In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

DELORES HENRY, Plaintiff, vs. PAUL PIATCHEK, et al., Defendants/Respondents, DARRELL WILLIAMS, SR., Proposed Intervenor/Appellant.	)	No. ED105742 Appeal from the Circuit Court of the City of St. Louis Honorable Rex M. Burlison Filed: July 10, 2018

OPINION

Darrell Williams, Sr. (Father) appeals from the trial court's judgment denying his motion to set aside its dismissal of, and permit his intervention in, a wrongful death lawsuit against the St. Louis Board of Police Commissioners and certain police officers in connection with the shooting of Darrell Williams, Jr. (Son). We reverse and remand for further proceedings.

Wrongful Death Statute

In this perfect storm of procedural missteps, the wrongful death statute is our beacon. Its unique mandates serve as our navigators, and the constitutional principle of due process our compass. Importantly here, the statute confers hierarchical standing to certain plaintiffs and prevents multiple actions against the same defendant. As relevant to this case,

§537.080 provides:

> 1. Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured, which damages may be sued for:
>
> (1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;
>
> (2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants...;
>
> (3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem. ... .
>
> 2. Only one action may be brought under this section against any one defendant for the death of any one person.

Background

This is the second appeal in this case. The facts and procedural history are detailed in *Love v. Piatchek*, 503 S.W.3d 318 (Mo. App. E.D. 2016). To review, after Son was fatally shot by police in 2009, Son's grandmother, Delores Henry (Grandmother), filed a wrongful death action naming herself as Son's "next of kin," without mention of Son's parents, who were incarcerated at the time.[1] Respondents answered the petition, and the parties began discovery. As chronicled in the attached appendix, between August 2010 and July 2011, Father, acting *pro se*, filed eight inquiries seeking information and inclusion in the case. Four filings specifically asserted Father's paternity. Two asked for "procedures for filing a petition" and "the local court rule for filing a lawsuit." Three contained requests to become a plaintiff in the case, including one formal motion. The trial court recorded these filings and responded to Father's requests for documents, but it failed to rule on his motion or otherwise address his prayers to participate. The court's docket sheet in that 12-

[1] Father, now 51 years old, remains incarcerated on felony drug charges and is scheduled for release in 2027.

month period contains 13 entries revealing Father's legal interest in and desire to join the suit. Despite his standing as a superior plaintiff, Father was excluded from Grandmother's case,[2] Respondents defended the suit for four years, and the trial court failed to acknowledge Father's absolute right to intervene.

Jury trial dates were set and continued from 2011 until 2014. One week before trial, Grandmother filed a motion to dismiss her suit without prejudice, which the trial court approved "so ordered." Months later, Son's mother, Kathryn Love (Mother), resurfaced and filed her own wrongful death suit, relying on the saving statue (§537.100) to overcome the three-year statute of limitations, which lapsed in 2012. The trial court dismissed Mother's suit as untimely, reasoning that Grandmother's original petition was invalid because she was not an eligible plaintiff - Son's parents still living - so there was nothing for the saving statute to revive. Binding precedent constrained this court to affirm, but concurring judges noted that Mother's suit would have been timely had the trial court granted Father's motion to intervene in the first suit, as was his right. *Love*, 503 S.W.3d at 320. Reviewing only the timeliness of Mother's petition in that appeal, we could not address the underlying omissions in the first case, only supposing in a concurring footnote: "The original case cannot be revived at this juncture because the judgment became final after Grandmother dismissed her petition. A party may collaterally attack a final judgment only through Rule 74.06." *Id.* at 320 FN 1.

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[2] Section 537.095 mandates that the "petitioner shall satisfy the court that he has diligently attempted to notify all parties having a cause of action." The record lacks any indication that Grandmother satisfied this obligation. Father himself inquired of the court whether an action had been filed and, upon receiving the case information, asked the trial court for Grandmother's lawyer's contact information. Father later informed the court, "I have attempted to become a plaintiff on the suit but everything is being kept a secret to me." Grandmother's first lawyer withdrew from the case in 2013, after the statute of limitations had expired. A lawyer's responsibility to a client does not imply that the lawyer may disregard the rights of third persons. Rule 4-4.4; *In re Krigel*, 480 S.W.3d 294, 300 (Mo. 2016) (condemning counsel's "passive strategy" to impair a father's intervention in termination of parental rights proceedings).

In the wake of *Love*, Father filed a motion to set aside judgment and intervene in the original case, relying on Rule 76.04(b)(5) permitting relief from judgment on equitable grounds. The trial court denied the motion without reaching the merits, reasoning that Grandmother's voluntary dismissal terminated the court's jurisdiction in the matter.

Father appeals and asserts that the trial court's approval of Grandmother's dismissal operated as an involuntary dismissal with prejudice as to Father's claim – *i.e.*, a judgment from which relief is available under Rule 74.06. Respondents contend that there was no judgment and the trial court lost subject matter jurisdiction the moment Grandmother dismissed her petition. We are compelled toward other conclusions but first offer a road map.

Abstract

This case is a procedural conundrum. Grandmother lacked standing, so her petition was a nullity that the parties nonetheless litigated for four years without acknowledging a superior plaintiff. Father, whose paternity is not disputed,[3] had an absolute statutory right to bring or join a wrongful death suit, but he was excluded from the one pending while statutorily prohibited from filing his own parallel suit. Three years later, after the statute of limitations had lapsed, Grandmother dismissed her inviable petition. Father's valid claim remained unrecognized, and Mother's subsequent petition couldn't relate back to Grandmother's nullity. This should not have happened, and now Father seeks to intervene and set aside Grandmother's dismissal.

Though the trial court treated Father's present motions to intervene and to set aside the

[3] Mother and Grandmother averred in their briefs to this court, both in *Love* and in the present case, that Father is the deceased's father. Respondents have never disputed this fact and, in their briefs, refer to Father as "the father (Father) of Decedent."

dismissal as one, they must be addressed separately.[4] We start with whether Father adequately asserted his claim in the first place and conclude that he did. Father's filings were sufficient as a motion to intervene as of right in Grandmother's suit. Failure to grant the motion during the pendency of the original case was plain error. On his renewed motion to intervene now before us, Father has demonstrated, through the underlying facts and procedural record, that substantial justice mandates his intervention.

Next we address Father's motion to set aside the underlying dismissal. The trial court erred in determining that it lacked jurisdiction to grant the motion. Rule 74.06 is the proper recourse. On the merits, Grandmother's purported dismissal of Father's claim was unauthorized, entered in violation of his due process rights, and therefore void. Father is entitled to prosecute his claim.

Standards of Review

"Denial of a motion for leave to intervene as a matter of right under Rule 52.12 will be affirmed by an appellate court unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *State ex rel Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 126 (Mo. 2000).

A trial court's ruling on a motion to set aside a judgment under Rule 74.06 is generally reviewed for an abuse of discretion. *Forsyth Fin. Grp., LLC v. Hayes*, 351 S.W.3d 738, 740 (Mo. App. W.D. 2011). However, whether a judgment should be vacated as void is a question of law that we review *de novo*. *Id.*

[4] Only a party has standing to attempt to set aside a judgment. *F.W. Disposal, LLC v. St. Louis County Council*, 266 S.W.3d 334, 339 (Mo. App. E.D. 2008). However, Father is an "aggrieved party" for purposes of appeal of his motion to intervene, even though he was denied party status in the underlying case. *State ex rel. Koster v. ConocoPhillips Company*, 493 S.W.3d 397, 401-402 (Mo. 2016). Thus, we first address the motion to intervene and conclude that it should be granted, making Father a party. Then we proceed to his motion to set aside the dismissal under Rule 74.06.

Discussion

I. Father's pleadings were sufficient to mandate intervention.

Father's multiple filings in the trial court in 2010 and 2011 included the following:

> My child (Darrell H. Williams, Jr.) was shot and killed by a St. Louis City police officer Nov. 18, 2009. I would like to know if a complaint has been filed withthis court in regards to my child's (Darrell H. Williams, Jr.) death.
>
> The above mention cause no. is in regards to a wrongful death suit regarding my son (Darrell Williams, Jr.). ... how can I become a plaintiff and proceed pro se?
>
> I am writing to you concerning the above cause # in which my son (Darrell Williams, Jr.) was shot and killed. ... As a father, I should be allowed to be a plaintiff. I request that I be listed a "pro se" plaintiff on this petition.
>
> Enclosed is a motion that I would like to file with this court. Also please sendme the local court rule for filing a law suit. Comes now plaintiff Darrell Williams, pro se, requesting to become a plaintiff in cause #1022-CC00155, for the following reason: Plaintiff Darrell Williams, Sr., is the father of the deceased Darrell Williams, Jr. Wherefore Plaintiff requests that this motion be granted.

Respondents argue that Father's motion was insufficient to preserve his rights because he didn't notice it up for hearing. While it is true that Father's attempt at service technically fell short,[5] we do not view his form fatal to substance on this particular record. "Procedural rules are but the means through which we seek to ensure the fair and orderly resolution of disputes and to attain just results. They are not ends in themselves." *Heintz v. Woodson*, 758 S.W.2d 452, 454 (Mo. 1988). Non-compliance is not determinative unless prejudice resulted. *Id.* Respondents suffered no prejudice here.

First, as a practical matter, Respondents cannot credibly claim that they neglected to inquire of the deceased's parents throughout extensive pre-trial discovery. A party with actual notice cannot show prejudice in a due process sense. *McMillan v. Wells*, 924 S.W.2d

[5] Rule 52.12(c) states: "A person desiring to intervene shall serve a motion upon all parties affected thereby." The certificate of service accompanying Father's motion indicates that it was mailed to the court clerk rather than to Respondents. Clearly Father attempted to comply with the rule but misunderstood the purpose of the certificate, namely to confirm notice to the opposing party.

33, 37 (Mo. App. S.D. 1996). Moreover, "a party has a continuing duty to monitor a case from the filing of the case to final judgment." *Manning v. Fedotin*, 64 S.W.3d 841, 846 (Mo. App. W.D. 2002). Respondents had at least constructive notice of Father's legal interest through his multiple, unambiguous, and conspicuous filings in the trial court record. Father's name, Darrell Williams, Sr., appears in eight docket entries in this case involving the deceased Darrell Williams, Jr. Father specifically identified himself as Son's father four times. Twice he requested "procedures for filing a petition" and "the local court rule for filing a lawsuit." But with Grandmother's suit already proceeding, Father could not file his own parallel suit; he had no choice but to intervene in the pending case. This is the very purpose of Rule 52.12(a)(1). Thrice he unequivocally asked to become a plaintiff in the case, once by the formal motion in question. Though Respondents insist that it was not their responsibility to identify the proper plaintiff, a lawyer may not disregard the rights of non-clients. Rule 4-4.4; *In re Krigel*, 480 S.W.3d 294, 300 (Mo. 2016) (condemning counsel's "passive strategy" to impair a father's intervention in termination of parental rights proceedings). Put simply, Respondents can hardly feign surprise or champion due process on the present record.

Further, we are not persuaded that Rule 52.12(a)(1) mandates a hearing where a movant's first-class status is uncontested. The rule states:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

To support their position that a hearing was required, Respondents cite *Allred v.*

Carnahan, 372 S.W.3d 477, 481 (Mo. App. W.D. 2012), instructing that an intervenor must show an interest in the subject, a risk that his interest would be impaired in his absence, and the inadequacy of existing parties to protect that interest. But these criteria apply only to part (2) of the rule, *i.e.*, "in the absence of a statute conferring an unconditional right of intervention." *Id.* And even then, "there is no requirement for an evidentiary hearing." *Id.* The rule "should be liberally construed to permit broad intervention; even the requirement of a pleading may be excused." *Id.* at 482; *State ex rel. St. Joseph, Mo. Ass'n of Plumbing, Heating and Cooling Contractors, Inc. v. City of St. Joseph*, 579 S.W.2d 804, 806 (Mo. App. W.D. 1979).[6]

And principally, Father's motion falls under part (1) of the rule permitting intervention as of right where conferred by statute. A first-class plaintiff has an absolute right to intervene in a wrongful death suit. *Martin v. Busch*, 360 S.W.3d 854, 856 (Mo. App. E.D. 2011). The statute provides: "any settlement or recovery by suit shall be for the use and benefit of those who sue or join, or *who are entitled to sue or join, and of whom the court has actual written notice*." §537.095. "When a statute confers an unconditional right of intervention, the proposed intervenor is entitled to intervene as a matter of right, the right to intervene is absolute, and *the motion must be approved*." *Id.* citing *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 127 (Mo. 2000). (emphasis added) There is no factual dispute here: Father was entitled to sue and the trial court had actual written notice of him.

We find support in *Lamastus v. Lamastus*, 886 S.W.2d 721 (Mo. App. E.D. 1994).

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[6] The dissent relies on *In re M.M.P.*, 10 S.W.3d 195 (Mo. App. W.D. 2000), to support its position that Father didn't sufficiently plead his right to intervention. But that case is factually and legally inapposite. There, a non-profit advocacy group sought intervention in a juvenile case based on a federal statute authorizing such groups to protect and advocate on behalf of disabled people. The trial court denied the motion and the appellate court affirmed, reasoning that the group hadn't pleaded - *because it did not have* - an unconditional statutory right to intervene. Conversely here, Father had precisely such a right. His failure to cite §537.080 does not excuse the trial court from following a statutory mandate.

There, in a dissolution case, an incarcerated putative father sent the trial court a single *pro se* letter denying his paternity. He did not even attempt to comply with procedural formalities as Father did here. Rather, the trial court sent notice to mother's counsel stating that the court didn't intend to respond or react to the letter until the case was heard, at which time the court found Lamastus in default. This court reversed, reasoning that the appointment of a guardian *ad litem* was mandatory when paternity is contested, regardless of the form of Lamastus's letter. *Id.* at 724-725. "[The letter] properly raised paternity as an issue; thus, the court was required to appoint a guardian." *Id.* Similarly here, Father made every effort to assert his status as a first-class plaintiff, not in just one letter but in multiple filings. The court was *required* to confer that status, and its failure to do so was plain error. Rule 84.13(c); *In re C.G.L.*, 28 S.W.3d 502 (Mo. App. S.D. 2000) (reversing denial of motion to intervene on plain error review); *Fitzpatrick v. Hannibal Regional Hospital*, 922 S.W.2d 840, 843 (Mo. App. E.D. 1996) (noting that denial of leave to file amended petition to include additional plaintiffs in wrongful death suit would be plain error because such plaintiffs are entitled to intervene as of right); *Sasnett v. Jons*, 400 S.W.3d 429, 437-438 (Mo. App. W.D. 2013) (describing plain error in civil cases as "when the injustice of the error is so egregious as to weaken the very foundation of the process").

To be sure, we do not suggest that a court must rule on every *pro se* demand. We simply conclude that, given the non-discretionary mandate of §537.080, Father's technical mistake is not outcome-determinative on this highly anomalous record. According to this court's precedent in *Lamastus*, Father's filings were sufficient to warrant the trial court's attention in 2011.[7]

[7] "If the court is not satisfied that proper notice has been given ... the logical course of action would be to direct the plaintiff to give proper notice. ... The court should normally afford the plaintiff the opportunity to make corrections. The defendants' suggestion that all claimants be unceremoniously tossed out of court is out of line with modern procedural norms." *Fitzpatrick*, 922 S.W.2d at 845. Father's intervention within

II. Father's present motion to intervene should be granted.

The foregoing facts and authorities necessarily dictate our analysis of Father's renewed motion to intervene now before us. While courts are reluctant to allow intervention after a case is concluded, it is permissible upon a "strong showing." *F.W. Disposal, LLC v. St. Louis County Council*, 266 S.W.3d 334, 339 (Mo. App. E.D. 2008). When considering the issue of timeliness, the court "must determine whether substantial justice mandates the allowance of intervention and whether existing parties to the case will be prejudiced if intervention is permitted." *Id.*

The record of Father's multiple attempts to assert his rights as a first-class plaintiff, all of them ignored,[8] provides a strong showing that substantial justice mandates intervention now and outweighs any purported prejudice to Respondents. The trial court erred in denying Father's present motion to intervene.

III. Rule 74.06 is available to attack a voluntary dismissal

In denying Father's motion to set aside, the trial court concluded, and Respondents assert here, that Grandmother's voluntary dismissal of her petition terminated the court's jurisdiction without a final judgment, so there's nothing to vacate in Father's favor.[9] In most circumstances, this is correct. Rule 67.02; *Applied Bank v. Wenzlick*, 344 S.W.3d 229 (Mo

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the statute of limitations would have permitted him to cure the standing defect in Grandmother's petition and proceed as the proper plaintiff. *See e.g., Asmus v. Capital Region Family Practice*, 115 S.W.3d 427 (Mo. App. W.D. 2003) (substitution of proper plaintiff within statute of limitations allowed where no prejudice to defendants). Though not briefed by the parties, Father's multiple filings arguably were also sufficient to constitute a petition. Fundamentally, Father was the first rightful plaintiff to timely file a claim. Whether viewed as a motion to intervene or as a petition, his pleadings should have prompted someone's concern to perfect the cause in a practical manner.

[8] The docket sheet in this case provides no basis to believe that the trial court would have entertained Father's present motions at any time prior to this court's concurring opinion in *Love*. Likewise, though the dissent faults Father for failing to appeal as soon as Grandmother dismissed her petition, nothing in the record suggests that Father was ever notified of that dismissal.

[9] This court retains authority to determine whether the trial court lost its jurisdiction in the underlying case. *Applied Bank*, 344 S.W.3d at 231. Were it not so, we would never have the authority to adjudicate whether a judgment is invalid, thus leaving the invalid judgment intact. *Id.*

App. E.D. 2011); *Zinke v. Orskog*, 422 S.W.3d 422 (Mo. App. W.D. 2013).[10] However, when a dismissal without prejudice operates to preclude a party from bringing another action for the same cause and has the practical effect of terminating the litigation in the form cast, an appeal from such a dismissal can be taken. *Chromalloy Am. Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1, 3 (Mo. 1997), *accord Eckel v. Eckel*, 540 S.W.3d 476, 489 at FN 16 (Mo. App. W.D. 2018). Further, Father didn't voluntarily dismiss his claim, and Grandmother had no authority to release it on his behalf; indeed, Father was the superior plaintiff. Missouri precedent supports Father's position that a court's jurisdiction survives to consider motions under Rule 74.06.

In *Richman v. Coughlin*, 75 S.W.3d 334 (Mo. App. W.D. 2002), the plaintiff moved to set aside a voluntary dismissal that her attorney had filed on her behalf without her consent. The trial court denied the motion on the basis that it lost jurisdiction when the dismissal was filed. The appellate court reversed, reasoning that Richman was entitled to judicial review of her claim that the dismissal was unauthorized and thus invalid. The court further instructed that, if the dismissal wasn't authorized, then the trial court retained jurisdiction to proceed on Richman's petition. *Id.* at 340. Similarly, in *Elam v. Dawson*, 216 S.W.3d 251 (Mo. App. W.D. 2007), an incarcerated plaintiff granted his parents a limited power of attorney to resolve certain matters against the defendant, but specifically excluding

[10] The dissent would end the inquiry here. But *Applied Bank* and its lineage are so dissimilar for their uncomplicated procedural facts that they provide little instruction on the aberrant record before us. No motions to intervene as of right, by other known parties with a clear legal interest, were pending unresolved and thus purportedly quashed by Grandmother's unilateral dismissal. Voluntary dismissal doesn't extinguish existing counterclaims or cross claims. Rule 67.05. Father asserted a substantive *claim*. Further, Father's motion was not "ancillary" in nature such that it would be deemed denied after 90 days under Rule 67.05. See *Hague v. Trustees of Highlands of Chesterfield*, 431 S.W.3d 504 (Mo. App. W.D. 2014) (motion for abuse of process not ancillary but rather "delve[d] into the merits," "more in the nature of a counterclaim," without regard to the form of the pleading). *Compare Atteberry v. Hannibal Regional Hospital*, 875 S.W.2d 171 (Mo. App. E.D. 1997) (motion for discovery sanctions ancillary). Were we not to conclude that Father's claim was wrongfully dismissed, *Hague* and *Atteberry* would compel an alternate conclusion that Father's claim survived dismissal and remains pending.

the release of any legal rights without his consent. Elam's parents exceeded that authority by entering into a settlement and voluntarily dismissing his lawsuit without consent. Elam moved to set aside the dismissal under Rule 74.06, and the trial court denied the motion. The appellate court reversed, instructing that Rule 74.06 contemplates relief from an unauthorized dismissal. Further, proceeding to the merits, the court held that the trial court's denial was "clearly erroneous" and "had no justification" because the record lacked any evidence of Elam's consent. *Id.* at 256. Similarly here, Grandmother had no authority to dismiss Father's claim without his knowledge or consent.

Granted, these cases involved named plaintiffs, whereas Father was wrongfully denied party status at the time. The procedural catch-22 of this case is not neatly solved by existing rules and authorities. But Father was a first-class plaintiff under the wrongful death statute, and his exclusion from the case was unjustified and erroneous. This court will not wield procedural rules or enforce collective failures in a manner that thwarts both judicial review and the clear legislative intent of the wrongful death statute. We consider Father's present motion cognizable on this unusual set of facts.

IV. Father is entitled to relief under Rule 74.06.

Rule 74.06 provides relief from judgment (or in this case a dismissal) in exceptional circumstances: (1) mistake, inadvertence, surprise, excusable neglect; (2) fraud, misrepresentation, or misconduct by an adverse party; (3) the judgment is irregular; (4) the judgment is void; or (5) it is no longer equitable that the judgment remain in force. Rule 74.06(b).

Citing part (5) of the rule, Father argues that the trial court's dismissal of his claim should be set aside because, given his erroneous and unjust exclusion from the case, it is no longer equitable that the judgment of dismissal remain in force. But this equitable part (5) of

the rule "is based on traditional equity practice, which limits its application to judgments that have a prospective effect, as contrasted to those that offer a present remedy for a past wrong." *Killingsworth v. Dickinson Theatres, Inc.*, 83 S.W.3d 656, 658 (Mo. App. S.D. 2002). "It addresses the situation in which a subsequent circumstance makes enforcement of such a judgment inequitable." *Id.* A judgment has prospective effect when it remains executory, such as an injunction or other equitable remedy. *Id.* When a judgment requires no ongoing supervision by the court and is not subject to changing conditions, it has no prospective effect. *Id.* The trial court's order dismissing Father's claim doesn't fit the foregoing description of a judgment from which relief is available under part (5) of the rule.

However, part (4) of the rule permits relief from judgments that are void for lack of due process, and this court can review unpreserved errors affecting substantial rights when we find that manifest injustice or miscarriage of justice as resulted. Rule 84.13(c). A void judgment is not subject to a "reasonable time requirement;" a party may seek relief at any time. *Kerth v. Polestar Entertainment*, 325 S.W.3d 373 (Mo. App. E.D. 2010).[11] Whether a judgment should be vacated as void is a question of law, which we review *de novo*. *Unifund CCR Partners v. Kinnamon*, 384 S.W.3d 703, 705 (Mo. App. W.D. 2012). "A judgment is not void merely because it is erroneous. In cases where personal and subject matter jurisdiction are established, a judgment should not be set aside unless the court acted in such a way as to deprive the movant of due process." *Id.* at 707. "A judgment rendered by a court acting in a manner inconsistent with due process can and should be declared void." *Kerth*, 325 S.W.3d at 389.

"A fundamental requisite of due process of law is the opportunity to be heard." *Id.* at

[11] *See also Taylor v. Taylor*, 47 S.W.3d 377 (Mo. App. W.D. 2001) (three years after father's parental rights were terminated without satisfying requirements of Chapter 211); *Williams v. Williams*, 932 S.W.2d 904 (Mo. App. E.D. 1996) (eight years after judgment entered without statutory authority to award asset); and *State ex rel. Houston v. Malen*, 864 S.W.2d 427 (Mo. App. S.D. 1993) (four years after dissolution where husband not served summons).

378-379. "To invoke the mandates of procedural due process, one must have been deprived of a property interest recognized and protected by the Due Process Clause." *Moore v. Board of Education of Fulton Public School No. 58*, 836 S.W.2d 943, 947 (Mo. 1992). A cause of action in the form of a suit for damages is a property right protected by the Fourteenth Amendment. *Kerth*, 325 S.W.3d at 379 FN 5. The General Assembly vested Father with first-class plaintiff standing, and Father did not sit on his rights. Father asserted his paternity four times. He asked for "procedures for filing a petition" and "the local court rule for filing a lawsuit." Three of his filings contained requests to become a plaintiff in the case, including a formal motion. Father asserted his rights clearly and persistently, to no avail. Instead, an ineligible plaintiff was allowed to arrogate and inter this case while the rightful plaintiff stood banging on the courthouse door.

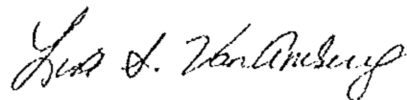
In *Love*'s concurrence, we acknowledged that *pro se* litigants are not entitled to indulgences that they would not have received as represented parties. 503 S.W.3d at 321. This principle is necessitated by the interests of fairness and judicial impartiality. *Id.* But in those same interests, *pro se* litigants are entitled to equal access. Addressing Father's motion would not have constituted an indulgence unavailable to represented parties. On the contrary, had Father walked into the clerk's office unrepresented, he would have received procedural assistance with his motion to intervene. Had he been represented by counsel, the court and the parties could not have ignored him. Inmates are not stripped of their due process rights at the prison gate. *Thompson v. Bond*, 421 F.Supp. 878, 882 (W.D. Mo. 1976) (declaring Missouri's civil death statute unconstitutional).

"Because litigants can request relief ... at any time, the concept of a void judgment is narrowly restricted to protect the strong public policy interest in the finality of judgments." *Unifund* at 706. Mindful of this narrow application, we nonetheless find the underlying record

uniquely illustrative of the concept. As previously discussed at length and demonstrated by the appendix, Father was wholly deprived of due process in the underlying suit. Father is entitled to relief under Rule 74.06(b)(4).

Conclusion

Multiple aspects of this case undermine public confidence in the legal system. Just as statutes of limitation were never intended to be used as swords (*Love*, 503 S.W.3d at 322), neither were procedural rules intended to pose insurmountable barriers to justice. *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883, 887 (Mo. 1987). Father had an absolute right to participate in this lawsuit, and he timely and adequately asserted that right. Father was and remains entitled to intervene. Grandmother was unauthorized to dismiss his claim. Father is entitled to relief under Rule 74.06(b)(4) in that his exclusion from and the dismissal of the case occurred in violation of his due process rights. The trial court erred in denying Father's motions to intervene and set aside the dismissal, and the case must be reversed and remanded for further proceedings on Father's claim.[12]



Lisa Van Amburg, Judge

Colleen Dolan, P.J., concur
and Sherri B. Sullivan, J., dissents in separate opinion.

[12] A court's order setting aside judgment restores the parties to their previous positions. *Matter of Foreclosure of Liens for Delinquent Land Taxes By Action In Rem Collector of Revenue v. Parcels of Land Encumbered With Delinquent Tax Liens*, 504 S.W.3d 880, 883 (Mo. App. E.D. 2016). Father asserted his claim within the statute of limitations in the original case; notwithstanding the result in *Love*, Mother remains a first-class plaintiff with standing to join Father's cause of action and/or to share in any eventual recovery. §537.080 and §537.095

APPENDIX

Trial court minute entries referring to Father in the original case:[13]

Event	Content
Father's filing 7/29/2010	Dear Clerk: My child (Darrell H. Williams, Jr.) was shot and killed by a St. Louis City police officer Nov. 18, 2009. I would like to know if a complaint has been filed with this court in regards to my child's (Darrell H. Williams, Jr.) death. If so, will you please forward me a copy of the docket sheet. Your reply will be appreciated.
Docket entry 8/20/2010	Offender Mail Received.[14] Legal mail received from Darrell William, Sr., United State Penitentiary, Coleman, FL, requesting a copy of the docket sheet. Sent to Certified Copy, original letter is in the legal file.
Docket entry 8/30/2010	Judge/Clerk Note. Docket sheets sent to Darrell Williams USP-2 26008 044 PO Box 1034 Coleman, FL
Father's filing 11/7/2010	Dear Clerk: Please provide me with a copy of the docket sheet regarding the above cause #. Also please provide me with the address and phone # of attorney MacArthur Moten of St. Louis, MO, who represents the case. Your reply will be appreciated.
Docket entry 11/12/2010	Offender Mail Received. Letter from inmate Mr. Darrell Williams, Sr., U.S.P., Post Office Box 1000, Lewisburg PA 17837 requesting a copy of the docket sheet. Sent to Certified Copy.
Docket entry 11/15/2010	Judge/Clerk Note. Photocopy of the docket sheet was processed and sent to defendant.
Father's filing 11/18/2010	Dear Mr. Favazza: The above mention cause no. is in regards to a wrongful death suit regarding my son (Darrell Williams, Jr.). I am currently incarcerated in PA in federal prison. ***I have attempted to become a plaintiff on the suit, but everything is being kept a secret to me. Sir, how can I become a plaintiff and proceed pro se?*** Also, will you please send me a copy of the following: 1. Petition filed 01-20-10 2. All exhibits, including crime scene picture, filed with petition 3. Defendants answer to plaintiff's petition, dated 03-16-10 4. Propose protective order filed by Defendants, dated 07-08-10 Your reply and assistance will be appreciated.
Docket entry 11/22/2010	Offender Mail Received. Letter from inmate Mr. Darrell Williams, Sr., U.S.P., Post Office Box 1000, Lewisburg, PA 17837 requesting to be a plaintiff on the case (Pro se). Request for a copy of the petition filed on January 20, 2010, all exhibits including the crime scene pictures filed with the petition, defendant's answer to the plaintiff's petition dated March 16, 2010 and a copy of the protective order filed by the defendant's dated July 8, 2010. Sent to Judge Dowd and Certified Copy.

[13]Bold italic font added for emphasis

[14]Although this is a civil case in which Father sought recourse for the alleged wrongful death of his own son, the clerk's minutes repeatedly refer to Father as "offender," "defendant," and "inmate."

Docket entry 11/24/2010	Judge/Clerk Note. Copies mailed to Darrell Williams USP 26008-044 PO Box 1000 Lewisburg PA 17837
Father's filing 11/20/10 Rec'd 11/29/10 No corresponding docket entry	Dear Judge Neill or Judge Dowd:[15] I am writing to you concerning the above cause # in which my son (Darrell Williams, Jr.) was shot and killed. I am currently incarcerated, and both sides of the family are keeping everything a secret to me. I have attempted to become a plaintiff on this petition, which has been to no avail. ***As a father, I should be allowed to be a plaintiff. I request that I be listed a "pro se" plaintiff on this petition.*** Also, I request that I be provided with the following: 1. Petition filed 01-20-2010, including exhibits. 2. Defendant's answer to plaintiff petition, dated 03-16-2010 3. Plaintiff request to produce to M. Karnowski, dated 04-16-10 4. Motion to compel, dated 04-16-10 5. Proposed protective order, dated 06-24-10 6. Motion for protective order, dated 07-13-10 7. Motion for sanction, dated 07-13-10 8. Filed motion, dated 07-16-10 Your reply will be appreciated.
Father's filing 12/12/10	Dear Clerk: Will you please send me the following information/documents: 1. Summons issued to all defendants under the above cause # 2. Corporation served to all defendants under the above cause # 3. All motions filed on 04-19-10 under the above cause # 4. 05-12-10 court order 5. 07-20-10 court order 6. 08-04-10 filing 7. *Procedures for filing a petition* 8. Docket sheet
Docket entry 12/16/10	Offender Mail Received. A letter from the defendant requesting a copy of the summons issued to the defendants, motion dated 4/19/10, court order dated 5/12/10, motion dated 8/4/10 and the docket sheet. Sent to Certified Copy.
Docket entry 12/29/10	Judge/Clerk Note. Request for copy of pleadings and docket sheets prepared for Darrell Williams, Register Number 26008-044, U.S. Penitentiary, P.O. Box 1000, Lewisburg, PA 17837
Father's filing 2/20/11	Dear Clerk: Will you please send me a docket sheet regarding the above case #. Your reply will be appreciated.
Docket entry 2/24/11	Offender Mail Received. Letter from the defendant requesting docket sheet.
Docket entry 2/28/11	Judge/Clerk Note. Letter received from defendant February 25, 2011 requesting copy of documents in files. Letter sent to file CC

[15] Though only two judges are named in the court minutes around the time of Father's letters, a total of eight different judges appear in the minutes corresponding to various orders and trial settings over the four-year period that this case was pending, undoubtedly due to the 22nd circuit's docketing system. Regardless, vis-à-vis the public, the court is a single institution.

Father's filing 5/10/11	Dear Clerk: Enclosed is a motion that I would like to file with this court. Also ***please send me the local court rule for filing a law suit.*** Also please send me a court docket sheet of cause #1022-CC00155.
	Comes now plaintiff Darrell Williams, pro se, requesting to become a plaintiff in cause #1022-CC00155, for the following reason:
	1. ***Plaintiff Darrell Williams, Sr., is the father of the deceased Darrell Williams, Jr.***
	Wherefore Plaintiff requests that this motion be granted.
	Certificate of Service. I certify that a true and correct copy of the enclosed motion was mailed postage prepaid to the court clerk on this 10th day of May, 2011.[16]
Docket entry 5/16/11	Offender Mail Received. A letter from Darrell Williams was received requesting a copy of the docket sheet. The letter was filed in the legal file and a post card was sent to the Darrell Williams with instructions for copies from the legal file.
	Motion Filed. Mr. Darrell Williams Sr. motion to be added as a party plaintiff.
Father's filing 7/12/11	Dear Clerk: Will you please send me a copy of the docket sheet regarding the above cause #. I am currently confined in the state of PA and I don't have access to internet.
Docket entry 7/26/11	Judge/Clerk Note. A postcard with the number of pages requested and the amount due for copies was mailed to Darrell Williams.[17]

[16] Father attempted to format his motion in compliance with procedural rules by including a certificate of service but obviously misunderstood its purpose, *i.e.*, to ensure notice to other parties

[17] After a full year of repeated attempts to participate in the case, all to no avail, Father evidently threw up his hands, as docket sheet contains no other references to Father after July 2011

In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

DELORES HENRY,	)	No. ED105742
	)	
Plaintiff,	)	Appeal from the Circuit Court of
	)	the City of St. Louis
vs.	)	
	)	
PAUL PIATCHEK, et al.,	)	Hon. Rex M. Burlison
	)	
Defendants/Respondents.	)	
	)	
DARRELL WILLIAMS, SR.,	)	
	)	
Proposed Intervenor/Appellant.	)	FILED: July 10, 2018

DISSENT

While I sympathize with Appellant's plight, I respectfully dissent. I find Appellant never filed a proper motion to intervene as a matter of statutory right in Grandmother's wrongful death suit in order to establish his right as a party to the underlying action. Moreover, the effect of Grandmother's voluntary dismissal of her suit was as if the lawsuit had never been brought, thereby resulting in the trial court losing its jurisdiction to take any further action in the case and to grant Appellant's motion. I believe the trial court properly denied non-party Appellant's motion to set aside Grandmother's voluntary dismissal without prejudice and to intervene.

Alleged Motion to Intervene

I first take up Appellant's challenge to the denial of his "motion" to intervene. The majority finds that Appellant's filings, "notwithstanding procedural shortcomings," are sufficient to warrant his absolute statutory right to intervene. I believe the majority's holding on this point is contrary to Missouri law. Rule 52.12(c), which governs intervention, states:

> (c) Procedure. A person desiring to intervene shall serve a motion upon all parties affected thereby. The motion shall state the grounds therefor, and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Appellant relies on a number of letters to the trial court to justify intervention, and the majority finds that Appellant's "pleadings" constituted a proper motion to intervene as of right pursuant to Rule 52.12(a)(1). I disagree.

In order to consider Appellant's letters to the court as a motion to intervene as a matter of right pursuant to Rule 52.12(a)(1), Appellant must have sufficiently set forth applicable grounds in his filings and pled "an unconditional right to intervene as granted by a state statute." In re M.M.P., 10 S.W.3d 195, 198 (Mo. App. W.D. 2000). Appellant's letters to the court assert he was the decedent's father, inquired about filing a lawsuit, and requested to be added as plaintiff in Grandmother's ongoing wrongful death suit. Appellant never filed a pleading asserting a "statute of this state" gave him an "unconditional right to intervene" and his letters were inadequate to assert a right to intervene under Rule 52.12(a)(1). See In re M.M.P., 10 S.W.3d at 198 (agency's motion to intervene as a matter of right pursuant to 52.12(a)(1) was inadequate because it did not properly plead that a state statute conferred upon them an unconditional right to intervene as required by the rule).

Even if Appellant's letters were sufficient to constitute a motion to intervene as a matter of right, Appellant failed to serve the motion "upon all parties affected" by the motion as specifically required by Rule 52.12(c). Appellant's "motion" was never served upon any party and was never called up for a hearing. Nothing in the record indicates Respondents were aware of Appellant's letters to the court, let alone that such correspondence was going to be deemed a motion to intervene as a matter of statutory right.[1] Consequently, Appellant never became a party. As Appellant did not meet the requirements of Rule 52.12(a) for intervention as of right, because he did not notice up his motion for hearing, I cannot now convict the trial court of error for denying a motion that does not comply with the requirements of the Rules.

Rule 74.06 Limited to "Parties"

As indicated in the majority opinion, Grandmother voluntarily dismissed her suit without prejudice pursuant to Rule 67.02 on April 14, 2014. On January 17, 2017, almost three years after Grandmother voluntarily dismissed her case, Appellant filed his motion to set aside the dismissal. Following the trial court's denial of Appellant's motion, Appellant now brings this appeal asking this Court to overturn the trial court's ruling and allow him to set aside the dismissal and to intervene in the 2010 case. This request is unavailing.

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[1] Assuming arguendo that Appellant's letters constituted a proper motion to intervene as a matter of right, as discussed later, the motion was deemed denied when Grandmother dismissed her suit. At this point, Appellant should have sought review of the trial court's denial or, in this case, the trial court's failure to rule upon his alleged motion. The proper place to review whether Appellant's letters to the trial court constituted a proper motion and whether such a motion should have been granted was on direct appeal. However, Appellant did not appeal, which is why the majority is engaged in this "procedural conundrum."

I note that although Appellant filed a motion to set the judgment aside pursuant to Rule 74.06(b), no relief could be provided under that rule. The provisions of Rule 74.06(b) are limited to parties; therefore, the trial court was without jurisdiction to take any further action. Rule 74.06, titled "Relief from Judgment or Order" provides:

> **(b) Excusable Neglect--Fraud--Irregular, Void, or Satisfied Judgment.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is irregular; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment remain in force.

By its express terms, Rule 74.06(b) can only "relieve a party or his legal representative from a final judgment[.]" Appellant was never a party to Grandmother's action. He never filed a proper motion to intervene in the action and, even if his letters to the court could be construed as a proper motion, the motion was never ruled upon. Appellant never served his motion on the opposing party, never called his "motion" up for a hearing, and the trial court never ruled upon the motion. Moreover, Appellant never sought review of the trial court's failure to rule upon his "motion" after the original judgment became final upon Grandmother's voluntary dismissal.

Contrary to the majority's position, because Appellant never became a party, Rule 74.06 does not apply to him as the provisions for relief under the rule are specifically limited to parties.

Effect of Voluntary Dismissal

The majority next attempts to argue that despite being a non-party, Appellant was still entitled to relief under Rule 74.06 for an "unauthorized voluntary dismissal" that was

"void" and in violation of his due process rights. Again, the majority opinion is in conflict with Missouri law.

A voluntary dismissal under Rule 67.02(a) "disposes of the entire case and is effective upon the date it is filed with the court" and "'it is as if the suit had never been filed.'" Applied Bank v. Wenzlick, 344 S.W.3d 229, 230 (Mo. App. E.D. 2011), quoting Richter v. Union Pacific R. Co., 265 S.W.3d 294, 297 (Mo. App. E.D. 2008). At that point, the trial court loses jurisdiction over the case and any further action by the trial court is a nullity. Applied Bank, 344 S.W.3d at 230. Here, Grandmother filed her voluntary dismissal on April 14, 2014, and the case was dismissed on that date and any order entered by the trial court after that date is a nullity. Rule 67.02(a); Applied Bank, 344 S.W.3d at 231. Thus, the trial court was correct in its ruling that it had no authority to grant Appellant's motion to set aside Grandmother's dismissal because Rule 67.02 provided Grandmother an absolute right to dismiss her case without prejudice and once dismissed, the trial court instantly lost jurisdiction over the action.

Pro Se Litigants

Finally, throughout its analysis, the majority requires the trial court to investigate the entire court file and to *sua sponte* either call up any potential matters for a hearing and rule upon the matter or to rule upon the matter without notice to opposing parties or the benefit of a hearing. This is not only unduly burdensome to the court but requires the court to act as an advocate for *pro se* litigants. Presumably, this new obligation for the court could equally extend to parties represented by counsel whose attorneys have failed to adequately prosecute a motion or the case. It is well settled that "*[p]ro se* litigants are bound by the same standards as parties represented by attorneys, and are therefore not

entitled to indulgences they would not have received had they been represented by counsel." State v. Clay, 529 S.W.3d 357, 362 (Mo. App. E.D. 2017), citing State v. Chambers, 481 S.W.3d 1, 10, fn. 4 (Mo. banc 2016); Manning v. Fedotin, 64 S.W.3d 841, 846 (Mo. App. W.D. 2002). "'Judicial impartiality, judicial economy, and fairness to all parties preclude courts from granting *pro se* litigants preferential treatment.'" Pennington-Thurman v. Bank of Am., N.A., 486 S.W.3d 471, 478 (Mo. App. E.D. 2016), quoting Nelson v. Nelson, 195 S.W.3d 502, 514 (Mo. App. W.D. 2006). As such, "'we must require *pro se* appellants to comply with these rules and I cannot relax our standards merely because one is a non-lawyer.'" Pennington-Thurman, 486 S.W.3d at 478, quoting Brown v. Ameristar Casino Kansas City, Inc., 211 S.W.3d 145, 146 (Mo. App. W.D. 2007).

Conclusion

In conclusion, proposed intervenor and non-party, Appellant, is not entitled to have the trial court grant his motion to set aside Grandmother's 2014 voluntary dismissal and allow him to intervene and begin the case anew against Respondents. The trial court properly denied Appellant's motion to set aside and to intervene, ruling that it lacked authority to grant the motion. The trial court also correctly determined that Grandmother's voluntary dismissal disposed of the entire case and that the effect of the voluntary dismissal was that the trial court lost jurisdiction over the case on the date of the dismissal and thereafter had no authority to act to grant Appellant's motion. I would affirm the trial court's judgment denying Appellant's motion.

SHERRI B. SULLIVAN, J.