

Appeal No. SC 87206

SUPREME COURT OF MISSOURI
EN BANC

JAMES HENSEL and LORI HENSEL,
Plaintiffs/Appellants
v.
AMERICAN AIR NETWORK, INC., et al.,
Defendants/Respondents

Appeal from the St. Louis County Circuit Court, Division 12
Honorable Steven H. Goldman, Circuit Judge
Circuit Court Cause No. 03CC-003581

**SUBSTITUTE BRIEF OF DEFENDANTS/RESPONDENTS
AMERICAN AIR NETWORK, INC., AIR AMBULANCE CARE FLIGHT
INTERNATIONAL, INC., D/B/A CARE FLIGHT INTERNATIONAL AND AIR
M.D., INC., AND HENRY AIR, LTD.**

John W. Cowden # 21447
Baker Sterchi Cowden & Rice, L.L.C.
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108
(816) 471-2121
(816) 472-0288 (Fax)

Caroline M. Tinsley # 49377
Baker Sterchi Cowden & Rice, L.L.C.
1010 Market Street, Suite 950
St. Louis, Missouri 63101
(314) 231-2925
(314) 231-4857 (Fax)

Attorneys for Defendants/Respondents
American Air Network, Inc.,
Air Ambulance Care Flight International, Inc.,
d/b/a Care Flight International and Air M.D., Inc., and
Henry Air, Ltd.

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	3
STATEMENT OF FACTS.....	6
POINTS RELIED ON	16
ARGUMENT.....	19

- I. The Trial Court Did Not Err In Granting Summary Judgment In Favor of American Defendants Based On Expiration Of The Applicable Kentucky Statute of Limitations, And Missouri Supreme Court Rules 9.03 And 55.03, Because American Defendants Were Entitled To Judgment As A Matter of Law, In That The Formal Filing Of The Petition Was Not Timely And Plaintiffs’ Failure To Comply With Rule 9.03 Was Not Cured, Or Curable 16, 19

- II. The Trial Court Did Not Err In Granting Summary Judgment In Favor Of American Defendants And Did Not Abuse Its Discretion In Failing To Grant Plaintiffs’ Motion For Leave To Amend By Interlineation, Because Plaintiffs’ Failures To Comply With Missouri Supreme Court Rules 9.03 And 55.03 Were Not Curable By Untimely Adding An Omitted Required Signature In Order For The Requested Relief To Relate Back To The Original Lodging Of The Petition With The Clerk’s Office, In That The Petition Was Not Formally And Officially Filed At That Time 17, 31

III.	The Trial Court Did Not Err In Granting Summary Judgment In Favor Of American Defendants Based On The Expiration Of The Applicable Kentucky Statute Of Limitations, Because American Defendants Did Not Waive Their Statute of Limitations Affirmative Defenses, In That American Defendants Plead the Applicable Statute of Limitations As A Defense In Their Answers And Specified The Particular Statute Of Limitations Upon Which They Relied Within Their Dispositive Motions Which Fairly And Adequately Advised Plaintiffs Of The Affirmative Defenses.....	18, 37
CONCLUSION		41
RULE 84.06(c) CERTIFICATE OF COMPLIANCE		43
CERTIFICATE OF SERVICE.....		44
APPENDIX		45

TABLE OF AUTHORITIES

Cases

<i>Alvarado v. H & R Block, Inc.</i> , 24 S.W.3d 236 (Mo. App. W.D. 2000).....	18, 38
<i>Bendis v. Alexander and Alexander, Inc.</i> , 916 S.W.2d 213, (Mo. App. W.D. 1995).....	19
<i>Black v. Baptist Medical Center</i> , 575 So. 2d 1087 (Ala. 1991).....	24, 25
<i>Bowling v. S.S. Kresge Co., et al.</i> , 431 S.W.2d 191 (Mo. 1968).....	20
<i>Chouteau Auto Mart, Inc. v. First Bank of Missouri</i> , 148 S.W.3d 17 (Mo. App. W.D. 1994).....	39
<i>Davenport v. Lee</i> , 72 S.W.3d 85 (Ark. 2002)	24, 30, 31
<i>Day v. DeVires and Associates, P.C.</i> , 98 S.W.3d 92 (Mo. App. W.D. 2003)	40
<i>Fruin v. Northwestern Medical Faculty Foundation, Inc.</i> , 551 N.E.2d 1010 (Ill. App. 1st 1990)	24, 28, 29
<i>Grady v. Amrep, Inc.</i> , 139 S.W.3d 585 (Mo. App. E.D. 2004)	18, 38
<i>Harper v. Gibson</i> , 601 F. Supp. 156 (W.D. Mo. 1985).....	19
<i>Janiczek v. Dover Mgmt. Co.</i> , 481 N.E.2d 25 (Ill. App. Ct. 1985).....	25, 27, 28
<i>Johnson v. Vee Jay Cement</i> , 77 S.W.3d 84, 87 (Mo. App. E.D. 2002)	18, 37
<i>Joseph Sansone Co. v. Bay View Golf Course</i> , 97 S.W.3d 531, (Mo. App. E.D. 2003).....	18, 21
<i>Malone v. State</i> , 798 S.W.2d 149, 151 (Mo. banc 1990)	17, 31
<i>McEvers v. Stout</i> , 578 N.E.2d 321 (Ill. App. 4th Dist. 1991).....	24
<i>Mikesic v. Trinity Lutheran Hospital</i> , 980 S.W.2d 68 (Mo. App. W.D. 1998)	22, 23
<i>Nettles v. American Telephone and Telegraph Co.</i> , 55 F.3d 1358 (8th Cir. 1995)	20

<i>Preston v. University of Arkansas for Medical Sciences</i> , 128 S.W.3d 430 (Ark. 2003) ..	24
<i>Professional Laminate & Millwork v. B & R Enterprises</i> , 651 N.E.2d 1153	
(Ind. App. 1995)	24
<i>Rose v. City of Riverside</i> , 827 S.W.2d 737 (Mo. App. W.D. 1992).....	18, 38
<i>Save Our Creeks v. City of Brooklyn Park</i> , 682 N.W.2d 639 (Minn. Ct. App 2004)	
<i>aff'd</i> 699 N.W.2d 307 (Minn. banc. 2005).....	24, 25, 26, 27, 28
<i>Southwestern Bell Telephone Co. v. Buie</i> , 758 S.W.2d 157, 161 (Mo. App.	
E.D. 1988)	39
<i>State ex. Rel. Mather v. Carnes</i> , 551 S.W.2d 272 (Mo. App. W.D. 1977)	16, 21, 23
<i>State ex. Rel. Nixon v. Consumer Automotive Resources, Inc.</i> , 882 S.W.2d 717	
(Mo. App. E.D. 1994).....	39
<i>Strong v. Gilster Mary Lee Corp.</i> , 23 S.W.3d 234 (Mo. App. E.D.	
2000).....	16, 20, 21, 22, 23, 29, 31
<i>Teel v. American Steel Foundaries</i> , 529 F. Supp. 337 (E.D. Mo. 1981)	19
<i>Tooley v. State</i> , 20 S.W.3d 519, 520 (Mo. banc 2000).....	17, 31
<i>Trzecki III v. Gruenewald</i> , 532 S.W.2d 209 (Mo. banc 1976)	20
<i>Tudor v. Tudor</i> , 617 S.W.2d 610 (Mo. App. S.D. 1981)	39
<i>Wallace v. Washington</i> , 863 S.W.2d 373 (Mo. App. W.D. 1993).....	20
<i>Wallingford v. State</i> , 131 S.W.3d 781 (Mo. 2004)	17
<i>Wright v. State ex rel. Patchin</i> , 994 S.W.2d 100 (Mo. App. S.D. 1999)	16, 21, 31
Other Authorities	
Kentucky Revised Statute §413.140.....	16, 18, 20, 37, A-3

Missouri Revised Statute §516.190.....	16, 18, 19, 37, A-5
Missouri Supreme Court Rules 9.02	16, A-6
Missouri Supreme Court Rules 9.03	16, 19, 20, 21, 24, 29, 31, 32
Missouri Supreme Court Rules 9.04	16, A-7
Missouri Supreme Court Rule 55.03.....	17, 19, 31, 32, 33, 35, 36, A-8
Missouri Supreme Court Rule 55.08.....	38
Missouri Supreme Court Rule 84.04(f).....	7, A-11
Missouri Supreme Court Rule 83.08(b)	26

STATEMENT OF FACTS

The Statement of Facts submitted by Plaintiffs/Appellants James Hensel and Lori Hensel (“Plaintiffs”) is inaccurate and incomplete in some instances. Therefore, pursuant to Missouri Supreme Court Rule 84.04(f), Defendants/Respondents American Air Network, Inc., Air Ambulance Care Flight International, Inc. d/b/a Care Flight International and Air M.D., Inc., and Henry Air, Ltd. (“American Defendants”) provide the following facts:

1. On Tuesday, September 2, 2003, Plaintiffs’ Petition (“Petition”) was lodged with the Clerk of Circuit Court for the Twenty-First Judicial Circuit (St. Louis County), State of Missouri, for filing. (Legal File, p. 7). September 2, 2003, was the day immediately following Labor Day.

2. The matter was assigned a Cause Number of 03CC-003581, assigned to Division 12 (Circuit Judge Steven H. Goldman), and the Petition was date stamped by the Clerk as “RECEIVED” not “FILED” by the Clerk’s Office on September 2, 2003 at 2:32 p.m., pursuant to the rubber stamp impressions placed on the first page of the Petition. (Legal File, p. 7).

3. On September 2, 2003, the Petition only contained a signature block for the law firm of Dolt, Thompson, Shepherd & Kinney, P.S.C., identifying same as “Counsel for Plaintiffs,” by and through only two (2) named attorneys at that firm, Liz J. Shepherd and Frederick C. Dolt, located at 310 Starks Building, 455 South Fourth Avenue, Louisville, KY, 40202, with a phone number of (502) 587-6554. The signature line is only signed in full with the name of Liz Shepherd. (Legal File, p. 20).

4. The signatures of Liz Shepherd on page 14 of the Petition, and on the Circuit Civil/Equity Cover Sheet dated September 2, 2003, are different from the signature on an Affidavit signed by Liz J. Shepherd before a Notary Public on September 2, 2003, in the County of Jefferson, State of Kentucky. (Legal File, pp. 20; 23; 24 and, Supplemental Legal File p. 7).

5. The Affidavit of Liz J. Shepherd, referred to in paragraph 5 above, was attached to a Motion For [her] Admission *Pro Hac Vice*, signed by a Missouri attorney, Spencer E. Farris, and filed on October 27, 2003. (Legal File, pp. 21 - 24).

6. Mr. Farris filed an Affidavit on November 23, 2004, wherein he stated that he signed the name of Liz Shepherd on the signature line of the Petition with Ms. Shepherd's authorization to sign "her" name on the document. (Legal File, pp. 133 and 134).

7. The Order of Admission *Pro Hac Vice* for Kentucky attorney, Liz J. Shepherd, was signed by a judge, dated and filed on November 4, 2003, which was two (2) months after the Petition was lodged with and received by the Clerk's Office on September 2, 2003. (Legal File, p. 46).

8. On September 2, 2003, the Petition which was lodged with and received by the Clerk's Office, did not bear the required signature block (including the filer's address, Missouri Bar number, telephone number and facsimile number) nor a signature of a Missouri attorney, as an attorney of record for Plaintiffs, as required by Missouri Supreme Court Rule 55.03(a). (Legal File, p. 20).

9. On September 2, 2003, the Petition which was lodged with and received by the Clerk's Office did not bear the required signature block and signature of an out-of-state attorney previously authorized by the Missouri Supreme Court to practice before the Courts of Missouri in this particular matter pursuant to a *Pro Hac Vice* Admission Order for such attorney (as an attorney of record for Plaintiffs) as required by Missouri Supreme Court Rules 9.03 and 55.03(a). (Legal File, p. 20).

10. On September 2, 2003, neither of the Kentucky attorneys identified on the last page of the Petition, Liz J. Shepherd nor Frederick C. Dolt, were members of the Missouri Bar nor had they been admitted to practice in Missouri on a *pro hac vice* basis in this cause. (Legal File, pp. 20 and 46).

11. On September 2, 2003, the Petition which was lodged with and received by the Clerk's Office did not bear the required signature of Plaintiffs, as unrepresented parties, as alternatively required by Missouri Supreme Court Rule 55.03(a). (Legal File, p. 20).

12. Plaintiffs James Hensel and his wife, Lori Hensel, both claimed to be residents of the State of Florida. (Legal File, p. 9, ¶ 1).

13. The Petition contained claims for personal injuries allegedly sustained by James Hensel and for loss of consortium allegedly sustained by his wife, Lori Hensel, as the result of an aviation incident on August 30, 2002. (Legal File, pp. 7-20).

14. The Petition asserted that on August 30, 2002, James Hensel was the co-pilot of an aircraft that crashed while in the process of landing in Fayette County, Kentucky, at the Blue Grass Airport located in Lexington. (Legal File, p. 12, ¶ 10).

15. The statute of limitations for personal injury actions in Kentucky is one (1) year after the cause of action accrued. (KY. REV. STAT. § 413.140(1)(a)). (Legal File, p. 66, ¶ 5, pp. 72, 84, ¶ 5).

16. On October 27, 2003, Spencer Farris, a member of the Missouri Bar, formally entered his appearance and simultaneously filed a Motion For Admission *Pro Hac Vice* for Liz J. Shepherd along with her supporting Affidavit. (Legal File, p. 2 (Date line, 10/27/03 and Entry lines, 01 and 02); and, pp. 21-24).

17. The Motion For Admission *Pro Hac Vice* and the related Filing Memorandum filed by Spencer Farris on October 27, 2003, were both receipt stamped by the Clerk's Office as "RECEIVED & FILED" on said date at 9:59 a.m. (Legal File, pp. 7 and 21; and, Supplemental Legal File, p. 8).

18. On November 3, 2003, American Defendants filed their separate Answers and Affirmative Defenses to Plaintiffs' Petition. (Legal File, pp. 25-31, 32-38, and 39-45).

19. On November 5, 2003, Defendants/Respondents Thunder Aviation Services, Inc., Thunder Aviation Acquisition, Inc., Thunder Air Charter, Inc. and Thunder Aviation NA, Inc. ("Thunder Defendants") filed their joint Answer and Affirmative Defenses to Plaintiffs' Petition. (Legal File, p. 47-54).

20. On July 9, 2004, Thunder Defendants filed their joint Motion For Summary Judgment along with their Suggestions In Support. (Legal File, p. 55-64).

21. On July 19, 2004, American Defendants filed their joint Motion For Summary Judgment along with their Suggestions In Support wherein they specifically

plead and set forth in detail Missouri's Borrowing Statute § 516.190 and Kentucky's applicable one year statute of limitations as stated in Kentucky Revised Statute § 413.140. (Legal File, pp. 65-75; and A3-4).

22. On August 30, 2004, one (1) year after the passing of the applicable Kentucky statute of limitations, Plaintiffs filed their Motion For Leave To Amend Petition By Interlineation. (Legal File, pp. 76-78).

23. Paragraph 2 of Plaintiffs' Motion For Leave To Amend Petition By Interlineation states that "Attorney Spencer Farris, with permission, signed the Petition on behalf of attorney Liz Shepherd." (Legal File, p. 76, ¶ 2).

24. On September 2, 2003, attorney Shepherd had not been admitted *Pro Hac Vice* to represent Plaintiffs in this case before the Missouri Courts, and was not admitted to do so until November 4, 2003. (Legal File, p. 46).

25. On August 30, 2004, Plaintiffs filed their separate Responses to the American Defendants and the Thunder Defendants' separate Motions For Summary Judgment, as well as their separate Suggestions in Opposition to the Motions For Summary Judgment. (Legal File, pp. 79, 84, 90 and 101).

26. Attached to Plaintiffs' separate Responses to the American Defendants' and the Thunder Defendants' separate Motions For Summary Judgment is an identical Affidavit of Spencer E. Farris dated August 30, 2004. (Legal File, pp. 82 - 83, and 88 - 89. This Affidavit is also known and referred to as the "first" Affidavit of Spencer E. Farris).

27. The fourth (4th) paragraph of the first Affidavit of Spencer E. Farris states that “[W]ith authorization from Liz J. Shepherd, I signed the Petition in this matter on behalf of Liz J. Shepherd, an attorney who is licensed in the State of Kentucky and was later admitted to *pro hac vice* with respect to this matter.” (Legal File, pp. 82, 88).

28. Neither the fourth (4th) paragraph of the first Affidavit of Spencer E. Farris, nor anywhere else in this first Affidavit, is it affirmatively stated by Mr. Farris, as a licensed Missouri attorney and pursuant to Missouri Supreme Court Rule 55.03, that he had the authorization from either Ms. Shepherd or Plaintiffs to sign the Petition on his own behalf as Plaintiffs’ legal counsel and as an attorney of record for Plaintiffs in this case. (Legal File, pp. 76-78, 82-83, and 88-89).

29. On September 15, 2004, American Defendants filed their joint Brief in Opposition to Plaintiffs’ Motion to Amend By Interlineation and their separate joint Reply to Plaintiffs’ Suggestions in Opposition to the Motion For Summary Judgment. (Legal File, pp. 112, 115).

30. On September 17, 2004, Thunder Defendants filed their joint Reply to Plaintiffs’ Suggestions in Opposition to the Motion for Summary Judgment and Suggestions in Opposition to Plaintiffs’ Motion to Amend By Interlineation. (Legal File, p. 123).

31. On September 20, 2004, attorney Spencer E. Farris filed his Withdrawal Memorandum in connection with his desire to withdraw as an attorney of record on behalf of Plaintiffs in this case. (Supplemental Legal File, p. 9).

32. The Court's Minute Docket entry for Mr. Farris' Withdrawal Memorandum noted that this document was filed but not approved as of its filing date on September 20, 2004. (Legal File, p. 4, Date line, 09/20/04).

33. On October 4, 2004, Plaintiffs' Kentucky attorney, Liz Shepherd, who previously had been admitted *pro hac vice* in this case on November 4, 2003, filed a Motion For Additional Time To Retain Associate Counsel pursuant to the requirements of Missouri Supreme Court Rule 9.03 which provides that an out-of-state attorney allowed to practice before the Missouri Courts on a *pro hac vice* basis in a particular case have a locally licensed Missouri attorney designated as an associate counsel in the case. (Supplemental Legal File, p. 11).

34. On November 22, 2004, the Trial Court granted Defendants'/Respondents' Motions for Summary Judgment and entered its Judgment on behalf of the American and the Thunder Defendants. (Legal File, p. 132 and A3).

35. On November 23, 2004, Plaintiffs filed a "second" Affidavit of Spencer E. Farris. (Legal File, p. 133).

36. The third (3rd) paragraph of the second Affidavit of Spencer E. Farris states "the Court Clerk did not accept the *pro hac vice* motion" for the admission of Liz Shepherd, Esquire, at the time it was tendered to the Clerk's Office along with the original Petition [on September 2, 2003], and that this motion was executed only by Liz Shepherd. (Legal File, p. 133, ¶3).

37. The third (3rd) paragraph of the second Affidavit of Spencer E. Farris states that the Court Clerk did not accept the *pro hac vice* motion referred to in paragraph 40,

above, on the basis that the motion required a receipt from the Supreme Court [of Missouri] before it would be “accepted.” (Legal File, p. 133, ¶3).

38. The third (3rd) paragraph of the second Affidavit of Spencer E. Farris states that when the original *pro hac vice* motion was rejected by the Clerk’s Office [on September 2, 2003], Mr. Farris “initialed the Petition and requested a check [the required Supreme Court filing fee] from Liz Shepherd, payable to the Supreme Court.” (Emphasis added). (Legal File, p. 133, ¶3).

39. The check referred to in paragraph 43 was requested by Mr. Farris from Liz Shepherd to accompany the proper submission of the necessary paper work to the Supreme Court as a condition precedent to filing a *pro hac vice* motion in the Circuit Court pursuant to Missouri Supreme Court Rule 9.03. (Legal File A4-5).

40. The required fee referred to in paragraphs 42 and 43 is necessary in order for Plaintiffs’ out-of-state and non-Missouri licensed attorney to obtain the formal and proper receipt from the Supreme Court for filing in the Circuit Court contemporaneously with the *pro hac vice* motion for consideration and ruling by the Circuit Court pursuant to Missouri Supreme Court Rule 9.03. (Legal File, A-4-5).

41. The third (3rd) paragraph of the second Affidavit of Spencer E. Farris states that [on September 2, 2003] Mr. Farris “would have immediately sought leave of court and/or appeared to receive the *pro hac vice* motion or taken any other action as directed by Liz Shepherd, Esquire.” (Legal File, pp. 133-134, ¶3).

42. The fourth (4th) paragraph of the second Affidavit of Spencer E. Farris states that “[w]ith authorization from Liz J. Shepherd, I signed the Petition in this matter

[by initialing] on behalf of Liz J. Shepherd, an attorney who is licensed in the State of Kentucky and was later admitted to *pro hac vice* with respect to this matter.” (Legal File, p. 134, ¶4).

43. Exhibit 1 attached to the second Affidavit of Spencer E. Farris is a letter dated September 4, 2003 from Spencer E. Farris to Ms. Liz J. Shepherd, wherein he states that he “filed the Hensel petition on your behalf on September 2, 2003.” (Legal File, p. 134).

44. On December 21, 2004, Plaintiffs filed their Motion to Reconsider Or Motion for New Trial. (Legal File, p. 136).

45. On December 28, 2004, the Trial Court entered its Order denying Plaintiffs’ Motion to Reconsider or Motion for New Trial. (Legal File, p. 142).

46. On January 7, 2005, Plaintiffs filed their Notice of Appeal. (Legal File, p. 143).

47. Plaintiffs’ brief was filed with the Missouri Court of Appeals on April 12, 2005 and oral argument was subsequently requested by all parties. (*Hensel v. American Air Network*, No. ED 85686, Docket Entries, Date lines 04/12/05, 04/26/05 and 04/28/05).

48. On May 12, 2005, the American Air Defendants filed a Supplemental Legal File and their Respondents’ Brief and the Thunder defendants filed their Respondents’ Brief on May 13, 2005. (*Hensel v. American Air Network*, No. ED 85686, Docket Entries, Date lines 05/12/05 and 05/13/05).

49. On May 27, 2005, the Appellants' Reply Brief was filed with the Eastern District Court of Appeals. (*Hensel v. American Air Network*, No. ED 85686, Docket Entries, Date line, 05/27/05).

50. After hearing oral argument on August 24, 2005, the Missouri Court of Appeals issued an opinion on August 30, 2005, affirming the trial court's dismissal based on the statute of limitations. (*Hensel v. American Air Network*, No. ED 85686, Docket Entries, Date line, 08/24/05 and 08/30/05).

51. A Motion for Rehearing or Transfer to the Missouri Supreme Court was filed by the Plaintiffs/Appellants on September 14, 2005, and denied by the Missouri Court of Appeals, Eastern District, on October 11, 2005. (*Hensel v. American Air Network*, No. ED 85686, Docket Entries, Date line, 09/14/05 and 10/11/05).

52. On October 25, 2005, Plaintiffs/Appellants filed an Application for Transfer to the Missouri Supreme Court which was sustained on November 22, 2005, and transferred to this Court on November 28, 2005. (*Hensel v. American Air Network*, No. ED 85686, Docket Entries, Date line, 10/25/05, 11/22/05 and 11/28/05).

POINTS RELIED ON

- I. The Trial Court Did Not Err In Granting Summary Judgment In Favor Of American Defendants Based On Expiration Of The Applicable Kentucky Statute Of Limitations, And Missouri Supreme Court Rules 9.03 And 55.03, Because American Defendants Were Entitled To Judgment As A Matter of Law, In That The Formal Filing Of The Petition Was Not Timely And Plaintiffs' Failure To Comply With Rule 9.03 Was Not Cured, Or Curable.**

Joseph Sansone Co. v. Bay View Golf Course, 97 S.W.3d 531

(Mo. App. E.D. 2003)

State ex. rel. Mather v. Carnes, 551 S.W.2d 272 (Mo. App. W.D. 1977)

Strong v. Gilster Mary Lee Corp., 23 S.W.3d 234 (Mo. App. E.D. 2000)

Wright v. State ex. rel. Patchin, 994 S.W.2d 100 (Mo. App. S.D. 1999)

Kentucky Revised Statute § 413.140

Missouri Revised Statute § 516.190

Missouri Supreme Court Rule 9.02

Missouri Supreme Court Rule 9.03

Missouri Supreme Court Rule 9.04

II. The Trial Court Did Not Err In Granting Summary Judgment In Favor Of American Defendants And Did Not Abuse Its Discretion In Failing To Grant Plaintiffs’ Motion For Leave To Amend By Interlineation, Because Plaintiffs’ Failures To Comply With Missouri Supreme Court Rules 9.03 And 55.03 Were Not Curable By Untimely Adding An Omitted Required Signature In Order For The Requested Relief To Relate Back To The Original Lodging Of The Petition With The Clerk’s Office, In That The Petition Was Not Formally And Officially Filed At That Time.

Malone v. State, 798 S.W.2d 149 (Mo. banc 1990), *cert. denied*, 500 U.S.

929, 111 S. Ct. 2044, 114 L. Ed. 2d 128 (1991)

Tooley v. State, 20 S.W.3d 519 (Mo. banc 2000)

Wallingford v. State, 131 S.W.3d 781 (Mo. 2004)

Missouri Supreme Court Rule 55.03

III. The Trial Court Did Not Err In Granting Summary Judgment In Favor Of American Defendants Based On The Expiration Of The Applicable Kentucky Statute Of Limitations, Because American Defendants Did Not Waive Their Statute of Limitations Affirmative Defenses, In That American Defendants Plead The Applicable Statute Of Limitations As A Defense In Their Answers And Specified The Particular Statute Of Limitations Upon Which They Relied Within Their Dispositive Motions Which Fairly And Adequately Advised Plaintiffs Of The Affirmative Defenses.

Alvarado v. H & R Block, Inc., 24 S.W.3d 236 (Mo. App. W.D. 2000)

Grady v. Amrep, Inc., 139 S.W.3d 585 (Mo. App. E.D. 2004)

Johnson v. Vee Jay Cement, 77 S.W.3d 84 (Mo. App. E.D. 2002)

Rose v. City of Riverside, 827 S.W.2d 737 (Mo. App. W.D. 1992)

Kentucky Revised Statute § 413.140

Missouri Revised Statute § 516.190

ARGUMENT

I. The Trial Court Did Not Err In Granting Summary Judgment In Favor of American Defendants Based On Expiration Of The Applicable Kentucky Statute of Limitations, And Missouri Supreme Court Rules 9.03 And 55.03, Because American Defendants Were Entitled To Judgment As A Matter of Law, In That The Formal Filing Of The Petition Was Not Timely And Plaintiffs' Failure To Comply With Rule 9.03 Was Not Cured, Or Curable.

The trial court correctly granted summary judgment in favor of American Defendants based on the expiration of the applicable Kentucky one-year statute of limitations. The attempted filing of the Petition was a legal nullity because the Petition was not signed and filed by Plaintiffs *pro se*, or by an attorney representing Plaintiffs who was authorized to practice law in Missouri or who met the requirements of Missouri Supreme Court Rule 9.03. Missouri law mandates the Petition be treated as a nullity. Subsequent attempts to remediate the deficiency must fail as such actions cannot relate back to an event that is a legal nullity.

The injury at issue occurred in Kentucky on August 30, 2002; however, Plaintiffs brought their cause of action in Missouri. Missouri utilizes a borrowing statute whenever a cause of action originates in another state and the statute of limitations for the originating state is shorter than Missouri's for the cause of action. MO. REV. STAT. § 516.190; *Harper v. Gibson*, 601 F. Supp. 156, 158-59 (W.D. Mo. 1985); *Teel v. American Steel Foundaries*, 529 F. Supp. 337, 341 (E.D. Mo. 1981); *Bendis v. Alexander and Alexander, Inc.*, 916 S.W.2d 213, 218-219 (Mo. App. W.D. 1995). By utilizing

Missouri's borrowing statute, the Court will make Kentucky's statute of limitations Missouri's own. *Nettles v. American Tel. and Tel. Co.*, 55 F.3d 1358, 1362 (8th Cir. 1995); *Trzecki III v. Gruenewald*, 532 S.W.2d 209, 211 (Mo. banc 1976); *Bowling v. S.S. Kresge Co., et al.*, 431 S.W.2d 191, 193 (Mo. 1968); *Wallace v. Washington*, 863 S.W.2d 373, 374 (Mo. App. W.D. 1993). The statute of limitations for personal injury cases in Kentucky is one year after the cause of action accrued. (KY. REV. STAT. § 413.140). One year after the date of the accident was August 30, 2003. Due to the fact that August 30, 2003 fell on a Saturday, and Monday, September 1, 2003, was a legal holiday, the statute of limitations expired on September 2, 2003.

The practice of law in Missouri is limited to persons with specific qualifications and duly licensed in Missouri as attorneys. *Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234, 238 (Mo. App. E.D. 2000). Besides the Bar licensing procedures, out-of-state attorneys may practice law in Missouri on a limited basis pursuant to Missouri Supreme Court Rules 9.02 to 9.04. Specifically, Rule 9.03 governs the practice of law in Missouri by non-resident attorneys licensed in another state and not in Missouri. (Mo. Sup. Ct. R. 9.03). Any out-of-state attorney who engages in the practice of law in Missouri without being duly licensed as a Missouri attorney, or seeking admission *pro hac vice*, is engaged in the unauthorized practice of law. *Strong*, 23 S.W.3d at 240 (citing *Jacobs v. Queen Ins. Co.*, 51 S.D. 249, 213 N.W. 14, 15 (S.D. 1927)).

Action taken by one not licensed to practice law in Missouri may be void and the effect of the unauthorized practice of law is the dismissal of the cause, or treatment of the particular actions taken by the unlicensed and/or unauthorized representative as a nullity.

Joseph Sansone Co. v. Bay View Golf Course, 97 S.W.3d 531, 532 (Mo. App. E.D. 2003); *Strong*, 23 S.W.3d at 241; *Wright v. State ex. rel. Patchin*, 994 S.W.2d 100, 102 (Mo. App. S.D. 1999); *State ex. rel. Mather v. Carnes*, 551 S.W.2d 272, 288 (Mo. App. W.D. 1977). Retroactive application of a motion for admission *pro hac vice* subsequent to the unauthorized legal action is not authorized by Missouri Supreme Court Rule 9.03. *Strong*, 23 S.W.3d at 241.

The parties agree the Petition was received by the Court on September 2, 2003; however, the parties disagree about the legal effectiveness of the Court's receipt of the Petition. The signature block for Plaintiffs' attorney listed Liz Shepherd. The name signed on the Petition was Liz Shepherd, representing to the Court and to the parties being served that she was the only attorney representing Plaintiffs. On September 2, 2003, Liz Shepherd was not a Missouri licensed attorney, nor was she admitted *pro hac vice* to the Circuit Court of St. Louis County, Missouri. Although no other attorney's name is listed on the Petition, Plaintiffs request this Court to disregard Missouri's Rules of Civil Procedure and Professional Conduct by arguing that a Missouri licensed attorney actually signed Ms. Shepherd's name with her authorization and on her behalf. It does not matter whether Mr. Farris penned Ms. Shepherd's signature on the Petition, it is still her name on the pleading, and her name alone. Equally important, there is no evidence in the record, including Mr. Farris' Affidavits, indicating that on September 2, 2003, Mr. Farris represented Plaintiffs. Thus, the only reasonable deduction from the circumstances and lack of evidence to the contrary is that Mr. Farris did not sign his name as he was not authorized to do so.

As Plaintiffs admit, the general rule in Missouri when one has engaged in such unauthorized practice of law is to require dismissal of the action. (Appellant's Substitute Brief, p. 24); *Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234, 241 (Mo. App. E.D. 2000). Plaintiffs fail to note that Missouri courts apply this general rule except for "cases that present special circumstances that may allow an exception to the rule." *Id.* These special circumstances have been determined to be proceedings involving minors or incompetents. See, e.g., *Mikesic v. Trinity Lutheran Hospital*, 980 S.W.2d 68, 73-74 (Mo. App. W.D.1998). Here, Plaintiffs have presented no such special circumstances. "[T]he normal effect of a representative's unauthorized practice on behalf of a party is to require dismissal of the cause or to treat the particular actions taken by the representative as a nullity." *Strong*, 23 S.W. at 241 (citing *State ex rel. Mather v. Carnes*, 551 S.W.2d 272 (Mo. App. W.D. 1997)) .

Plaintiffs attempt to distinguish their situation from the *Strong* case in an effort to circumvent the general rule. The party in *Strong* requested amendment of the pleading to reflect substituted counsel from that counsel's *own* office. Here, Plaintiffs are requesting the Court to amend the pleadings to reflect a substitution of counsel for an attorney who is not a member of Ms. Shepherd's firm and who is not identified in any manner on the Petition. If it is improper to substitute counsel *within* the same firm, it certainly is not appropriate to substitute counsel from a *different* firm.

Appellants' response, "[T]he problem with such argument is that 'Law firms don't represent clients; lawyers do.'" *Strong*, 23 S.W.3d at 240," fails to undercut Respondents'

argument. (Appellants' Substitute Brief, p. 29). Attorneys represent their clients before the Court in conformity with the Missouri Rules of Civil Procedure and Professional Conduct. In order to represent a client in Court, among other requirements, a properly licensed or admitted attorney should file an Entry of Appearance and affix his or her name and address to each pleading filed with the Court. In *Strong*, as in the instant case, the attorney seeking substitution did not enter an appearance or affix his name or signature to the pleading(s) in question. Specifically in this case, Mr. Farris did not enter his appearance as an attorney representing the Plaintiffs until October 27, 2003. Therefore, just as in *Strong*, substitution or interlineation of Mr. Farris as attorney of record on September 2, 2003 is improper.

Plaintiffs continue their attempt to distinguish the *Strong* case by pointing out the appellant in *Strong* took no action to correct his actions pertaining to the unauthorized practice of law. Plaintiffs waited almost three months after filing the Petition before filing a Motion for Admission *Pro Hac Vice* for Ms. Shepherd. Plaintiffs made no effort to remedy the deficiency in the Petition by moving to amend the Petition for almost one year, and then *only* in response to Defendants' motion for summary judgment. There is no basis to apply any exception to the general rule.

Plaintiffs' belated attempt to amend the signature block of the Petition is without merit. Neither Spencer E. Farris' name nor his signature appear on the original Petition. Plaintiffs filed two Affidavits executed by Mr. Farris. Neither Affidavit avers anything more than the fact that Ms. Shepherd authorized him to sign her name *on her behalf*. As

the Court in *Strong* recognized, Rule 9.03 governing *pro hac vice* appearances “provides no authority, either express or implied, for a retroactive filing.” *Id.* at 241. The fact that Ms. Shepherd was later admitted *pro hac vice* is irrelevant because she was not admitted at the time the Petition was filed. Likewise, the fact that Mr. Farris later entered his appearance in this matter is irrelevant because he was not associate counsel and had not entered his appearance at the time the Petition was filed.

Other jurisdictions have also reached similar conclusions. *Black v. Baptist Medical Center*, 575 So.2d 1087 (Ala. 1991) (holding a complaint filed by an attorney not licensed to practice law in Alabama and not admitted *pro hac vice* was a nullity); *Preston v. Univ. of Arkansas for Med. Sci.*, 128 S.W.3d 430 (Ark. 2003) (finding a complaint, filed by an Oklahoma attorney who did not satisfy the requirements for admission *pro hac vice*, was a nullity and thus, a subsequent complaint could not relate back for limitations purposes); *Davenport v. Lee*, 72 S.W.3d 85 (Ark. 2002) (holding that an amended complaint cannot relate back to a pleading that is a legal nullity.); *Fruin v. Northwestern Medical Faculty Found., Inc.*, 551 N.E.2d 1010 (Ill. App. 1st Dist. 1990.); and *Professional Laminate & Millwork v. B & R Enterprises*, 651 N.E.2d 1153 (Ind. App. 1995). *But cf. McEvers v. Stout*, 578 N.E.2d 321 (Ill. App. 4th Dist. 1991).

Plaintiffs principally rely upon two cases in support of their newly advanced argument that the trial court’s decision should be overruled because dismissal would unduly penalize the litigants. (Appellants’ Substitute Brief, pp. 30-32); *Save Our Creeks v. City of Brooklyn Park*, 682 N.W.2d 639 (Minn. Ct. App 2004) (hereinafter *Save Our*

Creeks I) *aff'd* 699 N.W.2d 307 (Minn. banc. 2005) (hereinafter *Save Our Creeks II*); *Janiczek v. Dover Mgmt. Co.*, 481 N.E.2d 25 (Ill. App. Ct. 1985). Plaintiffs' new argument in reliance on these cases is improper as it may alter "the basis of a claim that was raised in the court of appeals brief." (Mo. Sup.Ct. R. 83.08(b)). In any event, the cases do not support Plaintiffs' requested relief.

Save Our Creeks I and II are legally and factually distinct from the case at bar and, therefore, not instructive in this instance. Regardless, if the four-point test adopted by the Minnesota Supreme Court in *Save Our Creeks II* was applied to the instant case, it is clear that Appellants would **not** be permitted leave to amend their Petition given the undisputed facts of this case.

Save Our Creeks I and II involved a declaratory-judgment action filed by a recently incorporated nonprofit group, Save Our Creeks (hereinafter "SOC"). A spokesman of SOC, and non-attorney, signed the complaint. As in Missouri, corporations must be represented by an attorney. After defendants filed a motion to dismiss, the corporation hired an attorney who entered an appearance on behalf of the corporation. Although denying the motion to dismiss, the trial court certified the question to the Minnesota Court of Appeals.

The Minnesota Court of Appeals and the Minnesota Supreme Court considered the narrow question, "whether a complaint filed and signed on behalf of a **corporate entity** by a **non-lawyer** is a legal nullity." *Save Our Creeks II*, 699 N.W.2d at 309 (emphasis added). The Minnesota Supreme Court, affirming the Appellate Court's decision,

determined that when a pleading is signed by a non-attorney on behalf of a corporation such is a defect that *may* be cured by amendment under certain narrow and specific facts. *Id.* at 311. However, if the facts do not meet the four-part test articulated by the Court, the defect is not curable. *Id.*

The Minnesota Supreme Court, emphasizing the narrowness of the first prong of the test, held that:

“ . . . an amendment to add an attorney's signature to a corporation's complaint should be permitted when the following four elements are met: (1) the corporation acts without knowledge that its action was improper; (2) upon notice, the corporation diligently corrects its mistake by obtaining counsel, but in no event may it appear in court without an attorney; (3) the non-attorney's participation in the action is minimal; and (4) the non-attorney's participation results in no prejudice to the opposing party. ***We emphasize that as to the first prong, if a corporation knows or should know that its action is improper, amendment will not be allowed.***”

Save Our Creeks II, 699 N.W.2d. at 311(emphasis added).

As initially indicated, *Save of Creeks I* and *II* are not instructive given the legal and factual distinctions from the instant case. The case at bar involves individuals who were able to file a Petition *pro se*, but chose to hire a Kentucky attorney to file suit in Missouri. *Save Our Creeks I* and *II* involved a corporate entity which could not file a complaint on its on behalf without representation by an attorney. While Liz Shepherd is an attorney, although not licensed to practice in Missouri, the signatory in *Save Our*

Creeks I and *II* was a non-attorney. In this case, Liz Shepherd, an attorney, knew or should have known she was not licensed to practice law in Missouri and was not acting in accordance with the Missouri Supreme Court Rules. The corporation in *Save Our Creeks I* and *II* (which was newly formed) did not know nor did it have reason to know that the corporation must be represented by an attorney.

Under the first prong of the four-part test articulated in *Save Our Creeks II*, Appellants would fail to establish they are entitled to amend their Petition. Ms. Shepherd, as an attorney, knew or should have known under the circumstances her signature was legally ineffective. Ms. Shepherd knew or should have known the proper procedure for obtaining *pro hac vice* admission in Missouri and knew or should have known she was practicing law without a license. As such, she knew or should have known that her signature alone was not legally effective and thus, a nullity.

Likewise, the third-prong of the four-part test is not met in this instance. The third prong requires that the “non-attorney’s participation in the action is minimal.” *Id.* Under Plaintiffs’ analogy, the non-attorney signatory is the equivalent to the non-licensed attorney signatory. In this matter, the non-licensed attorney signatory is Ms. Shepherd. To meet this prong of the test, Ms. Shepherd would have to have minimal involvement in the action. Clearly, this prong cannot be satisfied as Ms. Shepherd’s involvement has been substantial. Ms. Shepherd has attended numerous hearings at the trial court level and has been involved with the appeals to the Missouri Court of Appeals and to this Court.

The second case which Appellants heavily quote is *Janiczek*. As with *Save Our*

Creeks I and II, Appellants' reliance on *Janiczek* is misplaced. *Janiczek* involved an Illinois licensed attorney who was retained by the plaintiff. Thereafter, and unbeknownst to the plaintiff, the attorney was disbarred. The significance of the distinction between the facts in *Janiczek* and the instant case is reflected by the Illinois Court of Appeals decision in *Fruin v. Northwestern Medical Faculty Foundation, Inc.*, 551 N.E.2d 1010 (Ill. App. 1st 1990).

Fruin, a case quite similar to the case at bar, was decided by the Illinois Court of Appeals after the *Janiczek* case. *Fruin* involved an appeal from the dismissal of a complaint signed and filed by an attorney licensed in Wisconsin, but who was not licensed to practice in Illinois. *Id.* at 668. The complaint, a medical malpractice action, was filed four days before the expiration of the applicable statute of limitations. *Id.* Although the Wisconsin attorney consulted with an Illinois law firm, which apparently also prepared the initial pleadings, the Illinois firm did not enter an appearance until after the statute of limitations had run. *Id.*

In its opinion, the Illinois Court of Appeals recited the general and well-established rule in Illinois: a pleading signed by a person not licensed to practice in Illinois is a nullity. *Id.* The rule, as is the case here, "applies even when subsequent court appearances are made by a duly licensed attorney." *Id.* In expounding upon the distinctions which lead to the different outcomes in *Fruin* and *Janiczek*, the Court explained that unlike *Janiczek*, who hired an Illinois attorney, with offices in Illinois, the plaintiff in *Fruin* hired a Wisconsin attorney, with offices in Wisconsin. *Id.* As to the issue of seemingly penalizing the litigant, the Court noted:

“while unfortunate, is not reason enough to permit a relaxation of the rules regarding the unauthorized practice of law. Similarly, Colgan's failure to ensure that he obtained the necessary authorization to practice in another state can not justify a deviation from that state's rules.”

Id. Although not placing the blame on the plaintiff, the Court in *Fruin* did note that the plaintiff should have inquired into the attorneys’ ability to practice law in Illinois. *Id.*

The dismissal of this action should be sustained as in *Fruin*. Plaintiffs, residents of Florida, hired a Kentucky attorney to sue defendants in Missouri for an injury that occurred in Kentucky. Ms. Shepherd, like Mr. Colgan in *Fruin*, does not have offices in the state where the suit was instituted. Plaintiffs have some responsibility to inquire about Ms. Shepherd’s ability to practice law in Missouri. Likewise, Ms. Shepherd has the responsibility to obtain the necessary authorization required to practice law in Missouri. Despite local counsel entering an appearance on behalf of the Plaintiffs after the expiration of the statute of limitations, just as in *Fruin*, the entry cannot relate back to a legal nullity.

The general rule that a pleading filed by a person not licensed to practice in Missouri is a nullity should be applied to this matter. Plaintiffs should not be allowed to sidestep the effect of the nullity rule by arguing Ms. Shepherd’s admittance *pro hac vice* results in a relation back. As the Court in *Strong* recognized, Rule 9.03 governing *pro hac vice* appearances “provides no authority, either express or implied, for a retroactive filing.” *Id.* at 241. Ms. Shepherd’s later *pro hac vice* admission is irrelevant because she was not admitted at the time the Petition was filed and, therefore, the pleading is a nullity.

Likewise, Mr. Farris' later entry of appearance in this matter is irrelevant.

II. The Trial Court Did Not Err In Granting Summary Judgment In Favor Of American Defendants And Did Not Abuse Its Discretion In Failing To Grant Plaintiffs' Motion For Leave To Amend By Interlineation, Because Plaintiffs' Failures To Comply With Missouri Supreme Court Rules 9.03 And 55.03 Were Not Curable By Untimely Adding An Omitted Required Signature In Order For The Requested Relief To Relate Back To The Original Lodging Of The Petition With The Clerk's Office, In That The Petition Was Not Formally And Officially Filed At That Time.

Plaintiffs contend that Missouri Supreme Court Rule 55.03(a) governs this matter and, as such, the Petition should be treated as an unsigned pleading. Plaintiffs argue that Rule 55.03(a) provides an opportunity to *promptly* correct the omission of a signature on unsigned papers before the pleading is stricken due to the deficiency. (Mo. R. Civ. P. 55.03(a)). Plaintiffs further argue that in granting summary judgment for American Defendants and not ruling on Plaintiffs' Motion to Amend by Interlineation, the Court abused its discretion. As the Petition was filed in violation of Rule 9.03, it is deemed a nullity and the typical rules for determining whether a trial court abused its discretion are not applicable. See, *Strong*, 23 S.W.3d at 241; *Wright v. State ex rel Patchin*, 994 S.W.2d 100, 1001-102 (Mo. App. S.D. 1999). Since the pleading was not legally effective, the trial court lacked authority to grant an amendment. See, e.g. *Davenport v. Lee*, 72 S.W.3d 85 (Ark. 2002) (holding where a complaint was a nullity, and *never existed*, an amended complaint cannot relate back to a nonexistent complaint).

If this Court determines the trial court did have authority to rule on Plaintiffs' Motion to Amend and that Rule 55.03(a) is applicable to pleadings signed in violation of Rule 9.03 as "unsigned," Defendants assert Plaintiffs failed to meet the requirements of Rule 55.03(a). Plaintiffs did not seek to amend the Petition *promptly* and for jurisdiction to attach, the signature of a representative *of* Plaintiffs remains a mandatory element. The failure of a Missouri attorney representing a plaintiff to sign a petition in his own name renders it a nullity. *See, generally, Tooley v. State*, 20 S.W.3d 519, 520 (Mo. banc 2000); *Malone v. State*, 798 S.W.2d 149, 151 (Mo. banc 1990), *cert. denied*, 500 U.S. 929, 111 S. Ct. 2044, 114 L. Ed. 2d 128 (1991). As there was no jurisdiction to rule on the Motion to Amend, no abuse of discretion occurred.

Furthermore, even if the Court granted Plaintiffs' motion to insert the signature of Spencer Farris, Plaintiffs' Petition would be a legal nullity because: (1) there is no evidence that Spencer Farris was an authorized representative of Plaintiffs on or before September 2, 2003, and (2) the requirements of Rule 55.03(a) would not be met.

Missouri Rule 55.03(a) requires every pleading to be signed by "at least one attorney of record in the attorney's individual name or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address, Missouri Bar number, and telephone number, if any." In this case, the pleading did not simply lack Mr. Farris' signature, it lacked his name and all of the accompanying information which indicate representation of a party. Further, the body of the Petition does not indicate Plaintiffs are represented by any counsel other than Liz Shepherd.

Clearly, this is not a situation Rule 55.03(a) sought to address and Plaintiffs fail to cite any Missouri case law indicating Rule 55.03(a) would be applicable here.

Missouri Rule 55.03(b) addresses the representations made to the Court upon the filing and signature of an attorney. When an attorney signs a petition to be filed with a court, that attorney is certifying “that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances” that the presentation has no improper purpose, the claims are warranted by existing law, and the allegations and the factual contentions have evidentiary support. (Mo. R. Civ. P. 55.03(b)(1)-(4)). There is no evidence in the record or in Mr. Farris’ averments that he complied with these requirements and that he was making these representations to the Court. Conversely, in signing Liz Shepherd’s name on her behalf, Mr. Farris was not willing to make these representations to the Court.

Plaintiffs state “it is undisputed that Plaintiffs retained both Liz Shepherd, a Kentucky attorney, and Spencer Farris, a Missouri Attorney. (Legal File, p. 82, 133).” (Appellants’ Substitute Brief, p. 16). Defendants vigorously dispute that Mr. Farris was retained by Plaintiffs on or before September 2, 2003. An examination of page 82, the Affidavit of Spencer Farris executed on August 30, 2004, reveals that Mr. Farris avers:

“With authorization from Liz J. Shepherd, I signed the Petition in this matter on behalf of Liz J. Shepherd, an attorney who is licensed in the State of Kentucky and was later admitted to *pro hac vice* with respect to this matter.”

This citation to the record fails to establish an attorney-client relationship and, in fact, cuts against Plaintiffs. If Farris represented Plaintiffs, why have Plaintiffs failed to produce any documents evidencing that a relationship existed on or before September 4, 2003?

Plaintiffs also cite page 133 of the Legal File in support of their contention that Spencer Farris represented Plaintiffs on or before September 2, 2003. This citation references the first page of the second Affidavit executed by Mr. Farris. Again, Plaintiffs' citation to the record fails to support their position. This citation merely states that Mr. Farris attempted to tender a *Pro Hac Vice* Motion which was not accepted by the clerk and:

“Had the clerk advised the Petition would not be accepted with the certified *Pro Hac Vice* motion approval, the undersigned would have immediately sought leave of court and/or appeared to receive the pro hac vice motion or taken other action as directed by Liz Shepherd, Esquire.”

(Legal File, p. 133). This merely confirms Mr. Farris was filing this matter on behalf of Ms. Shepherd, not Plaintiffs in this matter. In fact, Plaintiffs admit that, “[I]t is also undisputed that Liz Shepherd’s name was signed on the Petition, with her permission, by Spencer Farris...” (Appellants’ Substitute Brief, p. 16).

If Mr. Farris represented Plaintiffs, why was his name not on the Petition and, further, if the *pro hac vice* was denied, why would Mr. Farris not just add his name, address, bar number and signature as counsel to the Petition? In fact, Mr. Farris’ Affidavit states a number of things he would have done had the Petition been rejected by

the Clerk and adding his name as an attorney of record is noticeably absent. Clearly, Plaintiffs failed to present any evidence to the trial court establishing that Mr. Farris had an attorney-client relationship with Plaintiffs on or before September 2, 2003. As such, although Mr. Farris is a member of the Missouri Bar, he was not an authorized representative of Plaintiffs and, likewise, his signature would be ineffective and treated as a nullity. Given that Plaintiffs produced two Affidavits of Mr. Farris to the trial court and neither provide any evidence to support their contention that Mr. Farris represented Plaintiffs on or before September 2, 2003, Plaintiffs have failed to create any genuine issue of material fact as to whether an attorney-client relationship existed between Mr. Farris and Plaintiffs at the relevant time. In fact, Plaintiffs admit that, “[I]t is also undisputed that Liz Shepherd’s name was signed on the Petition, with her permission, by Spencer Farris...” (Appellants’ Substitute Brief, p. 16).

This is not a case where an attorney inadvertently failed to sign his or her name to a client’s pleading after performing due diligence. Instead, this is a case where a local attorney was asked to sign a pleading on behalf of another attorney. Mr. Farris intentionally signed Ms. Shepherd’s name and intentionally did not sign his own name. To allow the later insertion of Mr. Farris’ signature would undermine the integrity of the legal system.

Plaintiffs’ reliance on *Wallingford v. State*, 131 S.W.3d 781 (Mo. 2004) as support for their contention that Rule 55.03(a) allows an amendment to add a signature to an unsigned pleading is misplaced. In *Wallingford*, a *pro se* party inadvertently failed to

sign a declaration on a motion and filed a motion to correct this mistake just four days after the deadline expired. The Court, after finding Rule 55.03 applied, granted the amendment as the appellant “promptly corrected the omission of the signature.” Unlike *Wallingford*, Plaintiffs sought to amend the pleadings to add new counsel and the signature of that counsel. Additionally, Plaintiffs did not move to file such an amendment promptly as in *Wallingford*, but rather waited approximately one year after the pleading was filed, and then, only in response to Defendants’ motions for summary judgment. Plaintiffs have failed to cite any Missouri case indicating that Rule 55.03 applies here or that such an amendment is appropriate under that rule.

III. The Trial Court Did Not Err In Granting Summary Judgment In Favor Of American Defendants Based On The Expiration Of The Applicable Kentucky Statute Of Limitations, Because American Defendants Did Not Waive Their Statute of Limitations Affirmative Defenses, In That American Defendants Plead the Applicable Statute of Limitations As A Defense In Their Answers And Specified The Particular Statute Of Limitations Upon Which They Relied Within Their Dispositive Motions Which Fairly And Adequately Advised Plaintiffs Of The Affirmative Defenses

American Defendants raised the statute of limitations defense in their separately filed answers and, further, specifically identified in detail Missouri's Borrowing Statute § 516.190 and Kentucky's applicable one year statute of limitations as stated in Kentucky Revised Statute § 413.140 within their Joint Motion for Summary Judgment and supporting Memorandum. Plaintiffs argue because American Defendants did not plead the statute of limitations affirmative defense with particularity in their answers, the defense is waived. Missouri case law does not support this contention. The statute of limitations affirmative defense is preserved when the statute of limitations is pleaded with particularity in a later motion to dismiss or summary judgment motion. *Johnson v. Vee Jay Cement*, 77 S.W.3d 84, 87 (Mo. App. E.D. 2002) ("Vee Jay stated in its answer that the plaintiffs' claim was barred by the applicable statute of limitation; however, it did not specify which section applied. In its motion to dismiss, Vee Jay set forth several grounds on which it claimed the plaintiffs' claim was time-barred with specificity. This was

sufficient to raise the statute of limitations defense.”) *Grady v. Amrep, Inc.*, 139 S.W.3d 585 (Mo. App. E.D. 2004) (Defendant filed an answer that stated plaintiff’s claims were barred by statute of limitations and pleaded with more specificity in a motion for summary judgment. The court held the defendant’s affirmative defense was sufficiently raised.) See also, *Alvarado v. H&R Block, Inc.*, 24 S.W.3d 236, 241 (Mo. App. W.D. 2000).

In *Rose v. City of Riverside*, 827 S.W.2d 737 (Mo. App. W.D. 1992), the Missouri Court of Appeals for the Western District upheld the trial court’s order granting defendant summary judgment based on the expiration of the applicable statute of limitations despite the defendant not raising the statute of limitations as an affirmative defense in its answer. The appellant/plaintiff argued that the defendant did not raise the statute of limitations as a defense in its answer and the defense was therefore waived. The Missouri Court of Appeals found the entry of summary judgment against the plaintiff based on the expiration of the statute of limitations was appropriate. The Court further noted:

“[I]t would be an abuse of discretion to refuse to allow the respondent to amend its answer to include a statute of limitations defense.” *Id.* at 739.

Therefore, the Missouri Court of Appeals concluded there was no purpose in remanding the case to allow defendants to seek to amend their answer and to not grant the same would be an abuse of discretion.

Plaintiffs cite Rule 55.08 and case law discussing affirmative defenses and statute of limitations generally, but fail to cite any case law striking the affirmative defense when

it has been raised in an answer and particularly identified and argued in a motion for summary judgment.

Two cases are cited by the Plaintiffs in support of the proposition that an affirmative defense cannot be raised for the first time “in response to a motion for summary judgment.” (Appellants’ Substitute Brief, p. 46.); *Chouteau Auto Mart, Inc. v. First Bank of Missouri*, 148 S.W.3d 17, 26 (Mo. App. W.D. 1994); *State ex rel. Nixon v. Consumer Automotive Resources, Inc.*, 882 S.W.2d 717, 720-21 (Mo. App. E.D. 1994). In *Chouteau*, unlike the present case, the bank did not plead an affirmative defense of apparent authority. American Defendants did plead the affirmative defense of the statute of limitations in its responsive pleadings. Additionally, the affirmative defense of apparent authority is a defense that may be waived where the defense of the statute of limitations is not. In *Consumer Automotive Resources*, the defendant failed to plead *any* affirmative defenses in its responsive pleadings. Conversely, American Defendants in this case did plead the statute of limitations as a defense in their responsive pleadings.

Plaintiffs cite several cases for the proposition that pleading the specific statute is required, and for the proposition that Defendants have not fulfilled that requirement. The cited cases are easily distinguished. Plaintiffs cite *Tudor v. Tudor*, 617 S.W.2d 610 (Mo. App. S.D. 1981), but the court in that case held the party cited the *wrong* statute of limitations, and therefore could not rely on it as an affirmative defense. There is no claim in this case that Defendants are relying on the wrong statute of limitations. Plaintiffs cite *Southwestern Bell Telephone Co. v. Buie*, 758 S.W.2d 157, 161 (Mo. App. E.D. 1988) for the same proposition. In that case, the defendants failed to cite the particular statute

of limitations in their motion to dismiss. Conversely, American Defendants in this case pleaded with particularity the correct statute of limitations in their Joint Motion for Summary Judgment.

Plaintiffs also rely on *Day v. DeVries and Assoc., P.C.*, 98 S.W.3d 92 (Mo. App. W.D. 2003), but defendants in that case merely stated in their motion for summary judgment that the “cause of action is barred by the Kansas statute of limitations.” *Id.* at 95. Here, the specific statute of limitations was identified in the motion and suggestions in support.

CONCLUSION

The applicable Kentucky one-year statute of limitations expired before Plaintiffs properly filed a Petition. The Petition was submitted for filing by a Kentucky attorney who was not licensed to practice law in Missouri and was not admitted to practice *pro hac vice* in this case. Thus, the Petition was a legal nullity and subject to dismissal. Further, the defect could not be corrected by amending the Petition, applying retroactively counsel's subsequent admission *pro hac vice*, or adding a Missouri licensed attorney after the expiration of the statute of limitations. Any subsequent attempted corrective action taken after Plaintiffs' attorney filed the Petition on September 2, 2003 could not relate back to a Petition that does not legally exist.

Accordingly, Defendants/Respondents American Air Network, Inc., Air Ambulance Care Flight International, Inc., d/b/a Care Flight International and Air M.D., Inc., and Henry Air, Ltd., respectfully request that this Court affirm the Trial Court's summary judgment in their favor.

BAKER STERCHI COWDEN & RICE, L.L.C.

By _____
John W. Cowden # 21447
2400 Pershing Road
Suite 500
Kansas City, Missouri 64108
(816) 471-2121
(816) 472-0288 (Fax)

-and-

Caroline M. Tinsley # 49377
1010 Market Street, Suite 950
St. Louis, Missouri 63101
(314) 231-2925
(314) 231-4857 (Fax)

Attorneys for Defendants/Respondents
American Air Network, Inc.,
Air Ambulance Care Flight International, Inc.,
d/b/a Care Flight International and Air M.D., Inc.,
and Henry Air, Ltd.

RULE 84.06(c) CERTIFICATION

The undersigned attorney certifies that two (2) copies of the foregoing Brief in paper form and one (1) computer disk of Defendants/Respondents American Air Network, Inc., Air Ambulance Care Flight International, Inc., d/b/a Care Flight International and Air M.D., Inc., and Henry Air, Ltd.'s Brief were sent via first-class U.S. Mail, postage prepaid, this 29th day of December, 2005, to Liz J. Shepherd, Esq., Dolt, Thompson, Shepherd, & Kinney, P.S.C., 310 Starks Building, 455 South Fourth Avenue, Louisville, Kentucky 40202, and Richard L. Rollings, Jr., Esq., Richard L. Rollings, Jr., 43 Lakeshire Drive, Camdenton, Missouri 65202, Attorneys for Plaintiffs/Appellants; Robert W. Cotter, Esq., Patrick J. Kaine, Esq., Dysart Taylor Lay Cotter & McMonigle, P.C., 4420 Madison Avenue, Kansas City, MO 64111, Attorneys for Defendants/Respondents Thunder Aviation Services, Inc., Thunder Aviation Acquisition, Inc., Thunder Air Charter, Inc. and Thunder Aviation NA, Inc..

The undersigned, further, certifies that the accompanying floppy disk has been scanned for viruses and is virus-free.

Additionally, the undersigned certifies that the American Defendants'/Respondents' Brief complies with the limitations contained in Rule 84.06(b).

The undersigned, further, certifies that the American Defendants'/Respondents' Brief contains 9,555 words and 906 lines of text.

BAKER STERCHI COWDEN & RICE

John W. Cowden

21447

Attorney for Defendants/Respondents
American Air Network, Inc.,
Air Ambulance Care Flight International, Inc.,
d/b/a Care Flight International and Air M.D., Inc., and
Henry Air, Ltd.

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Brief in paper form and one (1) copy of the foregoing Brief on disk have been sent via first-class U.S. Mail, postage prepaid, this 29th day of December, 2005, to the following attorneys of record:

Liz J. Shepherd, Esq.
Dolt, Thompson, Shepherd, & Kinney, P.S.C.
310 Starks Building
455 South Fourth Avenue
Louisville, Kentucky 40202

-And-

Richard L. Rollings, Jr., Esq.
Richard L. Rollings, Jr.
43 Lakeshire Drive
Camdenton, Missouri 65202

Attorneys for Plaintiffs/Appellants

Robert W. Cotter, Esq.
Patrick J. Kaine, Esq.
Dysart Taylor Lay Cotter & McMonigle, P.C.
4420 Madison Avenue
Kansas City, MO 64111

Attorneys for Defendants/Respondents
Thunder Aviation Services, Inc.,
Thunder Aviation Acquisition, Inc.,
Thunder Air Charter, Inc. and
Thunder Aviation NA, Inc.

APPENDIX

APPENDIX

TABLE OF CONTENTS

1)	Kentucky Revised Statute § 413.140	A-3
2)	Missouri Revised Statute § 516.190.....	A-5
3)	Missouri Supreme Court Rule 9.02.....	A-6
4)	Missouri Supreme Court Rule 9.04.....	A-7
5)	Missouri Supreme Court Rule 55.03.....	A-8
6)	Missouri Supreme Court Rule 84.04.....	A-11