In the Missouri Court of Appeals
Eastern District
NORTHERN DIVISION

IN THE ESTATE OF: JOSEPH B. MICKELS	)	No. ED104985
	)	Appeal from the Circuit Court of Marion County
	)	Honorable John J. Jackson
	)	Filed: August 22, 2017

Ruth Mickels appeals the trial court's denial of her application to be appointed personal representative of her late husband's estate so that she could pursue the claim announced by the Missouri Supreme Court, when this case was previously on appeal. The trial court found the application to be untimely and barred by Section 473.020. We conclude that the trial court should exercise its equitable powers and consider granting Mrs. Mickels's application given the unique facts of this case. Thus, we would reverse the trial court and remand the cause. However, given the circumstances, and the dearth of Missouri law on the interplay of equity and probate's time limits, we transfer the case to the Missouri Supreme Court.

Factual and Procedural Background

The Missouri Supreme Court described the facts and procedural history of this case in the prior appeal. *Mickels v. Danrad*, 486 S.W.3d 327 (Mo. banc 2016). We incorporate and use those facts here without further attribution.

On December 8, 2008, Joseph Mickels, Sr. sought medical attention after experiencing numbness, blurred vision, and headaches. He underwent a magnetic resonance imaging ("MRI") procedure. On December 12, 2008, Dr. Danrad reviewed the MRI but made no diagnosis.

On February 17, 2009, Mr. Mickels underwent a CT scan of his brain after arriving at a hospital in an altered mental state. Dr. Danrad again reviewed the results, but this time he diagnosed Mr. Mickels with a brain tumor that was both terminal and incurable. Despite immediate surgery, Mr. Mickels died of this tumor on June 12, 2009.

On June 7, 2012, the Mickels family filed a wrongful-death action against Dr. Danrad.[1] They presented evidence that – even though Mr. Mickels certainly would have died of his brain tumor without regard to Dr. Danrad's alleged negligence – he would not have died on June 12, 2009, had the brain tumor been diagnosed following the initial MRI. Mr. Mickels's treating oncologist, Dr. Carl Freter, testified that the tumor was incurable when it was found and it would have been incurable at the time of the original MRI. Nevertheless, Dr. Freter opined, it was more likely than not that if the tumor had been discovered earlier, Mr. Mickels would have lived an additional six months on average.

Dr. Danrad moved for summary judgment on the ground that the Mickels family had not pleaded and could not prove facts showing that his alleged negligence resulted in Mr. Mickels's death as required by Missouri's wrongful-death statue, Section 537.080.1. The trial court agreed and entered judgment dismissing the family's petition.

The Mickels family appealed, and this Court affirmed. On the family's application, the Missouri Supreme Court transferred the case to that Court for consideration.

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[1] The members of the Mickels family who filed suit are Ruth Mickels, Joseph Mickels, Jr., Billy Joe Mickels, Brittany Mickels, and Jennifer Unglesbee.

The Supreme Court agreed that the Mickels family could not sue for wrongful death under Missouri's wrongful-death statute because Mr. Mickels's death was not caused by Dr. Danrad's alleged negligence. *Mickels*, 486 S.W.3d at 329. "As alleged, Dr. Danrad's negligence certainly injured Mr. Mickels, but it just as certainly did not kill him. Instead, Mr. Mickels died of ... an incurable, terminal brain tumor." *Id.* The Supreme Court noted that every state supreme court to address the issue had reached the same conclusion. *Id.* The Supreme Court, however, did not end its analysis and opinion there. Rather, the Supreme Court held that Dr. Danrad's alleged negligence, although not actionable for wrongful death, was nevertheless actionable. *Id.* The Supreme Court announced:

> Dr. Danrad's alleged negligence did not cause Mr. Mickels's death, but it surely injured him by depriving him of the opportunity to delay his death for up to six months.

Id. In announcing this claim, the Supreme Court relied on two cases from Florida, *Tappan v. Florida Medical Ctr.*, Inc., 488 So.2d 630 (Fla. Dist. Ct. App. 1986) and *Williams v. Bay Hospital, Inc.*, 471 So.2d 626 (Fla. Dist. Ct. App. 1985). In finding that the allegations in the petition stated a cause of action for negligence, the Missouri Supreme Court stated that Mr. Mickels "would have been able to sue Dr. Danrad for this negligence while he lived, and his personal representative can bring that action under section 537.020 after his death."[2] *Mickels*, 486 S.W.3d at 329-330. And in concluding the opinion, the Supreme Court stated that "the allegations in the petition do state a cause of action for negligence that would have been actionable under section 537.020 if brought by Mr. Mickels' personal representative." *Id.* at 331. Noting that in the "furtherance of justice," dismissal was inappropriate "unless the appellate

[2] Section 537.020 is referred to as the "survivorship statute" because causes of action other than those resulting in death are said to "survive" the plaintiff's demise and may be brought by the plaintiff's personal representative. The section provides: "Causes of action for personal injuries, other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death...."

court is convinced that the allegations are such that a recovery cannot be had," the Supreme Court vacated the judgment and remanded the case to the trial court. *Id.*

On remand, Ruth Mickels, Mr. Mickels's widow, filed an application to be appointed personal representative so that she could pursue the claim described by the Supreme Court. The trial court denied her application, ruling simply that the application was "untimely, [and] barred Section 473.020."[3] Mrs. Mickels now appeals.

Discussion

The probate code requires the opening of an estate to occur within one year of decedent's death. Section 473.020; *Johnson v. Akers*, 9 S.W.3d 608, 609 (Mo. banc 2000). This one-year statute of limitations also applies to the appointment of a personal representative. *Id.*; *Kemp v. Balboa*, 959 S.W.2d 116, 119 (Mo. App. E.D. 1997). Missouri's probate code provides only one express exception to this one-year limitation period. That exception is found in Section 537.021, and involves "lost chance of recovery or survival." *Id.* That exception does not apply here. *Mickels*, 486 S.W.3d at 329 n.3 (expressly noting that Mr. Mickels has no claim for "lost chance of survival").

Mrs. Mickels urges the invocation of the trial court's equitable powers. Section 472.030 provides that "[t]he probate division of the circuit court has the same legal and equitable powers to effectuate its jurisdiction and to enforce its orders, judgments and decrees in probate matters as circuit judges have in other matters...." The Missouri Supreme Court, in construing this section, held that the probate division of the circuit court has "complete and unrestricted equitable powers in 'probate matters.'" *In re Myers' Estate*, 376 S.W.2d 219, 224 (Mo. banc 1964); *see also, e.g., Estate of Cantonia v. Sindel*, 684 S.W.2d 592 (Mo. App. E.D.

[3] We interpret the trial court's order to mean that the trial court viewed Section 473.020 as an absolute bar to Mrs. Mickels's application, and that the trial court did not consider equity.

1985)(affirming the probate court's use of equitable power in a discovery-of-assets proceeding); *accord Estate of Goslee*, 807 S.W2d 552, 554 (Mo. App. S.D. 1991). We find the circumstances of this case make a compelling case for exercise of those powers.

It is true that two of the purposes of the probate code are to "provide a speedy method for administering a decedent's estate," and to "establish a time after which claims are forever barred against the estate...." *North v. Hawkinson*, 324 S.W.2d 733, 736 (Mo. 1959). And Missouri caselaw abounds with situations in which the courts have rigidly enforced the statute of limitations in the probate code. This is especially true in cases involving claims against an estate and the nonclaim statute, Section 473.360.[4] *See, e.g., Hatfield v McCluney*, 893 S.W.2d 822, 824-25 (Mo. banc 1995)(holding that untimely-filed claim by judgment creditor was barred by statute of limitations); *Harrison Mach. Works v. Aufderheide*, 280 S.W.711, 712-13 (Mo. App. 1926)(rigidly enforcing nonclaim statute of limitation and refusing to forgive time limit under equitable principles). The purpose of the nonclaim statute is to expedite the settlement of estates. *In re Bierman's Estate*, 410 S.W.2d 342, 346 (Mo. App. 1966). And the Missouri Court of Appeals has gone so far as to announce that the nonclaim statute of limitation is "rigidly enforced, and no one is entitled, either in law or equity, to file a claim after the expiration of the time fixed therein." *Harrison Machine Works,* 280 S.W. at 712.

Recently, the Missouri Supreme Court applied the one-year statute of limitations for the appointment of a personal representative, even though the appointment did not involve the administration of assets, but was for the purpose of representing the decedent in a paternity action against the decedent. *Johnson v. Akers*, 9 S.W.3d 608 (Mo. banc 2000). Missouri cases dealing the appointment of a personal representative to pursue litigation on behalf of the estate

[4] The nonclaim statute establishes the time in which to present a claim against an estate of a deceased person in probate court. *North v. Hawkinson*, 324 S.W.2d 733, 743 (Mo. 1959).

are few. The *Kemp* case involved just such a situation, although we find it factually distinguishable from the case at hand. *Kemp v. Balboa*, 959 S.W.2d 116, (Mo. App. E.D. 1998). When Kemp died, his lawsuit against Balboa was pending in federal court. Kemp's mother was substituted as a party. She then applied for letters of administration. The only property of Kemp subject to administration was the federal lawsuit. The probate court granted Ms. Kemp's application and appointed her personal representative. Balboa moved for revocation of the letters of administration on grounds that the application was untimely filed, because it was filed more than one year after Kemp's death. This Court agreed, finding that the action was not one for "lost chance of recovery or survival," and thus held that the one-year period of limitations applied. *Id.* at 119.

We fully acknowledge this caselaw and the reasoned purposes of the probate time limitations. At some point an estate needs finality. But we find this situation differs and is distinguishable from the situations where the courts have rigidly enforced the statute of limitations contained in the probate code. This is not an outside party, seeking to extend the life of the estate. This is unlike the claim cases noted above that involved the administration of assets, where the claim would operate to the detriment of the estate by decreasing estate assets. This is even unlike *Johnson*. Although the appointment of a personal representative in that case did not involve administration of estate assets, the sought-after paternity action is still, by its very nature, a potential claim against the estate. The situation here is entirely different. The postponement of the finality of the estate here is at the behest of the estate itself, for its potential benefit.

We also endorse the general rule that a court in equity will not grant relief against a mistake of law. *Cardinal Partners, L.L.C. v Desco Inv. Co.*, 301 S.W.3d 104, 110 (Mo. App.

E.D. 2010). But we see no mistake of law here. This is not a case of the Mickels family belatedly pursuing a pending cause of action, such as in *Kemp*, nor is this a case of the family overlooking a readily-discernible cause of action. Dr. Danrad argues that equitable relief should not be forthcoming because the petition stated a cause of action for a survivorship action, which was already in existence at the time the family filed their petition. Dr. Danrad's argument misses the point. True, a survivorship action is well-known and long-recognized. But the issue here is not whether Missouri recognizes that claims survive death. The issue is whether the pleaded facts stated a cause of action in the first place. And here, the Missouri Supreme Court broke new ground and announced that they did.

Moreover, in making this announcement, the Supreme Court did not rely on any Missouri caselaw. Instead, the Supreme Court relied exclusively on Florida caselaw. Neither this Court nor the trial court anticipated our Supreme Court's holding. Indeed, the Western District of this Court has previously explicitly rejected just such a claim. *Morton v. Mutchnick*, 904 S.W.2d 14, 17 (Mo. App. W.D. 1995)(noting: "It appears that plaintiffs are arguing that they should be allowed to recover damages for Mr. Morton's lost chance to have his life extended by an unknown period of time until his ultimate death as a result of AIDS-related illness. Unfortunately, Missouri does not recognize such a cause of action."). We cannot conclude that the Mickels family, or their lawyer, should have, within a year of Mr. Mickels's death, foreseen that seven years down the road, the Supreme Court would rule as it did. Lawyers need not be prophets.

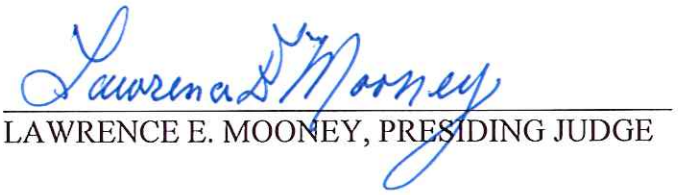
The parties have not cited, and our independent research has not revealed any Missouri case allowing a party, under equitable principles, to avoid the one-year limitation period for appointment of a personal representative. We also acknowledge the Missouri Supreme Court's

admonition that any extension to the one-year limitation period for appointment of a personal representative should be through legislative act, not by "judicial fiat." *Johnson*, 9 S.W.3d at 610 n.3. But the exercise of a trial court's equitable powers is inherently dependent on the facts. *See, e.g., Hemphill v. Quigg*, 355 S.W.2d 57, 62-63 (Mo. 1962); *Estate of Cantonia*, 684 S.W.2d at 595 (noting that "[i]n equitable actions the probate court has the inherent power to adjust equity between the parties without rigid adherence to any determined form and may shape the remedy to meet the demands of justice"). Would not equity provide a remedy if, for example, an executor misled a claimant about the time limit for filing a claim? When so challenged at oral argument, Dr. Danrad's lawyer conceded that the trial court might have to consider an equitable remedy. We can find no reasoned principle that would bar the trial court from considering the unique facts here and exercising its equitable powers. To the contrary, we conclude the facts here demand that the trial court exercise its equitable powers.

Mrs. Mickels cogently asked: "Will equity witness the Supreme Court announce a new cause of action in the underlying case, yet stand by idly while Mrs. Mickels is barred from pursuing that new claim?" We would answer in the negative. The trial court should have exercised its discretion to consider granting Mrs. Mickels's application and appointing her personal representative to pursue the cause of action.[5] We would reverse the trial court's decision and remand the cause to that court for further proceedings. But given the circumstances here, and the dearth of Missouri law on the interplay of equity and probate's time limits, we

[5] Dr. Danrad contends that the appointment of a personal representative would be futile, as the underlying negligence cause of action would be barred by the statute of limitations applicable to medical-malpractice actions set forth in Section 516.105. This issue is beyond the scope of this appeal, and is reserved for the trial court. Following remand and appointment of Mrs. Mickels as personal representative, Dr. Danrad is free to raise this affirmative defense, and the parties may fully litigate the issue at that time.

transfer this case to the Missouri Supreme Court. Rule 83.02.



LAWRENCE E. MOONEY, PRESIDING JUDGE

KURT S. ODENWALD, J. and
COLLEEN DOLAN, J., concur.