WD76789

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

[redacted] and [redacted]
by and through their next friend, [redacted]
Respondents,

vs.

[redacted]
Respondent,

[redacted]
Appellant,

and [redacted] and [redacted]
Respondents.

On Appeal from the Circuit Court of Platte County
Honorable Thomas C. Fincham, Associate Circuit Judge
Case No. 13AE-CV01451

REPLY BRIEF OF THE APPELLANT

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Throughout her brief, Respondent [redacted] ("Mother") asserts a variety of supposed factual statements that are not reflected in the record in any way. The Court should disregard these statements and given them no consideration.

"Appellate review of a trial court's judgment is limited to evidence that was properly before the trial court," and this Court "will not accept counsel's statements as a substitute for record proof." *McDonald v. Thompson*, 35 S.W.3d 906, 909 (Mo. App. 2001). Thus, "[S]tatements in briefs, when unsupported by the record and not conceded by a party's adversary, are not evidence" and "are insufficient to supply essential matters for review." *Id.* "Statements of fact in a brief which are unsupported by the record are not evidence." [1] *In re Marriage of Osborne*, 895 S.W.2d 285, 289 (Mo. App. 1995). This Court "will not consider matters not contained in the record," which "factual assertions in the briefs cannot supplement …." *J.B. Allen, Inc. v. Pearson*, 31 S.W.3d 526, 529 (Mo. App. 2000). "As far as [this Court's] review is concerned," such matters "do not exist." *Henning v. Dir. of Revenue*, 790 S.W.2d 513, 514 (Mo. App. 1990).

The Court readily can identify the unsupported statements in Mother's brief by their lack of citation to the record. Mother was required, of course, to include "specific

[1] There is an exception for a "statement of fact is asserted in one party's brief and conceded to be true in the adversary's brief," which this Court "may consider … as though it appears in the record." *McDonald*, 35 S.W.3d at 909-10. Appellant [redacted] ("Husband") does not concede that any unsupported statements in Mother's brief are true.

page references to the relevant portion of the record on appeal" in both her statement of facts and argument. Rule 84.04(c), (e), and (f). For ease of the Court's review, however, the unsupported factual statements that are not reflected in the record are as follows:

- a statement that Husband "suffered from a drug and alcohol addiction and … participated in extra-marital affairs" (Resp. Br. 5);
- a statement that, at the time he filed for dissolution of marriage, Husband "was residing in the marital home with his paramour" (Resp. Br. 11);
- statements that Husband admitted at any time that he knew he "was not the biological father of the minor children," and that, "in the years leading up to the party's separation [Mother] offered to [Husband] the opportunity to adopt the three children but he refused" (Resp. Br. 5, 12); and
- statements recounting a supposed probate case Mother opened in Jackson County, Missouri, and proceedings in that supposed case (Resp. Br. 6, 11, 16).

None of these statements refer to any part of the record on appeal. After scouring the record, undersigned counsel is unable to find any record support for any of these statements. Husband does not concede any of these statements are true.

Accordingly, this Court may not accept Mother's unsupported "statements as a substitute for record proof." *McDonald*, 35 S.W.3d at 909. They "are not evidence." *Osborne*, 895 S.W.2d at 289. They "are insufficient to supply essential matters for review." *McDonald*, 35 S.W.3d at 909. Rather, they simply "do not exist" to this Court. *Henning*, 790 S.W.2d at 514. As a result, the Court must "not consider" these "matters not contained in the record …." *J.B. Allen*, 31 S.W.3d at 529.

Reply as to Argument

In his opening brief, Husband invoked the well-established law of Missouri that, under Rule 52.12(a), any person who states an independent cause of action as to the subject matter of ongoing litigation whose specific interest as to the outcome of that litigation is unrepresented by any present party has a right to intervene in that litigation (Brief of the Appellant ("Aplt. Br.") 19-22). He explained that, as a result, the trial court erred in denying his right to intervene in the paternity proceedings below to bring his cause of action for third-party custody over the three children (collectively "the Children") whom he had raised as their father from their births and, until the proceedings below, believed he was their biological father.

As Husband explained, this was because, as the Supreme Court recently held in *In re T.Q.L.*, 386 S.W.3d 135, 139-40 (Mo. banc 2012), § 452.375.5(5), R.S.Mo., authorizes an independent cause of action for third-party custody (Aplt. Br. 23-29), the Children's custody could not be litigated in any other proceeding (Aplt. Br. 31), taken as true, the pleading Husband attached to his motion to intervene sufficiently stated a cause of action for third-party custody (Aplt. Br. 32-29), and the only other party to the proceedings, Mother, opposes Husband's third-party custody claim (Aplt. Br. 40-41).

In response, Mother continues to oppose Husband's third-party custody claim. Largely, however, she ignores the law Husband has discussed. Instead, she first argues § 452.375.5(5) *does not* authorize a cause of action for third-party custody and, instead, is subject to a trial court first making certain findings *before* third-party custody can be litigated. Second, she argues the pleading Husband attached to his motion to intervene

and sought leave to file is a mere "exhibit" that carries no weight. Third, citing *DeWitt v. Lechuga*, 393 S.W.3d 113, 118 (Mo. App. 2013), she argues the paternity proceeding did not involve custody and, thus, as no party has requested a custody determination, Husband's third-party custody claim states no interest in the outcome of the proceeding. Fourth, she argues the fact Husband did not state a claim for third-party custody earlier has some adverse effect on his present claim. Finally, she argues upholding Husband's right to intervene would "open the floodgates of custody litigation."

Mother's arguments are without merit. First, the Supreme Court already firmly and specifically has held § 452.375.5(5) does authorize an independent cause of action for third-party custody, without the requirement of any predicate findings. *T.Q.L.*, 386 S.W.3d at 139-40.

Second, the pleading Husband sought leave to intervene is more than a mere exhibit to a motion. Rather, it is the instrument, specifically required in Rule 52.12(c), by which, taking its allegations as true, the courts determine whether Husband states a claim that activates intervention as a matter of right under Rule 52.12(a).

Third, this paternity proceeding, unlike the one in *DeWitt*, involves no interstate custody issues that would deprive the trial court of jurisdiction under the UCCJEA to determine the children's custody. As a result, the proceeding below innately involves a determination as to the custody of the Children, especially considering Mother already has informed the trial court that custody should be determined (Legal File 88). Moreover, as the Children's custody only is litigable in the proceedings below, if custody presently *were not* at issue therein, it only would amplify the fact that Husband's interest

in his third-party custody claim is unrepresented by any existing party and, absent his intervention, would be destroyed.

Fourth, that Husband did not state a custody claim earlier in the paternity proceedings is irrelevant. His answer to Mother's paternity petition merely denied all the petition's material allegations and sought it dismissed. A custody claim would have been inconsistent with that position. Moreover, Husband could not have stated a *third-party* custody claim until he actually was a third party, which did not happen until he was dismissed from the paternity action. Husband's motion to intervene was timely and his right to intervene absolute, and the law of Missouri does not recognize an estoppel exception to that right.

Finally, upholding Husband's right to intervene in the proceedings below will not open any floodgates of custody litigation. There already is an independent cause of action for third-party custody under § 452.375.5(5). As with any other cause of action, only a person who states sufficient, specific factual allegations meeting it can state such a claim. It was that way before this case and will be afterward. The status of Missouri children involved in dissolution or paternity actions will not change as a result of the Court's decision in this case.

The trial court's denial of Husband's motion to intervene was error. This Court should reverse its order and remand for further proceedings over Husband's third-party custody claim.

A. The law of Missouri authorizes a cause of action for third-party custody.

In his opening brief, Husband explained the Supreme Court recently reconfirmed that § 452.375.5(5) allows persons not biologically related to a child the right to state an independent cause of action for third-party custody of the child, so long as the person states sufficient facts to meet that cause of action (Aplt. Br. 23-29). *T.Q.L.*, 386 S.W.3d at 139-40. While earlier decisions were unsure about this (Aplt. Br. 29 n.1), *T.Q.L.* firmly held that, as long as the person "sufficient[ly] alleg[es] the elements required" under § 452.375.5(5), the statute gives him "a cause of action for third-party custody." 386 S.W.3d at 139. The pleading Husband sought to intervene to file sufficiently alleged such a cause of action (Aplt. Br. 32-39).

Despite this, Mother disputes that § 452.375.5(5) authorizes an independent cause of action for third-party custody (Resp. Br. 21-22, 25-27). Instead, citing no authority, she argues § 452.375.5(5) does not "confe[r] the statutory authority" for such a claim (Resp. Br. 21). Paraphrasing some earlier, pre-*T.Q.L.* case law without citing so, she argues the General Assembly "clearly intended there be a barrier to this type of claim when it required a court to make findings of unfitness and best interests first before a third party could claim custody" (Resp. Br. 26).

But that is precisely what the Supreme Court rejected in *T.Q.L.*, transferring the case from the Southern District which had held exactly what Mother advances (Aplt. Br. 27) (citing *In re T.Q.L.*, 2012 WL 457719 at *2-3 (Mo. App. slip op. Feb. 14, 2012) (transferred to Mo. banc May 29, 2012)). *T.Q.L.* makes plain that, while the ultimate decision on the merits of the third-party custody claim rest soundly with the trial court

making the findings Mother discusses, this is not a legislative barrier to a party *litigating* the claim. 386 S.W.3d at 138-39.

While the Southern District had "declin[ed]" to state § 452.375.5(5) "create[s] a cause of action," and held "there is currently no law permitting [a person not biologically related to a child] to seek custody" of that child, 2012 WL 457719 at *2-3, the Supreme Court plainly disagreed. As long as the person's pleading, taking "the facts in [it] … as true," "construe[ing them] liberally in [his] favor," and "grant[ing him] reasonable inferences based on those allegations," is "sufficient to allege the elements" set forth in § 452.375.5(5), his pleading "meet[s] a cause of action for third-party custody" under that statute. *T.Q.L.*, 386 S.W.3d at 139-40.

Similarly, Mother's attempts to distinguish *T.Q.L.* fail. She claims the paramour in that case "believed he was the father of a child," and it "was later determined that [he] was not the biological father of the child" (Resp. Br. 25). Were that true, *T.Q.L.* would not be distinguished, but would be directly on par with this case, as Husband believed he was the children's father until the paternity test (L.F. 6, 104-07, 131, 155, 165). *T.Q.L.*, however, is even *more* emphatic, because, in reality, the paramour *admitted* he was not the child's natural father from the outset. 386 S.W.3d at 137. Moreover, the only issue in *T.Q.L.* was whether § 452.375.5(5) authorized a person not biologically related to a child independently to state a cause of action for third-party custody. *Id.* The Supreme Court held the statute does authorize this. *Id.* at 138-40.

As a result, the only material difference between *T.Q.L.* and this case is the procedural posture. There, the paramour initiated the third-party custody proceeding

himself by filing a petition. *Id.* at 137. Conversely, in this case, Husband seeks to intervene in an existing paternity proceeding to state the same type of third-party custody cause of action the paramour in *T.Q.L.* was authorized to state.

But this is a distinction without a difference. As Husband explained in his opening brief, anyone who has an independent cause of action as to the outcome of an ongoing case and whose interests are not represented by an existing party is a necessary party to that case just as if he brought the case himself and, under Rule 52.12(a), is entitled to intervene as a matter of right (Aplt. Br. 19-22). Mother does not dispute that law, nor does she address it at all.

Accordingly, as the plaintiff in *T.Q.L.* had a right to state his cause of action for third-party custody independently, Husband has a concomitant right to intervene in the proceedings below to state his similar cause of action for third-party custody. No existing party to the proceedings represents Husband's third-party custody interest. The only remaining party, Mother, opposes it.

B. The pleading Husband attached to his motion to intervene as required by Rule 52.12(c) properly states an authorized cause of action for third-party custody over the Children that no other party represented.

As Husband explained in his opening brief, "Intervention generally should 'be allowed with considerable liberality'" (Aplt. Br. 21) (quoting *Johnson v. State*, 366 S.W.3d 11, 20 (Mo. banc 2012) (citation omitted)). As long as the pleading Rule 52.12(c) requires to be attached to the motion to intervene, as in an ordinary petition, "contain[s] a short and plain statement of the facts showing that the pleader is entitled to

relief, and a demand for judgment for the relief to which the pleader claims she is entitled," such that it states a cause of action as to the subject of the litigation that no other party represents, the pleader has a right to intervene (Aplt. Br. 20 (quoting *T.W. ex rel. R.W.* [redacted]*H.*, 393 S.W.3d 144, 151 (Mo. App. 2013)).

Mother ignores this law and argues, instead, that the pleader must make the allegations in his motion to intervene, and the attached pleading required by Rule 52.12(a) is merely "an exhibit to [a] motion" that has no other significance (Resp. Br. 9, 22). Mother cites no law to support this notion.

This is because Mother's argument is without support. Rule 52.12(c) plainly requires that a motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." It is well-established that this pleading is more than a mere, disregard-able "exhibit" with no function. Rather, it is the procedural vehicle by which the courts determine whether the intervention movant does, indeed, have a right to intervene, as it "set[s] forth the claim … for which intervention is sought." *T.W.*, 393 S.W.3d at 151. This pleading is reviewed just as any other to determine whether the pleader has stated a cause of action that warrants intervention as a matter of right. *Id.*

"Typically, … motions to intervene of right are decided on the basis of the motion, the pleadings, argument of counsel, and perhaps suggestions in support or opposition." *Allred v. Carnahan*, 372 S.W.3d 477, 483 (Mo. App. 2012). As such, the pleading required by Rule 52.12(c) provides the crucial information to the trial court – and to this Court on what the parties agree is *de novo* review (Aplt. Br. 16-17; Resp. Br. 19-20) – as

to what the intervenor movant's claim is. *Moxness v. Hart*, 131 S.W.3d 441, 446-47 (Mo. App. 2004). The pleading may be stated in the body of the intervenor movant's motion, but does not have to be, as "Rule 52.12(c) does not require separateness, only that the pleading accompany the motion."[2] *Id.* at 447.

Either way, the motion invoking the requirements for intervention as a matter of right under Rule 52.12(a) together with the pleading evincing the party's interest in the subject of the litigation that no other party adequately represents are what are necessary to "consider the motion to intervene as asserting a right under Rule 52.12(a)." *In re M.M.P.*, 10 S.W.3d 195, 198 (Mo. App. 2000). If the party made both proper assertions in the motion and proper allegations in the pleading, taken as true, to establish the necessary interest in the outcome of the litigation, he has the right to intervene. *T.W.*, 393 S.W.3d at 151.

Even if the pleading were merely a standard "exhibit," however, it would not change how it must be viewed. As Mother "acknowledges," "exhibits to a pleading are a part thereof," and "are meant to inform the facts of the pleading, the purpose of which is to eliminate the need to set forth a document/exhibit at length in the text of a pleading" (Resp. Br. 9).

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[2] Though, on at least one occasion, the Supreme Court has disapproved of not attaching a separate pleading. *Transit Cas. Co. ex rel. Pulitzer Publ'g Co. v. Transit Cas. Co.*, 43 S.W.3d 293, 303 n.5 (Mo. banc 2001).

Thus, as Mother is forced to admit, even viewing Husband's motion for third-party custody attached to his motion to intervene as a mere "exhibit," it still constituted a part of his motion to intervene and informed the facts of his motion to intervene. The same, standard test would remain: taking the allegations in his attached motion for third-party custody as true and construing them liberally, did he state a cause of action for third-party custody over the children that no existing party represented? *T.W.*, 393 S.W.3d at 151; *T.Q.L.*, 386 S.W.3d at 139-40. The plain answer is that he did (Aplt. Br. 32-39), which Mother does not contest.

C. The paternity proceeding below – the only forum in which the Children's custody could be litigated – innately involved determining their custody, and especially so once Husband stated his third-party custody claim.

Mother's main argument is that because the proceedings below are an action in paternity, and she never requested the trial court to determine the children's custody, custody was never at issue and Husband cannot make it at issue by intervening to state a third-party custody claim (Resp. Br. 8, 10, 24, 26-27, 28). The only authorities she cites for this proposition are the paternity statutes themselves and *DeWitt*, 393 S.W.3d at 113.

Mother argues Husband has no "legal right that requires protection," because § 210.841.3, R.S.Mo., allows custody to be determined in a paternity action but "does not independently authorize the grant of relief beyond a determination of paternity" (Resp. Br. 10) (citing *DeWitt*, 393 S.W.3d at 113). She asserts "custody is not automatically at issue in a paternity case," but rather "must be joined to the proceeding" (Resp. Br. 24) (citing *DeWitt*, 393 S.W.3d at 113).

Thus, because Mother, the only party remaining in the proceedings below, believes she "did not specifically seek a declaration that she have custody over the children," "the only matter properly before the [trial] court in this case is the paternity of the minor children" (Resp. Br. 28). She believes this is because, "In paternity cases, custody, visitation, support and other claims **may** be joined to the action, however, those claims are not automatically put at issue," until "a party … properly plead[s] those issues" (Resp. Br. 28) (emphasis in the original). Simply put, she argues Husband cannot invoke the cause of action for third-party custody in § 452.375.5(5) "because custody is not at issue" (Resp. Br. 26).

These arguments are without merit. First, Mother misunderstands both the paternity statutes and *DeWitt*, the sole case she cites. The law of Missouri is that, when a child's paternity is at issue, his custody also *always* is at issue *unless*, under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), §§ 452.700 through 452.930, R.S.Mo., some other state has jurisdiction over that question. As Mother admits the Children's "home state" is Missouri for all purposes, the action below necessarily will determine their custody. With Mother as the sole remaining party to that action, however, absent joining another party Mother will receive sole physical and legal custody over the children.

Missouri's Uniform Parentage Act ("UPA"), §§ 210.817 through 210.854, R.S.Mo., requires that the trial court's ultimate judgment "shall contain the Social Security number of each party and may contain any other provision directed against the appropriate party to the proceeding concerning … [t]he custody and guardianship of the

child." § 210.841.3(2), R.S.Mo. The "needs and best interests of children are the same whether or not their parents are married[.]" *Sutton v. McCollum,* 2013 WL 4456996 at *3 (Mo. App. slip op. Aug. 21, 2013) (quoting *Edmison ex rel. Edmison v. Clarke,* 988 S.W.2d 604, 611 (Mo. App. 1999)).

Accordingly, § "452.375 governs the initial award of custody in paternity cases, as well as dissolution cases." *Id.* (quoting *Day ex rel. Finnern v. Day,* 256 S.W.3d 600, 602 (Mo. App. 2008)). "Missouri courts have rejected [the] argument" that the § "452.375.2 best interests factors should not control the best interests determination in paternity cases because those factors are listed in the chapter governing dissolutions rather than in the chapter governing paternity actions." *Id.*

Thus, the custody statute that a court in a dissolution action court cannot enter judgment *unless* it first "has considered and made provision for child custody, the support of each child, the maintenance of either spouse and the disposition of property," as long as it has jurisdiction over the children's custody, § 452.305.1(3), R.S.Mo., applies equally in paternity cases. As for jurisdiction to determine custody, § "452.740.1 of Missouri's version of the UCCJEA is the exclusive basis for determining whether the trial court is authorized to make a child custody determination. § 452.740.2." *DeWitt,* 393 S.W.3d at 118.

Mother misunderstands *DeWitt*. *DeWitt* does not hold that custody of a child whose undisputed home state is Missouri is not automatically at issue in an action over his paternity. Rather, it holds that when another state is the child's "home state" under the UCCJEA, the Missouri trial court can consider the child's paternity but lacks

jurisdiction to determine the child's custody. *Id.* at 116-19. "This analysis may well result in bifurcated adjudications, where one state adjudicates paternity and child support and another state adjudicates custody and parenting time." *Id.* at 118.

In *DeWitt*, for example, the child was conceived in Missouri but born in California and had resided in California since birth. *Id.* at 115. The father filed a petition for paternity in Missouri, in which he requested the trial court declare him the child's natural father and grant him legal and physical custody of the child. *Id.* The Missouri trial court, however, dismissed the father's petition, holding California courts, not it, had exclusive jurisdiction to adjudicate the child's custody. *Id.*

This Court affirmed the trial court's dismissal of the father's claims for custody but reversed its dismissal of his request to determine the paternity of the child. *Id.* at 119-20. Under the UCCJEA, California was the child's "home state," and thus the California courts, which had not declined jurisdiction, had exclusive "jurisdiction to make a child custody determination…" *Id.* at 119. Conversely, because the child was conceived in Missouri, the Missouri "trial court had the statutory authority to make a paternity determination." *Id.* at 118.

But this is not the situation here. No party contests that Missouri is the Children's "home state" – "the state in which [they have] lived with a parent or a person acting as a parent for at least six consecutive months immediately prior to the commencement of" the proceedings below. *Id.* at 119 (quoting § 452.705(8), R.S.Mo.). Indeed, Mother admitted in both actions below that she, Husband, and Respondent [redacted] "have claims to the custody of the" Children (L.F. 12, 88). In the paternity action, she admitted the

Children have resided in "Missouri for more than ninety days prior to the filing of" her petition (L.F. 88). The Children presently reside with Mother, as they have throughout the proceedings in this case.

Plainly, Missouri is the Children's "home state." As a result, the trial court has jurisdiction over their custody and *will* determine their custody, as Mother requested (L.F. 88). If Mother is the only party below, she will receive sole custody.

Moreover, were Mother correct that custody of the Children is not yet at issue in the proceedings below, Husband's right to intervene only would be even more well-grounded than it already is. As Husband explained in his opening brief, and Mother does not dispute, the pending paternity action is the only action in which the Children's custody can be determined (Aplt. Br. 31). The UPA provides that a parentage determination "may be joined by separate document with an action for … custody …." § 210.829.1, R.S.Mo. If Mother, the only remaining party below, has not automatically (or at least by her admission in her petition (L.F. 88)) joined a custody determination, it would be possible the Children's custody would not be determined in the only action in which it presently can be determined.

Husband, however, seeks to intervene to state precisely such a claim. A party has the right to intervene in a pending action when he "claims an interest relating to the … subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede [his] ability to protect that interest, unless [his] interest is adequately represented by existing parties." Rule 52.12(a).

If custody is not yet at issue, Husband's third-party custody claim is a claim relating to the Children who are the subject of the paternity action below, and he is so situated that the disposition of the action without any custody determination will destroy his ability to protect his cause of action. No other party represents his interest. Plainly, in that circumstances, he also would have the absolute right to intervene.

D. Husband's third-party custody claim was timely and is not estopped.

Mother also argues the fact Husband first stated a third-party custody claim in his motion to intervene, and not earlier, should have some adverse effect on him (Resp. Br. 7-8, 14, 24, 26-27). She recounts Husband did not earlier "counter plead [*sic*] the issues of custody and visitation," and "did not raise the issue of parental fitness in his petition for dissolution of marriage" (Resp. Br. 8, 14, 24). She argues he thus "pass[ed] up the opportunity to make custody and fitness an issue in the dissolution or paternity action," and therefore "allow[ing him] to intervene at this juncture" somehow "would circumvent to purpose [*sic*] of the law and the intent of the legislature" (Resp. Br. 8, 26-27).

But Mother does not identify the precise legal effect she believes gives the timeline of this case an adverse effect on Husband's ability to state his third-party custody claim by intervening, as opposed to earlier. She seems to be arguing some species of estoppel or, perhaps, that Husband's motion to intervene was untimely.

The right to intervene under Rule 52.12(a) is "absolute," and is not subject to an "equitable estoppel exception," especially where the opposing party does not specifically argue so. *Charles v. Consumers Ins.*, 371 S.W.3d 892, 902 (Mo. App. 2012). Similarly, while "delay may be the basis for denying intervention, [Missouri courts] have been

restrained in finding that delay justifies denying intervention" and routinely have allowed intervention even after judgment. *Id.* at n.11. The trial court must take the motion to intervene as it finds it and weigh it and its allegations to determine whether the intervenor movant has an absolute right to intervene. *Id.* at 902.

In this case, although Husband sought custody of the Children in his dissolution of marriage petition (L.F. 6), his response to Mother's paternity petition only sought it dismissed (L.F. 106). He even filed a motion to dismiss along with his response (L.F. 110-13). He plainly knew custody otherwise could be at issue, however, so he also simultaneously sought appointment of a guardian ad litem (L.F. 115-16).

The results of DNA testing sometime between May 21 and July 8, 2013 (L.F. 131, 155), that Husband was not the Children's natural father, changed his situation. First, it made Husband a third party, as Respondent acknowledges (Resp. Br. 26-27). He plainly could not have stated a claim for third-party custody before he was, indeed, a third party. Second, he moved to intervene immediately on July 8, 2013 (L.F. 135). There was no delay, let alone undue delay. Virtually as soon as Husband became a third party and knew that custody would not be litigated in the dissolution (and only could be litigated in the paternity action), he stated his cause of action for third-party custody. The law of Missouri does not recognize any adverse effect on Husband's motion to intervene from this timeline, nor does Mother identify one.

E. This case does not risk opening any "floodgates of litigation."

Finally, Mother argues that upholding Husband's right to intervene by "read[ing] *T.Q.L.* broadly" risks "open[ing] the floodgates of custody litigation," reasoning it

"would allow any person at any time to file a motion to intervene, allege parental fitness and join any custody action" (Resp. Br. 26). She argues Husband's "position as it related to the" Children is "that of a person in the general public at worst [*sic*] or … of a former step parent [*sic*] at best," and thus, "If a court were to allow him to intervene at this late date it would be tantamount to permitting any unrelated person to intervene in any pending action in which custody was an issue" (Resp. Br. 8-9).

This alarmism is without merit and undeserved. As Husband pointed out in his opening brief, and Mother does not dispute, persons not biologically related to children have been granted their custody many times (Aplt. Br. 24). To this end, this Court does not need to "read *T.Q.L.* broadly" in order to uphold Husband's right to intervene. It need merely apply *T.Q.L.*'s plain holding that § 452.375.5(5) creates an independent cause of action in which a party stating sufficient allegations can seek third-party custody of a child. 386 S.W.3d at 139-40. It necessarily follows that a third party stating such sufficient allegations whose interests are unrepresented in an existing dissolution or paternity case must have a right to intervene in the existing action to state that claim.

Indeed, *any* cause of action is subject to a party stating sufficient allegations bringing it. That is the usual course of justice, not a "flood of litigation." Claims that have merit will granted, and those that do not will be denied. Having a cause of action however, Husband has the right to litigate it. In this case, he has the right to intervene.

Conclusion

The Court should reverse the trial court's order denying Appellant [redacted]s motion to intervene as a matter of right and should remand this case with instructions to grant that motion and for further proceedings.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2013 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule XLI, and that this brief contains 5,111 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I hereby certify that, on October 28, 2013, I filed a true and accurate Adobe PDF copy of this Reply Brief of the Appellant via the Court's electronic filing system, which notified the following of that filing:

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