Appeal No. SC 87206

IN THE SUPREME COURT OF MISSOURI

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

SUBSTITUTE BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

1. This is a personal injury action arising out of an aircraft accident that occurred in Lexington, Kentucky, on August, 30, 2002. (L.F. 7-20).

2. Plaintiff, James Hensel, was the co-pilot on the subject aircraft. Against these defendants, the Petition alleges a count of product liability. (L.F. 7-20).

3. The Petition in the instant case was filed on September 2, 2003. (L.F. 7).

4. It was not signed in the name of an attorney licensed to practice in Missouri, nor was it signed by the plaintiffs acting *pro se*. (L.F. 20).

5. These Defendants raised the statute of limitations as an affirmative defense. (L.F. 6-7).

6. On October 27, 2003, a Missouri attorney entered an appearance on behalf of plaintiffs. Also, on October 27, 2003 a Motion for Admission *Pro Hac Vice* was filed on behalf of the Kentucky attorney in whose name the Petition was signed. An order granting the Motion for Admission *Pro Hac Vice* was entered on November 4, 2003. (L.F. 2, 21, 46).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BASED ON THE STATUTE OF LIMITATIONS.

A. STATEMENT OF THE CASE

This is a personal injury action arising out of an aircraft accident that occurred in Lexington, Kentucky, on August 30, 2002. Under the Missouri Borrowing Statute, because the injury occurred in Kentucky, Kentucky's one-year statute of limitation applies to this action. The Petition was filed on the last day before Kentucky's one-year statute of limitation expired.[1] However, the Petition was not signed in the name of an attorney licensed to practice law in Missouri nor was it signed by the plaintiffs acting *pro se*. Accordingly, under Missouri law, the Petition is deemed a nullity. Thus, because a lawsuit was not properly filed within Kentucky's one-year statute of limitations, plaintiffs' cause of action is time barred. The trial court granted the Thunder defendants' motion for summary judgment on this issue and plaintiffs now appeal.

B. SUMMARY JUDGMENT STANDARDS

Summary Judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Daffron v. McDonnell Douglas Corp., 874 S.W.2d 482, 483 (Mo.App. 1994). Rule 74.04, Missouri Rules of Civil Procedure. All evidence is viewed

[1] August 30, 2003, one year from the date of the accident, fell on a Saturday. September 1, 2003 was the Labor Day Holiday. Therefore, September 2, 2003 was the last day before the expiration of the one-year Kentucky Statute of Limitations.

in the light most favorable to the non-moving party and the 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. ITT Commercial Finance Corp. v. Mid-Am Marine Supply Corp. 854 S.W.2d 371, 376 (Mo. banc 1993).

When the movant is a "defending party," it is not necessary to controvert each element of the non-movant's claim to establish a right to summary judgment. Id. It is sufficient if a movant shows either: (1) facts negating any one of the claimant's elements, (2) shows that the party opposing the motion has presented insufficient evidence to allow the finding of 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 a properly pleaded affirmative defense. Id. Once the movant has established a right to judgment as a matter of law, the non-movant must show a genuine dispute as to the material facts. Id.

C. DISCUSSION

1. Missouri Borrowing Statute

Missouri's Statutes of Limitations include a borrowing statute. It provides that "whenever a cause of action has been fully barred by the laws of the State . . . in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the Courts of this State." 516.190 R.S.Mo. The purpose of this statute is to "prevent forum shopping for a statute of limitations, thereby preventing a plaintiff from gaining more time by simply suing in a different forum than where the cause of action actually

accrued." Harris-Layboy v. Blessing Hospital, Inc., 972 S.W.2d 522, 524 (Mo.App. 1998).

The effect of Missouri's borrowing statute is "to adopt and make as Missouri's own" the statute of limitations where a cause of action originates. Bowling v. S.S. Kresge Company, 431 S.W.2d 191, 193 (Mo. 1968). Missouri's borrowing statute preempts any conflict of laws questions. Thompson by Thompson v. Crawford, 833 S.W.2d 868, 872 (Mo. banc 1992). The term "originated," as used in Section 516.190, has been determined to have the same meaning as the term "accrued," as used in Section 516.100. Thompson by Thompson v. Crawford, s*upra* at 871. Section 516.100 defines "accrued" as "when the damage resulting there from is sustained and is capable of ascertainment . . ."

Damage is sustained and capable of ascertainment "where it can be discovered or made known, not when the plaintiff actually discovers the injury or the wrongful conduct." Alvarado v. H&R Block, Inc., 24 S.W.3d 236, 242 (Mo.App. 2000). Under this objective test, a cause of action accrues "when an injury is complete as a legal injury." Nettles v. American Telephone and Telegraph Company, 55 F.3d 1358, 1362 (8th Cir. 1995). A tort claim accrues where the harm to the plaintiff is discovered. *See, e.g.,* Wayne v. Lederle Laboratories, 729 F. Supp. 662, 666 (W.D.Mo. 1989). Many Missouri cases have held that a foreign state's statute of limitation applies in personal injury actions where the accident occurred in a foreign state. *See, e.g.,* Davis v. Liberty Mut. Ins. Co., 55 F.3d 1365, 1367 (8th Cir. 1995); McIndoo v. Burnett, 494 F.2d 1311 (8th

Cir. 1974); Teel v. American Steel Foundries, 529 F.Supp. 337, 340-41 (E.D.Mo. 1981); Dorris v. McLanahan, 725 S.W.2d 870, 871 (Mo. banc 1987); Trzecki v. Gruenewald, 532 S.W.2d 209, 211-12 (Mo. banc 1976); Girth v. Beaty Grocery Co., 407 S.W.2d 881 (Mo. 1966); Wallace v. Washington, 863 S.W.2d 373, 374 (Mo.App.W.D. 1993); Allen v. Pittman, 749 S.W.2d 19, 20-21 (Mo.App.S.D. 1988); Richardson v. Watkins Bros. Mem. Chapels, Inc., 527 S.W.2d 19 (Mo.App.W.D. 1975).

Under the statements of the law set forth above, because the accident and injury occurred in Kentucky, Kentucky's statute of limitations will apply. Under K.R.S. § 413.140, the statute of limitations applicable to this case is one year. *See,* Hazel v. General Motors, 863 F. Supp. 435 (W.D.Ky. 1994).

2. Nullity Rule

The accident occurred on August 30, 2002. The Petition in this case was filed on September 2, 2002. Even though the one-year statute would have appeared to expire on August 30, 2003, that day fell on a legal holiday and September 2, 2003 was the next day after the legal holiday on which the Petition could be filed. Accordingly, the Petition seemingly was filed within the applicable one-year statute of limitations. However, the Petition was not signed in the name of an attorney licensed to practice in Missouri, nor was it signed by the Plaintiff acting *pro se*. The Petition was signed with a signature purporting to be that of an attorney licensed to practice in Kentucky but who had not, as of September 2, 2003, the date the Petition was filed, submitted a motion for admission to practice *pro hac vice* in compliance with Rule 9.03. While plaintiffs claim that the

petition was signed on plaintiffs' Kentucky attorney's behalf by a Missouri attorney, plaintiffs do not argue that this alters the analysis in any way. In fact, plaintiffs appear to concede that the filing of the petition in this case on September 2, 2003 was in violation of Rule 9.03 and constituted the unauthorized practice of law.

Under Missouri law, proceedings by a person unauthorized to practice law are a "nullity" and hence may properly be dismissed. Strong v. Gilster Mary Lee Corp., 23 S.W.3d 234, 241 (Mo.App.E.D. 2000). A non-resident attorney who is unlicensed to practice in Missouri and who has also failed to comply with the requirements of Rule 9.03 in obtaining permission to appear in a given case *pro hac vice* is unauthorized to file any pleadings in the case. Id. at 240. Pleadings filed in a civil matter by a non-Missouri licensed attorney renders his or her actions a nullity as an attorney on behalf of his or her client. Id. at 241. *See also,* Wright v. State ex. rel. Patchin, 994 S.W.2d 100 (Mo.App.S.D. 1999). While the opinion in Strong acknowledges exceptions to the general rule in rare cases, a review of Mikesic v. Trinity Lutheran Hospital, 980 S.W.2d 68 (Mo.App. 1998), the case cited as an example of such an exception, shows that this exception would not apply to this case.

Consistent with Missouri law, cases from other jurisdictions have concluded that the filing of a petition by one not licensed to practice in the jurisdiction does not toll the running of the statute of limitations. Preston v. University of Arkansas for Medical Sciences, 128 S.W.3d 430 (Ark. 2003) and Black v. Baptist Medical Center, 575 So.2d 1087 (Ala. 1991).

Plaintiffs argue the subsequent Entry of Appearance on their behalf by an attorney licensed to practice in Missouri and the filing of a Motion for Admission *Pro Hac Vice* on October 27, 2003, nearly two months after the Petition was filed, and the Order granting the Motion for Admission *Pro Hac Vice* of the Kentucky attorney on November 4, 2003, remedy the defective filing of September 2, 2003. However, the Court of Appeals soundly rejected such an argument in the *Strong* case. It held that Rule 9.03 governing motions for admission *pro hac vice* "provides no authority either expressed or implied, for a retroactive filing." Strong, 23 S.W.3d at 241.

In Davenport v. Lee, 72 S.W.3d 85 (Ark. 2002), the Arkansas Supreme Court considered whether a wrongful death complaint filed by a person not licensed to practice law in Arkansas could be amended so as to relate back to the original filing date which was within the statute of limitations. The Supreme Court held that the complaint was a nullity and as such, never existed and, thus, an amended complaint cannot relate back to something that never existed. Accordingly, this case supports the conclusion that plaintiffs' cause of action is time barred under the applicable one-year statute of limitations.

3. Plaintiffs' Substitute Brief

The Thunder defendants have set forth above the facts and argument advanced to the trial court in support of their summary judgment motion. The Thunder defendants will now address the arguments raised in Plaintiffs' substitute brief.

In their first point, plaintiffs argue that the nullity rule should not apply to this case because Rule 9.03 does not mandate such a result. Further, plaintiffs suggest that the proper approach for dealing with the admitted violation of Rule 9.03 in this case is to treat the petition signed by an attorney not licensed to practice law in Missouri as an unsigned pleading which can be corrected under Rule 55.03(a). Plaintiffs' arguments are contrary to established Missouri precedent and afford no basis for reversal of the trial court's summary judgment.

First, plaintiffs are incorrect in their assertion that there is an open question as to the appropriate sanction for violation of Rule 9.03 governing the admission of out of state attorneys *pro hac vice*. The court in the Wright case cited above expressly addresses the issue.

> What is the penalty when a nonresident lawyer fails to comply with the filing and formal appearance of local counsel requirements of Rule 9.03…? The Carnes case, relied upon by the trial court, answers the question. It holds that failure by a nonresident lawyer to comply with Rule 9.03 renders his actions a nullity as an attorney on behalf of his client. Wright v. State ex rel. Patchin, 994 S.W.2d at 101-02.

Thus, it is incorrect for plaintiffs to suggest the trial court erred in granting summary based upon the nullity rule. Missouri Courts have clearly set forth that in Missouri the general rule is that the effect of a representative's unauthorized practice of law is to treat the actions taken by the representative as a nullity. Strong v. Gilster Mary Lee Corp., 23

S.W.3d at 241. Plaintiffs offer this Court no justification for deviating from the general rule, other than perhaps the fact that their attorney eventually filed a motion to appear *pro hac vice* approximately two months after the petition was filed. The court in Strong cited Mikesic v. Trinity Lutheran Hospital, 980 S.W.2d 68 (Mo.App.W.D. 1998) as an example of where a Missouri court found an exception to the nullity rule. However, plaintiffs make no attempt to draw analogies between this case and Mikesic that would support deviating from the general rule in this case.

Next, plaintiffs contend they can escape the effect of the nullity rule under Rule 55.03(a) which allows for correction of unsigned pleadings if done promptly. The provision of Rule 55.03(a) upon which plaintiffs rely applies to unsigned pleadings, not pleadings filed in violation of Rule 9.03. Plaintiffs cite no Missouri case, because there are none, that holds a pleading filed in violation of Rule 9.03 should be treated as an unsigned pleading.

Plaintiffs rely on cases applying Rule 55.03(a) to allow correction of unsigned pleadings. However, these cases have no application to the present case. This case involves the unauthorized practice of law in Missouri not the technical/clerical mistake of failing to sign a pleading. Plaintiffs' Kentucky and Missouri attorneys had the opportunity to file a petition signed by plaintiffs' Missouri attorney on the last day of the limitations period. They chose to file an admittedly unauthorized pleading in violation of Rule 9.03 instead. Rule 55.03(a) by its express terms allows for correction of "unsigned" filings. Plaintiffs' complaint was not unsigned and thus Rule 55.03(a) does not apply to

aid plaintiffs' argument. Plaintiffs' counsel's apparent failure to apprehend the significance of filing a pleading in violation of Rule 9.03 on September 2, 2003 continues in their brief where they state "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." Appellants' Substitute Brief, p. 24. Missouri cases which have adopted and implemented the nullity rule in cases involving the unauthorized practice of law demonstrate plaintiffs are simply wrong in their attempt to equate violation of Rule 9.03 with the technical defect of an unsigned pleading. Clearly, Missouri courts do and should treat the unauthorized practice of law differently from a clerical mistake.

Plaintiffs cite Operating Engineers Local 139 v. Rawson Plumbing, Inc., 130 F.Supp.2d 1022 (E.D.Wis. 2001) in support of their unsigned pleading argument. In that case the District Court treated an answer and counterclaim signed by a corporate officer who was not an attorney and filed on behalf of a corporate defendant as an unsigned pleading under Rule 11(a) F.R.C.P. There was not a statute of limitations question in Rawson and, thus, it is not particularly helpful in this discussion. The District Court acknowledged that the offending pleading was, in fact, signed but cited Kovilic Constru. Co. v. Missbrenner, 106 F.3d 768, 772 (7th Cir. 1997) for the proposition that a pleading signed by one without authority to do so could be treated as an unsigned pleading under Rule 11(a). Kovilic in no way supports the position that a pleading signed by one who has no authority to do so should be treated as an unsigned pleading under Rule 11(a).

The Seventh Circuit simply opined in dicta as to the results of that case if, for the sake of argument, it were to treat such a pleading as unsigned. Id. at 772.

Plaintiffs also rely on Save our Creeks v. City of Brooklyn Park, 699 N.W.2d 307, 310 (Minn. 2005). In this case, the Minnesota Supreme Court determined that a complaint signed and filed by a nonattorney on behalf of a corporate entity was not a legal nullity and thus could be corrected even after a statute of limitations had expired. The case is directly contrary to Reed v. Labor and Industrial Relations Comm., 789 S.W.2d 19, 23 (Mo. banc 1990) in which this Court held that filings by lay persons on behalf of a corporation are "null and void."

Plaintiffs cite to Becker v. Montgomery, 532 U.S. 757, 121 S.Ct. 1801, 149 L.Ed.2d 983 (2001). In this case, the Supreme Court simply applied Rule 11(a) F.R.C.P. to allow an inmate to correct an unsigned notice of appeal. The present case does not involve an unsigned pleading, thus Becker offers no support for plaintiffs' position. It does not address pleadings that constitute the unauthorized practice of law.

The Missouri cases plaintiffs cite in support of their unsigned pleading theory do not support plaintiffs' position. Both Tooley v. State, 20 S.W.3d 519 (Mo. banc 2000) and Wallingford v. State, 131 S.W.3d 781 (Mo. banc 2004) involved pro se applications for post conviction relief. In Tooley, this Court determined that an unsigned motion for post-conviction relief was a nullity under prior precedent. However, it also held that under the express language of Rule 55.03(a), the unsigned pleading could be corrected. In Wallingford, this Court clarified that the correction of a timely filed motion for post-

conviction relief to add the required signature related back for timeliness purposes where the correction occurred after the 90 window for filing such motions had expired. Plaintiffs cite to Tooley and Wallingford in support of their argument that this Court can allow correction of their null and void petition. However, both Tooley and Wallingford involved true unsigned pleadings. The explicit language of Rule 55.03(a) allows correction only for "unsigned filing(s)." The present case does not involve an unsigned filing. It involves a filing made in violation of Rule 9.03 that constituted the unauthorized practice of law. Neither Tooley nor Wallingford support plaintiffs' attempt to treat their unauthorized pleadings as an unsigned pleading. The cases merely establish that in true cases involving unsigned pleadings, relief may be allowed under Rule 55.03(a).

The case of Drury Displays, Inc. v. Bd. of Adjustment of the City of St. Louis, 760 S.W.2d 112 (Mo. banc 1988) does not support plaintiffs' position. This case involved whether party seeking review of a board of adjustment decision could amend its petition to add the verification required by the applicable statute. This Court held it could add the required verification by amendment. The Drury Displays case, however, did not involve application of the nullity rule in cases involving the unauthorized practice of law.

Plaintiffs' arguments have been rejected in a number of other jurisdictions applying the Federal or state counterpart to Rule 55.03(a) in cases involving the unauthorized practice of law. In Black v. Ameritel Inns, Inc., 139 Idaho 511, 81 P.3d 416 (2003), the Idaho Supreme Court considered whether to allow an amendment to correct

an unauthorized pleading under Idaho Rule 11 which is substantially similar to Rule 55.03(a). In that case, plaintiffs were residents of the State of Washington. They hired a Washington attorney to prosecute a discrimination action against defendant in Idaho. The Washington attorney drafted the complaint, signed his clients' names followed by his initials and filed the complaint on the last day before the limitations period expired on the claims. The Idaho Supreme Court held the filing was in violation of Idaho Rule 11 because it was not signed either by plaintiffs or by an attorney licensed to practice law in Idaho. On the request to amend to relate back, the court held that Idaho Rule 11 was designed to correct a technical defect where a pleading is unsigned, but not the situation where a pleading was signed and filed in violation of Rule 11. Accordingly, the court did not allow the amendment and affirmed dismissal of the plaintiffs claims based upon the statute of limitations.

In Gonzales v. Wyatt, 158 F.3d 1016 (5th Cir. 1998), the Fifth Circuit determined that a §1983 complaint submitted by a nonlawyer could not be cured under Rule 11(a) to survive a statute of limitations defense. In this case, the complaint was prepared by a non-lawyer inmate and submitted to the clerk for filing without the plaintiff ever having seen, reviewed or approved it. The court stated

> When the unsigned pleading or other paper is tendered to the clerk for filing by the pro se party himself, that purpose of Rule 11a may be sufficiently fulfilled to allow relation back if the party with reasonable promptness thereafter signs and refiles the document. But where the

> document is tendered and signed by a nonlawyer on behalf of another, then there comes into play the underlying principle itself, namely that in federal court a party can represent himself or be represented by an attorney, but cannot be represented by a nonlawyer. Id. at 1021.

The court held that because plaintiff did nothing to ratify the complaint before the statute of limitations expired, it could not be amended to relate back under Rule 11(a) F.R.C.P. to survive the statute of limitations defense.

In Naimo v. Fleming, 95 Nev. 13, 588 P.2d 1025, the Supreme Court of Nevada upheld dismissal of a complaint filed in violation of NRCP 11, the Nevada rule equivalent of Rule 55.03(a). Out-of-state counsel signed the complaint and filed it in Nevada court but apparently did not serve defendants. Eighteen months later, plaintiff filed an amended complaint signed by a Nevada attorney. Defendants did not learn of the lawsuit until the amended complaint was filed. Further, the statute of limitation expired on the claims before the amended complaint was filed. The trial court dismissed plaintiff's claims upon defendants' motion finding that plaintiff's out-of-state counsel deliberately violated the rules governing signing of pleadings and admission of out-of-state attorneys "in an effort to keep their lawsuit viable but avoid the cost of associating Nevada counsel." Id. at 1026. The trial court also held the case should be dismissed as the statute of limitations had run prior to the filing of the amended complaint which was signed by the Nevada attorney. The Nevada Supreme Court affirmed dismissal of plaintiffs' claims.

In Safeway Stores, Inc. v. Maricopa County Superior Court, 19 Ariz.App. 210, 505 P.2d 1383 (1973) a complaint in a slip and fall case was signed by plaintiff's husband, a nonlawyer, and filed two days before the statute of limitations had expired. The Arizona Court of Appeals stated

> In our opinion that complaint was not sufficient to toll the statute of limitations, and in fact it had no legal significance. If the act of filing a complaint operates to toll the statute against a defendant, we do not think it is asking too much to insist that the plaint submit to the jurisdiction of the court by the same act. The complaint here did not do this. It was not signed by the plaintiff nor by a licensed attorney at law… Id. at 1385.

The Court of Appeals went on to hold that summary judgment on the statute of limitations defense was appropriate and that because no valid complaint was filed prior to expiration of the statute of limitations, there could be no relation back of a later filed complaint. Id. at 1386.

These cases, largely on all fours with the present case, have rejected efforts to cure unauthorized pleadings filed prior to expiration of the statute of limitations through the artifice of treating them as unsigned pleadings. The courts in these cases have found a distinction between a true unsigned pleading which they have held is a mere technical defect and a pleading that constitutes the unauthorized practice of law. Rule 55.03(a) and

its counterparts in other jurisdictions, the courts have held, do not allow correction of an unauthorized pleading to avoid the bar of the statute of limitations.

Plaintiffs needed to file their petition on or before September 2, 2003 to avoid the bar of the statute of limitations. Their Kentucky attorney obviously knew that to file the petition with hers as the only signature, she needed to obtain leave to practice *pro hac vice* pursuant to Rule 9.03 as she presented such a motion with her petition. When plaintiffs' attorneys learned on September 2, 2003 that they could not file the motion for admission *pro hac vice* because they had not paid the fee to obtain the required certificate from the Supreme Court, they were faced with a choice. They could file the petition in violation of Rule 9.03 and hope for the best. Or, they 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. Why plaintiffs' attorneys chose to act as they did is not clear. They now admit that it was a mistake. What is clear, however, is 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.

Plaintiffs claim that enforcing the statute of limitations in this case based on a technicality would be unfair. Statutes of limitations are by their very nature arbitrary, and sometimes seemingly unfair. Granting summary judgment based on the statute of limitations in this case would be no different than granting a summary judgment based on the statute of limitations in a case where the petition was filed one day late, also a case

where little prejudice can be shown. As the Alabama Supreme Court succinctly stated in Black v. Baptist Medical Center, 575 So.2d 1087, 1089:

> Finally, Black argues that this case should not have been disposed of because his attorney failed to adhere to "a minor, technical, local rule of court." He contends that such a result would be unfair. While this Court sympathizes with Black's predicament, we do not agree with this characterization of Rule VII. The regulation of the admission of attorneys to practice before Alabama Courts is a matter of great concern to the state and to this Court. Rules effecting such regulation cannot be considered minor. In addition, Rule VII is neither hyper-technical nor overburdensome; it sets out a fair procedure for ensuring that only properly qualified attorneys in good standing represent clients in our Courts.

Missouri courts have also expressed similar sentiments with regard to the unauthorized practice of law in Missouri. *See* Strong v. Gilster Mary Lee Corp., 23 S.W.3d 234, 239-241. This is the very basis for application of the "nullity rule." *See also* State ex rel. Mather v. Carnes, 551 S.W.2d 272, 288 (Mo.App. 1977) ("That the question of professional qualification to act as counsel for a party to the litigation was not raised by the plaintiff until his appeal and brief does not diminish the power of a court to act, even on judicial notice alone, **on a matter so vital to the public protection**. (emphasis added)").

Because the plaintiffs have offered no justification for deviating from the nullity rule, this Court should affirm the trial court's summary judgment.

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DID NOT ABUSE ITS DISCRETION BY NOT GRANTING PLAINTIFFS' MOTION FOR LEAVE TO AMEND PETITION BY INTERLINEATION.

Plaintiffs second point relied on focuses on the trial court's failure to allow them to amend their petition to allow for their Missouri attorney to sign the petition. They contend that if leave to amend the petition were granted this would cure the defective pleading and allow them to avoid the bar of the statute of limitations.

Plaintiffs rely on Rule 55.33(a) and the standards for determining whether a trial court has abused its discretion in denying a motion to amend. *See* Manzer v. Sanchez, 985 S.W.2d 936, 939 (Mo.App.E.D. 1999). However, the Thunder defendants contend that the normal rules for determining whether the trial court abused its discretion in denying a motion to amend are not applicable here. Because the petition filed on September 2, 2003 was in violation of Rule 9.03, it is deemed a nullity. See Strong v. Gilster Mary Lee Corp., 23 S.W.3d 234, 241 (Mo.App.E.D. 2000) and Wright v. State ex rel. Patchin, 994 S.W.2d 100, 101-102 (Mo.App.S.D. 1999). Accordingly, there is no viable pleading that was filed prior to the expiration of the statute of limitations that can be amended. Accordingly, the trial court was simply without authority to grant the motion to amend.

In Davenport v. Lee, 72 S.W.3d 85 (Ark. 2002), the Arkansas Supreme Court considered whether a wrongful death complaint filed by a person not licensed to practice law in Arkansas could be amended so as to relate back to the original filing date which was within the statute of limitations. The Arkansas Supreme Court held that the complaint was a nullity and as such, never existed and, thus, an amended complaint cannot relate back to something that never existed, nor can a nonexistent complaint be corrected. Id. at 94. Accordingly, this case supports the conclusion that the trial court did not err in rejecting plaintiffs' motion to amend.

III. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR DEFENDANTS BECAUSE DEFENDANTS DID NOT WAIVE THE STATUTE OF LIMITATIONS DEFENSE IN THAT THEY PLEADED SAME IN THEIR ANSWER AND IN THEIR SUMMARY JUDGMENT MOTION AND SUGGESTIONS IN SUPPORT OF THEIR SUMMARY JUDGMENT MOTION.

Plaintiffs claim the Thunder Defendants have waived the statute of limitations defense. Under established Missouri law, plaintiffs' claim of waiver has no merit.

Where the affirmative defense based on the statute of limitations is pleaded generally in an answer to a Petition, as was done by the Thunder Defendants in this case, and where the specific grounds for the defense are included in a summary judgment motion, suggestions in support of a summary judgment motion, or motion to dismiss, Missouri courts have held that the affirmative defense of statute of limitations is properly

and sufficiently raised and not waived. Rose v. City of Riverside, 827 S.W.2d 737 (Mo.App. 1992), Johnson v. Vee Jay Cement, 77 S.W.3d 84 (Mo.App.E.D. 2002), Armoneit v. Ezell, 59 S.W.3d 628 (Mo.App.E.D. 2001), and Grady v. Amrep, Inc., 139 S.W.3d 585 (Mo.App.E.D. 2004). *See also* Bohrmann v. Schremp, 666 S.W.2d 30, 32 FN3 (Mo.App.E.D. 1984) ("Regardless of whether a defendant raises an affirmative defense in the answer, he or she should be permitted to raise the defense in a motion for summary judgment. (citation omitted)"

Accordingly, the trial court did not err in granting summary judgment to defendants.

CONCLUSION

Wherefore, for the foregoing reasons, the Thunder respondents respectfully request that this Court affirm the trial court's entry of summary judgment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of Respondents' 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 29th day of December, 2005.

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RULE 84.06(c) AND (g) CERTIFICATE

I hereby certify that this Respondents' Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and that the entire brief contains 5,119 words. I hereby further certify that the floppy disks containing the brief and filed with the Court and served on the Attorneys of Record were scanned for viruses by an anti-virus program and are virus-free according to such program.

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APPENDIX

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