

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.)
BC MISSOURI EMERGENCY)
PHYSICIANS, LLP, SCOTT L. LANDRY,)
M.D. AND DAVID POGGEMEIER, M.D.,)
Relators,) Case No. 091418
vs.)
THE HONORABLE NANCY L.)
SCHNEIDER,)
Respondent.)

**APPEAL FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY,
MISSOURI
THE HONORABLE NANCY L. SCHNEIDER, CIRCUIT JUDGE
CASE NO. 0911-CV11523
EASTERN DISTRICT COURT OF APPEALS NO. 95724**

BRIEF OF RELATORS

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JURISDICTIONAL STATEMENT

This case is an original action in prohibition before this Honorable Court. The Honorable Nancy L. Schneider, in her official capacity as circuit judge of the circuit court of the county of St. Charles, is the Respondent. Because a circuit court is the Respondent, adequate relief in prohibition cannot be afforded by application to any other circuit court. Supreme Court Rule 84.22(a).

Relators previously filed a petition for writ of prohibition before the Missouri Court of Appeals, Eastern District. The court of appeals denied Relators' petition without opinion on November 23, 2010. A denial of a writ petition without opinion is not appealable. Accordingly, Relators filed a new petition for writ of prohibition in this Court to prohibit Judge Schneider's order of October 5, 2010, denying Relators' motion to dismiss. Relators requested dismissal under Section 537.100, RSMo. 2010 because the statute of limitations had expired.¹

On January 25, 2011, this Court entered its preliminary writ of prohibition. Relators seek this Court to make permanent its preliminary writ. This Court has jurisdiction pursuant to Article V, Section 4, of the Missouri Constitution, and Supreme Court Rules 84.22, 84.23, 84.24 and 97.01.

¹ Unless otherwise indicated, all further statutory references are to RSMo. 2010.

STATEMENT OF FACTS

On October 5, 2010, the Honorable Nancy L. Schneider (“Respondent”), entered an order denying Relators’ Motion to Dismiss Plaintiff’s Second Amended Petition against Relators. (Appendix, p. A1). Relators’ motion to dismiss asserted that the statute of limitations ran on the wrongful death claim alleging medical negligence by Relators in treating Alverna Katz in 2005.

On October 2, 2008, plaintiff originally filed a petition alleging medical negligence against defendants Barnes-Jewish St. Peters Hospital, Washington University, John Doe and Jane Doe (not Relators herein). (Appx., p. A2). The original petition stated only, “That Defendants John Doe and Jane Doe and the above Defendants are providers of medical services, who at all times relevant to this action was engaged in providing medical services to the consuming public, including Decedent for a fee.” (Appx., p. A2, paragraph 7).

Plaintiff did not further identify John Doe and Jane Doe nor give any identifying information to describe what their role was in the care and treatment of decedent that allegedly resulted in her death on October 2, 2005. (Appx., p. A2).

On April 21, 2009, plaintiff filed an amended petition again alleging negligence against Barnes-Jewish St. Peters Hospital, Washington University, and John and Jane Doe. The amended petition is identical in its description of John and Jane Doe as well as the allegations of negligence. Again, plaintiff failed to provide any identifying information about John Doe and Jane Doe other than to state they are providers of medical services to decedent. (Appx., p. A5, paragraph 7, and Count 1).

Almost two years after filing his petition and nearly five years after the alleged negligence occurred, plaintiff filed his second amended petition on August 6, 2010. For the first time, Plaintiff added BC Missouri Physicians, LLC (properly named B.C. Emergency Physicians LLP), Scott L. Landry, M.D., David Poggemeier, M.D., and Neal W. Holzum, M.D., as defendants and removed Washington University and John and Jane Doe. (Appx., p. A10, Count II, paragraph 13). The second amended petition, unlike the first amended petition, also provides more details regarding the allegations against these defendants. (Appx., p. A10).

In response to plaintiff's second amended petition, defendants BC Missouri Emergency Physicians LLP, Scott L. Landry, M.D., David Poggemeier, M.D., and Neal W. Holzum, M.D., filed motions to dismiss on the basis that the three year statute of limitations for a wrongful death claim had expired. On October 5, 2010, Respondent entered an order denying the motions to dismiss. (Appx., p. A1).

On November 1, 2010, Relators filed a petition for writ of prohibition in the Missouri Court of Appeals, Eastern District, to prohibit Respondent's order of October 5, 2010, permitting the case to move forward. On November 23, 2010, the Eastern District denied Relators' petition of prohibition. (Appx., p. A19).

On January 4, 2011, Relators filed a petition for writ of prohibition with this Court to prohibit Judge Schneider's order. On January 25, 2011, this Court issued a preliminary writ of prohibition. (Appx., p. A20). On February 22, 2011, Respondent filed his Return to the preliminary writ in prohibition with this Court. (Appx., p. A21).

Relators now request that this Court make permanent the Preliminary Writ which it issued on January 25, 2011.

POINT RELIED ON

I. Relators are entitled to a permanent writ prohibiting Respondent from allowing the case against Relators to go forward, because Respondent exceeded her authority as a matter of law in that:

(A) The statute of limitations had run in this lawsuit by October 2, 2008 under Section 537.100; therefore, adding Relators to the lawsuit in August 2010 was improper; and

(B) This case should have been dismissed because the allegations against Relators do not relate back to the original filing date.

Schultz v. Romanace, M.D., 906 S.W.2d 393 (Mo. App. S.D. 1995)

Maddux v. Gardner, 192 S.W.2d 14 (Mo. App. 1945)

Section 537.080, RSMo. 2010

Section 537.100, RSMo. 2010

Rule 55.33, Mo. R. Civ. P. 2010

ARGUMENT

I. Relators are entitled to a permanent writ prohibiting Respondent from allowing the case against Relators to go forward, because Respondent exceeded her authority as a matter of law in that:

(A) The statute of limitations had run in this lawsuit by October 2, 2008 under Section 537.100; therefore, adding Relators to the lawsuit in August 2010 was improper; and

(B) This case should have been dismissed because the allegations against Relators do not relate back to the original filing date.

Standard of Review

The question presented by this original proceeding in prohibition is whether Section 537.100, the three-year statute of limitations for wrongful death actions, bars plaintiff's claim. Relators request this court make permanent its preliminary writ of prohibition because Plaintiff did not name Relators BC Missouri Emergency Physicians LLP, Scott L. Landry, M.D., and David Poggemeier, M.D. in the lawsuit until nearly two years after the statute of limitations had run and five years after the alleged negligence occurred.

The writ is available to avoid useless lawsuits and to afford relief at the earliest possible moment in the litigation. *State ex rel. McDonnell Douglas Corp. v. Gaertner*, 601 S.W.2d 295, 296 (Mo. App. E.D. 1980). Prohibition "may be appropriate to prevent unnecessary, inconvenient, and expensive litigation." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc. 2001). The writ should issue where the trial court

wrongly decides a matter of law where the facts are uncontested, and thus deprives a party of an absolute defense. *State ex rel. Police Retirement System of St. Louis v. Mummert*, 875 S.W.2d 553, 555-56 (Mo. banc 1994); *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498, 500 (Mo. App. E.D. 1985).

The writ is the proper remedy to prevent a lower court from proceeding with an action barred by the statute of limitations. *See e.g., State ex rel. Hilker v. Sweeny*, 877 S.W.2d 624, 626-28 (Mo. banc 1994); *State ex rel. Brandon v. Dolan*, 46 S.W.3d 94, 95-96 (Mo. App. S.D. 2001). *See also State ex rel. Hamilton v. Dalton*, 652 S.W.2d 237, 239 (Mo. App. E.D. 1983) (in original proceeding for writ of prohibition, lower court mandated to render summary judgment where “reference to the pleadings conclusively demonstrated that the pending petition attempted to state a cause of action barred by res judicata or by the applicable statute of limitations”). Whether a statute of limitations applies is a question of law, which is reviewed de novo. *State ex rel. Gasconade County v. Jost*, 291 S.W.3d 800, 803 (Mo. App. E.D. 2009).

Further, a writ of prohibition is proper in any of the following three circumstances: “(1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy [an] excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court’s order.” *State ex rel. Proctor v. Bryson* 100 S.W.3d 775, 776 (Mo. banc 2003). Whether the trial court has exceeded its authority is a question of law which the appellate court reviews independently of the trial

court. *See State ex rel. Teefey v. Bd. of Zoning Adjustment*, 24 S.W.3d 681, 684 (Mo. Banc 2000).

Here, Respondent has no jurisdiction to proceed on a matter outside of the statute of limitations. Relators request a writ of prohibition because based on the pleadings, the action is time barred and Relators' motion to dismiss should have been granted. *See e.g., State ex rel. Hamilton v. Dalton* 652 S.W. 2d 237 (Mo. App. E.D. 1983). Moreover, Relators will suffer irreparable harm if the trial is allowed to proceed and final judgment is rendered on a matter outside the statute of limitations.

Relators seek prohibition to prohibit Respondent from doing anything other than vacating her order of October 5, 2010 and to prevent this case from going forward against Relators. Granting Relators' Writ of Prohibition is the proper remedy in this action to address Respondent's ruling and dismissal of plaintiff's second amended petition.

(A) PURSUANT TO SECTION 537.100, THE STATUTE OF LIMITATIONS HAD RUN IN THIS LAWSUIT BY OCTOBER 2, 2008; THEREFORE, ADDING RELATORS TO THE LAWSUIT IN AUGUST 2010 WAS IMPROPER.

Relators are before this Court because the statute of limitations for a wrongful death cause of action has run. Plaintiff is seeking damages for decedent's alleged wrongful death pursuant to Section 537.080. The statute of limitations for wrongful death cases, Section 537.100, requires that an action must be "commenced within three years after the cause of action shall accrue."

Here, all parties agree the statute of limitations ran on October 2, 2008, three years after decedent's death. Plaintiff filed the original petition against defendants John and

Jane Doe within the statutory time limit, but did not join Relators BC Missouri Emergency Physicians LLP, Scott L. Landry, M.D., nor David Poggemeier, M.D., until nearly two years after the statute of limitations had run and five years after the alleged negligence occurred. Relators had no knowledge or notice of the lawsuit for the death of Alverna Katz until they were named defendants and served the second amended petition in August 2010.

This Court should make permanent the preliminary writ which it issued on January 25, 2011. The Court should prohibit Respondent from doing anything other than vacating her order of October 5, 2010, to prevent the case from going forward against Relators.

(B) THIS CASE SHOULD HAVE BEEN DISMISSED BECAUSE THE ALLEGATIONS AGAINST RELATORS DO NOT RELATE BACK TO THE ORIGINAL FILING DATE.

Pursuant to *Schultz v. Romanace, M.D.*, 906 S.W.2d 393 (Mo. App. S.D. 1995), *Maddux v. Gardner*, 192 S.W.2d 14 (Mo. App. 1945), and Rule 55.33(c), this case should be dismissed because the statute of limitations has run against Relators and the allegations against Relators do not relate back to the original filing date.

Rule 55.33(c) allows amended pleadings filed out of time to relate back to the original pleading in certain situations. *Goodwin v. 8182 Maryland Associates Ltd. Pushup*, 80 S.W.3d 484, 487-89 (Mo. App. E.D. 2002). Rule 55.33² provides as follows:

² All rule references are to Mo. R. Civ. P. 2010, unless otherwise indicated.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and within the period provided by law for commencing the action against the party and serving notice of the action, the party to be brought in by amendment: 1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits; and 2) knew or should have known that, but for the mistake concerning the identity of the proper party, the action would have been brought against the party.

“Rule 55.33(c) applies only to amendments changing the party against whom a claim is asserted.” *Windscheffel v. Benoit*, 646 S.W.2d 354, 356 (Mo. banc 1983). “[F]or the rule to apply, plaintiff must have made a mistake in selecting the proper party to sue, i.e., plaintiff must have brought an action against the wrong party.” *Id.*

Here, plaintiff attempted to add Relators BC Missouri Emergency Physicians, LLP, Dr. Landry, and Dr. Poggemeier nearly five years after the alleged negligence and two years after the statute of limitations had run. Rule 55.33(c) does not aid plaintiffs in this matter because it applies only to amendments changing the party against whom a claim is asserted, not to an amendment which seeks to add a party. *Schultz v. Romanace*,

906 S.W.2d 393, 396 (Mo. App. S.D. 1995); *See also*, *Windscheffel v. Benoit*, *supra*; *State ex rel. Hilker v. Sweeney*, 877 S.W.2d 624 (Mo. 1994).

The law further distinguishes addition of parties from substitution of parties. In order to utilize a fictitious name and substitute the party at a later date, the Missouri Courts have held that there has to be a description as to the conduct of the individual involved and the potential identity of the individual involved so as to allow the person who has not been named sufficient information that a claim may be brought against him or her. *See e.g.*, *Maddux v. Gardner*, 192 S.W.2d 14 (Mo. App. 1945); *Schultz v. Romanace, M.D.*, 906 S.W.2d 393 (Mo. App. S.D. 1995); *see also* Rule 55.33(c).

In *Maddux*, the plaintiff originally brought suit against a “John Doe” and a “Richard Roe.” *Id.* at 17. In the original petition, the plaintiff described “John Doe” as the engineer of the train in question and “Richard Roe” as the fireman on the train. *Id.* The plaintiff subsequently filed a petition amending by interlineations the names John Doe and Richard Roe to the specifically named engineer and firemen. *Id.* When the defendant engineer filed a motion to dismiss claiming that the statute of limitations had run, the court held that the plaintiff was merely substituting names. *Id.* As such, the amendment related back to the filing of the original petition and the statute of limitations had not run. *See also* *Smith v. Lewis*, S.W.2d 558, 561-62 (Mo. App. 1983) (noting, with respect to the holding in *Maddux*, that the action commenced against “John Doe,” the engineer, because the allegations of the time and place of the occurrence and the description of the train adequately informed the defendants at the outset who was the real person conditionally designated by the fictitious name).

Unlike in *Maddux*, plaintiff here has made no attempt in the original or amended petition to provide any identifying information as to John Doe or Jane Doe. The *Maddux* plaintiff, in its original petition, described the “John Doe” defendant as the engineer on the train in question. Here, plaintiff cannot point to any language within either of the two previously filed petitions that would place BC Missouri Emergency Physicians, LLP, Dr. Landry, or Dr. Poggemeier on notice that they were in some manner the entities that were the “John and Jane Doe” defendants. Plaintiff did not state that the “John Doe” was even a physician, nor did plaintiff state the type of medical service provided. Plaintiff did not provide a title of the person, date of service, location of the service, or the type of service provided by this “John Doe.”

Rather, plaintiff merely stated “That Defendants John Doe and Jane Doe and the above Defendants are providers of medical services, who at all times relevant to this action was engaged in providing medical services to the consuming public, including Decedent for a fee.” (Appx., p. A2, paragraph 7). This could be a “description” of any individuals who ever provided any medical service to decedent at any time in her life. It certainly is not sufficient to give notice that a claim may be brought against Relators.

The present case is similar to *Schultz v. Romanace*, 906 S.W.2d 393 (Mo. App. 1995). In *Schultz*, the plaintiff brought a medical malpractice action against seven named individuals and six additional defendants identified either as John or Jane Doe:

John Does I, II, III, and Jane Does I, II, and III, are persons whose identities are presently unknown but who were responsible for rendering skilled care, treatment, and supervision for Brian Schultz at Missouri Rehabilitation

Center in Mount Vernon, Missouri. The true identities of said persons will be substituted at such time as they become known to plaintiff. Plaintiff requests the order of the court posting a copy of this petition in one or more places conspicuous to employees and staff of Missouri Rehabilitation Center at Mount Vernon. *Id.* at 394.

Subsequently, several years after the statute of limitations ran, plaintiff filed an amended complaint adding Jean Pierre Romanace, M.D. and Larry Carnagey as defendants. *Id.* The court, distinguishing *Maddux*, held that the original petition in the case did not “sufficiently describe” the conduct from which Dr. Romanace or Mr. Carnagey could be identified as persons whose treatment produced the plaintiff’s injuries. *Id.* at 395-396. Moreover, the pleading did not state facts that would have notified Dr. Romanace or Mr. Carnagey that they were the persons against whom claims were made concerning their treatment of the plaintiff. *Id.* at 395. The court maintained that given the lack of detail in the original petition, the amended petition was not merely a substitution of parties, but rather an addition of two new parties. *Id.* at 395-396. The court therefore dismissed the claim against Dr. Romanace and affirmed judgment on the pleadings in favor of Mr. Carnagey. *Id.* at 396.

Similarly here, plaintiff’s original petition lacks any description or identifying information. In fact, plaintiff’s petition is lacking in more detail than the petition in *Schultz*. The original petition in *Schultz* at least linked the plaintiffs to the Missouri Rehabilitation Center in Mount Vernon, Illinois. *Id.* at 394. The original petition in the instant case does not even attempt to isolate where the alleged negligent treatment

occurred. Moreover, the plaintiff in *Schultz* requested a court order to post a copy of the petition in one or more places conspicuous to employees and staff of Missouri Rehabilitation Center at Mount Vernon; when the order was entered, it was posted on a bulletin board at the facility. *Id.* No such request or posting was made in the instant case.

The only distinction between *Schultz* and this case is that plaintiff in *Schultz* never dropped “John and Jane Doe” defendants from the amended petition, while plaintiffs here removed “John and Jane Doe” defendants from the second amended petition. Plaintiff presumably maintains that since the unidentified defendants are no longer listed, the new parties are “substituted” for them. This reasoning is flawed. It is a distinction without a difference. Whether “John and Jane Doe” defendants remain in the case has no bearing on the relation back analysis. The question of whether the defendants were added as opposed to substituted turns solely on the specificity of the description given them in the original pleading. Plaintiff in his prior petitions failed to make any attempt to describe the unknown defendants in any fashion.

Clearly, the court in *Schultz* felt there was insufficient description to allow the newly added defendants, in addition to the fact the petition continued to include the “unidentified” defendants. No court has overturned the holding and reasoning in *Maddux, supra*. Pursuant to *Maddux and Schultz*, the original petition must sufficiently describe, identify, or otherwise provide notice as to who may be a potential defendant in this action. Anything less would render the applicable statute of limitations meaningless. Any plaintiff in any action could circumvent any and all statute of limitations by naming

“John and Jane Doe” defendants and later amending the petition by substitution of parties.

Here, plaintiff is trying to bypass the statute of limitations for wrongful death and add, more than two years after the statute expired, three new defendants. This Court should make permanent the preliminary writ which it issued on January 25, 2011. The Court should prohibit Respondent from doing anything other than vacating her order of October 5, 2010, to prevent this case from going forward against Relators.

CONCLUSION

Plaintiff's attempt to name Relators nearly two years after the statute of limitations has run and five years after the alleged negligence occurred is a blatant attempt to circumvent the statute of limitations by adding parties. For the foregoing reasons, Relators respectfully request this Court make permanent a preliminary writ of prohibition to prohibit the order of October 5, 2010, denying Relators' motion to dismiss on grounds that Respondent exceeded her authority because the statute of limitations had run pursuant to Section 537.100. Additionally, Relators respectfully request this Court make permanent its preliminary writ of prohibition because the allegations do not relate back to the original filing date.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed, with postage prepaid, U.S. Mail this 23 day of March, 2011, to: The Honorable Nancy L. Schneider, judge of the Circuit Court of St. Charles County, Division No. 2, 300 N. Second Street, St. Charles, MO 63301; Mark T. McCloskey and Patricia N. McCloskey, 4472 Lindell Blvd., St. Louis, MO 63108, P: (314) 721-4000, F: (314) 721-3664, mccloskeylaw@aol.com, Attorneys for Plaintiffs; Peter J. Krane and Jennifer Collins Hansen, Williams, Venker & Sanders, LLC, 100 N. Broadway, 21st Floor, St. Louis, MO 63102, P: (314) 345-5000, F: (314) 345-5055, pkrane@wvslaw.com, jhansen@wvslaw.com, Attorneys for Defendant Barnes-Jewish St. Peters Hospital;; and Michael J. Smith and Tricia J. Mueller, Lashly & Baer, P.C., 714 Locust Street, St. Louis, MO 63101, P: (314) 621-2939, F: (314) 621-6844, msmith@lashlybaer.com, tmueller@lashlybaer.com, Attorneys for Defendant Neal W. Holzum, M.D.

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CERTIFICATE OF COMPLIANCE

As required by the Missouri Supreme Court Rule 84.06, I hereby certify that this Brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and states the number of words in the brief, as follows:

This brief is prepared using Microsoft Word, is proportionally spaced, and contains 4,355 words. Also, pursuant to Missouri Supreme Court Rule 84.06, accompanying this Brief is a CD containing full text of this Brief. Undersigned counsel further states that a copy of the diskette has been provided to opposing counsel, that the diskette has been scanned for viruses and that the diskette is virus-free.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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