SC98673

IN THE SUPREME COURT OF MISSOURI

CAROLYN HOLMES,
***Personal Representative of the Estate of* ROBERT V. HOLMES,**

Plaintiff / Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,

Defendant / Respondent.

On Appeal from the Circuit Court of Jackson County
Honorable Bryan E. Round, Circuit Judge
Case No. 1816-CV11138

SUBSTITUTE REPLY BRIEF

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Reply as to Facts

UP crafts its own statement of facts (Substitute Brief of the Respondent ["Resp.Br."] 7-13), per Rule 84.04(f). But the same standards governing Mrs. Holmes's own statement of facts as appellant govern UP's as respondent, too. *Walton v. City of Seneca*, 420 S.W.3d 640, 644 n.3 (Mo. App. 2013).

UP's statement of facts equally must "be a fair and concise statement of the facts relevant to the questions presented for determination without argument." Rule 84.04(c). Its "primary purpose … is to afford an immediate, accurate, complete and unbiased understanding of the facts …." *Tavacoli v. Div. of Emp. Sec.*, 261 S.W.3d 708, 710 (Mo. App. 2008). A respondent fails this when it "argue[s] conclusions [it] suggest[s] should be drawn from the evidence …." *Walton*, 420 S.W.3d at 644 n.3. Simply put, "[i]nterspersing argument throughout the statement of facts violates Rule 84.04." *Rogers v. Hester ex rel. Mills*, 334 S.W.3d 528, 534 (Mo. App. 2010).

UP's statement of facts violates these rules. First, it is replete with argumentative, conclusory, and accusatory statements, many not citing the record.

Not citing the record, UP's statement of facts accuses Mrs. Holmes "of misrepresentations, unfulfilled promises, missed deadlines, delay, and inaction" (Resp.Br. 7). It makes a legal argument about the Federal Employer's Liability Act, 45 U.S.C. §§ 51, *et seq.* ("FELA"), even citing case law (Resp.Br. 7). Citing other cases in which Mrs. Holmes's trial counsel was involved, it argues the FELA's capacity requirements for a wrongful death case were "no secret to [Mrs.] Holmes" (Resp.Br. 7).

UP's statement of facts repeatedly accuses Mrs. Holmes and her counsel of bad motives. In a long footnote not citing the record or any materials in it,[1] UP accuses "lack of proper appointment" as "be[ing] a recurring issue in cases filed against Union Pacific by [Mrs.] Holmes's *pro hac vice* trial court counsel" (Resp.Br. 9 n.3). Not citing the record, it argues that Mrs. Holmes's being captioned in her original petition as the personal representative of her late husband's estate was not her trial counsel's mistake, but that she "acknowledged that she had *misrepresented* her status in her April 2018 petition" (Resp.Br. 10) (emphasis added). It then accuses her of intentionally lying: that she "*falsely* claimed she was the properly appointed personal representative" (Resp.Br. 11) (emphasis added). There is no evidence Mrs. Holmes *falsely misrepresented* anything, only that her counsel was mistaken. Finally, UP makes a legal argument about what Mrs. Holmes argued to the Court of Appeals and what the Court of Appeals decided (Resp.Br. 13).

These are arguments and conclusions, not facts. They have no place in a statement of facts in an appellate brief.

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[1] The materials UP cites are included in its appendix to its brief but are not in the record on appeal. This is improper, Rule 84.04(h), and the Court should not consider them. While UP states these are reports of other cases, this Court cannot take judicial notice of unpublished orders from these other cases. *Phillips v. Mo. Dep't of Soc. Servs.*, 723 S.W.2d 2, 2 n.2 (Mo. banc 1987) ("*A fortiori* a record of a prior discrete proceeding not introduced in evidence in the subject case which is the matter now before us should not be included in the record on appeal"); *Sher v. Chand*, 889 S.W.2d 79, 84 (Mo. App. 1994) (A court may not "take judicial notice of records in one proceeding in deciding another and different proceeding").

Casting further aspersions on Mrs. Holmes and her trial counsel, UP also includes a long passage about her not responding to its initial motion to dismiss within the ten days that 16th Cir. Local Rule 33.5.1 requires (Resp.Br. 9-10). This is irrelevant to the issue before the Court of whether the trial court erred in denying Mrs. Holmes leave to amend her petition and instead dismissing her case. She asked for and received leave to respond to UP's motion to dismiss out of time (D6; D12). Therefore, that has no bearing on the trial court's decision months later that now is being reviewed.[2]

Finally, UP states that Mrs. "Holmes offered no explanation for why she waited three weeks" to file her petition for letters of administration in probate court, "instead pointing the finger at the Clay County probate court for taking 'fifteen days to perform the ministerial task' of granting letters" (Resp.Br. 12). That is untrue. As she explained to the trial court, "The additional 20 days were spent retaining local counsel to administer the Estate in Clay County, preparing the required pleadings including the Application for Appointment of Personal Representative, and obtaining executed Renunciations of Rights by each of the applicable heirs to the decedent's Estate" (D27 p. 3). Mrs. Holmes already explained that in her statement of facts in her opening brief (Brief of the Appellant ["Aplt.Br."] 17).

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[2] What actually happened was that Mrs. Holmes was represented below by Missouri counsel from St. Louis and *pro hac vice* counsel from Pennsylvania, neither of whom had been aware of that local rule. While that is not an excuse for non-familiarity with the local rules, counsel learned a valuable lesson. This frequently happens in Jackson County, which is one of very few Missouri circuits with a local rule setting a motion response deadline.

Reply Argument

A. Summary

At root, this is a case where a plaintiff's petition mistakenly failed a curable requirement, the kind of thing that happens in Missouri trial courts every day without much fanfare or effect. Mrs. Holmes filed an FELA wrongful death petition without first having been appointed the personal representative of her late husband's estate. And upon UP pointing this out to the court, within a short time she had obtained that appointment.

But the trial court here did not take care of this simple deficiency the way Missouri trial courts routinely do – and as this Court's Rules 55.33(a) and 67.06 mandate (Aplt.Br. 21-29) and the FELA allows (Aplt.Br. 29-42) – by allowing Mrs. Holmes to cure it by amendment of her petition once she had been appointed the personal representative and so was able to cure it. Instead, the trial court refused her leave to file her first amended petition that would have cured it, dismissed her case, and then refused to reconsider.

In her opening brief, Mrs. Holmes explained that this was error, requiring reversal and remand for further proceedings on her first amended petition, as this Court and the Court of Appeals routinely have ordered in like circumstances (Aplt.Br. 19-45).

In response, UP essentially accuses Mrs. Holmes's trial counsel of lateness, and argues that this justifies the trial court denying her leave to amend her petition when she could. But it points to no law actually supporting anything other than futility – the fact that an amendment *will not* cure a deficiency – as a valid reason to deny leave to amend a petition.

UP's response is without merit. It does not change the bare fact that the trial court denied Mrs. Holmes leave to file an amended petition that was not futile, but *would* cure the sole deficiency in her original petition, at a time when it could, and then further denied her leave to do so *after* it had dismissed her petition. The law of Missouri is that this is error.

Rather, the law of Missouri is and must be that a trial court cannot refuse to allow a plaintiff to cure a deficiency in her petition and instead dismiss her case. Our modern rules of procedure must "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *United States v. Hougham*, 364 U.S. 310, 317 (1960). The trial court's judgment must be reversed.

B. Mrs. Holmes's invocation of Rule 67.06 is preserved for appeal.

In her opening brief, Mrs. Holmes explained that Rule 55.33(a) mandated the trial court to freely grant her leave to amend her petition, even out of time, to cure the deficiency in her original petition (Aplt.Br. 21-25). She then explained that Rule 67.06 amplified this, as it did not allow the trial court to dismissing her petition without *then* allowing her an opportunity to cure the defect when she requested to at that time (Aplt.Br. 25-29).

UP argues Mrs. Holmes cannot rely on Rule 67.06 now (Resp.Br. 14-15, 24-25). It argues this is because she "never made this argument or even cited to Rule 67.06 in the trial court" and her "brief to the court of appeals did not make the same argument asserted here, or even cite to Rule 67.06" (Resp.Br. 24-25).

This is untrue. First, Mrs. Holmes made the same argument to the Court of Appeals that she makes to this Court. She cited and quoted Rule 67.06 in her same argument in her opening brief, including discussing *Costa v. Allen*, 274 S.W.3d 461, 463 (Mo. banc 2008), and related case law, and argued that under it, as in *Costa* "a request to amend the petition filed within the 30-day post-judgment motion period after entry of judgment should be granted" (Court of Appeals Brief of the Appellant pp. 13-14). There is no violation of Rule 83.08(b). Mrs. Holmes has not altered the basis of any claim that she raised before the Court of Appeals, has not stated any new argument, and incorporates no material from her brief in that court by reference.

Second, Mrs. Holmes did argue to the trial court that it should allow her to file her first amended petition *after* it granted UP's motion to dismiss. After the order granting UP's motion to dismiss, she filed what she titled a "motion for reconsideration of judgment" (D25; D27). UP mentions this in its statement of facts, only saying that she "unsuccessfully sought reconsideration" without mentioning the motion's substance (Resp.Br. 13) (citing D25; D27). But in that motion, Mrs. Holmes argued that she had been unable to file a first amended petition by the date the trial court had set because she had not yet been appointed personal representative, and she asked for the order of dismissal to be vacated and for her to be able to file her petition now (D25; D27). She asked "to be permitted Leave to Amend her pleadings" (D27 p. 4).

That Mrs. Holmes's "motion for reconsideration" did not cite Rule 67.06 itself does not matter. In determining whether a claim for relief properly was made below such that it can be raised on appeal, this Court "do[es] not concern [itself] with the title of the pleading or with a party's citation to a particular Rule, but we look instead to the substance of the pleading." *State ex rel. Mo. Parks Ass'n v. Mo. Dep't of Nat. Res.*, 316 S.W.3d 375, 382 (Mo. App. 2010). In other words, "Missouri courts have looked not to the nomenclature employed by the parties, but to the actual relief requested in the motion." *Berger v. Cameron Mut. Ins. Co.*, 173 S.W.3d 639, 641 (Mo. banc 2005). Indeed, that is why, despite no rule allowing for a "motion for reconsideration," this Court routinely has treated them as either a motion for new trial or a motion to amend the judgment. *See, e.g.*, *Taylor v. United Parcel Serv., Inc.*, 854 S.W.2d 390, 392-93 (Mo. banc 1993); *Massman Constr. Co. v. Mo. Highway & Transp. Comm'n*, 914 S.W.2d 801, 803 (Mo. banc 1996).

Mrs. Holmes's "motion for reconsideration" asked for exactly the relief Rule 67.06 allows: after dismissal due to a deficiency in an original petition, to be able to file a first amended petition curing that deficiency. She did not have to specifically cite that rule in order to argue now in this Court, just as she did in the Court of Appeals, that the trial court had to grant her that relief. Her reliance in this Court on Rule 67.06 is proper.

C. The law on which UP relies does not support affirming the denial of leave to file a first amended petition that would cure the sole deficiency in a plaintiff's original petition and avoid dismissal.

As to the merits of Mrs. Holmes's point, UP first argues that the trial court *had* allowed her to file an amended petition, but she did not, so it could deny her leave to amend once she was able to (Resp.Br. 16-23).[3] It argues this was proper because she previously had been late in answering its motion to dismiss (Resp.Br. 18-19). It accuses her of "falsely … stat[ing]" in her original petition's caption that she was the personal representative of her late husband's estate, of "misrepresent[ing] that fact" (Resp.Br. 17-18). It goes through the entire short timeline of the case below (Resp.Br. 17-22).

UP's argument is sleight-of-hand. Mrs. Holmes acknowledges that the trial court did allow her until April 3, 2019 in which to file an amended petition that could allege specifically that she had been appointed the personal representative of her late husband's estate. She acknowledges that she did not meet that deadline, because as UP admits, she had not been appointed the personal representative by April 3, 2019.

But that was not the trial court's error under Rules 55.33(a) and 67.06. Rather, it was in denying Mrs. Holmes leave to amend *when she requested it*

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[3] UP no longer argues, as it did both below and in the Court of Appeals, that an appointment of a plaintiff as personal representative cannot be made during an FELA wrongful death case so as to relate back to the filing of the case. As Mrs. Holmes pointed out in her opening brief, the law of Missouri and the United States is that in an FELA case, appointment as personal representative post-petition and amendment of the petition to state so cures any failure to be appointed pre-petition (Aplt.Br. 29-42).

on April 10, once she *had* been appointed personal representative, and instead dismissing her case without *then* allowing her to amend.

In her opening brief, Mrs. Holmes explained that the factors for an amendment under Rule 55.33(a) apply to a request for leave to amend at any time, including "out of time" (Aplt.Br. 22). She cited *Neenan Co. v. Cox*, 955 S.W.2d 595, 598-99 (Mo. App. 1997) (Stith, J., joined), *overruled on other grounds by Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 534 n.4 (Mo. banc 2002), in which the Court of Appeals applied these same factors for a request to file a counterclaim out of time. UP responds that in *Neenan*, the counterclaim timing was governed by Rule 55.32, which allows counterclaims "when justice required" (Resp.Br. 40). But leave to amend a petition is governed by a similar standard under Rule 55.33(a), which mandates that "leave shall be freely given when justice so requires." The point is that either for a counterclaim in *Neenan* or a petition here when Mrs. Holmes requested it on April 10, the same factors govern a request to amend it at the time that request is made.

Mrs. Holmes also cited a number of decisions reversing a dismissal of a claim when, upon dismissal, the trial court refused to allow leave to amend, all of which reiterated that if a deficiency in the original petition leading to the dismissal was curable, upon that dismissal the trial court had to allow the plaintiff to amend the petition curing it (Aplt.Br. 26-28). UP goes through all but two of those decisions and tries to show some distinction, such as again accusing Mrs. Holmes of "intentionally misrepresenting" her status in the original petition rather than her counsel being mistaken, and the

timing of her initial request to amend compared to the requests in those cases (Resp.Br. 35-39).

UP's responses are distinctions without a difference. The point is that in all the decisions Mrs. Holmes cited, a plaintiff could cure a deficiency in a petition by amendment, the plaintiff asked to amend to make that cure when he or she could do so, the trial court denied that request, and the appellate court reversed (Aplt.Br. 26-28). Moreover, in many of them, as here, the plaintiff asked *again* for leave to amend *after* the dismissal, and citing Rule 67.06 the appellate court held the plaintiff had to be allowed to leave to amend *then*.

The two decisions on which Mrs. Holmes relied but to which UP gives no response, *Western Cas. & Sur. Co. v. Kan. City Bank & Tr. Co.*, 743 S.W.2d 578, 581-83 (Mo. App. 1988), and *Boyd v. Kan. City Area Transp. Auth.*, 610 S.W.2d 414, 417 (Mo. App. 1980), bear this out. In both, as here, the plaintiff asked to amend its petition so as to cure a deficiency *after* the trial court had granted the defendant's motion to dismiss. In both, the trial court denied that request. In both, the appellate court reversed. That UP cannot find any meaningful distinction between this case and those is because there is none. The trial court's refusal to allow Mrs. Holmes to amend her petition on dismissing it is error here, too, just as it was in those decisions.

Also telling is that despite nearly 40 pages of argument, UP only can come up with four decisions in which an appellate court affirmed a dismissal under what it argues are like circumstances: *Townsend v. Union Pac. R.R.*

Co., 968 S.W.2d 767 (Mo. App. 1998); *Branson Hills Assocs., L.P. v. First Am. Title Ins. Co.*, 258 S.W.3d 568 (Mo. App. 2008); *Sheffield v. Matlock*, 587 S.W.3d 723, 731 (Mo. App. 2019); *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605 (Mo. banc 2008) (Resp.Br. 23, 26-28, 34). All four just continue to show why the trial court's decision here was error.

First, neither *Townsend* nor *Branson Hills* involved the denial of leave to file an amended petition so as to cure a deficiency in an original petition that led to dismissal. In *Townsend*, a *pro se* plaintiff who sought a continuance to obtain counsel failed to obtain counsel by the latest date the trial court set by order, so it dismissed his case. 968 S.W.2d at 768. In *Branson Hills*, the trial court dismissed the plaintiff's case for failure to prosecute. 258 S.W.3d at 572-73. Neither decision has any bearing on the issue in this case.

Bach did not involve the issue in this case, either. There, after a jury had found against it at trial, the defendant asked to amend its answer to assert an affirmative defense of the setoff of a settlement with another defendant under § 537.060, R.S.Mo., which it long had known of. 257 S.W.3d at 610. There was no deficiency of a petition, threat of dismissal as a result, or request to amend to cure that deficiency. Neither Rule 55.33(a) nor Rule 67.06 were implicated. *Bach* is inapposite.

Sheffield, on which UP relies throughout its brief (Resp.Br. 14, 26, 33), is equally inapposite, and only goes to show the extremely limited circumstances in which it is permissible to deny leave to amend a pleading, which are not present here. There, leave to amend was properly denied and

the case dismissed because the plaintiff's proposed amendment would not have cured the deficiency in its original petition at all. 587 S.W.3d at 731.

In *Sheffield*, a homeowner sued a foreclosure consultant's attorneys for the consultant's alleged injuries to the homeowner, but did not plead an "exceptional circumstance" that would allow the attorneys to be liable for their clients' actions. *Id.* at 729-30. In response to the attorneys' motion to dismiss, the homeowner sought to file an amended pleading that would have raised new claims against the attorneys. *Id.* at 730. But the amended pleading still would not have cured the deficiency in the original petition: the homeowner's "additional legal theories" in the proposed amended petition "[we]re premised entirely on the factual allegations of Respondent Attorneys' conduct contained in Appellant's initial petition," which remained insufficient to allege their liability. *Id.*

So, in *Sheffield*, too, there was no request to amend a deficiency that would cure it. Instead, the court in *Sheffield* applied the well-known rule that "where an amendment would be futile, the circuit court [does] not abuse its discretion in denying [a plaintiff] leave to amend." *Spencer v. State*, 334 S.W.3d 559, 573 (Mo. App. 2010) (affirming denial of leave to amend where proposed new claims would fail on their face); *see also, e.g.*, *Rigby Corp. v. Boatmen's Bank & Tr. Co.*, 713 S.W.2d 517, 547 (Mo. App. 1986).

UP briefly tries to argue that Mrs. Holmes's proposed amendment of her petition to state that she had been appointed the personal representative of her late husband's estate also would not have cured the defect in her original petition (Resp.Br. 31). But it only says that this is because the

appointment was "void" for being untimely, a meritless claim it makes in the final nine pages of its brief and Mrs. Holmes refutes below at pp. 19-29. As Mrs. Holmes explains below, her appointment was valid, the trial court did not hold otherwise, and UP cannot challenge the appointment collaterally. Instead, the sole deficiency UP and the trial court identified was that Mrs. Holmes had not been appointed the personal representative, and her first amended petition truthfully stating specifically that she had and attaching her letters of administration would have cured that deficiency.

Finally, UP briefly argues that Rule 67.06 only applies on a dismissal with prejudice, and here the dismissal was without prejudice (Resp.Br. 25-26). That is untrue. As Mrs. Holmes explained in her "motion for reconsideration" and in her opening brief, because Missouri's one-year savings statute, § 516.230, R.S.Mo., does not apply to FELA actions and she was past the FELA's statute of limitations, the dismissal was effectively with prejudice (D25 p. 2; Aplt.Br. 23).

In the modern era, neither this Court nor the Court of Appeals has upheld a trial court's decision to refuse to allow a plaintiff to amend its petition to cure a deficiency when the plaintiff could do so and instead dismiss the plaintiff's case. That UP is unable meaningfully to distinguish Mrs. Holmes's authorities (or even address all of them) or find any on-point in its favor is telling. No authority supports UP's notion that a plaintiff's prior lateness is a reason for refusing her leave to amend her petition to cure a deficiency. Under Rules 55.33(a) and 67.06, there is simply no just reason why Mrs. Holmes could not have been allowed to amend her petition on April

10 or after dismissal. As UP suggested would have accommodated it, the trial court could have done what UP requested and continued "all deadlines for 120 days to account for the four months after Union Pacific had filed its motion" to dismiss (Resp.Br. 12) (citing D20 pp. 4-5; D21).

The trial court erred in denying Mrs. Holmes's April 10, 2019 request for leave to file her first amended petition and instead dismissing her case without further leave to amend. This Court should reverse the trial court's judgment and remand this case with instructions to allow Mrs. Holmes to amend her petition and for further proceedings.

D. UP's self-described "collateral attack" on the letters of administration that the Clay County Probate Court issued Mrs. Holmes is untenable.

In the final nine pages of its brief, UP argues that because the trial court "concluded that the probate division issued" Mrs. Holmes's letters of administration appointing her personal representative "beyond the statutory limitations period," "[a] collateral attack of those letters as void is an alternative ground for affirmance" (Resp.Br. 45-54). It argues that the probate court lacked "subject matter jurisdiction" to issue the letters, so in response to Mrs. Holmes's appeal it can make a "collateral attack" on those letters as an alternative basis to argue that the trial court's judgment should be affirmed (Resp.Br. 45-54).

UP's argument is unsupported by the record and flies in the face of both basic appellate procedure and more than 160 years of uniform jurisdictional and probate law. The trial court never "concluded" that Mrs. Holmes's letters were "void," because it had no power to do so. Regardless,

Rule 84.04(f) does not allow a respondent on appeal to collaterally attack a judgment in a separate case, of which letters of administration qualify. Moreover, UP's allegation that Mrs. Holmes violated a "statute of limitations" in probate court does not affect the probate court's "subject matter jurisdiction." And in more than a dozen decisions spanning from 1857 to the present, including an FELA wrongful death case almost directly on point, *see McIntyre v. St. Louis & S.F. Ry. Co.*, 227 S.W. 1047, 1049-50 (Mo. 1920), this Court and the Court of Appeals uniformly and without exception have held that a party in a civil case against a personal representative of an estate cannot mount a collateral challenge to the validity of the appointment. Finally, Mrs. Holmes properly applied for letters and was granted them.

This Court should reject UP's attempt in response to Mrs. Holmes's appeal to mount a collateral attack on the Clay County Probate Court's letters of administration.

1. The trial court did not hold that Mrs. Holmes's letters were invalid, but merely raised the possibility that they had not been timely sought.

UP suggests in both its statement of facts and its argument that the "trial court's dismissal order concluded that the [Clay County] probate division issued [Mrs. Holmes's] letters [of administration] beyond the statutory limitations period" and therefore found they were "void" (Resp.Br. 45). It states that "[t]he trial court explained that Missouri law imposed a one-year period of limitations under Mo. Rev. Stat. § 473.020 in which to seek letters of administration," Mr. Holmes "died on July 3, 2015," Mrs. Holmes did not seek the letters "until March 25, 2019," and "[t]he court

therefore dismissed the action" (Resp.Br. 13) (emphasis added).

This is untrue. Nowhere in its dismissal order did the trial court "conclude" that Mrs. Holmes's letters were "void." Instead, it merely raised the possibility that they had not been timely sought, without making any conclusion about that. (Likely, the court knew it was without power to make that conclusion, as a simple Westlaw search reveals. See below at pp. 24-28.)

The trial court noted the statute of limitations under § 473.020 and the exception to it under § 537.021.1, R.S.Mo. (D24 pp. 3-4). But it did not hold this was the reason for its dismissal; instead, it held it was entering the dismissal because Mrs. Holmes "failed to be appointed as personal representative before filing this cause of action *or in the proscribed time* [sic] *of the Court's previous order*" (D24 p. 4) (emphasis added). Within that "prescribed time," meaning the order granting until April 3, 2019 to amend her petition, was more than one year after Mr. Holmes's death.

Necessarily then, the trial court was not specifically holding that the letters entered more than one year later were void, only merely raising the possibility of untimely action. Instead, it found that it was Mrs. Holmes's failure to be appointed by April 3, 2019 that meant she "lacks standing" (D24 p. 4). As Mrs. Holmes explains in her opening brief, this was error.

Nowhere in its order did the trial court find that Mrs. Holmes's letters were "void," as UP argues (Resp.Br. 45). Therefore, Mrs. Holmes was under no obligation to address such a contention in her opening brief.

2. The well-established, uniform law of Missouri is that UP cannot "collaterally attack" the Clay County letters, which remain valid only unless the probate court revokes them.

UP argues that its "collateral attack" on Mrs. Holmes's letters is proper because Rule 84.04(f) allows a respondent to "include additional arguments in support of the judgment." While a respondent can make additional arguments in support of a trial court's judgment, that does not allow it to attack a separate judgment in a different case.

First, because UP did not argue below that Mrs. Holmes's letters were invalid in any way, its argument is improper. In the context of a grant of a motion to dismiss, this Court's review is limited to "only the grounds raised in the motion to dismiss in reviewing the propriety of the trial court's dismissal of a petition …." *Travelers Cas. Co. of Am. v. Manitowoc Co.*, 389 S.W.3d 174, 176 (Mo. banc 2013).

Here, UP did not make any argument about the validity of Mrs. Holmes's letters or her ability to seek them in 2019 in its motion to dismiss (D4), its suggestions in support of its motion (D5), its reply in support of its motion (D11), its renewal of its motion (D16), its opposition to Mrs. Holmes's April 10, 2019 request to file her first amended petition (D20), or even its opposition to her "motion for reconsideration" (D26). Simply put, at no time below did UP ever make the argument it now makes in its brief – even *after* when it now alleges the trial court made this "conclusion." Instead, in its suggestions in support of its motion to dismiss, it argued the opposite, that Mrs. Holmes *could* still become the personal representative: "Under FELA,

she therefore has no standing to sue *until she obtains those letters*" (D5 p. 6) (emphasis added).

Second, this limitation makes sense because there is no record before the Court of the probate court proceedings, only Mrs. Holmes's bare letters attached to her proposed amended petition. By its own admission (Resp.Br. 45 n.9), UP effectively is attempting to appeal directly to this Court from the denial of its challenge to Mrs. Holmes's letters, bypassing the Court of Appeals and without filing a record on appeal, formulating a point relied on, or making an argument of trial court error. Judge Chamberlain in Clay County had good reason for holding that UP's argument seeking to revoke Mrs. Holmes's letters is without merit. UP cannot circumvent Missouri's entire appellate process to challenge his decision.

Third, UP is wrong that it ever could have made the argument that it now makes for the first time in its brief in this Court, or that it can make that argument now. It suggests that it can make this "collateral attack" – UP's words – because collateral attacks are allowed on judgments that are "void" (Resp.Br. 47), and despite this Court's clarification in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009) of what subject-matter jurisdiction means in Missouri, Mrs. Holmes's letters are "void" because they were not issued within what it calls the "statutory limitations period" (Resp.Br. 45, 47-50).

Notably, not a single decision UP cites about an allegedly "void" judgment involved an argument that the plaintiff's claim violated a statute of limitations. This is because both before and after *Webb*, it has been well-

established that a statute of limitations does not implicate a trial court's "jurisdiction." "[T]he lapse of the statute of limitations is not jurisdictional[.]" *State v. Easterday*, 534 S.W.3d 914, 917 (Mo. App. 2017) (alteration in the original) (citation omitted). "The running of a statute of limitations is an affirmative defense. Affirmative defenses do not implicate a trial court's subject matter jurisdiction." *Reverse Mortg. Solutions, Inc. v. Est. of Hunter*, 479 S.W.3d 662, 668 (Mo. App. 2015) (internal citation omitted).

For this reason, for more than 160 years this Court and the Court of Appeals uniformly and without exception have held that a party in a civil case involving a personal representative of an estate (and the older forms of executor and administrator) cannot collaterally attack the probate court's order of appointment, even if the party alleges that statutory prerequisites for the appointment were not met.

In *McIntyre*, which is almost directly on point, this Court held that a railroad in a wrongful-death FELA case could not collaterally attack the validity of the plaintiff's appointment as administrator, despite its argument that the appointment was untimely because at the time of the appointment, the decedent's widow had not yet renounced her right to be administrator. 227 S.W. at 1049-50. The Court held:

> A judgment of the probate court, on matters within its jurisdiction, is as conclusive and impervious to collateral attack as the judgment of a court of general jurisdiction. When a court, having jurisdiction of the class of actions like the one before it and of the persons interested, must determine whether it has jurisdiction by the ascertainment of facts in pais, its determination is conclusive. If, in the absence or silence of the record as to any fact necessary to give jurisdiction, such court

> retains it, the finding of jurisdictional facts is presumed. In such case the judgment cannot be attacked collaterally by showing that the court erroneously found the facts which would give it jurisdiction.

Id. "The effect of the [railroad]'s position is to attempt to invalidate the judgment of the probate court by disputing the facts which the court must have found in order to render the judgment. On that theory of the law no judgment would ever settle any question of fact." *Id.* at 1050.

All other decisions from this Court and the Court of Appeals on this issue from 1857 to the present uniformly agree. *See*:

- *Miller v. Gayman*, 482 S.W.2d 414, 417 (Mo. 1972) (in action by executrix on note, defendant could not collaterally challenge validity of letters appointing her on the ground of statutorily improper residence);
- *Rodewald v. Rodewald*, 297 S.W.2d 536, 539 (Mo. 1957) (to challenge administratrix's appointment, defendant had to do so in probate court, not on appeal from judgment in administratrix's favor);
- *State ex rel. Nelson v. Hammett*, 203 S.W.2d 115, 122 (Mo. App. 1947) (same re: argument that appointment was due to fraud; "[t]he proceedings in the probate court wherein relator was appointed executor were in rem and the order or judgment of the probate court appointing the executor is conclusive as against the world");
- *Kerr v. Prudential Ins. Co. of Am.*, 194 S.W.2d 706, 710-11 (Mo. App. 1946) ("[t]he appointment of Charles Kerr as administrator was a judicial act and the judgment of the court in making such appointment is not subject to collateral attack; and if he acted within the power

granted him by statute it cannot be attacked in a collateral proceeding");

- *Thompson v. Kan. City, Clay Cnty. & St. Joseph Ry. Co.*, 27 S.W.2d 58, 61 (Mo. App. 1930) (appointment of administratrix by probate court of wrong county that lacked statutory authority did not affect its validity for her ability to act and those actions were not subject to collateral attack; her appointment remained valid until vacated);
- *State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md.*, 298 S.W. 83, 90 (Mo. 1927) (same re: argument that there was insufficient statutory notice for appointment of administrator);
- *Wyatt v. Wilhite*, 183 S.W. 1107, 1108-09 (Mo. App. 1916) (same re: argument that decedent was not resident of county whose probate court issued the letters; "This being a collateral proceeding, the appointment of defendant as administrator of his father's estate must be regarded as res adjudicata, though the court erroneously found the deceased was a resident of Cass county");
- *Connor v. Paul*, 119 S.W. 1006, 1007 (Mo. App. 1909) (same re: argument that administrator/executor failed to give the statutorily required bond on appointment);
- *In re Davison's Est.*, 73 S.W. 373, 374 (Mo. App. 1903) (same where administrator was appointed by wrong county; "when a probate court has granted letters of administration on a decedent's estate, the grant has validity until it is set aside");

- *Macey v. Stark*, 21 S.W. 1088, 1091-92 (Mo. 1893) (same re: argument that administrator did not make statutorily required affidavit; letters issued to an administrator are evidence that the proper steps were taken to procure the appointment, parties desiring to make objection must do so in the probate court, and it is not open to them to make such objections in a collateral suit);
- *Brawford v. Wolfe*, 15 S.W. 426, 427 (Mo. 1891) (probate court's judgments "are no more subject to collateral attack than are those of courts of general jurisdiction. The appointment of the administrator of Davis, then, is conclusive in this action, and cannot be called in question");
- *Johnson v. Beazley*, 65 Mo. 250, 264-65 (1877) ("To allow the heirs, or any one else, in a collateral proceeding to question the correctness of the judgment of the [probate] court [appointing administrator], would so imperil the titles conveyed at administrator's sales of lands that no prudent man would bid their value, and estates would be sacrificed"); and
- *Riley's Adm'r v. McCord's Adm'r*, 24 Mo. 265, 269 (1857) ("Any illegality in the grant of letters of administration cannot be taken advantage of in a collateral proceeding. They must be regarded as valid until they are regularly revoked").

UP does not cite any decision in a case involving the personal representative of an estate in which a party was allowed to argue collaterally that the personal representative's letters of administration were void for any

reason, let alone timeliness, **because none exists**, and more than 160 years of uniform Missouri law holds directly otherwise. UP's argument does not implicate the probate court's "subject matter jurisdiction." The law of Missouri does not allow it to collaterally attack the probate court's judgment now. As UP (unsuccessfully) has done, it must make any challenge properly in the probate court.

3. The probate court acted within its jurisdiction in issuing the letters, which therefore are valid.

Regardless, UP is wrong that Mrs. Holmes's letters are in any way "void." She properly and timely requested letters of administration under § 473.050.6, R.S.Mo., and the probate court issued them.

Section 473.050.6 provides that, "Except as provided in subsection 4 of this section and section 537.021, no letters of administration shall be issued unless application is made to the court for such letters within one year from the date of death of the decedent." Section 537.021's exception to § 473.050.6's one-year deadline states in relevant part:

> 1. The existence of a cause of action for an injury to property, for a personal injury not resulting in death, or for wrongful death, which action survives the death of the wrongdoer or the person injured, or both, shall authorize and require the appointment by a probate division of the circuit court of:
>
> (1) A personal representative of the estate of a person whose property is injured, or a person injured or a person entitled to maintain a wrongful death action upon the death of any such person and such appointment in only those cases involving loss chance of recovery or survival shall be made notwithstanding the time specified in section 473.050 for the exclusive purpose of pursuing a cause of action related to such injury or wrongful death ….

Therefore, § 573.021 permits courts to issue letters more than one year after a decedent's date of death.

While Mrs. Holmes's application is not in the record before this Court, she applied for letters and specifically cited § 537.021. Because the specific statute that she cited in her application permits courts to issue letters more than one year after a decedent's date of death, the probate court had authority to issue letters to Mrs. Holmes.

Whatever UP's argument as to why the letters were issued erroneously, the grant of letters to Mrs. Holmes is a proper judgment of the probate court within its jurisdiction that "has validity until it is set aside" by the probate court. *Davison's Estate*, 73 S.W. at 374. "They must be regarded as valid until they are regularly revoked." *Riley's Adm'r*, 24 Mo. at 269.

Conclusion

This Court should reverse the trial court's judgment and remand this case with instructions to allow Mrs. Holmes to amend her petition and for further proceedings on her FELA action.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Rule 84.06(b), as this brief contains 7,372 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this substitute reply brief, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on January 12, 2020, I filed a true and accurate Adobe PDF copy of this substitute reply brief via the Court's electronic filing system, which notified the following of that filing:

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