Appeal No. SC87206

In The

SUPREME COURT OF MISSOURI
EN BANC

JAMES HENSEL and LORI HENSEL

Plaintiffs/Appellants

vs.

AMERICAN AIR NETWORK, INC.,
et al.

Defendants/Respondents

Appeal from the Circuit Court of
St. Louis County, Missouri

Case No. 03CC-003581

APPELLANTS= SUBSTITUTE BRIEF

Liz J. Shepherd
Admitted Pro Hac Vice
DOLT, THOMPSON, SHEPHERD
& KINNEY, P.S.C.
310 Starks Building
455 South Fourth Avenue
Louisville, KY 40202
(502) 587-6554
(502) 587-0001 FAX

Richard L. Rollings Jr.
Missouri Bar No. 40650
RICHARD L. ROLLINGS, JR.
Attorney at Law
43 Lakeshire Dr.
Camdenton, MO 65020
(417) 861-2199
(877) 871-0299 FAX
Rick@RRollings.com

Attorneys for Plaintiffs/Appellants

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JURISDICTIONAL STATEMENT

This is an appeal from the granting of summary judgment in favor of the Defendants/Respondents on Plaintiffs/Appellants= claims for personal injuries and loss of consortium arising from an airplane crash in Kentucky.

This case is not within the exclusive jurisdiction of the this Court under Article V, Section 3 of the Missouri Constitution and original appellate jurisdiction was in the Court of Appeals, Eastern District. This case is now before this Court on transfer pursuant to Supreme Court Rule 83.04 and Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

On August 30, 2002, Plaintiff/Appellant James Hensel was the co-pilot of the Gates LearJet 25C, N45CP, when it crashed while in the process of landing at the Blue Grass Airport in Lexington, Fayette County, Kentucky. (Legal File, p. 12, & 10). The various Respondents and Defendants either owned, operated, manufactured or serviced the Gates LearJet 25C, N45CP. (Legal File, p. 9-12, && 2-8).

Plaintiff James Hensel was injured on August 30, 2002. Plaintiffs= Petition was filed on September 2, 2003. (Legal File, p. 1, 7). August 30, 2003, was a Saturday. September 1, 2003, was the Labor Day holiday. Therefore, September 2, 2003, was within even the Kentucky one-year statute of limitations. (Legal File, p. 61, 69). The Petition was signed on behalf of Liz J. Shepherd by Spencer E. Farris. (Legal File, p. 20, 134). Liz Shepherd is an attorney licensed to practice law in the state of Kentucky. (Legal File, p. 134). Spencer Farris is a member in good standing of the Missouri Bar. (Legal File, p. 133). Spencer Farris explained the circumstances surrounding the filing of the Petition as follows:

> At the time of filing the initial Petition, the undersigned [Spencer Farris] tendered a motion for admission *pro hac vice* which was executed by Liz Shepherd, Esquire. At that time, the Court Clerk did not accept the *pro hac vice* motion, but advised that it needed a receipt from the Supreme Court before it would be accepted. The undersigned therefore initialed the Petition and requested a check from Liz Shepherd, payable to the Supreme Court. (Exhibit 1). Had the

> Court Clerk advised that the Petition would not be accepted without 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 . . . .

(Legal File, p. 133-34). Spencer Farris entered his appearance in the trial court and a Motion for Admission Pro Hac Vice was filed on October 27, 2003. (Legal File, p. 2, 21). An Order of Admission Pro Hac Vice was entered on November 4, 2003. (Legal File, p. 2, 46).

Defendants/Respondents Thunder Aviation Services, Inc., Thunder Aviation Acquisition, Inc., Thunder Air Charter, Inc. and Thunder Aviation NA, Inc. filed their Motion for Summary Judgment on July 9, 2004. (Legal File, p. 3, 55). Defendants American Air Network, Inc., Air Ambulance Care Flight International, Inc. d/b/a Care Flight International, Air M.D., Inc., and Henry Air, Ltd=s Joint Motion for Summary Judgment was filed on July 19, 2004. (Legal File, p. 3, 65). Plaintiffs filed their Responses to both summary judgment motions as well as a Motion for Leave to Amend Petition by Interlineation on August 30, 2004. (Legal File, p. 3-4, 76, 79, 84).

A Stipulation of Dismissal Without Prejudice with respect to the remaining Defendants was filed on October 25, 2004. (Legal File, p. 4, 129).

Judgment was entered in favor of Defendants/Respondents Thunder Aviation Services, Inc., Thunder Aviation Acquisition, Inc., Thunder Air Charter, Inc. and Thunder Aviation NA, Inc., hereinafter the Thunder Defendants, and Defendants/Respondents American Air Network, Inc., Air Ambulance Care Flight International, Inc. d/b/a Care

Flight International, Air M.D., Inc., and Henry Air, Ltd, hereinafter the American Air Defendants, on November 22, 2004. (Legal File, p. 4-5, 132).

A Motion to Reconsider or Motion for New Trial was filed on December 21, 2004. (Legal File, p. 5, 136). Such motion was denied by Order entered December 28, 2004. (Legal File, p. 5, 142). Plaintiffs filed their Notice of Appeal to the Court of Appeals, Eastern District, appeal number ED85686, on January 7, 2005. (Legal File, p. 5, 143).

During oral argument before the Court of Appeals, Patrick Kaine, attorney for the Thunder Defendants, admitted that if not for the statute of limitations, it would be possible for Plaintiffs to amend the Petition to correct the deficiency caused by failure to timely file a motion for admission pro hac vice.

The Court of Appeals entered its Order and Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b) on August 30, 2005. The Order affirmed the trial court=s grant of summary judgment in favor of Defendants. Plaintiffs filed their Application for Transfer, Motion for Rehearing, and Suggestions in Support of Appellants= Motion for Rehearing in the Court of Appeals on September 14, 2005. The Court of Appeals denied the Application for Transfer and Motion for Rehearing on October 11, 2005.

Plaintiffs filed their Application for Transfer with this Court on October 25, 2005. This Court sustained the Application for Transfer on November 22, 2005.

POINTS RELIED ON

I. The Trial Court Erred in Granting Summary Judgment to Defendants Based on the Statute of Limitations and Rule 9.03, Because Defendants Were Not Entitled to Judgment as a Matter of Law as the Petition Was Timely and Any Failure to Comply With Rule 9.03 Was Cured or Curable, In That the Petition Was Filed Within the Statute of Limitations and Plaintiffs= Counsel Subsequently Complied with Rule 9.03 and Plaintiffs Sought Leave to Amend the Petition to Add the Signature of Plaintiffs= Missouri Counsel.

Drury Displays, Inc. v. Board of Adjustment, 760 S.W.2d 112 (Mo.banc 1988)

Operating Engineers Local 139 Health Benefit Fund v. Rawson Plumbing, Inc., 130 F.Supp.2d 1022 (E.D.Wis. 2001)

Save Our Creeks v. City of Brooklyn Park, 699 N.W.2d 307, 309 (Minn.banc 2005)

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

Supreme Court Rules 9.03, 55.03(a), and 55.33

II. The Trial Court Erred in Granting Summary Judgment to Defendants and Thereby Effectively Denying Plaintiffs= Motion For Leave to Amend Petition by Interlineation, Because the Trial Court Abused Its Discretion in Failing to Grant the Motion For Leave to Amend, In That Rule 55.03(a) Allows a Party to Correct the Omission of a Signature on a Pleading, Plaintiffs Cause of Action Was Lost As a

Result of the Failure to Grant the Motion, No New Matters Were Being Added to the Petition, Plaintiffs Sought Leave to Amend Promptly, and Defendants Would Suffer No Prejudice or Injustice by the Amendment.

Manzer v. Sanchez, 985 S.W.2d 936 (Mo.App.E.D. 1999)

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

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

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

Supreme Court Rules 55.03(a) and 55.33

III. The Trial Court Erred in Granting Summary Judgment to Defendants Based on the Statute of Limitations, Because Defendants Waived the Affirmative Defense of the Statute of Limitations, In That the Defendants= Answers Failed to Specify the Particular Statute of Limitations Upon Which Defendants Rely as Required by Rule 55.08.

Day v. DeVries and Assoc., P.C., 98 S.W.3d 92 (Mo.App.W.D. 2003)

ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371 (Mo.banc 1993)

Norman v. Wright, 100 S.W.3d 783 (Mo. 2003)

Chouteau Auto Mart, Inc. v. First Bank of Missouri, 148 S.W.3d 17 (Mo.App.W.D.2004)

Supreme Court Rule 55.08

ARGUMENT

I. The Trial Court Erred in Granting Summary Judgment to Defendants Based on the Statute of Limitations and Rule 9.03, Because Defendants Were Not Entitled to Judgment as a Matter of Law as the Petition Was Timely and Any Failure to Comply With Rule 9.03 Was Cured or Curable, In That the Petition Was Filed Within the Statute of Limitations and Plaintiffs= Counsel Subsequently Complied with Rule 9.03 and Plaintiffs Sought Leave to Amend the Petition to Add the Signature of Plaintiffs= Missouri Counsel.

A. Standard of Review

This is an appeal from the granting of summary judgment. This Court has explained the standard of review in such cases as follows:

> When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered. [Citations omitted]. Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. [Citations omitted]. We accord the non-movant the benefit of all reasonable inferences from the record. [Citation omitted].

Our review is essentially de novo. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. [Citation omitted]. The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment. [Citation omitted].

ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, 376 (Mo.banc 1993).

Summary judgment is only proper if it is shown Athat there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.@ Supreme Court Rule 74.04(c)(6). When a defending party is seeking summary judgment, there are three possible methods for making the required showing:

a "defending party" may establish a right to judgment by showing (1) facts that negate any one of the claimant's elements facts, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's *properly-pleaded affirmative defense*.

ITT Commercial Finance Corp., 854 S.W.2d at 381 (emphasis added). Defendants sought summary judgment in this case based on the third method.

B. The Petition Was Timely Filed

The question to be decided under this Point is whether the defect resulting when a petition is originally signed only by an out of state attorney can be cured. As such defect should be curable, summary judgment in favor of defendants was improper and this Court should reverse.

As an initial matter, it is important to note that Plaintiffs= Petition was timely filed regardless of the applicable statute of limitations. Plaintiff James Hensel was injured on August 30, 2002. Plaintiffs= Petition was filed on September 2, 2003. (Legal File, p. 1, 7). August 30, 2003, was a Saturday. September 1, 2003, was the Labor Day holiday. Therefore, it is undisputed that September 2, 2003, was within even the Kentucky one-year statute of limitations. (Legal File, p. 61, 69). As a result, Plaintiffs= Petition was timely filed and any defect in the Petition was cured and relates back to the original date the Petition was filed.

Defendants argue that the statute of limitations expired on the theory that the Plaintiffs= Petition was a nullity because it was signed by an attorney that was not authorized to practice in Missouri and the requirements of Supreme Court Rule 9.03 were not met. However, Missouri law does not prohibit the correction of such a defect even if the Petition is considered a nullity. The failure to comply with Rule 9.03 was either corrected by the subsequent grant of the Motion for Admission Pro Hac Vice or should

have been corrected by the granting of Plaintiffs= Motion For Leave to Amend Petition by Interlineation, as discussed in Point II below.

A review of Missouri=s Supreme Court Rules shows that the failure to comply with Rule 9.03 does not alone support the grant of summary judgment in favor of Defendants. Rule 9.03 provides:

> Any attorney, whether or not a member of The Missouri Bar, not authorized to practice under Rule 9.02, but who is a member in good standing of the bar of any court of record and not under suspension or disbarment by the highest court of any state, may be permitted to appear and participate in a particular case in any court or administrative tribunal of this state under the following conditions:
>
> The visiting attorney shall file with his or her initial pleading the receipt for the fee required by Rule 6.01 and a statement:
>
> (a) Identifying every court of which he or she is a member of the bar;
>
> (b) Certifying that neither the attorney nor any member of his or her firm is under suspension or disbarment by any such court; and
>
> (c) Designating some member of The Missouri Bar having an office within the State of Missouri as associate counsel.
>
> The designated attorney shall enter an appearance as an attorney of record. The visiting attorney by her or his appearance agrees to comply with the Rules of Professional Conduct as set forth in Rule 4 and becomes subject to discipline by the courts of this state.

Supreme Court Rule 9.03. Such rule does not specify a sanction for failure to comply with its requirements and a simple hypothetical shows that Rule 9.03 does not support the trial court=s ruling.

In the present case, it is undisputed that Plaintiffs retained both Liz Shepherd, a Kentucky attorney, and Spencer Farris, a Missouri attorney. (Legal File, p. 82, 133). It is also undisputed that Liz Shepherd=s name was signed on the Petition, with her permission, by Spencer Farris and that Spencer Farris added his initials following such signature. (Legal File, p. 82, 133-34). Hypothetically, if Spencer Farris had also signed his name and included his address, Missouri Bar Number, and other required information on the Petition, the Petition would have been signed by a Missouri attorney and would have clearly been proper and valid even though a motion under Rule 9.03 had not been simultaneously filed with respect to Liz Shepherd. Defendants recognize that such a situation would have precluded judgment in their favor. The Thunder Defendants= argued in the Court of Appeals that Plaintiffs:

> could have taken the five minutes necessary to *add* a signature block for the Missouri attorney helping with the case, have him sign the petition on his own behalf and enter an appearance on behalf of plaintiffs.

(Thunder Defendants= Brief, p. 15). As a result, it is clear Defendants admit that this would have cured the deficiency in Plaintiffs= Petition. However, in the absence of a simultaneous Motion for Admission Pro Hac Vice, the signature of Liz Shepherd on the Petition would still have violated Rule 9.03. Defendants have not provided any

explanation why a petition signed only by an attorney in violation of Rule 9.03 is required to be treated as a nullity but a petition signed by attorney in violation of Rule 9.03 as well as by a Missouri attorney is not treated as a nullity. Both petitions involve the unauthorized practice of law, yet Defendants argue that one is treated as a nullity and one is not. Rule 9.03 simply does not provide a basis for such disparate treatment. However, Rule 55.03(a) does provide a basis for treating such petitions differently. Rule 55.03(a) also provides a basis for correcting the problem resulting from only the out of state attorney signing the petition.

Rule 55.03(a) provides:

> Every pleading, motion, and other filing shall 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 filing shall state the filer's address, Missouri bar number, telephone number, facsimile number, and electronic mail address, if any.
>
> An unsigned filing . . . shall be stricken *unless the omission is corrected promptly after being called to the attention of the attorney or party filing same.*

Supreme Court Rule 55.03(a) (emphasis added). The reference in Rule 55.03(a) to attorney is presumably to an attorney authorized to practice in Missouri. Therefore, while the Petition in the present case did include a signature, it clearly did not include a signature that complied with the requirements of Rule 55.03(a). Thus, the real problem with a pleading signed only by a visiting attorney that fails to comply with Rule 9.03 is

that it is *not* Asigned by at least one attorney of record in the attorney's individual name or . . . by the party@ as required by Rule 55.03(a). That rule provides for striking an unsigned pleading Aunless the omission is corrected promptly after being called to the attention of the attorney or party filing same.@ Supreme Court Rule 55.03(a). Therefore, if the only signature on a pleading or document is that of a visiting attorney and the requirements of Rule 9.03 have not been met, Rule 55.03(a) provides the support for striking such pleading or document, but only if the omission is not promptly corrected.

Other courts have treated pleadings signed by unauthorized persons as unsigned. In a case where a defendant corporation=s answer was signed by a corporate officer rather than an attorney, the Federal District Court explained:

> I believe that the best approach here is to treat defendant's attempted answer as though it were unsigned. Rule 11(a) requires all pleadings, motions, and other papers to be signed by an attorney of record for the party or (if the party is unrepresented) by the party. To be sure, the answer here is signed, but not by a person authorized to represent the corporation in federal court. *See Kovilic Constr. Co. v. Missbrenner,* 106 F.3d 768, 772 (7th Cir. 1997) (suggesting that court might regard documents signed by person without authority to do so as equivalent of unsigned documents under Rule 11(a)). Under the last sentence of Rule 11(a), an opposing party may call the corporation's attention to the requirement that it must appear by counsel; and, if the defect is not corrected promptly, the opposing party should then file a motion with the court to strike the paper under Rule 11(a).

Operating Engineers Local 139 Health Benefit Fund v. Rawson Plumbing, Inc., 130 F.Supp.2d 1022, 1024 (E.D.Wis. 2001).

The Minnesota Supreme Court recently addressed the same issue. The Court recognized that allowing a lay person to represent a corporation during litigation would constitute the unauthorized practice of law. *Save Our Creeks v. City of Brooklyn Park*, 699 N.W.2d 307, 309 (Minn.banc 2005) (hereinafter *Save Our Creeks II*). The Court explained that the majority of jurisdictions addressing the issue have determined that the signing of a complaint on behalf of a corporation by a non-attorney is a curable defect. *Save Our Creeks II*, 699 N.W.2d at 310. The Court in *Save Our Creeks II* allowed amendment of the complaint to add the signature of an attorney despite the fact that such attorney did not represent the corporation at the time the complaint was initially filed. *Save Our Creeks II*, 699 N.W.2d at 308, 312. The Minnesota Supreme Court affirmed the Court of Appeal=s treatment of the complaint as unsigned under Minnesota Rule of Civil Procedure 11. *Save Our Creeks II*, 699 N.W.2d at 310. The Court approved of the reasoning of the Court of Appeals which indicated:

> that viewing the lack of an attorney's signature on the complaint as a curable, nonjurisdictional defect is consistent with recent rulings of the United States Supreme Court (1) holding that a pro se litigant's failure to sign his notice of appeal as required by Fed. R. Civ. P. 11(a) was curable and that a late signature would relate back to the original filing date, *Becker v. Montgomery*, 532 U.S. 757, 149 L. Ed. 2d 983, 121 S. Ct. 1801 (2001), and (2) allowing amendment of an

> employment discrimination charge to add statutorily-required verification after the filing deadline had passed, *Edelman v. Lynchburg College*, 535 U.S. 106, 152 L. Ed. 2d 188, 122 S. Ct. 1145 (2002). *Save Our Creeks*, 682 N.W.2d at 643-44. The court explained that as in federal court, Minnesota Rule of Civil Procedure 11, which is the source of the signature requirement, provides that unsigned documents should be stricken only if the omission of the signature is not corrected promptly.

Save Our Creeks II, 699 N.W.2d at 310. Additionally, such amendment was considered to relate back to the date the complaint was originally filed. *Save Our Creeks II*, 699 N.W.2d at 312. The same treatment should apply regardless of the nature of the unauthorized practice of law involved.

Like the recent rulings from the U.S. Supreme Court discussed in *Save Our Creeks II*, 699 N.W.2d at 310, this Court has allowed (1) a pro se litigant that failed to sign a pleading to add the signature and have the amendment relate back to the date of the original pleading, *Wallingford v. State*, 131 S.W.3d 781 (Mo. 2004), and (2) amendment of a pleading to add a statutorily required verification, *Drury Displays, Inc. v. Board of Adjustment*, 760 S.W.2d 112 (Mo.banc 1988). Allowing amendment of a petition originally signed by a nonresident attorney to add the signature of a Missouri attorney is consistent with these decisions. *See Save Our Creeks II*, 699 N.W.2d at 310.

This Court has liberally applied Rule 55.03(a) to allow addition of signatures to pleadings, even pleadings otherwise considered a nullity. The trial court=s treatment of

the Petition as a nullity and therefore not amendable conflicts with this Court=s holding in *Wallingford* allowing amendment of post-conviction motions despite such motions being considered nullities.

The cases of *Tooley v. State*, 20 S.W.3d 519 (Mo. 2000), and *Wallingford v. State*, 131 S.W.3d 781 (Mo. 2004), indicate that a pleading or motion that is deemed a nullity is still amendable under Supreme Court Rule 55.03(a) and that such amendment may relate back to the date of the original filing. In *Tooley v. State*, 20 S.W.3d 519 (Mo. 2000), the Court was faced with an unsigned motion for post-conviction relief. This Court recognized Athat an unsigned, unverified motion for post-conviction relief is a nullity and does not invoke the jurisdiction of the court.@ *Tooley*, 20 S.W.3d at 520. The Court then held:

> Even though Tooley's unsigned motion was a nullity and in violation of Rule 55.03(a), his cause was dismissed prior to the expiration of the 90-day period within which a pro se motion could be filed. Rule 55.03(a) provides guidance to the court when confronted with an unsigned pleading. "An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party." Rule 55.03(a). Appellant should have the opportunity to correct the deficiency.

Tooley, 20 S.W.3d at 520.

This holding was expanded to include the addition of a signature after the time for filing the motion had expired in *Wallingford v. State*, 131 S.W.3d 781 (Mo. 2004). This Court explained the underlying facts in *Wallingford* as follows:

> On the last day of the 90-day period, [appellant] filed a *pro se* Rule 29.15 motion. He did not sign the declaration on the motion, but did sign the *in forma pauperis* affidavit. The circuit court appointed counsel, who filed an amended motion. Four days later - after all filing deadlines expired - [appellant] filed a "Motion to Correct Clerical Mistake under Rule 29.12(c)." He alleged he inadvertently forgot to sign the original motion. A month later, [appellant] filed a signed "Declaration" for the original motion. In the accompanying "Motion to Accept Movant's Declaration Pursuant to Tooley v. State," his counsel states that she discovered the error "just prior to filing the amended motion." The circuit court dismissed, finding no jurisdiction over a motion not signed within the original 90-day period.

Wallingford, 131 S.W.3d at 781. This Court then ruled:

> The circuit court held that Wallingford's "signature remains as a mandatory element for jurisdiction to attach," citing *Tooley v. State*, 20 S.W.3d 519 (Mo. banc 2000). The circuit court ruled that Wallingford's "failure to sign his motion renders it a nullity," again citing *Tooley*.
>
> While these general propositions are accurate, the specific holding of *Tooley* is that under Rule 55.03(a), movants have the opportunity to correct omission of a signature. Rule 55.03(a) applies where the dismissal occurs within

the original 90-day filing period, as in *Tooley*, or where it occurs later, as in this case.

Wallingford, 131 S.W.3d at 782. The Supreme Court Rules do not provide any basis for treating the Petition in the present case differently than the unsigned post-conviction motions in *Tooley* and *Wallingford*.

Wallingford and Rule 55.03(a) were recently applied by the Western District of the Court of Appeals in *Blanton v. State*, 159 S.W.3d 870 (Mo.App.W.D. 2005). The Court in *Blanton* recognized that AAn unsigned motion for post conviction relief is a nullity and does not invoke the circuit court's jurisdiction.@ *Blanton*, 159 S.W.3d at 870. The Court then held:

> Although Rule 55.03(a) gives the movant an opportunity to correct the missing signature and although the record establishes that Blanton knew as early as January 20, 2005, that he had not signed his motion, Blanton never "promptly" sought to correct the deficiency. [Citations omitted]. Hence, we have an unsigned motion and an alleged judgment from the circuit court ruling on that unsigned motion. For jurisdiction to attach, Blanton's signature remains a mandatory element, and his failure to sign the motion rendered it a nullity. [Citation omitted]. Because the circuit court did not have jurisdiction when it ruled on Blanton's motion, this court lacks jurisdiction to consider it. Hence, we dismiss Blanton's appeal.

Blanton, 159 S.W.3d at 871 (footnotes omitted). *Blanton* demonstrates that a distinction can properly be made between cases where the party takes prompt action to correct a deficiency and cases where the party does not. When no corrective action is taken, the failure to properly sign a pleading can be the basis for dismissal. When corrective action is promptly taken, as in the present case, any deficiency is eliminated and the case should be allowed to proceed.

This Court has also allowed amendment of an unverified petition to add a jurisdictionally required verification. *See Drury Displays, Inc. v. Board of Adjustment*, 760 S.W.2d 112 (Mo.banc 1988). Likewise, the U.S. Supreme Court has held that the failure to sign a notice of appeal does not warrant dismissal when such omission is promptly corrected. *See Becker v. Montgomery*, 532 U.S. 757, 121 S.Ct. 1801, 149 L.Ed.2d 983 (2001). A pleading signed by a visiting attorney that fails to simultaneously file a motion under Rule 9.03 should not be treated worse than a pleading that does not contain any signature at all. This is especially true when the visiting attorney promptly files the required motion which is then promptly granted.

The Court of Appeals, Eastern District, while acknowledging the general rule that the unauthorized practice of law normally requires dismissal of the action, has also recognized that Adismissal of proceedings may not be required in all cases in which one not authorized to practice law has acted in a representative capacity before a court or other legal tribunal@. *Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234, 241 (Mo.App.E.D. 2000). The Court indicated that amendment of the offending pleading to

add the signature of an attorney licensed in Missouri was an option to cure the initial defect.

> Appellant's [*242] argument that the Commission should have granted her motion to retroactively substitute counsel in the matter, so that the Application for Review would be deemed amended to reflect that it was originally filed by one of the attorneys in Mr. Turner's office who was licensed to practice law in Missouri, is without merit. While *such a solution might be reasonable if the Commission had authority to grant a party leave to amend her Application for Review* once the 20-day statutory time limit has elapsed, the Commission lacks such authority.

Strong, 23 S.W.3d at 241-42 (emphasis added). Under Rules 55.03(a) and 55.33(a), the circuit court in the present case clearly had authority to allow the amendment of Plaintiffs= Petition. More over, Plaintiffs cured the defect by obtaining admission pro hac vice long before the issue was raised by the Defendants.

In the present case, Plaintiffs corrected the problem by filing a Motion for Admission Pro Hac Vice on October 27, 2003. (Legal File, p. 2, 21). Plaintiffs= Motion was filed prior to an answer being filed by any of the Defendants. (Legal File, p. 2). Such motion was granted on November 4, 2003. (Legal File, p. 2, 46). The Order of Admission Pro Hac Vice entered prior to any complaint or objection by the Defendants should be sufficient to correct the status of the Petition as unsigned and eliminate any problems with the Petition. However, even if the admission pro hac vice did not relate back, Plaintiffs sought leave to amend the Petition by interlineation to add the signature

of Spencer Farris promptly after the Defendants raised the issue in their Motions for Summary Judgment. (Legal File, p. 3, 76). Thus, Plaintiffs sought to correct the lack of a signature of a Missouri attorney on the Petition as allowed by Rule 55.03(a). As discussed below, it was error for the trial court to effectively deny the motion to amend.

Both the trial court and Defendants relied on *Strong* as the basis for summary judgment in this action. Such case is clearly distinguishable. In *Strong*, counsel for the appellant took no actions, despite warnings from the Commission, until after dismissal.

> Appellant has offered no reason that would permit an exception to the general rule in this case. Appellant's counsel took no action to attempt to address the serious problem regarding his unauthorized practice, although he was advised of the problem by the Commission in a letter nearly three months earlier, until after the Commission entered its Order of Dismissal.

Strong, 23 S.W.3d at 241. In contrast, a Motion for Admission Pro Hac Vice was filed on October 27, 2003, and granted on November 4, 2003. (Legal File, 2, 21, 46). Such actions were taken eight (8) months before Defendants filed their motions for summary judgment complaining for the first time that the Motion for Admission Pro Hac Vice was not filed at the same time as the Petition. As a result, counsel for Plaintiffs corrected any deficiency in the initial pleadings as quickly as possible and long before any Defendant raised an objection.

Other arguments raised by Defendants are also without merit. The Thunder Defendants, in their Brief in the Court of Appeals, claimed:

that the filing of the unauthorized petition on September 2, 2003 was a deliberate attempt to evade the requirements of Rule 9.03 and a deliberate act constituting the unauthorized practice of law in the courts of Missouri.

(Brief of Respondents Thunder Aviation Services, Inc., Thunder Aviation Acquisition, Inc., Thunder Air Charter, Inc. and Thunder Aviation NA, Inc., hereinafter Thunder Defendants= Brief, p. 15). Such argument misstates the facts in this case.

It is undisputed that Plaintiffs, through their Kentucky counsel, Liz Shepherd, retained an attorney licensed in Missouri, Spencer Farris, prior to filing Plaintiffs= Petition. (Legal File, p. 133-34). Ms. Shepherd executed the affidavit required by Rule 9.03 and provided it to Mr. Farris for filing on September 2, 2003. (Legal File, p. 23-24, Affidavit of Liz Shepherd notarized September 2, 2003). Mr. Farris attempted to file the required Motion for Admission Pro Hac Vice on September 2, 2003. (Legal File, p. 133). However, Mr. Farris, Plaintiffs= Missouri counsel, had not obtained the receipt from the Supreme Court required by Rule 9.03 and the Motion was rejected by the clerk=s office. (Legal File, p. 133). Thus, while it is true that the requirements of Rule 9.03 were not met at the time the Petition was filed, it is also clear that neither Plaintiffs nor Liz Shepherd deliberately attempted to evade such requirements or deliberately participated in the unauthorized practice of law. Liz Shepherd took the actions she understood were necessary to obtain permission to act pro hac vice and relied upon Spencer Farris to file the necessary motion. It was Plaintiffs= Missouri counsel that failed to ensure the proper filing of the Motion for Admission Pro Hac Vice.

The American Air Defendants argued in the Court of Appeals that Spencer Farris did not represent Plaintiffs on September 2, 2003, and that even if he had signed the Petition, Ahe was not an authorized representative of Plaintiffs and his signature also would be a nullity.@ (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., hereinafter American Air Defendants= Brief, p. 22). Such argument misconstrues the facts in this case and ignores the standard for summary judgment. First, the Record indicates that Mr. Farris attempted to file the Motion for Admission Pro Hac Vice on September 2, 2003. (Legal File, p. 133). It is also undisputed that Mr. Farris signed Liz Shepherd=s name to the Petition and delivered the Petition to the clerk=s office. (Legal File, p. 133-34). The Motion for Admission Pro Hac Vice was filed on October 27, 2003. (Legal File, p. 2, 21). The Motion stated that AApplicant designates Spencer E. Farris . . . as associate and counsel.@ (Legal File, p. 21). The reasonable inferences to be drawn from these facts is that Mr. Farris was acting as counsel for Plaintiffs on September 2, 2003, and that the Motion for Admission Pro Hac Vice he attempted to file so indicated. *ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993) (AWe accord the non-movant the benefit of all reasonable inferences from the record.@). If Plaintiffs had simply wanted someone to deliver the Petition to the clerk=s office, it would have been

unnecessary to hire an attorney. FedEx is capable of delivering documents to the clerk=s office and that action alone does not require a license to practice law. Mr. Farris was acting as local counsel for Plaintiffs as required by Rule 9.03 on September 2, 2003. The American Air Defendants are misconstruing the facts in this case and thereby reach an absurd conclusion.

The American Air Defendants next attempt to distinguish the request for substitution of counsel in *Strong* from the Motion to Amend in the present case based on the fact that *Strong* involved another attorney from the same firm. (American Air Defendants= Brief, p. 22). The problem with such argument is that ALaw firms don=t represent clients; lawyers do.@ *Strong*, 23 S.W.3d at 240. Thus, it does not matter that Mr. Farris and Ms. Shepherd work in different firms. Both represent Plaintiffs and both represented Plaintiffs on September 2, 2003.

The American Air Defendants also complain that Plaintiffs waited almost a year before filing the Motion For Leave to Amend Petition by Interlineation. (American Air Defendants= Brief, p. 23). The problem with such argument is that Plaintiffs promptly filed the Motion for Admission Pro Hac Vice which they believed and still believe cured any deficiency. It was not until Defendants filed their various motions for summary judgment that Plaintiffs learned that Defendants claimed the Petition was nullity. At that point, Plaintiffs promptly filed the Motion to Amend pursuant to Rule 55.03 which provides that AAn unsigned filing . . . shall be stricken unless the omission is corrected

promptly after being called to the attention of the attorney or party filing same.@ Supreme Court Rule 55.03(a) (emphasis added). Plaintiffs attempted to correct the omission promptly after it was called to their attention.

The purpose of the prohibition against the unauthorized practice of law and the requirements of Rule 9.03 is to protect litigants and ensure that visiting attorneys are subject to Missouri=s Rules of Professional Conduct. Supreme Court Rule 9.03. Such purpose is not served by requiring dismissal of a petition signed without compliance with Rule 9.03. As one court has explained:

> a standard that requires dismissal of a pleading signed by a nonlawyer on behalf of a corporation would not advance the policy behind the rule that corporations must be represented by counsel. Indeed, dismissing a complaint as a nullity "would yield the ironic result of prejudicing the constituents of the corporation, the very people sought to be protected by the rule against the unauthorized practice of law." [Citation omitted]. Dismissal would also contravene the policy favoring adjudication of cases on the merits. The courts' interest in ensuring competent representation on behalf of corporations is better served by other sanctions against the unauthorized practice of law, including injunctive relief and disciplinary sanctions. [Citation omitted]. Unlike dismissal of a complaint, these sanctions appropriately focus on the misconduct of the offending actor instead of unduly penalizing the litigants by dismissing their complaint. [Citation omitted]. Dismissal

is thus not required to further the policy behind the legal-representation requirement.

Save Our Creeks v. City of Brooklyn Park, 682 N.W.2d 639, 645 (Minn.Ct.App. 2004) (hereinafter *Save Our Creeks I*) aff=d 699 N.W.2d 307 (Minn.banc 2005). Another court has also recognized that the unauthorized practice of law should not result in the punishment of an innocent litigant, explaining:

> We do not question the reasoning or the results in the foregoing decisions; however, we note that in none of these cases did a lay person initially retain a duly licensed attorney to represent him in a personal injury action who, unbeknownst to the client, was then disbarred before he [**27] filed the complaint. Given these unique circumstances, we believe that a rigid adherence to precedent would not advance, but would in fact defeat, the purposes of the rule prohibiting representation by nonattorneys. That rule is intended to protect litigants against the mistakes of the ignorant and the schemes of the unscrupulous and to protect the court itself in the administration of its proceedings from those lacking the requisite skills. [Citation omitted]. But, we do not believe that either of these purposes is promoted by the dismissal of plaintiff's action. Not only would such a result clearly penalize an innocent party possessing a substantial personal injury claim, but it also would overlook the fact that the party did secure the services of a licensed attorney to represent him at trial. While we have not discovered any Illinois

authority directly on point, there is an authority from other jurisdictions which suggests that, in this instance, dismissal of plaintiff's action was inappropriate. *Janiczek v. Dover Management Co.*, 134 Ill.App.3d 543, 546, 481 N.E.2d 25, 26-27 (Ill.App.Ct. 1985). Likewise, granting summary judgment in the present case does not have the effect of protecting litigants but instead punishes Plaintiffs for a technical mistake regarding the signature on the Petition. Other than the lack of a proper signature, Defendants have not alleged any deficiencies in Plaintiffs= Petition and such Petition clearly provided Defendants with notice of Plaintiffs= claims within the statute of limitations. The technical defect resulting from the failure to initially comply with Rule 9.03 should be correctable and Plaintiffs= counsel complied with the requirements of that rule long before Defendants filed their motions for summary judgment. Other methods exist for enforcing the prohibition on the unauthorized practice of law that do not adversely affect the litigants the rule is designed to protect.

In the present case, the failure to file the Motion for Admission Pro Hac Vice was promptly cured and there has been no allegation of any prejudice to Defendants. At most, Plaintiffs= Petition should be treated as unsigned at the time it was filed. Such defect was cured by the admission of Liz Shepherd pro hac vice on November 4, 2003. In the alternative, such defect can be cured by granting leave for Spencer Farris to sign the Petition as discussed under Point II. In either case, the fact that the Motion for Admission Pro Hac Vice was not filed until a short time after the Petition was filed does not support summary judgment in favor of Defendants. Plaintiffs= Petition was timely filed and the

statute of limitations does not bar Plaintiffs= claims. Therefore, Defendants were not entitled to judgment as a matter of law and this Court should reverse and remand to allow the Plaintiffs to proceed with their action.

II. The Trial Court Erred in Granting Summary Judgment to Defendants and Thereby Effectively Denying Plaintiffs= Motion For Leave to Amend Petition by Interlineation, Because the Trial Court Abused Its Discretion in Failing to Grant the Motion For Leave to Amend, In That Rule 55.03(a) Allows a Party to Correct the Omission of a Signature on a Pleading, Plaintiffs Cause of Action Was Lost As a Result of the Failure to Grant the Motion, No New Matters Were Being Added to the Petition, Plaintiffs Sought Leave to Amend Promptly, and Defendants Would Suffer No Prejudice or Injustice by the Amendment.

A. Standard of Review

The standard involved in reviewing a denial of leave to amend a petition has been explained as follows:

> Rule 55.33 provides that leave to amend a petition "shall be freely given when justice requires." The decision whether to allow a party to amend a pleading is a matter within the discretion of the trial court which we do not disturb unless there is an obvious and palpable abuse of discretion.

Manzer v. Sanchez, 985 S.W.2d 936, 939 (Mo.App.E.D. 1999).

B. The Trial Court Abused Its Discretion

The question presented in this Point is how Rules 55.03(a) and 55.33(a) apply to a petition signed only by an out of state attorney without compliance with Rule 9.03. As

such rules should allow amendment to add the signature of a Missouri attorney, the trial court erred and abused its discretion in failing to grant Plaintiffs= motion to amend.

Plaintiffs filed their Motion for Leave to Amend Petition by Interlineation on August 30, 2004. (Legal File, p. 3, 76). The Motion sought to amend the Petition to add the signature of Spencer Farris, a member of the Missouri Bar. (Legal File, p. 76-77). The trial court granted summary judgment in favor of Defendants without ruling on the Motion for Leave to Amend, (Legal File, p. 3-5, 132), thereby effectively denying the Motion for Leave to Amend Petition by Interlineation.

Amendment of pleadings is governed by Rule 55.33, which provides:

> (a) A pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the pleading may be amended at any time within thirty days after it is served. Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Supreme Court Rule 55.33(a). Various factors are generally considered when determining whether denial of leave to amend was an abuse of discretion.

> In reviewing the decision of the trial court, we are concerned with whether justice is furthered or subverted by the trial court's decision. [Citation omitted]. Factors that should be considered in deciding whether to allow leave for an amendment are

hardship to the moving party if leave to amend is not granted, the reasons for failure to include any new matter in earlier pleadings, timeliness of the application, whether the amendment could cure the inadequacy of the moving party's pleading, and the injustice resulting to the party opposing the motion should it be granted.

Manzer v. Sanchez, 985 S.W.2d 936, 939 (Mo.App.E.D. 1999).

Considering each of these factors shows that justice was subverted by the trial court=s decision. First, the hardship to Plaintiffs is clear as the failure to grant leave to amend the Petition resulted in summary judgment in favor of the Defendants. If such judgment is not reversed, Plaintiffs claims will be lost forever. Second, there is actually no new matter being added to the Petition, only the signature of Spencer Farris is being added. Mr. Farris was involved in the filing of the Petition but simply did not sign his name under the mistaken belief that it was not necessary. Third, Plaintiffs promptly filed the Motion for Leave to Amend Petition by Interlineation after the issue was raised by the Defendants. Additionally, Plaintiffs attempted to correct the deficiency earlier, before any answers were filed, by filing their Motion for Admission Pro Hac Vice. Fourth, the addition of the signature of a Missouri attorney, when considered with the granting of admission pro hac vice to Liz Shepherd, would eliminate the inadequacy resulting from Plaintiffs Petition having been filed without being properly signed under Rule 55.03(a). Lastly, no injustice results to Defendants as no new claims are being asserted and the Petition was filed within the statute of limitations, thus providing the protect the statute of limitations was designed to provide.

The Court in *Manzer* explained:

> Appellants argue after considering these factors, the trial court's failure to grant leave to amend the petition was an abuse of discretion and prejudicial. We agree. Appellants suffered a severe hardship in that their original petition was dismissed with prejudice and therefore, Appellants are prohibited from ever bringing the action. One key factor in this case is whether the proposed amendment could cure the inadequacy of the petition in light of Respondents' motions to dismiss. Appellants' proposed amendment would have cured the procedural defects of the original petition. Appellants' proposed First Amended Petition articulated sufficient facts to support their claims, and the proposed amendment did not set forth or add any new causes of action.

Manzer, 985 S.W.2d at 939. Similarly, the failure to grant Plaintiffs Motion for Leave to Amend Petition by Interlineation was an abuse of discretion and prejudicial in the present case.

Further, the Court of Appeals has also suggested that such an amendment is a reasonable method for correcting the deficiency created by failure to file a timely motion for admission pro hac vice. In *Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234, 241 (Mo.App.E.D. 2000), the Court stated:

> Appellant's [*242] argument that the Commission should have granted her motion to retroactively substitute counsel in the matter, so that the Application for Review would be deemed amended to reflect that it was originally filed by one of the

attorneys in Mr. Turner's office who was licensed to practice law in Missouri, is without merit. While *such a solution might be reasonable if the Commission had authority to grant a party leave to amend her Application for Review* once the 20-day statutory time limit has elapsed, the Commission lacks such authority.

Strong, 23 S.W.3d at 241-42 (emphasis added). Under Rules 55.03(a) and 55.33(a), the circuit court in the present case clearly had authority to allow the amendment of Plaintiffs= Petition and the failure to allow such amendment was an abuse of discretion.

Supreme Court Rule 55.03(a) allows pleadings that are not properly signed to be corrected after notice of the deficiency is given. Such rule states:

> Every pleading, motion, and other filing shall 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 filing shall state the filer's address, Missouri bar number, telephone number, facsimile number, and electronic mail address, if any.
>
> An unsigned filing . . . shall be stricken *unless the omission is corrected promptly after being called to the attention of the attorney or party filing same.*

Supreme Court Rule 55.03(a) (emphasis added). The Motion for Leave to Amend Petition by Interlineation was Plaintiffs attempt to promptly correct the omission as allowed by Rule 55.03(a). Such amendment would have added the signature of a Missouri attorney to the Petition and removed any basis for striking the Petition or

otherwise treating it as a nullity. Under the last sentence of Rule 55.03(a), Plaintiffs were entitled to such amendment.

Additionally, under Rule 55.33(c), a claim asserted in an amended pleading that arose out of the conduct, transaction or occurrence set out in the original pleading relates back to the date of the original pleading. Supreme Court Rule 55.33(c). Missouri Courts have recognized that such rule allows a required verification to be added by amendment and to relate back to the original filing. *See Drury Displays, Inc. v. Board of Adjustment*, 760 S.W.2d 112 (Mo.banc 1988). Similar to the amendment in *Drury Displays*, the proposed amended petition in the present case is identical to the Petition originally filed except for the addition of the signature of Spencer Farris.

As discussed earlier, this Court has recently interpreted Rule 55.03(a) as allowing amendment to add a signature to an unsigned pleading despite the time for filing having since elapsed. *Wallingford v. State*, 131 S.W.3d 781 (Mo. 2004). Despite the expiration of the statute of limitations *after* Plaintiffs= Petition was filed, Plaintiffs should be allowed to amend their Petition to add the signature of Spencer Farris under Rule 55.03(a). As a result, the trial court abused its discretion in failing to grant the Motion for Leave to Amend Petition by Interlineation.

Defendants argue that the failure to grant Plaintiffs= Motion to Amend was not an abuse of discretion based on their claim that the Petition was a nullity. American Air Defendants rely on the cases of *Tooley v. State*, 20 S.W.3d 519 (Mo. 2000), and *Malone v. State*, 798 S.W.2d 149 (Mo.banc 1990), for the proposition that Plaintiffs= Petition was

a nullity and could not be amended. (American Air Defendants= Brief, p. 24). However, such cases do not support Defendants= theory.

This Court in both *Tooley* and *Malone* was faced with unsigned motions for post-conviction relief and therefore did not address the question of whether an unsigned petition is a nullity. With respect to the unsigned motion, this Court in *Tooley* found that the absence of a signature rendered it a nullity. *Tooley*, 20 S.W.3d at 520. However, this Court also explained:

> Even though Tooley's unsigned motion was a nullity and in violation of Rule 55.03(a), his cause was dismissed prior to the expiration of the 90-day period within which a pro se motion could be filed. Rule 55.03(a) provides guidance to the court when confronted with an unsigned pleading. "An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party." Rule 55.03(a). *Appellant should have the opportunity to correct the deficiency.*

Tooley, 20 S.W.3d at 520 (emphasis added). Thus, contrary to Defendants= argument, this Court still found that Rule 55.03(a) allowed the signature to be added to the motion. Such ruling was recently explained by this Court, which stated:

> the specific holding of *Tooley* is that under Rule 55.03(a), movants have the opportunity to correct omission of a signature. Rule 55.03(a) applies where the dismissal occurs within the original 90-day filing period, as in *Tooley*, or where it occurs later, as in this case.

Wallingford v. State, 131 S.W.3d 781, 782 (Mo. 2004). This Court in *Wallingford* held that Rule 55.03 allowed amendment of a post-conviction motion to add a signature and that such amendment related back to the date of the original filing of the motion.

Wallingford, Tooley and *Malone* all involved post-conviction motions, which are required to be filed within a certain time period and such time period has been held to be jurisdictional. Despite the jurisdictional nature of such time period, this Court has held that Rule 55.03 allows an amendment to add a necessary signature to such motions even after the time period for filing the motions has expired. *Wallingford*, 131 S.W.3d at 782. Under such holding, Rule 55.03 would likewise allow the amendment of the Petition in this case to add the signature of Plaintiffs= Missouri counsel with such amendment relating back to the date the Petition was originally filed.

Defense counsel admitted during oral argument in the Court of Appeals that the Petition could have been amended to correct the deficiency if the statute of limitations was not involved. However, the statute of limitations does not affect the right to amend because Rule 55.33(c) allows an amendment to relate back to the date of the original pleading if no new claims are asserted.

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Supreme Court Rule 55.33(c). As a result, if the Petition can be amended to correct the deficiency, such amended pleading would be identical to the original except for the addition of the signature of a Missouri attorney. Rule 55.33(c) would allow the Amended Petition to relate back to the date of the original Petition which was admittedly filed within the statute of limitations.

The trial court=s failure to grant the Motion for Leave to Amend Petition by Interlineation, under the facts of this case, subverted rather than furthered justice in this matter. Such failure constituted Aan obvious and palpable abuse of discretion.@ *Manzer v. Sanchez*, 985 S.W.2d 936, 939 (Mo.App.E.D. 1999). This Court should therefore reverse and remand with instructions to grant Plaintiffs= motion.

III. The Trial Court Erred in Granting Summary Judgment to Defendants Based on the Statute of Limitations, Because Defendants Waived the Affirmative Defense of the Statute of Limitations, In That the Defendants= Answers Failed to Specify the Particular Statute of Limitations Upon Which Defendants Rely as Required by Rule 55.08.

A. Standard of Review

This is an appeal from the granting of summary judgment. This Court has explained the standard of review in such cases as follows:

> When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered. [Citations omitted]. Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. [Citations omitted]. We accord the non-movant the benefit of all reasonable inferences from the record. [Citation omitted].
>
> Our review is essentially de novo. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. [Citation omitted]. The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the record submitted and the

> law, an appellate court need not defer to the trial court's order granting summary judgment. [Citation omitted].

ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, 376 (Mo.banc 1993).

Summary judgment is only proper if it is shown Athat there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.@ Supreme Court Rule 74.04(c)(6). When a defending party is seeking summary judgment, there are three possible methods for making the required showing:

> a "defending party" may establish a right to judgment by showing (1) facts that negate any one of the claimant's elements facts, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's *properly-pleaded affirmative defense*.

ITT Commercial Finance Corp., 854 S.W.2d at 381 (emphasis added). Defendants sought summary judgment in this case based on the third method.

B. Defendants Waived the Defense of the Statute of Limitations

In deciding this Point, there are two factors that this Court needs to consider. The first factor is that it is undisputed that Plaintiffs= Petition was filed within even the one-year Kentucky statute of limitations. (Legal File, p. 61, 69). The basis upon which Defendants rely on the statute of limitations defense is not the time the Petition was filed but the failure to file a motion for admission pro hac vice simultaneously. The second factor is that Defendants forfeited their right to rely on the statute of limitations defense. Defendants can not rely on the affirmative defense of the statute of limitations as a result of failing to plead a specific statute of limitations in their answers. Thus, Defendants were not entitled to summary judgment as a matter of law.

Both motions for summary judgment were based on the statute of limitations. The Thunder Defendants= Motion stated Athis defendant [sic] is entitled to judgment because plaintiffs= action is time barred by the applicable one year statute of limitations.@ (Legal File, p. 55). This was confirmed by the Thunder Defendants= Suggestions which stated AThe basis of this Motion for Summary Judgment is that the Plaintiff=s [sic] cause of action is time barred.@ (Legal File, p. 58). The American Air Defendants= Suggestions likewise stated AIn order for a cause of action to be sustainable it must be commenced with [sic] the applicable statute of limitations@, (Legal File, p. 69), and Ano valid Petition was filed within the statute of limitations.@ (Legal File, p. 73-74).

Supreme Court Rule 55.08 provides that:

> In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including . . . statute of limitations . . . . A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance.

Supreme Court Rule 55.08. This Court has explained:

> "An affirmative defense is asserted by the **pleading of additional facts** not necessary to support a plaintiff's case which serve to avoid the defendants' legal responsibility even though plaintiffs' [sic] allegations are sustained by the evidence." *Reinecke v. Kleinheider*, 804 S.W.2d 838, 841 (Mo. App. 1991). [Emphasis added.] Bare legal conclusions, . . . fail to inform the plaintiff of the facts relied on and, therefore, fail to further the purposes protected by Rule 55.08.

ITT Commercial Finance Corp., 854 S.W.2d at 383. AThus, the rules contemplate that the factual basis for defenses be set out in the same manner as is required for pleading of claims.@ *ITT Commercial Finance Corp.*, 854 S.W.2d at 384.

In the context of the affirmative defense that the action is barred by the statute of limitations, the above rules have been held to require the pleading of the specific statute the defendant claims is applicable.

> A party wishing to avail himself of the affirmative defense of limitations must plead the particular statute on which he relies. [Citation omitted]. Merely pleading that the "cause of action is barred by the Kansas statute of limitations," as

was pled in this case, is not sufficient to raise the statute of limitations defense. [Citation omitted]. Because a defendant may obtain summary judgment on a "*properly-pleaded* affirmative defense," *ITT*, 854 S.W.2d at 381 (we added the emphasis), Day and Day Advertising would have been justified in arguing that deVries, Jones, and the firm were not entitled to summary judgment on the defense of limitations.

Day v. DeVries and Assoc., P.C., 98 S.W.3d 92, 95 (Mo.App.W.D. 2003); *see also Tudor v. Tudor*, 617 S.W.2d 610, 613 (Mo.App.S.D. 1981); *Southwestern Bell Telephone Co. v. Buie*, 758 S.W.2d 157, 161 (Mo.App.E.D. 1988).

Likewise, an affirmative defenses cannot be raised for the first time in response to a motion for summary judgment. *See Chouteau Auto Mart, Inc. v. First Bank of Missouri*, 148 S.W.3d 17, 26 (Mo.App.W.D. 2004); *State ex rel. Nixon v. Consumer Automotive Resources, Inc.*, 882 S.W.2d 717, 720-21 (Mo.App.E.D. 1994). The Court in *Chouteau Auto Mart, Inc.* explained:

To be entitled to summary judgment, Chouteau bears the burden of negating all properly pled affirmative defenses. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 381. Rule 55.08 requires that all applicable affirmative defenses be pled in the responsive pleadings along with "a short and plain statement of the facts showing that the pleader is entitled to the defense," [*26] or else it will be considered generally waived. *Holdener*, 971 S.W.2d at 950. The Bank did not plead the

affirmative defense of apparent authority in its answer and cross-claim to Chouteau's first amended petition.

Chouteau Auto Mart, Inc., 148 S.W.3d at 25-26. The Court of Appeals then stated and held:

> Chouteau argues that due to this omission, the Bank's affirmative defense of apparent authority is thereby waived. The Bank argues in response that the issue of Thompson's apparent authority was raised several times in responses to a few of the numerous motions for summary judgment filed by Chouteau throughout the progression of this case and, as a result, the pleadings should be deemed amended. Raising an affirmative defense for the first time in a response to a motion for summary judgment is, however, not sufficient, *See State ex rel. Nixon v. Consumer Automotive Resources, Inc.*, 882 S.W.2d 717, 721 (Mo. App. 1994), and Chouteau did object at the summary judgment motion hearing to the affirmative defense as not being properly pled.
>
> . . . The Bank did not include the affirmative defense of apparent authority in responsive pleadings, and it did not seek leave of the court to amend the pleadings. This court will not, therefore, reach the merits of the affirmative defense of apparent authority.

Chouteau Auto Mart, Inc., 148 S.W.3d at 26.

Additionally, a party is only entitled to judgment based on issues raised in the pleadings. APleadings present, define, and isolate the issues, so that the trial court and all

parties have notice of the issues. [Citations omitted]. The relief awarded in a judgment is limited to that sought by the pleadings.@ *Norman v. Wright*, 100 S.W.3d 783, 786 (Mo. 2003). In the absence of a properly pled affirmative defense, the issue of the statute of limitations is simply not before the court and judgment based on such issue is improper.

In the present case, the Thunder Defendants= Answer provided only:

> Plaintiffs= claims are barred by the applicable statue [sic] of limitations; plaintiffs have failed to mitigate their damages.

(Legal File, p. 53, & 13). Likewise, the American Air Defendants pled only:

> that this action is barred, in whole or in part, by the applicable statutes of limitation and statutes of repose.

(Legal File, p. 30, & 22; p. 36, & 23; p. 43, & 23). The Thunder Defendants did not even cite a specific statute of limitations in their Motion for Summary Judgment. (Legal File, p. 55-56). The first document filed in this case citing the Kentucky statute of limitations found in K.R.S. ' 413.140 was the Suggestions in Support filed by the Thunder Defendants. (Legal File, p. 58, 61). The American Air Defendants first specified such statute, citing the Kentucky statute of limitations found in Ky. Rev. Stat. Ann. ' 413.140(1)(a), in their Motion for Summary Judgment filed ten (10) days later. (Legal File, p. 65, 66).

AA party wishing to avail himself of the affirmative defense of limitations must plead the particular statute on which he relies.@ *Day*, 98 S.W.3d at 95; *see also Tudor*,

617 S.W.2d at 613; *Southwestern Bell Telephone Co.*, 758 S.W.2d at 161. The bare assertion that Plaintiffs= claims are barred Aby the applicable statutes of limitation@ or Aby the applicable statue [sic] of limitations@ fails to properly plead such affirmative defense as required by Rule 55.08. As a result, Defendants failed to show Athat there is no genuine dispute as to the existence of each of the facts necessary to support the movant's *properly-pleaded affirmative defense*.@ *ITT Commercial Finance Corp.*, 854 S.W.2d at 381 (emphasis added). In the absence of such a showing, Defendants were not entitled to summary judgment.

Defendants do not claim that they pled the statute of limitations with particularity in their Answers or that their general allegations constituted Aa short and plain statement of the facts@ as required by Rule 55.08. Defendants all argue that the affirmative defense of the statute of limitations is properly raised if it is pled with particularity in a motion for summary judgment. (Thunder Defendants= Brief, p. 19; American Air Defendants= Brief, p. 29). The problem with such argument is that it ignores the plain requirements of Rule 55.08 and this Court=s holding in *ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993).

Defendants were only entitled to summary judgment on the basis of a A*properly-pleaded affirmative defense*.@ *ITT Commercial Finance Corp.*, 854 S.W.2d at 381 (emphasis added); *see also Day*, 98 S.W.3d at 95. Allowing a defendant to cite the specific statute of limitations for the first time in a motion for summary judgment is the

equivalent of allowing the defendant to cite the specific statute of limitations for the first time at trial. Missouri law says that AA party wishing to avail himself of the affirmative defense of limitations must plead the particular statute on which he relies.@ *Day*, 98 S.W.3d at 95. This Court recently confirmed that AAffirmative defenses must be pleaded and proved.@ *Norman v. Wright*, 100 S.W.3d 783, 785 (Mo. 2003). This Court then explained:

> Pleadings present, define, and isolate the issues, so that the trial court and all parties have notice of the issues. [Citations omitted]. The relief awarded in a judgment is limited to that sought by the pleadings.

Norman, 100 S.W.3d at 786. The Defendants= answers did not include the properly pled affirmative defense of the statute of limitations. As a result, a judgment, summary or otherwise, based on that defense was improper.

Defendants suggested to the Circuit Court that the statute of limitations defense is properly raised if the particular statute is referenced in a motion for summary judgment, citing *Johnson v. Vee Jay Cement*, 77 S.W.3d 84 (Mo.App.E.D. 2002), *Grady v. Amrep, Inc.*, 139 S.W.3d 585 (Mo.App.E.D. 2004), *Alvarado v. H&R Block, Inc.*, 24 S.W.3d 236 (Mo.App.W.D. 2000), *Rose v. City of Riverside*, 827 S.W.2d 737 (Mo.App.W.D. 1992), and *Armoneit v. Ezell*, 59 S.W.3d 628 (Mo.App.E.D. 2001). (Legal File, p. 115, 117, 123, 124). Such cases are either distinguishable or simply do not support the Defendants= arguments.

Johnson v. Vee Jay Cement is distinguishable because it involved a motion to dismiss rather than a motion for summary judgment. *Johnson*, 77 S.W.3d at 86. The Court noted that the defense of the statute of limitations can properly be raised by a motion to dismiss. *Johnson*, 77 S.W.3d at 87. In contrast, a motion for summary judgment must be based on a *properly pled* affirmative defense. *ITT Commercial Finance Corp.*, 854 S.W.2d at 381. In addition, there is no indication in *Johnson* that the plaintiffs raised the issue of waiver of such affirmative defense in the trial court. The only argument cited by the Court of Appeals as made by the plaintiffs in the trial court was that a ten year statute of limitations applied. *Johnson*, 77 S.W.3d at 87.

While *Grady v. Amrep, Inc.* did involve a motion for summary judgment, the plaintiff failed to timely raise the issue of the defendant=s waiver of the statute of limitations defense. In *Grady*, the defendant=s answer did not specify the particular statute of limitations. *Grady*, 139 S.W.3d at 590. The defendant did specify the particular statute in its suggestions in support of its motion for summary judgment. *Grady*, 139 S.W.3d at 590. However, the plaintiff=s response to the motion for summary judgment did not raise the issue of waiver. The Court noted that

> Amrep's motion for summary judgment was granted on April 21, 1998. On May 20, 1998, Plaintiff filed a motion to reconsider, which raised *for the first time* the argument that Amrep did not properly assert the statute of limitations defense in its answer or motion for summary judgment.

Grady, 139 S.W.3d at 590 (emphasis added). In contrast, Plaintiffs in the case before this Court asserted in response to both of the motions for summary judgment that the Defendants were not entitled to summary judgment because they failed to properly plead the statute of limitations. Therefore, *Grady* is distinguishable because the plaintiff in that case failed to timely raise the issue of waiver. Just as the statute of limitations defense can be waived, the issue of such waiver can itself be waived. That is exactly what happened in *Grady*.

Alvarado v. H&R Block, Inc. also involves the granting of a motion for summary judgment but is again distinguishable. In that case, the Court recognized that AA party desiring to avail himself of the statute of limitations must plead the particular statute upon which he relies.@ *Alvarado,* 24 S.W.3d at 241. The Court then explained the facts as follows:

> The first pleading filed by Block was its motion to dismiss the negligence claims. Block's motion asserted that the Alvarado's "claims fail because they are barred under Missouri's Borrowing Statute, set forth at ' 516.190, RSMo (1996)." Block thereafter, in its answer filed on May 30, 1997, and its answer to the first amended petition filed on April 14, 1998, asserted that the Alvarado's claims were "barred by the applicable statute of limitations." Block filed its amended answer to the first amended petition on January 22, 1999, asserting that the Alvarado's claims were "barred by '' 338 and 339 of the California Code of Civil Procedure and/or Texas Civil Practice and Remedies Code 16.003(1)."

> Block pleaded the Missouri Borrowing statute in its initial responsive pleading, the motion to dismiss. Thereafter, Block pleaded the respective statute of limitations provisions from California and Texas in its amended answer to the first amended petition. Block, therefore, sufficiently pleaded its statute of limitations defense.

Alvarado, 24 S.W.3d at 241. Thus it is clear that the defendant in *Alvarado* pled the specific statute of limitations in an amended answer prior to filing its motion for summary judgment. In addition, there is no indication in *Alvarado* that the plaintiff raised in the trial court the issue of whether the statute of limitations was properly pled.

In contrast to *Alvarado,* the answers filed by the Defendants in the case before this Court did not cite a specific statute of limitations. Further, none of the Defendants sought leave to file an amended answer to correct such deficiency. As a result, at no time have any of the Defendants in this case affirmatively pled a specific statute of limitations as required by Rule 55.08.

Rose v. City of Riverside does not support the argument that the specific statute of limitations only needs to be cited in a motion for summary judgment as opposed to the defendant=s answer. *Rose* was decided on the basis that if the case was remanded to the trial court, it would be an abuse of discretion to refuse to allow the defendant to amend its answer to assert the specific statute of limitations. *Rose*, 827 S.W.2d at 739. As a result, the Court decided Ait would serve no useful purpose to remand the case to the trial court.@ *Rose*, 827 S.W.2d at 739.

Armoneit v. Ezell followed the holding in *Rose* that it would be an abuse of discretion in that particular case to not allow the defendant to amend his answer. *Armoneit*, 59 S.W.3d 634. In *Armoneit*, the petition was filed on August 26, 1999, and summary judgment was granted on March 8, 2000, based on the statute of limitations. *Armoneit*, 59 S.W.3d at 630-31. As a result, it appears that the statute of limitations defense, while not properly pled, was raised with particularity very early in the case.

In contrast to *Rose* and *Armoneit*, there are several factors in the present case that would enable a trial court to deny any motion to amend filed by the Defendants if this Court reverses and remands. First, significantly more time elapsed prior to the granting of summary judgment in the present case than did in *Armoneit*. In contrast to the slightly more than six (6) months that elapsed in *Armoneit*, nearly fifteen (15) months elapsed between the filing of Plaintiffs= Petition for Damages and the Judgment. The first Motion for Summary Judgment was not filed until ten (10) months after the Petition for Damages. As a result, the Defendants in this action delayed a much greater period of time before citing a specific statute of limitations.

Second, Defendants had ample opportunity to seek leave to amend their answers to cite the specific statute of limitations prior to the trial court ruling on the summary judgment motions, yet failed to do so. Plaintiffs= responses and suggestions in opposition to the summary judgment motions were filed on August 30, 2004, and raised the issue of waiver. (Legal File, p. 3-4, 79, 84-85, 91-93, 102-04). In addition, the Thunder Defendants cited *Rose* and *Armoneit* in their reply suggestions filed on

September 17, 2004. (Legal File, p. 124). Thus, Defendants were aware that their answers did not properly plead the affirmative defense of the statute of limitations. Despite having had ample opportunity to seek leave to amend prior to the trial court=s ruling, the Defendants all chose to stand on their answers, answers that did not include a citation to the specific statute upon which they relied. Due to that choice, the trial court would be well within its discretion to deny Defendants leave to amend their answers if this Court reverses and remands, as it should.

In addition, there is no indication in either *Rose* or *Armoneit* that the plaintiff raised in the trial court the issue of the defendant=s failure to properly plead the statute of limitations. As a result, it appears that the plaintiffs in those cases failed to timely raise the issue of waiver. In contrast, Plaintiffs raised such issue in the trial court prior to any ruling on the motions for summary judgment. Therefore, *Rose* and *Armoneit* are simply inapplicable since Defendants had an opportunity to seek leave to amend after the issue of waiver was raised in the trial court. To hold otherwise would be to assume Defendants are entitled to relief they purposely chose not to seek.

Denying Defendants relief under the statute of limitations is especially appropriate when Defendants have obtained all the protection the statute of limitations was intended to provide. In contrast to the cases cited by Defendants in the trial court, Plaintiffs= Petition in the present case was filed within the statutory period. As already stated, it is undisputed that Plaintiffs= Petition was timely filed. (Legal File, p. 61, 69). Defendants

want to claim the protection of the statute of limitations, despite failing to properly plead it, based on a technical problem regarding compliance with Rule 9.03.

> Statutes of limitation were never intended to be used as swords. Rather, they are shields, primarily designed to assure fairness to defendants by prohibiting stale claims, those where evidence may no longer be in existence and witnesses are harder to find, all of which tends to undermine the truth-finding process. [Citation omitted]. However, "where a plaintiff pleads a specific set of facts in trying to enforce a claim within the statutory period, and defendant had notice of such a claim from the date of its filing, the reasons for statute of limitations cease to exist. . . ."

Mikesic v. Trinity Lutheran Hospital, 980 S.W.2d 68, 73 (MoApp.W.D. 1998). Since Plaintiffs= Petition was timely, the purpose of the statute of limitations was served and Defendants are not entitled to relief.

Defendants are seeking to eviscerate the requirements in Rule 55.08 for pleading affirmative defenses as well as this Court=s clear directive that a defendant show Athat there is no genuine dispute as to the existence of each of the facts necessary to support the movant's *properly-pleaded* affirmative defense@, *ITT Commercial Finance Corp.*, 854 S.W.2d at 381 (emphasis added), in order to obtain summary judgment. A Aparty desiring to avail himself of the statute of limitations must plead the particular statute upon which he relies.@ *Southwestern Bell Telephone Co. v. Buie*, 758 S.W.2d 157, 161 (Mo.App.E.D. 1988). Plaintiffs simply request that such requirements be enforced.

Defendants failed to properly plead the statute of limitations in their affirmative defenses and therefore were not entitled to summary judgment. This Court should reverse the trial court=s Judgment and remand for further proceedings.

CONCLUSION

Defendants admit that Plaintiffs= Petition was filed within the statutory period. Liz Shepherd was admitted pro hac vice eight (8) months prior to Defendants raising the issue in their summary judgment motions. In response to Defendants= motions, Plaintiffs promptly sought to amend their Petition to add the signature of a Missouri attorney. Despite notice that their respective answers did not properly plead the statute of limitations, Defendants failed to seek leave to amend their answers.

Under these facts, the failure to comply with Supreme Court Rule 9.03 at the time the Petition was filed does not support summary judgment for Defendants. Supreme Court Rule 55.03(a) provides for an opportunity to correct the lack of a proper signature. Plaintiffs corrected this deficiency by filing a Motion for Admission Pro Hac Vice, which was granted shortly after being filed. Upon notice that such action might not have been sufficient, Plaintiffs sought leave to amend the Petition to add the signature of Spencer Farris, the Missouri attorney who actually signed and filed the Petition. Such amendment was proper under Rule 55.03(a) and should have been allowed by the trial court. As a result, Defendants were not entitled to summary judgment as a matter of law.

Additionally, Defendants waived the affirmative defense of the statute of limitations by failing to plead the particular statute in their respective answers. Additionally, Defendants failed to seek leave to amend their answers after having notice of the deficiency of their pled affirmative defenses. As a result, regardless of any failure to comply with Rule 9.03, Defendants were not entitled to summary judgment.

Plaintiffs therefore request that this Court issue its Order reversing the trial court=s Judgment granting summary judgment in favor of Defendants/Respondents and ordering this case remanded to the trial court with directions to allow Plaintiffs to amend their Petition to add the signature of Spencer Farris.

Respectfully Submitted,

DOLT, THOMPSON, SHEPHERD
& KINNEY, P.S.C.

By: _____

Liz J. Shepherd
Admitted Pro Hac Vice
DOLT, THOMPSON, SHEPHERD
& KINNEY, P.S.C.
310 Starks Building
455 South Fourth Avenue
Louisville, KY 40202
(502) 587-6554
(502) 587-0001 FAX

_____

Richard L. Rollings, Jr.
Missouri Bar No. 40650
RICHARD L. ROLLINGS, JR.
43 Lakeshire Dr.
Camdenton, MO 65020
(417) 861-2199
(877) 871-0299 FAX
Rick@RRollings.com

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of Appellants= Substitute Brief together with a copy of the floppy disk required by Supreme Court Rule 84.06(g) on the following counsel of record by depositing in the United States Mail, postage prepaid, on this 12th day of December, 2005.

John W. Cowden
Andrew Protzman
Baker Sterchi Cowden & Rice, L.L.C.
2400 Pershing Rd., Suite 500
Kansas City, MO 64108

Robert W. Cotter
Patrick J. Kaine
Dysart Taylor Lay Cotter & McMonigle, P.C.
4420 Madison Ave.
Kansas City, MO 64111-3407

_____
Richard L. Rollings, Jr.

RULE 84.06(c) AND (g) CERTIFICATE

I hereby certify that this Appellants= Substitute Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and that the entire brief contains 14,171 words. I hereby further certify that the floppy disks containing the brief and filed with the Court and served on the Attorneys for Respondents were scanned for viruses by an anti-virus program and are virus-free according to such program.

_____

Richard L. Rollings, Jr.
Missouri Bar No. 40650
RICHARD L. ROLLINGS, JR.
43 Lakeshire Dr.
Camdenton, MO 65020
(417) 861-2199
(877) 871-0299 FAX
Rick@RRollings.com

APPENDIX

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