Missouri Court of Appeals

Southern District

Division One

MARY ELLISON, ARTHUR FRY, DAVID FRY and SUSAN SLEEPER, Appellants/Respondents,	)	
vs.	)	No. SD32120 & SD32188 Consolidated
J.D. FRY, deceased, by LINDA FRY, TRUSTEE OF THE JOHN DELBERT FRY REVOCABLE INTERVIVOS TRUST, et al., Respondents/Cross-Appellants.	)	FILED: September 23, 2013

APPEAL FROM THE CIRCUIT COURT OF CAMDEN COUNTY

Honorable Ralph H. Jaynes, Senior Judge

REVERSED AND REMANDED

On interlocutory appeal,[1] we consider a judgment, several verdicts, and various claims in a family dispute over property once owned by decedents Vincil and Willa Fry. We find that several of these claims were time barred. Others were, in effect, against the wrong party. We reverse the judgment and remand.

[1] *See* Missouri Court Rule 74.01(b). Statutory references are to RSMo 2000. For simplicity, we refer to the parties as "Plaintiffs" or "Defendants" and to individuals by their first names.

Background

The record is extensive. We tersely summarize allegations, matters, and background spanning more than 30 years.[2] Parties and persons of interest include:

- Vincil and Willa Fry, husband and wife, who farmed and jointly owned a 160-acre home place and an adjacent 200 acres.
- Their adult children Arthur, Mary, and J.D.
- Arthur's adult children Susan and David.
- J.D.'s wife Linda and their adult son Delbert, who along with J.D. did business as Fry Grain.

In 1981, Vincil and Willa purportedly made a joint will as follows: home place to J.D.; the 200 acres to Susan and David subject to a life estate in Arthur; a third tract and cash to Mary; and remaining assets divided equally among Mary, Arthur, and J.D.

In June 1990, at age 82, Vincil wrecked a car and injured its occupants. Although fully insured, he and Willa fretted about losing their farm. J.D. took them to an attorney. On June 28, 1990, Vincil and Willa executed new wills; settled a trust to benefit Arthur, Susan, and David; and deeded one farm to J.D. and the other to Delbert, reserving life estates for themselves. Later, they made separate provision for Mary.

Vincil passed away in 2000. After Willa died in November 2005, her monies were divided between her children. No probate estates were opened.

[2] Further, we focus on facts needed to understand our analysis of dispositive points. Thus, we omit allegations regarding Linda Fry individually as Plaintiffs do not challenge the jury's zero-dollar verdict as to her. Same for complaints raised, then dropped, about 40 acres and a house.

In April 2008, Mary sued to set aside the 1990 farm conveyances to J.D. and Delbert, alleging that

> [s]aid conveyances were made solely as a result of the undue influence, coercion and deception practiced upon Vincil and Willa Fry by J. D. Fry for the purpose of securing title to said real estate for himself and his child, and depriving [Mary and Arthur] of such interests therein as they would have otherwise inherited upon the death of the last to die of Vincil and Willa Fry.

Mary also charged J.D. with breach of fiduciary duty, fraud, conversion, and unjust enrichment for alleged misdealing with his parents' monies and personal property from and after 1998. She made a conversion claim against Fry Grain as well.

Not joining in Mary's petition, Arthur purported to settle and fully release, in writing, any potential claims.

J.D., who had been failing, died six months after Mary sued him. Mary moved to substitute J.D.'s daughter "as Defendant in the place and stead of said J.D. Fry."[3] Citing § 537.021.1(2), the defense countered that the proper and only permitted substitute would be J.D.'s personal representative. After a hearing, the trial court substituted Linda, as trustee of J.D.'s revocable trust ("Trustee"), in place of J.D. As with Vincil and Willa, no probate estate was opened for J.D.[4]

In October 2011, Arthur, Susan, and David intervened and joined Mary in filing a ten-count amended petition. Defendants filed counterclaims that the court severed; those are still pending.

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[3] Mary alleged that, prior to J.D.'s death, his daughter had been his agent for litigation purposes under a "Durable Special Limited Power of Attorney."

[4] To quote the trial judge, midway through the jury trial three years later, "if we had a little probate around here, we wouldn't be in the courtroom today."

Plaintiffs' claims were tried to a jury for five days in April 2012. At the end of Plaintiffs' case, the court[5] dismissed Arthur's claims based on his release, dismissed claims against Delbert, and ruled that the evidence did not warrant punitive damage instructions. At the close of all evidence, the court dismissed the count against Fry Grain.

Jurors were instructed "that defendant J.D. Fry is deceased and [Trustee] has been substituted to take his place; therefore if you find against defendant J.D. Fry, your verdict must be against [Trustee]." Of six verdicts rendered, three are at issue:

- Mary's $35,000 verdict against Trustee for J.D.'s breach of fiduciary duty, fraud, conversion, and/or unjust enrichment.
- Two $5,500 unjust enrichment verdicts, one for Susan and the other for David, that hinged on allegations that J.D.'s 1990 deed was the result of undue influence.

The court entered a judgment consistent with these verdicts and certified, per Rule 74.01(b), that there was no just reason for delay.

Both Plaintiffs and Defendants have appealed, raising 11 points between them. We start with Defendants' appeal, wherein our disposition of two points makes it unnecessary to reach the others.

Defendants' Point II — Limitations as to Susan and David

We agree with Defendants: the claims by Susan and David were time barred. These plaintiffs never acquired the rights of action they purported to assert. We start from two cases: ***Turnmire v. Claybrook***, 204 S.W. 178 (Mo. 1918); and ***Pemberton v. Reed***, 545 S.W.2d 698 (Mo.App. 1976).

[5] This was the fifth judge to have served on the case.

Turnmire v. Claybrook

J.H. and Sarah Claybrook deeded land to their son Samuel in 1900. J.H. died in 1903, Sarah in 1913. In 1914, Samuel's siblings sued to set aside the deed for fraud and undue influence. Our supreme court affirmed dismissal based on the ten-year statute of limitations for recovery of land.

The court held that the statute of limitations was triggered against J.H. in 1900 when Samuel took the deed, and "having begun to run, would not be stopped by the death of [J.H]. His heirs would succeed to his rights, but would take them with the burdens imposed by law. The statute of limitations, once set in motion, cannot be stopped." ***Turnmire***, 204 S.W. at 179-80. "[T]he statute of limitations, which began to run in [J.H.'s] lifetime, barred such rights in his heirs long prior to the bringing of this action. His right of action accrued upon the delivery and acceptance of the deed in 1900, and this action was not brought until 1914." ***Id***. at 180.

Under married women's laws of that era, Sarah was protected from limitations until J.H. died.[6] Still, the court noted, "suit was not brought for nearly 11 years thereafter. What we have said of the heirs of the husband supra is equally applicable to the heirs of the wife." ***Id***. The passing of ten years without action by or on behalf of either grantor spouse barred their children's later action. ***Id***.

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[6] According to the court, Sarah

> became a feme sole January 23, 1903, upon the death of the husband. Grant it that she was protected up to that time; she should have then brought action. The statute as to her right of action at least began to run January 23, 1903, and was not halted by any subsequent events.

Turnmire, 204 S.W. at 180.

A similar result was reached nearly 60 years later, despite a limitations period much longer than in ***Turnmire*** or this case.

Maggie and Cora Pemberton, sisters, owned land in joint tenancy. In 1946, they deeded it to defendants Reed for no consideration, keeping a life estate. Cora died the following year, but Maggie lived until 1974. Two months after she died, relatives challenged the deeds for mental incapacity of the sisters and undue influence by the grantees.

It was agreed that both sisters were incompetent when they signed the deeds, which stretched limitations to 24 years. ***Pemberton***, 545 S.W.2d at 700.[7] When death overtook Cora, the right of action fell solely to Maggie as surviving joint tenant, but "expired altogether" before Maggie passed away in 1974. ***Id***.

The plaintiffs conceded this, but urged that *their* cause of action "did not arise until they had an immediate right of possession, which accrued to them upon the death of Maggie." ***Id***. at 701.

The court on appeal disagreed. If Maggie's right to sue expired before she died, her heirs *never* acquired a cause of action. ***Id***. at 701-03. "While Maggie lived, the plaintiffs as prospective heirs had no vested interest in her property and could not have challenged [her conveyances]." ***Id***. at 702. They could not sue in their own

[7] As the court explained (***id***.):

> In sum and paraphrase, § 516.010 requires a cause of action for the recovery of lands to be commenced within ten years of accrual. § 516.030 enlarges the period for the commencement of such an action for a person under disability to twenty-four years. § 516.050 allows an heir of a person who has died while still under disability an extension of three years, provided the deceased was 'entitled to commence such action'.

right, but claimed only through Maggie as heirs, standing "in the same relation to the grantee as did the grantor." ***Id***. "Their right to set aside the deeds is derived from Maggie." ***Id***. Since Maggie had no right to sue when she died, "the plaintiffs have no cause of action to pursue." ***Id***. at 703.

Application to This Case

Under the foregoing cases and others,[8] the right to contest these farm deeds accrued to Vincil and Willa, and the statute of limitations started, in June 1990. Any unexpired right at Vincil's death remained in Willa with the statute still running. That statute, whether five, ten, or 15 years,[9] expired before Willa's death in November 2005.

Plaintiffs' Tolling Theory Fails

Specifically citing § 516.120(5), Plaintiffs claim that "any statute of limitations concerning the 1990 Deeds was tolled due to J.D. Fry's active concealment of the facts concerning his fraud." This may be true, but only to a point. At most, there were 15 years after June 1990 to sue, despite any fraudulent concealment. To quote a fraction of this court's extensive analysis in ***Anderson v. Dyer***, 456 S.W.2d 808, 811-12 (Mo.App. 1970):

> The initial segment of Sec. 516.120(5) is simply a statute of limitations which imposes a five year limit on the commencement of actions brought for relief on the ground of fraud; the concluding

[8] *See, e.g.*, ***Gibson v. Ransdell***, 188 S.W.2d 35, 38 (Mo. 1945); ***Branner v. Klaber***, 49 S.W.2d 169, 176-77 (Mo. 1932). If a person not under statutory disability dies, having a right of action, his heirs "succeeding to his rights must bring such action within the period of limitations that commenced running upon the accrual of the right of action to the deceased." 12 Mo. Prac., Jurisdiction Venue Limitations § 7:349 (3d ed., updated Sept. 2013) (citing ***Turnmire***).

[9] *See*, respectively, § 516.120 (5 years), § 516.110 (10 years), § 516.120(5) & ***Anderson v. Dyer***, 456 S.W.2d 808, 811-12 (Mo.App. 1970) (up to 15 years). We discuss ***Anderson*** *infra*.

> portion constitutes a ten-year artificial lacuna fixed by the legislature on the accrual of the cause of action, i.e., fraud actions are deemed not to accrue during the ten-year suspension period until the discovery of the fraud.... If the fraud was not discovered or discoverable during the ten-year hiatus provided by the legislature, then the cause of action would be deemed to have accrued at the termination of such period and the statute of limitations would commence to run from that time, thereby permitting a maximum of fifteen years for commencement of the suit. [citations and quotation marks omitted]

"In other words, 'the action is to be brought within fifteen years in any event....'" ***Id***. at 812 (quoting ***Foster v. Pettijohn***, 213 S.W.2d 487, 490 (Mo. 1948)).

Our supreme court agrees, having quoted ***Anderson*** at length in confirming that if "ten years elapse without discovery of the fraudulent acts, the statute of limitations begins to run and after five years the cause of action is barred, even if the fraud has not yet been discovered." ***State ex rel. Stifel, Nicolaus & Co. v. Clymer***, 522 S.W.2d 793, 798 (Mo. banc 1975). *See also* ***Graf v. Michaels***, 900 S.W.2d 659, 661 (Mo.App. 1995) (quoting and following ***Anderson***).[10]

To summarize, any right to contest the farm deeds accrued to Vincil and Willa in June 1990 and expired in Willa's lifetime (***Pemberton***, ***Turnmire***), even assuming fraudulent concealment (***Clymer***, ***Anderson***, ***Gilmore***, ***Graf***).

Thus, Susan and David "have no cause of action to pursue." ***Pemberton***, 545 S.W.2d at 703. They had no vested interest in Willa's property while she lived, but

[10] We are not persuaded by Plaintiffs' reference to ***Kansas City v. W.R. Grace & Co.***, 778 S.W.2d 264, 273 (Mo.App. 1989). As noted, our supreme court has cited ***Anderson*** with approval on this issue; not so ***Grace***. *See* ***Kansas City v. Keene Corp.***, 855 S.W.2d 360, 367 (Mo. banc 1993) (as to limitations, "this Court is not called upon to decide whether *Grace* was properly decided."). Further, ***Gilmore v. Chicago Title Ins. Co.***, 926 S.W.2d 695, 698 (Mo.App. 1996), rejected the view, taken by Plaintiffs here, that ***Grace*** was contrary to a 15-year hard cap.

were at most "heirs apparent" with some possibility of inheritance. *See* ***Brown v. Kirkham***, 926 S.W.2d 197, 200 (Mo.App. 1996). Their rights (if any) derived solely from Willa, whose own right died before she did, years before anyone filed suit. ***Pemberton***, 545 S.W.2d at 701. We grant Point II.

Point IV – Ineffective Substitution

Defendants also correctly claim that the Trustee was improperly substituted as a defendant, so Mary's judgment against Trustee cannot stand.

At common law, tort actions "died with the death of either the wronged or the wrongdoer," a rule that still "prevails in Missouri except so far as it has been changed or modified by statute." ***State ex rel. Nat'l Ref. Co. v. Seehorn***, 127 S.W.2d 418, 420 (Mo. 1939). *See also* Borron, 5A Missouri Practice, *Probate Law & Practice* § 851 (3d ed., as updated Apr. 2013).

Missouri statutorily changed the common law for wrongs done to property interests. ***Id***. Under § 537.010, such actions survive a wrongdoer's death and may be "maintained in the manner set forth in section 537.021," which in turn requires appointment of a defendant ad litem[11] or "personal representative of the estate of a wrongdoer upon the death of such wrongdoer." § 537.021.1(2).

This did not happen. No one claims otherwise.

"'Revivor of actions being purely statutory in its origin, the modes provided by the Codes and statutes of the various states are exclusive, and the courts cannot

[11] Not an option in this case. "Section 537.021 authorizes the appointment of a defendant ad litem only in actions for damages in which the real party in interest is a deceased wrongdoer's liability insurer." ***Travis v. Contico Int'l, Inc.***, 928 S.W.2d 367, 370 (Mo.App. 1996). In that case, a circuit court used the wrong option (defendant ad litem, not personal representative) and the resulting judgment was held to be void. ***Id***.

grant such benefit by any other method.'" ***Wilson v. Darrow***, 122 S.W. 1077, 1080 (Mo. 1909) (quoting 18 Ency. of Plead. & Prac. p. 1128, par.5), *quoted in* ***Carter v. Decker***, 199 S.W.2d 48, 54 (Mo.App. 1947). *See also* ***Estate of Livingston***, 627 S.W.2d 673, 678 (Mo.App. 1982).

"Since the enactment of [§ 537.020 and its predecessor statutes[12]], the executor or administrator of a deceased tort-feasor is the one and only defendant in an action such as this." ***Clarke v. Organ***, 329 S.W.2d 670, 674 (Mo. banc 1959), quoted in ***State ex rel. Emmons v. Hollenbeck***, 394 S.W.2d 82, 86 (Mo.App. 1965).

Plaintiffs do not cite, nor have we found, any case allowing deviation from §§ 537.010-.021. Instead, Plaintiffs offer their belief that J.D.'s estate "would have held no assets," then deduce that "[s]ince it would be fruitless for Plaintiffs to attempt to collect a judgment against an empty estate, [§ 537.021] does not apply to the current action." They cite no support for this novel reasoning, which ignores § 537.021's mandate, the tenor of cases we have cited, and statutory claw-back processes.[13] Perhaps most importantly, but for §§ 537.010 & 537.021 and compliance therewith, Plaintiffs could not pursue their common-law claims against J.D. after he died. Point granted.

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[12] Like § 537.010 for property actions, § 537.020 provides for survival of personal injury and wrongful death actions. The quoted cases predate our legislature's creation of the defendant ad litem option.

[13] Including actions under § 473.340 (discovery of assets) or § 461.300. Under the latter, "[c]ertain recoverable transfers, most notably transfers to a trust … can be pulled back into probate and then used to pay [creditor and other] obligations." Robert J. Selsor, *Fattening Up the Skinny Estate - the Non-Probate Transfer Statute's Remedies for Pursuing A Decedent's Assets*, 67 J. Mo. Bar 286 (2011).

Since the judgment must be reversed as to all successful plaintiffs – Susan and David under Point II and Mary under Point IV – we need not reach Defendants' other points. We turn thus to Plaintiffs' points, taking some out of order.

Plaintiffs' Point I – Punitive Damages

Plaintiffs complain of the court's refusal to instruct on punitive damages. "Because punitive damages are not available in the absence of actual damages, this opinion need not fully address [Plaintiffs'] claim regarding the submissibility of punitive damages." ***LPP Mortg., Ltd. v. Marcin, Inc.***, 224 S.W.3d 50, 56 (Mo.App. 2007). Absent recovery of actual or compensatory damages, Plaintiffs could not recover punitives. ***Pittman v. Ripley County Memorial Hosp.***, 318 S.W.3d 289, 296 (Mo.App. 2010). Failure of Plaintiffs' judgment for actual damages bars punitive damages even if "the issue had been submitted to the jury." ***Adelstein v. Jefferson Bank & Trust Co.***, 377 S.W.2d 247, 252 (Mo. 1964). Plaintiffs "could not have been prejudiced by the ruling complained of." ***Id***. Point I fails.

Plaintiffs' Points III & IV – Fry Grain & Delbert

These points claim error in the dismissals of Fry Grain and Delbert.[14] Plaintiffs urge that they offered enough evidence to send both claims to the jury.

Rule 84.04(e) required all factual assertions in arguments supporting these points to include "specific page references to the relevant portion of the record on

[14] Mary and Arthur alleged that Fry Grain deprived Willa of farm subsidy payments, rent, and income from land and farm equipment between 1999 and 2005. The claim against Delbert, like those of David and Susan against Trustee, hinged on allegations that his 1990 farm deed was the result of undue influence.

appeal, *i.e.*, legal file, transcript, or exhibits."[15] Plaintiffs provided no such references, which are our tools to verify factual assertions made in support of appellate arguments and are essential to effective functioning of appellate courts. *See* ***Demore v. Demore Enterprises, Inc.***, Nos. SD32350 & 32362, slip op. at 6-7 (Mo.App. S.D. July 15, 2013).

> A party's mandated compliance with this Rule allows this court to verify the evidence upon which a party relies in support of its argument; without such compliance, this court would effectively act as an advocate of the non-complying party, which we cannot do. This court cannot ... spend time perus[ing] the record to determine if the statements are factually supportable.

Lombardo v. Lombardo*,* 120 S.W.3d 232, 247 (Mo.App. 2003) (quoting ***McCormack v. Carmen Schell Constr. Co****.,* 97 S.W.3d 497, 509 (Mo.App. 2002)).

Only by doing Plaintiffs' work could we know if this 2,200-page record supports their Point III and IV arguments. ***Lombardo****,* 120 S.W.3d at 247. "We cannot seine this record for that purpose or to remedy this rule violation without becoming a *de facto* advocate ...." ***Demore***, slip op. at 7. *See also* ***Shaw v. Raymond***, 196 S.W.3d 655, 659 n.2 (Mo.App. 2006). Thus, each point "wholly fails to preserve any error for review." ***Bailey v. Phelps County Reg'l Med. Ctr.***, 328 S.W.3d 770, 772 (Mo.App. 2010). Points denied.

Plaintiffs' Point II – Arthur's Claims & Release

Arthur takes issue with dismissal of his claims based on a "Settlement Agreement and Full and General Release" that he admitted signing, that recited

[15] Prior to this year, this requirement was part of Rule 84.04(i).

consideration, and that his own counsel offered into evidence. Such a release is presumed valid. ***Hatfield v. Cristopher***, 841 S.W.2d 761, 766 (Mo.App. 1992). This policy-based presumption fosters peaceful settlement of disputes and freedom of contract. ***Andes v. Albano***, 853 S.W.2d 936, 940 (Mo. banc 1993). It was Arthur's burden to produce evidence to overcome this presumption and prove some invalidity. ***Hatfield***, 841 S.W.2d at 766. We reject his complaints *seriatim*:

1. Arthur cites no record support for his suggestion that pages were added to the release after he signed it.[16] To the contrary, Arthur identified the complete release at trial, testified that he signed it, and his own lawyer put the complete release into evidence.

2. Arthur also never cites the record in arguing that he "was induced by fraud" to sign the release.

3. We decline Arthur's invitation to weigh the adequacy of consideration. The law encourages "freedom of contract and peaceful settlement of disputes. A person under no disability and under no compulsion may convey his property or relinquish his rights for as small a consideration as he may decide." ***Hackett v. St. Joseph Light & Power Co***., 761 S.W.2d 206, 212 (Mo.App. 1988).

4. Citing his subjective thoughts and intent, Arthur denies that there was enough mutual assent for a valid contract. "A party cannot use parol evidence to create an ambiguity or to show that an obligation is other than that expressed in the written instrument." ***Angoff v. Mersman***, 917 S.W.2d 207, 211 (Mo.App. 1996). This clear and unambiguous release is not made otherwise just because Arthur disputes its meaning. ***Id***. at 210.

Arthur has failed to convince us that error occurred.[17] We reject Point II.

Plaintiffs' Point V – Request for "Equitable Order"

After the jury verdicts, Plaintiffs moved the court to add to the final judgment a list of "Things from House Mary Ellison Would Like to Have." They offered no

[16] The lone transcript reference does not support this assertion at all.

[17] We would be challenged to find prejudice in any event. Arthur's claims would suffer the same limitations and/or wrong party problems fatal to Susan's, David's, and Mary's verdicts.

case law support in that motion and candidly admit on appeal that they have no case to cite. Nonetheless, they fault the trial court for refusing their request.

Plaintiff's motion cited their Counts IV and V, each of which sought money damages or, *in the alternative*, an order for delivery of personal property. In submitting these claims to the jury and asking for money damages, Plaintiffs elected their remedy. Point denied.

Conclusion

We reverse the Rule 74.01(b) judgment in favor of Plaintiffs Mary Ellison, David Fry, and Susan Sleeper, and remand for further proceedings not inconsistent with this opinion.

DANIEL E. SCOTT, J. – OPINION AUTHOR

NANCY STEFFEN RAHMEYER, P.J. – CONCURS

WILLIAM W. FRANCIS, JR., C.J. – CONCURS