

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 BRIEF OF THE APPELLANT

JONATHAN STERNBERG, Mo. #59533
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
Telephone: (816) 292-7020
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLANT
CAROLYN HOLMES

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Jackson County granting the defendant/respondent's motion to dismiss the plaintiff/appellant's action brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* ("FELA").

This case does not fall within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3, so the appellant timely appealed to the Missouri Court of Appeals, Western District. This case arose in Jackson County. Under § 477.070, R.S.Mo., venue lay within that district of the Court of Appeals.

After the Court of Appeals issued an opinion reversing the trial court's judgment and remanding the case for further proceedings, the respondent filed a timely motion for rehearing and application for transfer in the Court of Appeals, both of which were denied. The respondent then filed a timely application for transfer in this Court under Rule 83.04. The Court sustained that application and transferred this case.

Therefore, under Mo. Const. art. V, § 10, which authorizes this Court to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," this Court has jurisdiction.

Statement of Facts

A. Mrs. Holmes's suit and initial proceedings

In April 2018, Carolyn Holmes brought a wrongful death action in the Circuit Court of Jackson County under the FELA, 45 U.S.C. §§ 51, *et seq.* (“FELA”), and the Federal Locomotive Inspection Act, 49 U.S.C. §§ 20701, *et seq.*, against the Union Pacific Railroad Company (“UP”) (D2 p. 1). Both the petition’s caption and its prayer for relief listed Mrs. Holmes as “Personal Representative for the Estate of Robert V. Holmes” (D2 pp. 1, 5).

Mrs. Holmes alleged in her petition that her husband, Robert Holmes, had worked for UP and its predecessors from 1970 to 2010 as a fireman and conductor (D2 pp. 1-2). She alleged he contracted lung cancer, from which he died in July 2015 (D2 pp. 2-4). She alleged that his cancer and death were caused or contributed to by his exposure to toxic substances and carcinogens during his railroad employment, including “diesel fuel/fumes/benzene from the exhausts of the locomotives and track equipment; creosote from rail ties and timbers; silica dust from railroad ballast and traction sand and; asbestos fibers from the locomotives’ insulation and brake shoe dust from locomotives and rail cars” (D2 pp. 2-3). She alleged this was UP’s negligence because it had used known cancer-causing materials in its operation, which it knew or in the ordinary exercise of ordinary care should have known were harmful (D2 pp. 2-3). She alleged twelve ways in which this failed the railroad’s duty of care to Mr. Holmes (D2 pp. 3-4).

UP timely answered, denied Mrs. Holmes’s claims, and sought judgment in its favor (D3).

B. UP's motion to dismiss and Mrs. Holmes's response

One of UP's counsel stated in an affidavit that Mrs. Holmes had signed releases for medical records in the capacity as the personal representative of Mr. Holmes's estate (D5 p. 9). But he said that because her counsel still had not yet provided UP's counsel with her letters of administration appointing her personal representative, this was creating difficulty in obtaining the records, and he informed her counsel of this in November 2018 (D5 pp. 9-10). He said Mrs. Holmes's counsel responded that no "official estate has been opened" for Mr. Holmes (D5 pp. 9, 11). This led UP's counsel to conclude that "contrary to her complaint and signature on the authorizations," Mrs. Holmes "is not really the personal representative of Robert Holmes's estate" (D5 p. 9).

In December 2018, UP moved to dismiss Mrs. Holmes's action, arguing that her failure to have been validly appointed the personal representative of Mr. Holmes's estate meant she lacked "standing to sue" and the court lacked "subject matter jurisdiction" (D4 p. 1). It argued the FELA permitted only a personal representative to assert wrongful death claims and required the plaintiff to obtain a formal appointment as personal representative before bringing those claims (D5 pp. 3-4). It argued Mrs. Holmes had no letters of administration necessary to act as a personal representative, and her counsel had admitted this, so she lacked standing to bring her claims against UP (D5 pp. 1, 4). It argued she should not be permitted to amend her petition "because the defect is jurisdictional" (D5 pp. 4-5).

The trial court allowed Mrs. Holmes to respond to UP's motion to dismiss out of time (D12). In a section of her memorandum in opposition

titled “Capacity to Sue,” she argued that while UP was correct that she had not formally been appointed as Mr. Holmes’s personal representative, that was not fatal to her action (D8 pp. 1-2). She argued that under the FELA this was a question of her capacity to sue, and she had the ability to be formally granted letters of administration later and then amend her petition, which would relate back to her original petition (D8 pp. 2-5). She argued this effectuated the FELA’s special purposes (D8 pp. 6-7).

Mrs. Holmes argued the “court has the authority to allow a plaintiff to amend her original pleading to establish her capacity to bring an action” and it should do so here (D8 p. 4). She argued she “will formalize her position as the Administratrix of the Estate and her appointment as Administratrix should relate back” (D8 p. 2). Alternatively, she argued the court “should allow a filing of an Amended Complaint to more specifically plead the capacity to sue that, pursuant to FELA and the Supreme Court’s interpretation thereof, will relate back to the original date of filing” (D8 p. 2).

UP replied, arguing that Missouri law does not allow a post-filing appointment as a personal representative of an estate to relate back to the filing of a wrongful death action (D11 pp. 2-3). It argued that an action under the FELA should not be treated any differently (D11 pp. 3-7).

On March 4, 2019, the trial court entered an order staying action on UP’s motion to dismiss for 30 days, until April 3, “for Plaintiff to file an amended petition with all claims conforming to Missouri and Local Rule” (D13 p. 1; App. A6). Thereafter, “the Court will consider all plead [sic] matters, as it relates to the motion to dismiss” (D13 p. 1; App. A6).

C. Proceedings in probate court

On March 25, 2019, Mrs. Holmes opened an estate for Mr. Holmes in the Circuit Court of Clay County, Probate Division, and sought letters of administration to be appointed personal representative of his estate (D16 p. 1; D17 p. 1). All of his other heirs notified the probate court that they consented to her appointment (D15 p. 1; App. A8).

On April 1, still not yet having received the letters of appointment, Mrs. Holmes submitted a status update to the trial court in Jackson County explaining that she was awaiting the letters (D15; App. A8). On April 4, UP responded and renewed its motion to dismiss, arguing that as Mrs. Holmes had not filed an amended petition by 30 days from the court's March 4 order, and had not instituted the probate proceedings until March 25, the court should grant its motion to dismiss Mrs. Holmes's petition (D16).

On April 9, the Clay County probate court entered letters of administration in Mr. Holmes's estate appointing Mrs. Holmes as personal representative (D19; App. A15).

D. Further proceedings in circuit court

The next day, April 10, which was seven days after the March 4 order's deadline, Mrs. Holmes moved the trial court to file an amended petition out of time (D17). She attached a proposed first amended petition, to which the probate court's letters were an exhibit (D18; D19; App. A10, A15).

Mrs. Holmes stated she "prepared and filed the Request for the Grant of Letters of Administration within the time frame set by the Court" in its March 4 order, but the probate court "took fifteen days to" grant the letters

(D17 p. 2). She argued this was “excusable neglect” under Rule 44.01(b), and since UP was aware that the estate was open and letters were pending, it would not be prejudiced (D17 p. 2). Her proposed amended petition contained the same allegations against UP as in her original petition but added that she had been appointed Mr. Holmes’s personal representative by the Circuit Court of Clay County (D18 pp. 1-2; App. A10-11).

UP opposed Mrs. Holmes’ request (D20). It argued that her missing deadlines was not “excusable neglect” (D20 pp. 1-2). It argued that her waiting until March 25 to seek the letters was inexcusable (D20 p. 3).

On April 29, the trial court entered an order denying Mrs. Holmes’s motion to file an amended petition, “[b]ased on [her] inability to abide by the order” of March 4 (D23 p. 1; App. A16). It then entered an order granting UP’s motion to dismiss (D24; App. A2). It held that the FELA’s substantive law was federal, but it was subject to Missouri’s procedural rules (D24 p. 3; App. A4). It held that by not being Mr. Holmes’ personal representative, Mrs. Holmes lacked “standing” to sue UP (D24 pp. 2-4; App. A3-5). It held that the statute of limitations under § 473.020, R.S.Mo., to apply for appointment as a personal representative was one year after the date of a decedent’s death, and under § 537.021.1, R.S.Mo. “the existence of a cause of action for wrongful death” extended that time “in only those cases involving loss chance of recovery or survival” (D24 pp. 3-4; App. A4-5).¹ It stated:

¹ In August 2020, while its application for transfer was pending in this Court, UP filed a petition in the probate court to revoke Mrs. Holmes’ letters, arguing her seeking the appointment was untimely. *See Estate of Holmes*, Case No. 19CY-PR00252. Mrs. Holmes opposed this, arguing that the one-year limitation period in § 473.020 only applied to creditors petitioning to

Here, over one year has passed since decedent's death and Plaintiff failed to be appointed as personal representative before filing this cause of action or in the proscribed time of the Court's previous order. As such, the Court finds that Plaintiff lacks standing to bring this cause of action and Defendant's motion to dismiss is granted.

(D24 p. 4; App. A5).

Four days later, Mrs. Holmes moved the court to reconsider and allow her to proceed with her amended petition (D25). She argued she had informed the court on April 1 that the estate had been opened, but that the probate court had not yet issued the letters that were required for her to file an amended petition (D25 pp. 1-2). She argued the amended petition was sought a day after the letters were issued (D25 p. 2). She argued that as the saving statute in § 516.230, R.S.Mo. does not apply to an action under the FELA, a dismissal would foreclose any recovery (D25 p. 2). She argued,

The fact that Plaintiff's Amended Petition was filed as soon as possible after the Letters of Administration were issued, and that the dismissal of this action without prejudice extinguishes any potential legal remedy the Plaintiff has against Union Pacific for the death of her husband, qualify as good cause for the Court to re-open this action and amend its Order dismissing this cause.

(D25 p. 2).

open estates, and instead she was a surviving spouse applying to open an estate to bring a wrongful death action, which under §§ 473.050.1 and 537.021, R.S.Mo. she could do outside that deadline. In October 2020, the probate court agreed with Mrs. Holmes and dismissed UP's petition to revoke, "find[ing] that the Application and Appointment was specifically requested and granted pursuant to sec. 473.050 and sec. 537.021. RSMo." UP appealed that order to the Missouri Court of Appeals, Western District, where its appeal remains pending. *See* Case No. WD84149.

UP opposed Mrs. Holmes' motion (D26). It argued her filing her petition without an appointment as personal representative was conduct that "was reckless if not intentional" (D26 p. 4). It argued that the fact she now could not meet the statute of limitations did not make for a "manifest injustice" and was not "good cause" (D26 p. 6).

Mrs. Holmes replied, arguing that her appointment as personal representative would relate back to the original petition (D27 p. 2). She argued that she did not engage in any recklessness in seeking the appointment so as to amend her petition:

[Mrs.] Holmes was first required to receive Letters of Administration from the Clay County Circuit Court, a process which took the Clay County Circuit Court 16 days from the date of the filing of the Estate. 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. Completing all of that within 37 days does not evidence a "cavalier approach" towards this case.

(D27 p. 3). She argued that her capacity to sue was something she could cure even now, as parties can do so even after trial (D27 p. 3).

The court summarily denied Mrs. Holmes's motion to reconsider, and she appealed to the Missouri Court of Appeals, Western District (D28; D29). She then moved the court to redenate its order granting UP's motion to dismiss as a "judgment," which it did (D35; D37; App. A1).

The Court of Appeals ultimately issued a decision reversing the trial court's judgment and remanding this case for further proceedings. This Court then sustained UP's application for transfer and transferred this case.

Point Relied On

The trial court erred in denying Mrs. Holmes leave to file her first amended petition and instead dismissing her case *because* this was an abuse of discretion, as under Rule 55.33 a plaintiff may perfect her capacity as the personal representative of the estate of her decedent husband during the pendency of an FELA action and, once she has done so, may amend her petition to correct her status, which relates back to the date of the original petition, and under Rule 67.06 a court must allow a plaintiff to amend her petition to cure a curable error upon dismissing it when she requests to do so *in that* Mrs. Holmes was unable to file an amended petition including a true averment that she was the personal representative of the estate of her late husband until the probate court issued letters of administration to her, which was after the deadline the trial court had set for an amendment, but the trial court nonetheless then dismissed her petition and refused to allow her to amend.

Mo., Kan. & Tex. Ry. Co. v. Wulf, 226 U.S. 570 (1913)

Slater v. Kan. City Terminal Ry. Co., 271 S.W.2d 581 (Mo. 1954)

Vaughan v. St. Louis & S.F. Ry. Co., 164 S.W. 144 (Mo. App. 1914)

Peyton v. Bellefontaine Gardens Nursing & Rehab, Inc., 246 S.W.3d 914

(Mo. banc 2008)

Rule 55.33

Rule 67.06

Argument

The trial court erred in denying Mrs. Holmes leave to file her first amended petition and instead dismissing her case *because* this was an abuse of discretion, as under Rule 55.33 a plaintiff may perfect her capacity as the personal representative of the estate of her decedent husband during the pendency of an FELA action and, once she has done so, may amend her petition to correct her status, which relates back to the date of the original petition, and under Rule 67.06 a court must allow a plaintiff to amend her petition to cure a curable error upon dismissing it when she requests to do so *in that* Mrs. Holmes was unable to file an amended petition including a true averment that she was the personal representative of the estate of her late husband until the probate court issued letters of administration to her, which was after the deadline the trial court had set for an amendment, but the trial court nonetheless then dismissed her petition and refused to allow her to amend.

Preservation Statement

This point is preserved for appellate review. Mrs. Holmes made the argument in it in her opposition to UP's motion to dismiss (D8 pp. 2-7), her motion for leave to file her amended petition out of time (D17 pp. 1-2), her motion to reconsider the orders denying leave to amend and dismissing the case (D25 pp. 1-2), and her reply in support of that motion (D27 pp. 1-4).

Standard of Review

“[T]he decision to allow or disallow amendments to pleadings is within the sound discretion of the trial court.” *Lester v. Sayles*, 850 S.W.2d 858, 869

(Mo. banc 1993). “An appellate court will not disturb a trial court’s denial of a motion to amend a pleading unless it is clearly erroneous.” *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 611 (Mo. banc 2008).

But Missouri courts have identified “[f]actors to consider in the exercise of that discretion.” *Lester*, 850 S.W.2d at 869. So, in reviewing the denial of a motion to amend a pleading, this Court will reweigh the factors for itself and, if under the circumstances they are met, the denial of a motion to amend will be reversed. *See, e.g., id.*

Above all, “[i]n reviewing the trial court’s decision” denying leave to amend, an appellate court “look[s] to see whether justice is furthered or subverted by the course taken.” *Tisch v. DST Sys., Inc.*, 368 S.W.3d 245, 257 (Mo. App. 2012) (W.D.) (quoting *Kenley v. J.E. Jones Constr. Co.*, 870 S.W.2d 494, 498 (Mo. App. 1994) (E.D.); *see also Ben Brower Prop. Co., LLC v. Evella, LLC*, 554 S.W.3d 504, 511 (Mo. App. 2018) (S.D.).

As well, even where review is for abuse of discretion, a trial court “can abuse its discretion ... through the application of incorrect legal principles.” *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009). When a trial court’s exercise of discretion is challenged on legal grounds, no deference is warranted, and this Court’s review is *de novo*. *See id.*; *Bohrn v. Klick*, 276 S.W.3d 863, 865 (Mo. App. 2009); *Hurlock v. Park Lane Med. Ctr., Inc.*, 709 S.W.2d 872, 880 (Mo. App. 1985). A court necessarily abuses its discretion when it bases an otherwise discretionary ruling on an erroneous legal conclusion. *Bohrn*, 276 S.W.3d at 865.

* * *

When a defect in a plaintiff's petition is curable early on in a case, the trial court may not dismiss it without then allowing the plaintiff to cure the defect if she requests to. And when an FELA wrongful death plaintiff has not actually been appointed personal representative of the decedent's estate when she filed her petition, both Missouri and federal law allow her to cure this capacity issue by being appointed personal representative and amending her petition, which relates back to her original filing.

Here, though Mrs. Holmes had not been appointed personal representative of her husband's estate at the time she filed her FELA action for his wrongful death, she later obtained that appointment. Nonetheless, the trial court dismissed her petition and refused to allow her to amend it. This was error, requiring reversal and remand for further proceedings.

A. Rule 55.33(a) mandates that a trial court freely grant leave to amend a petition whenever doing so would further justice.

Rule 55.33(a) provides that after a responsive pleading is served, a "pleading may be amended only with leave of court or by written consent of the adverse party," but "leave shall be freely given when justice so requires" (App. A18). So, "Although a plaintiff does not have an absolute right to file an amended petition, leave to amend a petition 'shall be freely given when justice so requires.'" *Clark v. Kinsey*, 488 S.W.3d 750, 763 (Mo. App. 2016).

Because of this, "[t]rial courts are not to be stingy in granting leave to amend." *Ferrellgas, Inc. v. Edward A. Smith, P.C.*, 190 S.W.3d 615, 619 (Mo. App. 2006). An amendment "allow[s] a party to assert a matter ... neglected from inadvertence at the time of the original pleading." *Hoover v. Brundage-Bone Concrete Pumping, Inc.*, 193 S.W.3d 867, 870 (Mo. App. 2006).

This Court and the Court of Appeals have identified factors for deciding whether an amendment should be allowed under Rule 55.33(a):

- This Court has stated three factors: “(1) the hardship to the moving party; (2) the moving party’s reason for omitting the matter from the original pleadings; and (3) any injustice that would result to the nonmoving party if the court granted leave to amend.” *Bach*, 257 S.W.3d at 611 (citing *Lester*, 850 S.W.2d at 869).
- To these, all three districts of the Court of Appeals have added two more factors: “timeliness of the application” and “whether an amendment could cure any inadequacy of the moving party’s pleading.” *See Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309, 325 (Mo. App. 2010) (E.D.); *T.Q.L. v. L.L.*, 291 S.W.3d 258, 268 (Mo. App. 2009) (S.D.); *Doran v. Chand*, 284 S.W.3d 659, 666 (Mo. App. 2009) (W.D.).

If these factors favor the party seeking to make the amendment but the trial court denies leave to amend anyway, it abuses its discretion. *Lester*, 850 S.W.3d at 869-70 (reversing denial of leave to amend answer to add affirmative defense where these factors were met).

These same factors also apply to request to amend pleading out of time. *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 *Neenan*, after trial and a verdict in the plaintiff’s favor, the Court of Appeals applied Rule 55.33(a)’s factors to reverse the denial of leave to amend the defendant’s answer out of time to add counterclaim, requiring a new trial on all claims. *Id.*

B. Mrs. Holmes’s request to amend her petition to truthfully state she had been appointed personal representative of her late husband’s estate met all of Rule 55.33(a)’s factors for allowing her to do so.

The circumstances of this case meet all five factors Missouri courts have identified under Rule 55.33(a). Allowing Mrs. Holmes her amendment would further substantial justice. The trial court erred in holding otherwise.

First, there is hardship to Mrs. Holmes because leave to amend was denied. Her cause of action for the wrongful death of her late husband would be dismissed forever, with no possibility of recovery (D25 p. 2). The FELA includes a three-year statute of limitations, 45 U.S.C. § 56, which in a wrongful death case accrues on the decedent’s death. *Reading Co. v. Koons*, 271 U.S. 58, 65 (1926). Here, Mr. Holmes’s death was in July 2015 (D2 p. 2). Missouri’s one-year saving statute in § 516.230, R.S.Mo. “cannot be used to extend the FELA limitation period” *Ross v. Union Pac. R.R. Co.*, 906 S.W.2d 711, 712 n.2 (Mo. banc 1995). So, dismissing Mrs. Holmes’s petition in 2019 without denying leave to amend bars her action forever.

Second, the only reason Mrs. Holmes had not been able to state in her original petition that she had been appointed personal representative of her late husband’s estate was that this had not yet occurred (D8 pp. 1-2).

Third, in terms of the timeliness of her request to amend, Mrs. Holmes made it early on in the action, before any discovery and in the face of UP’s motion to dismiss (D1 pp. 7-8; D8 pp. 1-2), and then again after the trial court’s grant of that motion (D25). Moreover, the only reason she could not meet the arbitrary deadline of April 3 the trial court had set for an amendment including her as personal representative of the estate was that,

though she had applied for letters of administration, the Circuit Court of Clay County had not yet granted them by that point (D15; D17 p. 2; App. A8). But she kept the trial court apprised of her probate proceedings (D15; App. A8), and the day after the letters were issued moved to amend (D17). She also did not delay in the Clay County filing, but instead had to hire local counsel there, obtain renunciations of rights from the heirs, and prepare the pleadings, after which it took the court 16 days to issue the letters (D27 p. 3).

Fourth, the amended pleading Mrs. Holmes proposed to file would cure the sole deficiency that either UP or the trial court ever identified: that she needed to be appointed the personal representative of her husband's estate in order to be able to maintain her action (D4; D5 pp. 3-5; D24 pp. 3-4; App. A4-5). After being appointed personal representative, the sole change her proposed first amended petition sought to make was to add that she had been appointed Mr. Holmes's personal representative by the Circuit Court of Clay County (D18 pp. 1-2; App. A10-11). Moreover, the trial court was wrong that this was an issue of "standing" or "subject matter jurisdiction," but rather as Mrs. Holmes pointed out to the trial court, it was one of her capacity to sue that could easily be cured by an amendment, which then would relate back to her petition (D8 pp. 1-5). *See* below at pp. 29-42.

Finally, there would be no "injustice" to UP if leave to amend had been granted. "Injustice" in this context "is not measured by whether [the party] would suffer financial loss as a result of the court ruling." *Clark*, 488 S.W.3d at 763. Instead, it "is measured by whether [it] is deprived of a legitimate claim or defense because the motion for leave to amend caught [it] by

surprise after [it] had developed [its] strategy.” *Id.*; see also *Lester*, 850 S.W.3d at 869 (“injustice to the non-moving party’ ... is essentially a rule of prejudice” and means the non-moving party must be forced to undertake “additional discovery or other preparation ... to fend off” what the amendment changes).

Here, before even discovery, and where UP already had been operating under the assumption that Mrs. Holmes had been appointed the personal representative of her late husband’s estate, there would be no such injustice to UP. It would not change UP’s strategy or defense at all.

C. Rule 67.06 also required allowing Mrs. Holmes her requested amendment here, as it further mandates that when a defect in a plaintiff’s petition is curable early on in a case, the trial court cannot dismiss the petition without then allowing the plaintiff an opportunity to cure the defect if she requests to do so.

Under Rule 67.06, the requirement that trial courts freely grant amendments when justice requires is heightened further in the case of a first amended petition that is insufficient and otherwise would require dismissal. It provides, “On sustaining a motion to dismiss a claim, ... the court *shall* freely grant leave to amend and *shall* specify the time within which the amendment shall be made or amended pleading filed.” *Id.* (App. A20) (emphasis added).

“Rule 67.06 presumes the trial court has sustained the defendant’s motion to dismiss before it considers granting leave to amend and later determining dismissal with prejudice will occur should plaintiff fail to amend in a timely fashion.” *Black v. Rite Mortg. & Fin., Inc.*, 239 S.W.3d 165, 167 (Mo. App. 2007) (Draper, J.). If the trial court sustains a motion to dismiss, it

then must allow the plaintiff to amend her petition if by doing so she can cure the deficiency that would result in the dismissal. *Id.*

This means that under Rule 67.06, “[o]rdinarily when a first pleading is ruled to be insufficient in a trial court, the party is afforded a reasonable time to file an amended pleading if desired.” *Costa v. Allen*, 274 S.W.3d 461, 463 (Mo. banc 2008) (quoting *Dietrich v. Pulitzer Publ’g Co.*, 422 S.W.2d 330, 334 (Mo. 1968)). While Rule 67.06 does “not require [a] trial court *sua sponte* to grant leave to amend,” it “limit[s] its jurisdiction to disregard” a request for leave to amend a pleading in the face of a dismissal. *Id.* In *Costa*, this Court held that even a request to amend the petition filed within the 30-day post-judgment motion period after entry of judgment should be granted and reversed the denial of just such a request. *Id.*

Therefore, as in *Costa*, Missouri courts without fail have held that under Rule 67.06, when a trial court dismisses a plaintiff’s petition for a deficiency and the plaintiff has requested to amend her petition to cure that deficiency, the plaintiff then *must* be allowed to amend her petition to do so, and denying her leave to do so, especially on an erroneous legal basis, is reversible error. *See*:

- *McDonald v. Chamber of Com. of Indep.*, 581 S.W.3d 110, 113 n.6 (Mo. App. 2019) (reversing refusal to allow amendment after dismissing plaintiff’s Missouri Human Rights Act petition for lack of “subject matter jurisdiction” for failure to include she had exhausted her administrative remedies, as request for amendment was less than two

weeks after dismissal, proposed amendment would cure this deficiency, and this was not a question of “subject matter jurisdiction” at all);

- *Asmus v. Cap. Region Fam. Prac.*, 115 S.W.3d 427, 437 (Mo. App. 2003) (where only bankruptcy trustee had standing to bring medical malpractice claim, rather than the injured party himself, under Rules 55.33(a) and 67.06 the trial court’s dismissal and refusal to allow amendment to bring suit in name of the bankruptcy trustee, rather than the of injured party, was an abuse of discretion);
- *Arnold v. Am. Fam. Mut. Ins. Co.*, 987 S.W.2d 537, 542-44 (Mo. App. 1999) (Stith, J., joined by Breckenridge, J.) (reversing dismissal of insurance suit from deadly accident where trial court dismissed for plaintiffs’ failure to plead compliance with all contractual obligations under the insurance policies but then did not allow them to amend their petition to plead so);
- *Manzer v. Sanchez*, 985 S.W.2d 936, 939-40 (Mo. App. 1999) (reversing dismissal of shareholder derivative suit where, after dismissal, trial court refused to allow plaintiffs to amend petition that would have cured the original petition’s deficiency);
- *Western Cas. & Sur. Co. v. Kan. City Bank & Tr. Co.*, 743 S.W.2d 578, 581-83 (Mo. App. 1988) (same re: dismissing petition and then denying leave to amend in action to set aside debtor property transfer);
- *Arana v. Koerner*, 735 S.W.2d 729, 736 (Mo. App. 1987), *overruled on other grounds by Klemme v. Best*, 941 S.W.2d 493, 496 (Mo. banc 1997) (same re: legal malpractice case);

- *Gierke v. Hayes*, 724 S.W.2d 282, 285-87 (Mo. App. 1987) (same re: action for breach of fiduciary duty and fraud);
- *State ex rel. Willman v. St. Joseph Hosp.*, 707 S.W.2d 828, 832-33 (Mo. App. 1986) (same re: action for mandamus against revocation of physician's hospital privileges, where request to amend was made only four days after dismissal);
- *Boyd v. Kan. City Area Transp. Auth.*, 610 S.W.2d 414, 417 (Mo. App. 1980) (same re: service letter action, where request to amend was made only a week after dismissal);
- *State ex rel. Allen v. Barker*, 581 S.W.2d 818, 824-25 (Mo. banc 1979) (granting writ of prohibition against dismissal of counts for governmental immunity and holding the plaintiff must be allowed to amend his petition to state sufficient facts to activate an exception to that immunity doctrine).

The same as in all these decisions is true here.

First, the trial court recognized that Mrs. Holmes could cure the deficiency of her not having been appointed personal representative by filing an amended petition once she had been appointed personal representative, stating so (D13 p. 1; App. A6). Though it set a deadline of April 3, 2019 for this (D13 p. 1; App. A6), she informed the trial court within that deadline that the letters had not yet been issued (D15; App. A8). And as soon as they were, on April 10 – a mere six days after the deadline and one day after the letters' issuance – she moved to file her amended petition that would cure the deficiency (D17; D18; D19; App. A10, A15). The trial court's refusal to allow

her to do so and instead deciding to dismiss the case failed Rule 55.33(a) and was an abuse of discretion. *See* above at pp. 23-25.

Second, when the trial court then *did* grant UP's motion to dismiss (D23; D24; App. A2, A16), and a mere four days later she asked the court to reconsider and allow her to cure the deficiency by amending her petition (D25), as in all these decisions above it violated Rule 67.06, which *then* obligated the trial court to allow her to amend. "*On* sustaining [UP's] motion to dismiss [Mrs. Holmes's] claim, ... the court *shall* freely grant leave to amend and *shall* specify the time within which the amendment shall be made or amended pleading filed" *Id.* (App. A20) (emphasis added). At that point, the trial court had *actual* knowledge that Ms. Holmes *in fact* had been appointed personal representative of her late husband's estate and therefore possessed the legal capacity to pursue her FELA wrongful death claim.

As in all these decisions, 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. Under the FELA and Missouri law, Mrs. Holmes's failure to be formally appointed the personal representative of her late husband's estate before filing suit was curable by a later appointment and amendment of her petition, which would relate back to her original petition.

To the extent the trial court suggested the reason it was dismissing Mrs. Holmes's petition and denying her leave to amend was that her failure to be appointed the personal representative of her late husband's estate was an issue of her "standing" and its "subject matter jurisdiction" not curable in an amendment, this misapplied the law. Under the FELA, the issue was one

of Mrs. Holmes's *capacity* to sue, not her *standing*, and certainly not the trial court's "subject matter jurisdiction." Under both Missouri and federal law, Mrs. Holmes could cure this deficiency at any time by formal appointment and amendment of her petition, which would relate back to her original petition.

UP had argued in its motion to dismiss that Mrs. Holmes's failure to have been validly appointed the personal representative of Mr. Holmes's estate meant she lacked "standing to sue" and the court lacked "subject matter jurisdiction" (D4), and so she could not be permitted to amend her petition "because the defect is jurisdictional" (D5 pp. 4-5). And in its order granting UP's motion to dismiss, the trial court held Mrs. Holmes lacked "standing" to sue UP (D24 pp. 2-4; App. A3-5).

This is untrue. This had nothing to do with Mrs. Holmes's "standing." Instead, as she explained to the trial court, under the FELA the fact that she had not formally been appointed as Mr. Holmes's personal representative was not fatal to her action (D8 pp. 1-2). Instead, this was a question of her capacity to sue, and she had the ability to be formally granted letters of administration later and then amend her petition, which would relate back to her original petition (D8 pp. 2-5).

Mrs. Holmes was right, and UP was wrong. To the extent the trial court agreed with UP that Mrs. Holmes *could not* cure the capacity issue in an amended pleading, this misapplied the law. Rather, *especially* under the FELA, she had to be allowed to cure this issue in an amended pleading and continue with her case unimpeded.

1. The FELA has a remedial purpose that requires giving the plaintiff the benefit of every doubt.

Mrs. Holmes brought this action under the FELA, 45 U.S.C. §§ 51, *et seq.*, alleging that her husband's toxic exposure during his railroad work eventually led to his death from lung cancer (D2 pp. 1-5). As noted above at p. 23, the FELA requires that a plaintiff bring her action under it "within three years from the day the cause of action accrued." 45 U.S.C. § 56.

The FELA, a legislative departure from common law principles, was motivated by "the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Mo. Pac. R.R. Co.*, 356 U.S. 326, 329 (1958). It reflects a legislative recognition that the cost of human injury is an unavoidable expense of railroading, which must be borne by someone, and it has to be adjusted equitably between the worker and the carrier. *Id.* The FELA therefore was "designed to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations." *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949).

The FELA "uses broad language that, in turn, 'has been construed even more broadly' by [the U.S. Supreme] Court, consistent with its assessment of congressional intent." *Monessen S.W. Ry. Co. v. Morgan*, 486 U.S. 330, 343 (1988) (Blackmun, J., concurring in part and dissenting in part) (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561-62 (1987)). The U.S. Supreme Court has interpreted the FELA liberally to accomplish the FELA's avowedly "humanitarian" purpose. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). It has "recognized generally that the

FELA is a broad remedial statute, and ha[s] adopted a ‘standard of liberal construction in order to accomplish [Congress’s] objects.’” *Buell*, 480 U.S. at 562 (citation omitted).

So, because the FELA is remedial in nature, it must be “construed liberally to effectuate its purposes.” *Kulavic v. Chi. & Ill. Midland Ry. Co.*, 1 F.3d 507, 512 (7th Cir. 1993); *see also Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 509 (1957). And “the railroad employee is to be given the benefit of every doubt.” *Ratigan v. N.Y. Cent. R.R. Co.*, 291 F.2d 548, 553 (2d Cir. 1961) (collecting cases, including, among others, *Harris v. Pa. R.R. Co.*, 361 U.S. 15, 15 (1959), and *Moore v. Terminal R.R. Ass’n*, 358 U.S. 31, 31-32 (1958)).

2. A widow may file an action under the FELA for her husband’s wrongful death so as to meet its statute of limitations before she has been appointed personal representative of his estate and then amend her pleading to contain that appointment once it has been made.

Under the FELA, a decedent’s dependent widow has the right to bring a personal injury action against a railroad employer for the wrongful death of her spouse. Mrs. Holmes, not knowing she had a cause of action against the railroad, initially did not seek formal appointment as personal representative of the estate of her late husband. Despite UP’s arguments to the contrary, the law of both Missouri and the United States is that her lack of formal letters of administration to is not fatal to her action. Rather, both federal and Missouri law allow her to amend her pleading once the letters were issued. She tried to do so, but the trial court refused. This misapplied the law.

Under Fed. R. Civ. P. 17(a)(3),

The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

Further, Fed. R. Civ. P. 15(c)(1) allows an amendment to relate back to the date of the original pleading. This rule is based on the concept that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading.

Brown v. Shaner, 172 F.3d 927, 932 (6th Cir. 1999). The “thrust of Rule 15 is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings.” *Miller v. Am. Heavy Lift Shipping*, 231 F.3d 242, 248 (6th Cir. 2000).

The same is true under this Court’s rules. Rule 55.33(c) provides:

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

(App. A18).

Rule 55.33(c) applies to cure authority-to-sue issues in wrongful death cases. Under it,

where a wrongful death suit is timely filed by a party with a “legal or beneficial interest,” but lacking authority to maintain the suit for want of a court appointment, the suit is saved from the running of the statute of limitations by “substitution by

amendment of the plaintiff suing in the proper capacity,” which relates back to the filing of the original petition.

Peyton v. Bellefontaine Gardens Nursing & Rehab, Inc., 246 S.W.3d 914, 915-16 (Mo. banc 2008). In *Peyton*, the granddaughter who was her mother’s attorney-in-fact instituted the action, and this Court held that her amended petition naming her mother as the plaintiff related back to the original filing for statute-of-limitation purposes. *Id.*

Similarly, Rule 52.06 “clearly permits substitution of the proper party plaintiff where suit has been brought in the wrong name, whenever the issue becomes known” *City of Wellston v. SBC Commc’ns, Inc.*, 203 S.W.3d 189, 194 (Mo. banc 2006). It provides that “[m]isjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just” Rule 52.06.

This “reflects Missouri’s policy that, absent a showing of bad faith or prejudice in failing to sue in the name of the proper party, ‘[t]he law in Missouri for nearly a century is [that] a new action is not commenced by substituting the party having the legal right to sue instead of another party improperly named.’” *Id.* at 194 and 194. n.9 (quoting *Asmus*, 115 S.W.3d 433-34 (allowing amendment to substitute bankruptcy trustee for injured party; citing *Union Ctr. Redev. Corp. v. Leslie*, 733 S.W.2d 6, 8 (Mo. App. 1987) (trial court properly allowed amendment of pleading to substitute proper plaintiff where suit brought in individual name rather than in name of redevelopment corporation, but besides that the allegations were unchanged)).

Mrs. Holmes's action is under the FELA, which allows this kind of substitution in a wrongful death, too. As the FELA is a federal statute, federal decisions on point concerning the FELA and what it means to be a personal representative under it are particularly illuminating.

Mo., Kan. & Tex. Ry. Co. v. Wulf was an FELA case that the plaintiff commenced in her individual capacity rather than as a representative of the decedent's estate. 226 U.S. 570, 571 (1913). The U.S. Supreme Court held that the district court could allow her to amend her complaint so that the claim could proceed with the plaintiff as the representative of the estate, and that amendment would relate back to the original filing. *Id.* at 576-77. It noted that the amendment was not

equivalent to the commencement of a new action, so as to render it subject to the ... limitation [period] prescribed by [the FELA]. The change was in form rather than in substance. It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit.

Id. (internal citation omitted).

While an older case, *Wulf* remains not only good law, but the seminal case on this subject. It stands for the proposition that a court has the authority to allow a plaintiff to amend her original pleading to establish her ability to bring an action, and this is an issue of her capacity. Numerous courts have followed *Wulf* since. *See, e.g.:*

- *Lynam v. Livingston*, 257 F. Supp. 520, 525 (D. Del. 1966) (“when a cause of action exists at the time when the original complaint is filed, but at that time a plaintiff lacks standing to enforce it, a Court has the

power to permit the plaintiff to file a supplemental pleading to establish his right to sue, by reasons of facts occurring after the suit was begun”);

- *Rejsenhoff v. Colonial Navigation Co.*, 35 F. Supp. 577, 579 (S.D.N.Y. 1940)² (dismissing action without prejudice and tolling the statute of limitations to allow the plaintiff to obtain ancillary letters of administration).

Tidewater Marine Towing, Inc. v. Dow Chem. Co., 689 F.2d 1251 (5th Cir. 1982),³ provides a good example of how this works. There, a common-law wife of a decedent seaman brought a wrongful death action against the owners of the vessel upon which the decedent served. *Id.* at 1252. The common-law wife filed her action without being appointed the personal representative of the decedent’s estate. *Id.* at 1252-53. The district court dismissed the action, and the U.S. Court of Appeals for the Fifth Circuit approved the dismissal. *Id.* at 1253-54.

But the Fifth Circuit noted that that the common-law wife’s claim was not extinguished. *Id.* It allowed for an amended claim by a personal representative of the estate. *Id.* Relying on *Wulf*, the Court noted that “[s]ubstitution of the personal representative in place of the surviving parent is not the commencement of a new suit. The filing of the amended complaint

² *Rejsenhoff* was an action under the “Jones Act, [which] affords seamen the same rights and remedies for personal injuries provided to railway workers pursuant to the [FELA], and incorporates by reference the FELA.” *Duncan v. Am. Com. Barge Line, LLC*, 166 S.W.3d 78, 83 (Mo. App. 2004).

³ *Tidewater* also was a Jones Act case. *See* above at note 2.

(claim) relates back to the time of the original complaint (claim).” *Id.* (internal citation to *Wulf* omitted).

Trial counsel for Mrs. Holmes and for UP are no strangers to this issue, having litigated it in various federal district courts. *See, e.g., Tindall v. Union Pac. R.R. Co.*, No. 17-1221, 2017 WL 4155428 (C.D. Ill. Sept. 19, 2017). In *Tindall*, the district court found *Lang v. Tex. Pac. Ry. Co.*, 624 F.2d 1275 (5th Cir. 1980), to be particularly instructive:

In *Lang*, the plaintiff had not been appointed administrator of the estate until after the jury verdict had been rendered. *Id.* at 1277. The defendant, however, did not plead lack of capacity and only raised the issue in a motion for new trial. *Id.* On appeal, the Fifth Circuit affirmed the District Court’s decision to allow the plaintiff to amend her pleadings to demonstrate capacity.

“The appellants argue that because the appellee lacked the proper capacity throughout the trial, the trial and the verdict are nullities. We disagree. *See Reading*[, 271 U.S. at 58]. It is true, as the appellants contend, that only a personal representative may enforce the action. This limitation on enforcement, however, is not for the purpose of assuring that the proper party be before the court, but rather to assure all beneficiaries and heirs access to whatever funds might result from the litigation and to guarantee that the railroad will not be subject to multiple recoveries. Neither of those bases underlying § 51 are offended by permitting the appellee to amend her complaint after the trial has occurred. Moreover, it is apparent that the appellants have suffered no prejudice. The label affixed to the appellee is one of form not substance for the purpose of prosecuting the litigation. No new cause of action was involved nor were any different factual circumstances introduced. *See [Wulf, 226 U.S. at 577].*”

Tindall, 2017 WL 4155428 at *3.

As this case arises under the FELA, a federal statute, this federal law controls. *See generally, Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see also Rich v. St. Louis & S.F. Ry. Co.*, 148 S.W. 1011, 1015 (Mo. App. 1912). (“The interpretation, construction and effect of Federal Statutes concerning such commerce by the Supreme Court of the United States is conclusive upon all other tribunals when the same matters are called in question”).

But even under Missouri law, the result is the same.

It is well-established in Missouri that “[s]ubstituting a party having the legal right to sue, instead of one improperly named as plaintiff, is in no sense the commencement of a new suit, but so far as defendant is concerned the suit will be regarded as commenced at the time of the original issuing and service of the summons.” *Cytron v. St. Louis Transit Co.*, 104 S.W. 109, 111 (Mo. banc 1907). This Court even has adopted *Wulf*. *See Drakopoulos v. Biddle*, 231 S.W. 924, 926 (Mo. 1921) (concerning the Court’s allowance of substitution of the parties relating back to the original filing: “We are further fortified in the view we take of the amendment in this case by the opinion of Mr. Justice Pitney of the United States Supreme Court in *M. K. & T. Ry. Co. v. Wulf*”).

The point is that, as in *Wulf*, actions should not be dismissed for lack of the formality of the plaintiff being officially appointed as the personal representative of the estate of a decedent as long as the plaintiff can cure the deficiency. And in *Slater v. Kan. City Terminal Ry. Co.*, 271 S.W.2d 581 (Mo. 1954), which is directly on point the other way around, with an amendment from personal representative to heir, this Court held exactly that.

In *Slater*, the widow, as personal representative of the estate of her decedent husband, filed suit under the FELA for her husband's wrongful death. *Id.* at 582. It later was determined that the decedent was not an employee of the railroad as the FELA defines it. *Id.* So, the widow moved to amend her petition to bring the action under Missouri's wrongful death statutes. *Id.* But by that time, the statute of limitations had expired. *Id.*

This Court, relying on *Wulf* and *Drakopoulos*, allowed the widow's amendment of her status from personal representative to widow to relate back to the original filing:

In the amended petition plaintiff as widow was substituted for plaintiff as administratrix. The substitution by amendment was a mere change in the capacity in which plaintiff sued. Before and after the amendment plaintiff, personally, was the person really interested. In this situation, we say the amendment, the change in the capacity in which plaintiff sued, was but a formal one, and in the interest of justice it should be said that the amendment of the petition was not the commencement of a new action and was not barred by limitation. It should be held there was a continuation of the action on the same claim as encompassed within the factual averments of the original petition, and the amendment should be held to have related back to the time of the filing of the original petition.

Id. at 583.

Mrs. Slater merely doffed her cap as the widow and donned the cap of the administratrix. Since no substantive changes were made, this Court found that justice was served by allowing the amended pleading to relate back to the original petition.

This principle also has been applied in Missouri in FELA cases, allowing a plaintiff to cure her capacity issues by amendment, which related

back to the original petition. *See Vaughan v. St. Louis & S.F. Ry. Co.*, 164 S.W. 144, 148-50 (Mo. App. 1914).

In *Vaughan*, the widow sued the defendant railroad in her individual capacity. *Id.* at 145. The husband's death occurred February 12, 1909, and she commenced the action on February 10, 1910. *Id.* After a jury verdict on November 22, 1911 in her favor and before posttrial motions were filed, Mrs. Vaughan filed an "Entry of Appearance of Plaintiff as Administratrix of Her Deceased Husband, Lee Vaughan, and Adoption of Proceedings in Her Behalf Herein." *Id.* On August 27, 1912, post-verdict and while posttrial motions still were pending, Mrs. Vaughan obtained letters of administration for her husband's estate. *Id.* The railroad moved for a new trial, which the trial court denied. *Id.*

In a comprehensive review of *Wulf*, the Court of Appeals held *Wulf* stands for the proposition that while the action is pending, a substitution of the parties is an appropriate remedy. *Id.* at 148-50. Instead of absolutely denying Mrs. Vaughan her recovery, the Court of Appeals reasoned

that the administratrix in this case, having come in before the motion for new trial was disposed of, could, after the sustaining of said motion, have proceeded to trial anew on an amended petition, which she would have had a right to file as a party to the suit. In that event, a judgment, when rendered, will be authorized by law since it will be in favor of someone entitled to it. *And such is the course to be pursued now, under the authority of the Wulf case.*

Id. at 150 (emphasis added). So, even after the expiration of the statute of limitations, even *after verdict*, the Court of Appeals in *Vaughan* allowed the

plaintiff's amended petition to relate back to her original filing so that she was allowed to take her case to the trier of fact. *Id.* at 148-50.

Plainly, the concept of an individual commencing an FELA wrongful death case before having been appointed the personal representative of the decedent's estate, and then perfecting her status as the personal representative during the action, is well-ingrained in both federal and Missouri law, both older and more recent. Frankly, under the FELA's remedial mandate that it be construed liberally to benefit the plaintiff, that result should be considered essentially mandatory. As one court has noted, "[I]n the wake of the FELA's juggernaut of language, consistently iterated and reiterated over the course of seven and one-half decades, it is not hard to figure out who wins the ties and who gets the benefit of the close calls." *CSX Transp., Inc. v. Miller*, 858 A.2d 1025, 1038 (Md. App. 2004).

Therefore, the law of both Missouri and the United States is that Mrs. Holmes's failure to be appointed the personal representative of her deceased husband's estate *before* filing her action was not fatal to her ability to continue the action as the plaintiff. All it required was the mere formality of an amendment once she obtained the requisite letters of administration.

3. Whether an FELA wrongful death plaintiff has been appointed the personal administrator of the decedent's estate does not affect the trial court's subject-matter jurisdiction.

While Mrs. Holmes explained below that whether she was the personal representative of her late husband's estate went to her capacity to sue, curable by amendment (D8 pp. 1-5), UP's argument otherwise below was

premised on erroneous, outdated law conflating this with the trial court's "subject matter jurisdiction." This was incorrect.

When UP moved to dismiss Mrs. Holmes' action, it argued that her failure to have been validly appointed the personal representative of Mr. Holmes's estate meant she lacked "standing to sue" and the court lacked "subject matter jurisdiction" (D4). It argued she should not be permitted to amend her petition "because the defect is jurisdictional" (D5 pp. 4-5). It invoked Rule 55.27(a)(1) (D4 p. 1), which allows a motion to dismiss for "[l]ack of jurisdiction over the subject matter." In discussing this, it only cited decisions predating this Court's decision in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009) (D4; D5).

In *Webb*, this Court held that a court's lack of "authority" to hear a dispute does not equal a lack of "subject matter jurisdiction." *Id.* at 254. So, the failure to obey a statutory prerequisite to filing suit "do[es] *not* have any impact upon a circuit court's subject matter jurisdiction. ... Statutory prerequisites to suit are *not elements* to a lawsuit; ... [and] are *not* jurisdictional pleading requirements, at least not since the *Webb* ruling." *McDonald*, 581 S.W.3d at 115-16 (emphasis in the original) (reversing dismissal of action and denial of permission to amend petition where trial court erroneously held it had lacked subject matter jurisdiction).

The same is true here. Regardless of Mrs. Holmes's failure to be appointed personal representative at the time she filed her original petition, this did not affect the trial court's subject matter jurisdiction. Instead, this was curable by amendment once she had the appointment.

E. The trial court abused its discretion in refusing to allow Mrs. Holmes to amend her petition.

Given Rules 55.33(a) and 67.06, the FELA's remedial purposes and uniform interpretation, and the fact that it was undisputed that by the time the trial court dismissed Mrs. Holmes's petition she had been appointed the personal representative of her late husband's estate, the trial court's decision to *refuse* her leave to amend and instead dismiss her case was an arbitrary abuse of its discretion.

The trial court's dismissal of Mrs. Holmes's case below was based strictly on the fact that she was unable to file an amended petition that identified her as having been appointed the estate's personal representative within 30 days of the court's March 4, 2019 order (D23 p. 1; D24 pp. 2-4; App. A3-5, A16). Mrs. Holmes received her letters of administration for her deceased husband's estate on April 9, 2019 (D19 p. 1; App. A15) instead of April 3, 2019. Therefore, despite her request to file her amended petition out of time, the trial court refused and instead ordered her case dismissed (D23 p. 1; D24 pp. 2-4; App. A3-5, A16).

Rule 44.01(b) allows the circuit courts discretion concerning deadlines. *Allison v. Tyson*, 123 S.W.3d 196, 204 (Mo. App. 2003). It provides that

[w]hen by the these rules ... an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion ... (2) upon notice and motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect
....

Id. In *Inman v. St. Paul Fire & Marine Ins. Co.*, the Court of Appeals defined "excusable neglect" as this:

“Excusable neglect” is an action attributable to mishap and not the result of indifference or deliberate disregard. ... And, ... as “A failure which the law will excuse – to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) *not because of the party’s own carelessness, inattention, or willful disregard of the court’s process, but because of some unexpected or unavoidable hindrance or accident ...*”

347 S.W.3d 569, 576 (Mo. App. 2011) (citations omitted) (emphasis added).

Here, while Mrs. Holmes was well aware of the April 3 deadline the trial court had set, she could not in good faith have filed an amended petition by that date stating she had been appointed personal representative of the estate. This is because though she essentially knew by April 3 that the Clay County court eventually would grant her letters of administration, had she nonetheless averred that it had done so before the letters actually were in hand, it would have been a fraud on the court.

Instead, Mrs. Holmes’s hands were tied until the Clay County court actually issued her the letters, which did not occur until April 9 (D19 p. 1; App. A15). But she kept the trial court well-apprised of this, filing a memorandum on April 1 outlining the steps she had taken so far, that the estate had been opened, and that she was awaiting the letters of administration (D15 p. 1; App. A8).

Nonetheless, despite Mrs. Holmes’s best efforts to comply with the trial court’s order, the trial court apparently deemed them insufficient. To be sure, she did not dawdle. She hired local counsel to administer the estate in Clay County, prepared the required pleadings including the application for appointment of a personal representative, and obtained executed

renunciations of rights for each of the applicable heirs to her late husband's estate (D15 p. 1; D19 p. 1; D27 p. 3; App. A8, A15).

Before filing Mrs. Holmes's action below, there had been no need for an estate. The need for one was made necessary only because of this litigation. Once UP filed its initial motion to dismiss, Mrs. Holmes waited for the trial court to decide the issue before proceeding. If she had acted immediately and the court dismissed the action without allowing her to cure the deficiency, she would have expended a considerable amount of money to no end. It was only prudent to wait for the trial court's ruling.

While Mrs. Holmes is keenly aware of the trial court's general right to control its own docket, its refusal to allow her to file her amended petition six days out of the time the trial court had set abused its discretion under Rule 55.33(a). Its further refusal to allow her to amend her petition *after* dismissing her petition, by which time it *knew* she had been appointed the personal representative, violated Rule 67.06.

As in all the cases cited above at pp. 26-28, in which this Court or the Court reversed exactly such a refusal, it was equally reversible error here. All of the factors the trial court was supposed to weigh in determining whether to grant Mrs. Holmes leave to amend plainly weighed in her favor. *See* above at pp. 23-25. Its refusal to grant her that leave was an arbitrary abuse of its discretion.

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.

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,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

Jonathan Sternberg, Mo. #59533

2323 Grand Boulevard #1100

Kansas City, Missouri 64108

Telephone: (816) 292-7020

Facsimile: (816) 292-7050

jonathan@sternberg-law.com

COUNSEL FOR APPELLANT

CAROLYN HOLMES

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 11,720 words.

/s/Jonathan Sternberg

Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on December 14, 2020, I filed a true and accurate Adobe PDF copy of this substitute brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

Ms. Anne Marie O'Brien	Counsel for Respondent
Lamson, Dugan & Murray, LLP	Union Pacific Railroad Company
10306 Regency Parkway Drive	
Omaha, Nebraska 68114	
Telephone: (402) 397-7300	
Facsimile: (402) 397-7824	
aobrien@ldmlaw.com	

/s/Jonathan Sternberg
Attorney