reser v. Martin*, 576 S.W.2d 289, 290–91 (Mo. banc 1978).

That an order denying intervention has "the degree of definiteness" that justifies allowing an appeal makes sense: denial of the motion entirely ends the case as between the proposed intervenor and the parties.

The problem addressed in this point arises not from the nature of the order Wagoner contests, but from the content of the document he filed to pursue his challenge. Rule 81.08(a) unambiguously requires that the notice of appeal "specify … the judgment or order appealed from." The notice of appeal that Wagoner filed states: "Notice is given that Cory Wagoner, Proposed Intervenor, appeals from the judgment/decree entered in this action on December 11, 2014." L.F. 587. That Judgment—which Wagoner attached to his Notice of Appeal (*see* L.F. 591)—is copied in Appellant's Appendix at A14. Yet Wagoner seeks relief from this Court as to another order entirely, the

November 13 order denying the motion to intervene. Deciding whether he can do so, based on the notice of appeal that he filed, requires this Court to consider two lines of cases.

In the first line, the Court of Appeals has repeatedly and consistently held that an appeal can proceed only as to "the judgment or order" "specif[ied]" in the notice of appeal. *E.g.*, *Burton v. Klaus*, 455 S.W.3d 9, 12 (Mo. App. E.D. 2014) ("Our review on appeal is confined to a review of the decision identified in the notice of appeal."); *Maskill v. Cummins*, 397 S.W.3d 27, 32 (Mo. App. W.D. 2013) ("The appellate court is confined to review the decision identified in the notice of appeal."); *State v. Trotter*, 302 S.W.3d 819, 821-22 (Mo. App. W.D. 2010) ("The notice of appeal identifies the decision being appealed as the August 4, 2008, order dismissing his motion for ruling rather than the November 12, 2008, unsigned docket entry denying his motion to reopen. … Accordingly, we cannot review the motion court's decision denying his motion to reopen.); *Schrader v. QuikTrip Corp.*, 292 S.W.3d 453, 455-56 (Mo. App. E.D. 2009) ("Since the notice of appeal must specify the judgment or order appealed from, this court is confined to a review of the entry of summary judgment only."); *Erickson v. Pulitzer Pub. Co.*, 797 S.W.2d 853, 858 (Mo. App. E.D. 1990) ("Since the notice of appeal refers to the Count I summary judgment proceeding only and does not mention the dismissal order of September 13, 1989, this court is confined to a

review of the summary judgment only."); *Green Hills Prod. Credit Ass'n v. R & M Porter Farms, Inc.*, 716 S.W.2d 296, 299-300 (Mo. App. W.D. 1986) ("Nowhere [in the notice of appeal] is there any reference to that part of the judgment dismissing the answer and counterclaims. This court is precluded from taking up any claimed error in the dismissals."). That line of cases goes back to 1971. *Brissette v. Brissette*, 471 S.W.2d 691, 693 (Mo. App. St.L. 1971) ("The only order or judgment referred to in this notice of appeal is the order denying defendant's motion. That is all the appeal covers."). In ruling on this appeal, the Court of Appeals, Eastern District relied on this line of cases. Slip Op. No. ED102505 (Nov. 3, 2015) at 7, citing *Maskill*, *Burton*, and *Schrader*.

In his Application for Transfer, Wagoner relied on a second line of cases. He said that in those cases, the appellate courts held "that technical compliance with Rule 81.08(a) is not, in all instances, mandatory or jurisdictional." Application for Transfer at 1, citing *Wills v. Whitlock*, 139 S.W.3d 643 (Mo. App. W.D. 2004); *L.J.B. v. L.W.B.*, 908 S.W.2d 349 (Mo. 1995); and *Lake Winnebago v. Sharp*, 642 S.W.2d 118 (Mo. 1983). *See also* Application at 8, adding a citation to *Weller v. Hayes Truck Lines*, 197 S.W.2d 657 (Mo. banc 1946).

In concluding that the limitation of the notice of appeal to the judgment approving the settlement precluded it from addressing intervention, the Eastern District did not ignore that second line of cases. But the court

concluded that those cases do not allow as much leniency as required for an appellate court to permit an appellant to specifically state in his notice of appeal that he appeals from one order, then later brief and obtain relief from an altogether different order. The Eastern District quoted its decision in *Midwest Coal, LLL ex rel. Stanton v. Cabanas*, 378 S.W.3d 367, 376 (Mo. App. E.D. 2012), for the proposition that "Missouri courts are lenient with respect to a failure to specify the judgment or ordered appealed from if the lack of specificity does not prejudice the other party." Slip Op. at 7. In *Midwest Coal*, the Eastern District explained the limit it perceives on this second, more liberal line of cases:

> Missouri courts are lenient with respect to a failure to specify the judgment or order appealed from if the lack of specificity does not prejudice the other party. *Rea v. Moore*, 74 S.W.3d 795, 801 (Mo. App. S.D. 2002). "However, that leniency has occurred primarily in cases where the appellant sought to appeal one judgment or order." *Id.* By contrast, Missouri courts "have not shown such leniency when the notice of appeal only listed one judgment or order, but the points on appeal referred to more than one judgment or order." *Id.*

378 S.W.3d at 376. In *Rea*, the Southern District similarly observed:

> Further, Missouri cases have shown a leniency with respect to the failure to specify the judgment or order appealed from, so long as the lack of specificity does not prejudice the other party. … However, that leniency has occurred primarily in cases where the appellant sought to appeal one judgment or order; Missouri appellate courts have not shown such leniency when the notice of appeal only listed one judgment or order, but the points on appeal referred to more than one judgment or order. …

74 S.W.3d at 801. The Southern District then discussed two Court of Appeals precedents.

It explained that in *Anderson v. Anderson*, 869 S.W.2d 289, 292 (Mo. App. S.D. 1994), "the appellant's notice of appeal only referred to the trial court's denial of his motion to obtain relief pursuant to Rule 74.06, and not to an earlier default judgment entered by the court." 74 S.W.3d at 801. In *Anderson*, the court refused to consider the earlier default judgment.

And the Southern District explained that in *Erickson v. Pulitzer Pub. Co.*, the appellant "stated in his notice of appeal that he was appealing from a grant of summary judgment for the respondent and attached the order

granting the summary judgment motion to the notice of appeal," but "left the area marked 'Judgment or Order Appealed From' blank." 74 S.W.3d at 801, citing *Erickson,* 797 S.W.2d at 858. Because "no reference was made in his notice of appeal to an earlier judgment," the Eastern District's review was confined to the judgment attached to the notice of appeal. *Id.*

The cases cited by Wagoner in his Application fit on the other side of the line identified by the Eastern District in *Midwest Coal*. In each instance, though there may have been a technical error, the notice of appeal identified or the appellant attached to the notice of appeal the order in which error was alleged:

- In *Wills v. Whitlock*, the notice of appeal did not list the orders appealed from, but did say "attached," and then attached both orders as to which error was claimed in the points relied on. 139 S.W.3d at 658.
- In *L.J.B. v. L.W.B.*, the appellant attached to the prematurely filed notice of appeal the original judgment, but not—logically—the version of the same judgment that was not entered until after the notice of appeal. 908 S.W.2d at 350.
- In *Lake Winnebago v. Sharp*, 652 S.W.2d 118 (Mo. 1983), the court allowed an unsigned, rather than a signed,

affidavit (now notice) of appeal to suffice for a request for a trial *de novo* in circuit court of a municipal court judgment.

- In *Weller v. Hayes Truck Lines*, though the notice of appeal referenced "the order overruling the motion for new trial, [the appellant] sought to appeal from the final judgment itself, the only appealable judgment in the case." 197 S.W.2d at 660.

Here, the judgment referenced in the notice of appeal was not "the only appealable judgment in the case" (*id.*), because an order denying a motion to intervene is also—and separately—appealable. The judgment dismissing the case and the order denying intervention do not overlap; the errors that might be alleged in them are not the same, nor even similar. The record required to decide the claims of error might overlap, but would not be the same.

This is not an instance in which there was merely a technical error in the notice of appeal, such as a missing signature. It is one in which the notice of appeal said one order was the subject of the appeal, but months later, after the record had been filed, the Appellant's Brief alleged error in another order.

The Court should reject Wagoner's claim that this court "has a duty to freely exercise its jurisdiction to provide review on the merits" (Application for Transfer at 1) of an order other than the one listed in the notice of appeal. Instead, the Court should affirm the longstanding rule in the Court of

Appeals that in such a situation, even if the court's jurisdiction might permit such review, the Court should decline to exercise that jurisdiction, and treat the question posed as nonjusticiable because it is not within the scope of the unambiguous statement made by the notice of appeal.

C. That the November 13, 2014 Order denying Wagoner's motion to intervene was immediately appealable leads to the question whether the January 15 Notice of Appeal was timely as to the November Order.

As noted above, an order denying a motion is appealable. And according to the Court of Appeals, it is appealable immediately: "Denial of a motion for intervention as of right is immediately appealable." *Lodigensky v. Am. States Preferred Ins. Co.*, 898 S.W.2d 661, 663 (Mo. App. W.D. 1995). *See also State ex rel. Ideker, Inc. v. Grate*, 437 S.W.3d 279, 283 (Mo. App. W.D. 2014) ("We acknowledge that Ideker would have had the right to file an immediate appeal of the trial court's order denying its motion to intervene.")

Making an order immediately appealable is consistent with this Court's action in *State ex rel. Reser v. Martin*. There, the court held that the movant could not obtain immediate review of the denial of a motion to intervene through a writ petition because the movant could seek the same relief through an appeal. 576 S.W.2d at 290–91. That holding would make little

sense if an appeal were not immediately available but had to be delayed until after the matter was resolved among the parties.

Of course, Wagoner did not immediately appeal. In fact, he did not file a Notice of Appeal until January 15, 2015. So he must find support in this Court's rules for the proposition that one denied intervention can wait to appeal until a case is resolved as to the parties.

Under Rule 81.04(a), "No such appeal shall be effective unless the notice of appeal shall be filed not later than 10 days after the judgment or order appealed from becomes final." Unfortunately, although an order denying intervention as of right is immediately appealable, no rule specifically states when an order denying a motion to intervene "becomes final" and thus when the time for filing a notice of appeal begins to run.

Rule 81.05(a)(1)—labelled, somewhat inaccurately, "Finality as Affected by After-Trial Motions"—does tell us that a "judgment becomes final at the expiration of thirty days after its entry if not timely authorized after-trial motion is filed." But to read Rule 81.05(a) to give an unsuccessful intervenor the option of delaying an appeal can be problematic. To do so in this case, where the order denying intervention was nearly contemporaneous with the final judgment, would have little adverse impact on the parties and the judicial system. But what about a case that proceeds, after intervention was denied, for weeks or months or years? Through discovery and trial—

perhaps even a jury trial? There is no apparent policy justification for allowing the proposed intervenor in such a case to delay seeking appellate review. As soon as the motion to intervene is denied, constituting what really is a final judgment as to the movant, the time for filing a notice of appeal—10 days, per Rule 81.04(a)—should begin to run.

But Rule 81.05(a)(1) cannot be read without reference to Rule 74.01(a). That rule declares that whenever the word "judgment" is "used in [this Court's] rules," that word "includes a decree *and any order from which an appeal lies*." (Emphasis added.) Because an order denying intervention as of right is an "order from which an appeal lies," that order is included within the term, "judgment." And again, Rule 81.05(a) applies to "judgments."

That gave Wagoner the opening that he used to delay filing a notice of appeal. Although the November 13 Order was a final judgment in the sense that it ended the litigation between Wagoner, the proposed intervenor, and the parties, the circuit judge did not use the word "judgment." That omission came into play when calculating the date on which a notice of appeal was due. Rule 74.01(a) continues: "A judgment is rendered when entered. A judgment is entered when a writing signed by the judge and denominated 'judgment' or 'decree' is filed." That Rule as written means that the order denying intervention was filed and was appealable on November 13, but the

time for filing the notice of appeal of that order did not begin to run on November 13.[1]

So when did it begin to run? There are two choices.

One is to say that the time never began to run because there was never an order as to intervention that was "denominated 'judgment.'" Rule 74.01. Under that approach, Wagoner's January 15 Notice of Appeal, had it included the November 15 Order, would have been timely. But under that approach, a new notice of appeal filed today or tomorrow would also be timely. That makes no sense.

The other, better choice—one suggested by the court of appeals (*see* Slip Op., ED102505 (Nov. 3, 2015) at 7-8)—is to treat the Order and Final Judgment (L.F. 499) as the "judgment" under Rule 81.04(a). That makes sense. After all, the circuit court implicitly denied Wagoner's pending motion to alter or amend the November 13 Order when that court dismissed the case in its entirety with prejudice. The circuit court left no room in which to act on the motion to alter or amend—the circuit court could not grant the motion

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[1] Similar problems are before this Court in two different contexts: an order regarding arbitration *Sanford v. CenturyTel of Mo.*, No. SC95465 (set for argument on May 3, 2016); and an order denying a motion for DNA testing under § 537.035 in *Mercer v. State*, No. SC95451.

because by that time there was no case in which Wagoner could intervene.[2] Under that approach, Wagoner's January 15 Notice of Appeal would have been timely, had it actually appealed from the November 13 Order.

With regard to that option, we suggest that the Court not fully endorse the holding of the Court of Appeals, Western District, in *Eckhoff v. Eckhoff*, 242 S.W.3d 466 (Mo. App. W.D. 2008). There the Court of Appeals held that although denial of a motion to intervene was immediately appealable, the movant could also wait until there was a final judgment in the case because the statute allows parties to appeal prior orders, not just a final judgment:

> The Cornetts are correct that Ms. Morris and Ms. Loveland did not appeal immediately after the commissioner denied their motion and instead waited until judgment was entered in the case. The order denying the motion to intervene is, however, appealable pursuant to section 512.020(5), RSMo 2000, which provides, in pertinent part, "a failure to

[2] Thus the circuit court refused Wagoner's request that it revisit the November 13 Order and denominate it a judgment more than 30 days after the December 13 Order and Final Judgment, saying "No further actions may be taken in this matter as the case is closed." L.F. 605.

> appeal from any action or decision of the court before final judgment shall not prejudice the right of the party so failing to have the action of the trial court reviewed on an appeal taken from the final judgment in the case." Thus, Ms. Morris and Ms. Loveland's failure to appeal the order denying their motion to intervene before final judgment does not prohibit them from appealing the denial of their motion to intervene after final judgment in this case. *See Vigil–Keyes v. Vanderwal*, 203 S.W.3d 749, 750 n. 1 (Mo. App. W.D. 2006) … .

242 S.W.3d at 469. The authorities cited in *Eckhoff* do not support the holding.

Section 512.020(5) addresses only the "failure" of "the party" to appeal before there is a "final judgment." Neither Ms. Morris nor Ms. Loveland, in *Eckhoff*, nor Wagoner, here, was ever a "party" who could take advantage of savings provision of § 512.020(5).

And *Vigil-Keyes v. Vanderwal*, the case cited by the court, was inapposite. That was an appeal of "an interim order that abated child support payments"—an order that was contested by parties, not by a non-party. 203 S.W.3d at 750.

But most important, the Court of Appeals' holding in *Eckhoff* is problematic as a practical matter for the reason stated above: it allows a nonparty to choose to remain outside the case for weeks, months, or years, see what the result is, and only then demand that the case be restarted from the point of the erroneous denial of intervention—potentially a severe disadvantage to both the parties and the courts. This Court should reject that reading and not only confirm that an order denying intervention as of right is immediately appealable, but declare either that it should always be denominated a "judgment" so as to require an immediate appeal, or that denomination as a "judgment' is not required.

II. If Wagoner's Notice of Appeal were sufficient to timely raise questions about the order denying his motion to intervene, it would be correct to affirm that denial because his asserted interests could not have been adversely affected in any immediate and direct manner, and because the State adequately represented any interest Wagoner had at the time he sought to intervene. (Responds to Appellant's Points.)

A. Standard of review.

If Wagoner could belatedly bring the question of his intervention to this Court, it would be reviewed using the same standard applicable to the appeal of a bench trial:

> "In reviewing court-tried civil cases, this Court applies the standard set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976), that 'the decree or judgment of the trial court will be sustained ... unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.' "

Williams v. Williams, 99 S.W.3d 552, 556 (Mo. App. W.D. 2003), quoting *H.S. v. Bd. of Regents, Southeast Mo. State Univ.*, 967 S.W.2d 665, 668 (Mo. App. E.D. 1998).

The circuit court here made findings that may not be overturned unless there is no substantial evidence to support the findings or unless the findings go against the weight of the evidence. *Id*. Specifically, the circuit court found:

> The record does not support a finding that Wagoner has the requisite interest in the subject matter of this case to warrant intervention. Wagoner has paid into the PST Fund, but has not made any claim against it, nor has he been denied a claim, nor is there any evidence that the PST Fund will be unable to meet its statutory obligations to Fund participants in the future. Wagoner does not have a private cause of action to seek reimbursements for the Fund.
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> ****
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> Returning to Rule 52.12, the rule relating to intervention, the Court finds that the movant, Wagoner, does not have an interest in the subject matter of this lawsuit. The Court further finds that the disposition of this action will not impede

Wagoner's ability to protect his own interest. Wagoner's interest is his ability to make a potential future claim against the PST Fund. As noted above, Wagoner has no pending claim against the Fund, has not been denied a claim based on a lack of funds or for any other reason, and there is no evidence to suggest that the PST Fund will be unable to pay claims against the Fund in the future. To the contrary, Phillips 66 has presented evidence from the EPA Final Annual Soundness Snapshot and Assessment that the PST Fund is sound. The funds at issue in this case, about $2.6 million, is a small fraction of the existing balance in the Fund of about $66 million.

Finally, the Court finds that Wagoner's interests are, on this record, adequately represented by the existing parties. …. Wagoner and the Attorney General seek the same outcome— reimbursement of Fund monies, and there is no evidence that the Attorney General and the trustees are not able and willing to pursue the claim in this case.

L.F. at 420, 424 and 425. To the extent that the court did not make findings on any factual issue, those issues must be viewed as having been found in accordance with the decision reached, and all inferences drawn accordingly. *Williams*, 99 S.W.3d at 556 ("We will "uphold the judgment of the trial court under any reasonable theory pleaded and supported by the evidence.").

B. Wagoner had no standing to intervene in this action because he could not gain or lose by any judgment or settlement.

Rule 52.12(a) "Intervention of Right" establishes two separate tests for intervention, stating that "anyone shall be permitted to intervene in an action." In his brief (App. Br. at 14-16), Wagoner relies on the second of these tests:

> (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.

Rule 52.12(a).

Under that test, an intervenor must establish three elements to be allowed intervention as a matter of right. First, the applicant must show an interest in the subject of the action in which he seeks to intervene; second, he must show that, absent intervention, his ability to protect his interest will be impaired or impeded as a practical matter; and third, he must show that his interest is not adequately represented by the existing parties. *State ex rel. Nixon v. Am. Tobacco Co., Inc.,* 34 S.W.3d 122, 127 (Mo. 2000).

The intervenor carries the burden of establishing the elements required for intervention as a matter of right. *Id*. The intervenor must satisfy all three elements. *Id*. Wagoner did not and could not satisfy the first, "interest" element.

"To intervene as a matter of right, Movants' interest in the action must be 'a direct and immediate claim to, and have its origin in, the demand made or the proceeds sought or prayed by one of the parties to the original action.'" *In re Clarkson Kehrs Mill Transp. Dev. Dist. v. City of Ballwin, Missouri et al.*, 308 S.W.3d 748, 753 (Mo. App. E.D. 2010), citing *LeChien v. St. Louis Concessions, Inc.*, 33 S.W.3d 602, 604 (Mo. App. E.D. 2000). "'[T]he interest must be so immediate and direct that the would-be intervenor will either gain or lose by the direct operation of the judgment that may be rendered therein.'" *Am. Tobacco Co.*, 34 S.W.3d at 128. "It does not include a

consequential, remote or conjectural possibility of being affected as a result of the action." *Id*.

Here, Wagoner fails to identify any way in which he will "gain or lose by the direct operation of the judgment that may be [or, here, was] rendered." *Id*. At no point in his brief does Wagoner describe how the settlement affects him in any way. As a result, the trial court's finding that Wagoner "does not have an interest in the subject matter of this lawsuit," L.F. at 424, should be upheld.

Instead of pointing to an impact this litigation would have on his interests, in his statement of facts Wagoner discusses at length his other cases. There, he pursued the same claims against ConocoPhillips that the federal district court, like the court below, found "Wagoner is not the proper party to bring." L.F. at 97; *see also* L.F. 424 (The court below "finds that the movant, Wagoner, does not have an interest in the subject matter of this lawsuit.").

Merely filing another case cannot create an interest that meets the requirement that Wagoner "will either gain or lose by the direct operation of the judgment that may be rendered" in this case. *Am. Tobacco Co.*, 34 S.W.3d at 128. As found by the trial court here, in both cases, "Wagoner claimed to be seeking reimbursement from Phillips 66 on behalf of the PST Fund." L.F. at

418. The settlement of the claims here will not cause Wagoner to gain or lose any funds; it only affects recovery by the Fund.

It should also be noted that, should Wagoner have a direct claim against ConocoPhillips, the terms of the settlement and order of dismissal will not affect that claim. Wagoner is still free to bring any direct claim he has, although at no point has he alleged such a claim.

Because the Fund is denominated by the legislature as a "special trust" within the state treasury to which Wagoner pays an annual participation premium, Wagoner claims the Fund is a trust in which he has an interest as a "beneficiary." His contention is flawed, for at least two reasons.

First, in the context of the statutory scheme, there is no indication that the legislature intended to create a traditional trust for persons who could be considered "beneficiaries" of it. The statutes governing the Fund refer to "owner[s] or operator[s] of any underground storage tank … who seek to participate in the [Fund]," § 319.129.2, RSMo; but there are no references to "beneficiaries" of the Fund.

Second, Wagoner is not a "beneficiary" of the Fund in the sense of being a "beneficiary" of a trust. The administrative rules adopted by the Trustees do use the term "beneficiary," but in the context of one who, as a participant or otherwise is entitled to file a claim for benefits. *See* 10 CSR 100-5.010 - Claims for Cleanup Costs. Thus, Wagoner may, at some point in the future,

be a "beneficiary" in the common parlance of an insurance agreement: He may file an eligible claim for "benefits" under his policy seeking reimbursement for cleanup costs he incurs or coverage of a third-party's claim for damages.

Even if Wagoner was considered a "beneficiary" of a "trust" (not just as one filing a claim for insurance benefits under a policy), he still has no standing to bring an action against a third party on behalf of the Fund. Missouri courts apply and analyze the Restatement (Second) of Trusts. *See Obermeyer v. Bank of Am., N.A.*, 140 S.W.3d 18, 23 (Mo. 2004). Pursuant to the Restatement (Second) of Trusts, § 281(1), "where the trustee could maintain an action at law or suit in equity or other proceeding against a third person if the trustee held the trust property free of trust, the beneficiary cannot maintain an action at law against the third person."[3] Missouri courts have followed this approach. *See Scott v. Vogel-Boul Soda Water Co.*, 134 Mo. App. 302, 114 S.W. 44, 45 (1908) ("Defendant contends that Reed only, as trustee, had the power to foreclose the deed of trust. This is true, and Reed was the only necessary party plaintiff to the action, and he alone could

[3] The exception in subsection (2), allowing the beneficiary to bring the action if the beneficiary is in possession of the subject matter of the trust. (Restatement (Second) of Trusts, § 281(2)), does not apply here.

maintain it for the recovery of the property."); *see also Baker v. Dale*, 123 F.Supp. 364, 368 (W.D. Mo. 1954) ("And it is likewise well settled in Missouri that the property of the trust can only be recovered by the trustee, and the beneficiaries have no legal capacity to sue for its recovery…."). Both the district court and the circuit court reached the same conclusion with regard to Wagoner's purported cause of action. L.F. at 96 and 423.

The trust cases cited by Wagoner (App. Br. at 17) have no application to the facts of this case. *Stabler v. Stabler*, 326 S.W.3d 561 (Mo. App. E.D. 2010), did not involve the recovery of trust property. Instead, *Stabler* was a suit brought by the beneficiaries against the trustees for violations of duties as trustee. It is no surprise that the court would hold that the beneficiary can bring such an action. Likewise, *Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon ex rel. Weldon*, 231 S.W.3d 158, 166 (Mo. App. W.D. 2007), involved a claim brought by a beneficiary against the trustees. Neither precedent applies to the recovery of trust assets from a third party.

C. Wagoner's asserted interests were adequately represented by the State parties to this action.

The third element of the test for intervention requires that an aspiring intervenor establish that the intervenor's interest is not adequately represented by the existing parties. *Am. Tobacco Co.,* 34 S.W.3d at 127. "The

determination of whether a prospective intervenor's interest is adequately represented by an original party to an action usually turns on whether there is an identity or divergence of interest between the proposed intervenor and the party." *Kinney v. Schneider Nat'l Carriers, Inc.*, 200 S.W.3d 607, 611 (Mo. App. W.D. 2006).

The record here supports the circuit court's finding that Wagoner does not have a divergence of interest. *See* L.F. 424. To the extent that he has a goal, Wagoner wants the same outcome as the State in the instant case: a reimbursement to the Fund of monies wrongfully obtained by ConocoPhillips. As a result, the State can completely represent any interest Wagoner claims to have, so the motion to intervene was properly denied.

The fact that the State reached a settlement with ConocoPhillips does not mean that there is a divergence of interest. Both the State and Wagoner are interested in getting as large a settlement as possible, but the possibility of a larger settlement must be weighed against the risks posed in litigation should the case fail to settle. In Missouri, it is the Attorney General who is given the duty to weigh such risks on behalf of the State. *See State ex rel. Igoe v. Bradford*, 611 S.W.2d 343, 347 (Mo. App. W.D. 1980) ("It is for the attorney general to decide where and how to litigate issues involving public rights and duties and to prevent injury to the public welfare."); *see also* § 27.060, RSMo ("The attorney general shall institute, in the name and on the

behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations"). [4] As a result, the Attorney General appropriately opposed Wagoner's attempts to pursue these claims; Wagoner was usurping authority reserved to the Attorney General.

In Point III, Wagoner argues that the Attorney General is not the proper party to act on behalf of the State and the Fund.[5] He overlooks the role of the Trustees and the Attorney General's duties and authority with respect to litigation involving the Trustees.

Section 319.129 establishes that the management of the fund is given to the State, specifically through the Trustees:

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[4] In a dispute involving the authority of departmental counsel, the Cole County Circuit Court held that only the Attorney General could settle litigation involving the State. *Missouri Better Bean, LLC v. Hagler, et al.*, Case No. 08AC-CC00892, order at 2 (Cole County Cir. Ct., Apr. 9, 2009) ("Without the Attorney General's signature or approval, the Stipulation of Facts and Consent Agreement was never properly executed.")

[5] The Fund itself is an account within the State treasury, *see* § 319.129.1, RSMo, not an entity that can sue, be sued, or act in any way.

> 4. The general administration of the fund and the responsibility for the proper operation of the fund, including all decisions relating to payments from the fund, are hereby vested in a board of trustees.
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> ****
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> 8. The board of trustees shall be a type III agency and shall appoint an executive director and other employees as needed, who shall be state employees and be eligible for all corresponding benefits.

And while the board has been given some authority to hire outside counsel without approval of the Attorney General, that authority is limited to hiring counsel for the defense of third-party claims. Section 319.129.10 ("In order to carry out the fiduciary management of the fund, the board may select and employ, or may contract with … legal counsel to defend third-party claims…."). Thus, it is the Trustees who have oversight of the Fund, and the Attorney General who has the authority to pursue litigation on the Trustees' behalf and to enter into settlements regarding that litigation.

Wagoner cannot claim he can avoid having the Fund's litigation handled by the Attorney General because the statute gives him his own right

of action. In Missouri, when there is no express provision in a statute either establishing or prohibiting a private cause of action but there is language expressly authorizing the State or a department of the State to bring an action, no private right of action to enforce the statute exists. *Johnson v. Kraft General Foods, Inc.*, 885 S.W.2d 334, 336 (Mo. 1994). Section 319.127, RSMo, expressly authorizes the Attorney General, at the request of the Department of Natural Resources to bring an action if there is a violation of sections 319.100 to 319.137, RSMo, or any standard, rule or regulation, order or permit term or condition adopted or issued thereunder. No statute creates a private right of action for such violations. Here, the State is enforcing 10 CSR 100-4.010 (6)(D), which allows the Trustees to enter the terms of an agreement that the Trustees deem appropriate. Again, it is the Trustees' or the State's action, and it is the Attorney General, not Wagoner, who has the authority to represent the interests of the Trustees.

In an effort to constrain the Attorney General's authority, Wagoner relies on *State ex rel. Champion v. Holden*, 953 S.W.2d 151 (Mo. App. S.D. 1997). App. Br. at 28. That case has no application to the facts here. In that case, the Attorney General attempted to remove trustees from a trust. The court ruled that the Attorney General may only seek removal on behalf of a public trust, *i.e.* a trust that benefits the general public, not a trust with defined beneficiaries. Here, the Attorney General is a party because of his

relationship to the Trustees as a State agency, so *Holden* is inapposite. In addition, the Fund provides for the cleanup of the environment and protection of the general public, so even under *Holden* the Attorney General could bring this action, were it necessary to do so.

State ex rel. McKittrick v. Missouri Pub. Serv. Comm'n, 175 S.W.2d 857, 862 (Mo. 1943), also has no application here. If anything, *McKittrick* reinforces the conclusion that the Attorney General is the appropriate person to represent the State's interest here. In *McKittrick,* this Court concluded that the General Assembly had expressly limited the Attorney General's authority to represent and act on behalf of the Public Service Commission. Wagoner points to no such limitation here.

Wagoner's claim of taxpayer standing is equally weak. As the circuit court noted, taxpayer standing cannot apply because this case does not involve a tax:

> It is clear in any event that [the taxpayer standing test doesn't] apply here, as the PST Fund does not collect or spend taxes. The Fund collects fees. Our Supreme Court has already ruled that the surcharge imposed by § 319.132.1 is a fee, not a tax. *Reidy Terminal, Inc. v. Dir. of Revenue*, 898 S.W.2d 540, 542 (Mo. 1995). The same is true of the yearly

> premium paid to procure insurance—it is not a tax. Wagoner is not required to use the PST Fund for insurance, so long as he can prove he has some form of financial responsibility. In short, Wagoner does not have taxpayer standing to intervene.

L.F. at 424.

In addition, a taxpayer standing suit requires some wrongful behavior by a public official, not by a private party dealing with the government. "Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts." *E. Missouri Laborers Dist. Council v. St. Louis Cnty.*, 781 S.W.2d 43, 47 (Mo. 1989). Here, the State, through the Attorney General and the Trustees, seeks reimbursement for funds wrongfully obtained by ConocoPhillips. Thus, the damages are the result of ConocoPhillips' wrongful acts, not the acts of any state officeholder–much less the result of expenditures of tax revenue.

Finally, an action by Wagoner in Greene County Circuit Court cannot provide a basis to dismiss this case. Wagoner relies on "the pending action doctrine" to argue that this Court lacks jurisdiction. However, that doctrine does not apply because, as this Court has held, the doctrine requires identity of parties:

> Abatement, also known as the "pending action doctrine," holds that where two actions involving the same subject matter between the same parties are brought in courts of concurrent jurisdiction, the court in which service of process is first obtained acquires exclusive jurisdiction and may dispose of the entire controversy without interference from the other.

State ex rel. J.E. Dunn, Jr. & Assocs., Inc. v. Schoenlaub, 668 S.W.2d 72, 74 (Mo. 1984). Wagoner is not a party to the present action and the Attorney General, who is a party here, was not a party to the Greene County suit. As a result, this suit and the Greene County suit do not have the same parties.

CONCLUSION

For the reasons states herein, the Appellant's Points Relied On should be denied as nonjusticiable. In the alternative, both the order of dismissal entered December 11, 2014 and the order entered November 13, 2014, denying Wagoner's motion to intervene should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet, on the 25th day of March, 2016, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 8,947 words.

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