

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**

REPLY BRIEF OF RELATORS

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ARGUMENT

1. Neither the facts nor the law supports Respondent’s argument that plaintiff’s second amended petition substituting Relators for Jane Doe was a mere correction of a misnomer, and/or change in the name of a party, and therefore, related back to the original filing pursuant to Rule 55.33(c).¹

Respondent’s argument that the pleadings in this case satisfy the relation back provisions of Rule 55.33(c) is based on two infirm premises. First, respondent asserts that notice to defendants David Poggemeier, M.D., Scott L. Landry, M.D., and BC Missouri Emergency Physicians, LLP is not required because respondent merely misnamed them in the original pleading. Second, respondent maintains that even if notice were necessary under rule 55.33(c), the original pleading sufficiently described these defendants. Neither premise is supported by the facts or the applicable law.

As explained in Relators’ opening brief, 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 the action against the wrong party.” *Id.* at 357.

Respondent contends that plaintiff’s second amended petition substituting Relators for Jane Doe was a mere correction of a misnomer, and/or change in the name of a party, and therefore, related back to the original filing pursuant to Rule 55.33(c). (Resp. Brief, 16.) However, substitution of parties for fictitious names is clearly not the correction of a

¹ All rule references are to Mo. R. Civ. P. 2010, unless otherwise indicated.

misnomer. Plaintiff has not pled any facts to support the contention that this is a misnomer. Nowhere in the complaint is there a hint or suggestion that John and Jane Doe are defendants David Poggemeier, M.D., Scott L. Landry, M.D., and BC Missouri Emergency Physicians, LLP.

Respondent's argument rests on a gross misapplication of the law. Contrary to Respondent's assertion, this case is not "a classic example of a misnomer case," analogous to *Bailey v. Innovative Management & Investment, Inc.*, 890 S.W.2d 648 (Mo. Banc 1995); (Resp. Brief, 16.) In *Bailey*, the Supreme Court of Missouri addressed the issue of a misnomer and held that the relation back doctrine applied to the plaintiff's second amended complaint. *Id.* The facts in *Bailey*, however, are inapposite and plainly demonstrate why this is not a misnomer case.

In *Bailey*, a worker who was injured when a nail gun accidentally discharged sued his employer, and he later joined the nail gun manufacturer as defendant, "Bostitch Manufacturing Company." *Id.* at 649. After the statute of limitations had expired, the worker served the manufacturer with a second amended petition, changing the manufacturer's name from "Bostitch Manufacturing Company" to "Stanley-Bostitch, Inc.," which was the successor corporation. *Id.* at 651. The court reasoned that because Stanley-Bostitch Inc. was a successor to Bostitch Manufacturing Company, the defendant named in the first amended petition, and because essentially the same corporation was named in both petitions, there was no doubt that both references are to the corporation that manufactured the nail gun. *Id.* at 652. Therefore, it was clear that the plaintiff

intended to sue the original manufacturer of the nail gun and both references are to the corporation that manufactured the nail gun. *Id.* at 652.

The facts here are entirely different. Unlike the defendant corporation originally misnamed in *Bailey*, the designation of “John and Jane Doe” as defendants in no way indicates that these defendants are David Poggemeier, M.D. and Scott L. Landry, M.D. Defendants Poggemeier and Landry are not the successors to John and Jane Doe, nor is John and Jane Doe a misspelling of their name. This is not a misnomer case at all, let alone a “classic example” of one. Rather, this is a case in which plaintiff failed to properly name the defendants in the petition and first amended petition, and instead used John and Jane Doe defendants as placeholders for the universe of defendants from which plaintiff would later substitute Doctors Poggemeier and Landry, and BC Missouri Emergency Physicians, LLP as defendants.

Respondent alternatively suggests that substituting David Poggemeier, M.D., and Scott L. Landry, M.D., for the fictitious defendants could be a case of adding or changing a party, therefore requiring notice pursuant to Rule 55.33(c). (Resp. Brief, 15.) According to Respondent, even if naming Relators in the second amended petition constitutes “changing or adding” a party, plaintiff had sufficient information to allege a cause of action against the John Doe and Jane Doe defendants and did sufficiently allege a cause of action; he merely lacked their names. (Resp. Brief, 18.)

As Relators point out in their opening brief, in order to utilize a fictitious name and substitute a party at a later date, the Missouri Courts require a description of the conduct of the individual involved and the potential identity of the individual involved so

as to sufficiently inform the person who has not been named that a claim may be brought against him or her. *See e.g. Maddux v. Gardner*, 192 S.W.2d 14 (Mo.App.1945) and *Schultz v. Romanace, M.D.*, 906 S.W.2d 393 (Mo. App. S.D. 1995). Here, plaintiff does not allege a cause of action against Jane or John Doe sufficient to put David Poggemeier, M.D., Scott L. Landry, M.D., and BC Missouri Emergency Physicians, LLP on notice that they would be named defendants pursuant to Rule 55.33(c).

Contrary to Respondent's assertion, this case is not at all like *Maddux*, where the nature of the event, the allegation of negligence, and the job descriptions of the fictitious defendants was sufficiently pleaded. Here, plaintiff failed to provide any job description of Jane and John Doe defendants in the original petition other than to say they 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." (Resp. brief, 19.) "Providers of medical services" could apply to anyone in the healthcare industry who comes in contact with the public; there is no indication from the plaintiff's petition that defendants are doctors, nor is there any indication when the medical services were provided, the type of medical services provided, nor where the medical services were provided.

Unlike in *Maddux*, plaintiff's petition and first amended petition does not indicate the location where the defendants worked. Neither petition provides any identifying information as to these defendants' negligent acts. Thus, plaintiff's claim that the nature of the event, the allegation of negligence and the job descriptions of the fictitious defendants was sufficiently pleaded is a blatant misrepresentation of the facts.

Relators agree with Respondent that this case is analogous to *Windscheffel v. Benoit*, 646 S.W.2d 354 (Mo. Banc 1983), but for entirely different reasons. *Windscheffel* held that the rule governing relation back of amendments did not apply to a medical malpractice action in which the plaintiff wished to add, not change, a party to his suit, and thus, the relation back rule did not prevent his medical malpractice action from being barred by the two-year statute of limitations. That holding applies equally here.

In *Windscheffel*, the plaintiff argued that his amended petition naming the doctor defendant related back to his original petition in which Research Hospital was a named party. *Id.* at 356. The plaintiff maintained that the doctor defendant was inadvertently omitted from the original petition, and this omission constituted a mistake, allowing the amendment to relate back to the original pleading. *Id.* The court, however, disagreed, finding that inadvertently omitting the doctor defendant did not constitute a mistake in identity of the party, but an addition of a party. *Id.* Since Rule 55.33(c) only applies to “mistake[s] in selecting the proper party to sue,” it did not prevent the medical malpractice action against the doctor from being barred by the two-year statute of limitations. *Id.*

The Court should find here, as in *Windscheffel*, that plaintiff made no mistake in identity when he named John and Jane Doe defendants. Respondent hopes to expand Rule 55.33(c) to include the naming of John and Jane Doe defendants on the ground that such a practice is analogous to the mistaken selection of parties. But here they are not mistakenly named, and Respondent has provided no case law to support such an argument. In this case, John and Jane Doe were names used as a placeholder by plaintiff

because plaintiff did not know the identity of the defendants and chose not to sufficiently describe them. Plaintiff does not seek to change parties pursuant to Rule 55.33(c). Instead, plaintiff seeks to add three new parties nearly two years after the statute of limitations has run in this lawsuit.

2. Respondent’s Contention that whether Relators had sufficient notice to satisfy the notice requirements of Rule 55.33(c) is a question of fact is not supported by Missouri law.

Respondent argues that if plaintiff’s substitution of Relators for “Jane Doe” in his second amended petition constitutes a change of party under Rule 55.33(c), it is necessary to reach a factual conclusion on the issue of notice before a determination can be made as to whether or not all of the elements of Rule 55.33(c) have been met. Respondent’s argument is without merit. The single case cited by Respondent, *Mallek v. First Banc Ins.*, 220 S.W.3d 324 (Mo. App. E.D. 2007), certainly does not stand for this proposition. *Mallek* simply holds that in order to allow amended pleadings filed out of time to relate back in accordance with the rule, the plaintiff must have sued the wrong party.

In *Mallek*, the court concluded that the plaintiff sued the wrong defendant corporations, naming as defendants First Banc Insurors Agency, Inc. and Three Cities Bancorp, Inc., d/b/a First-Banc instead of First Banks, Inc. and First Brokerage America, L.L.C. *Id.* at 331. Therefore, the court had to determine whether the properly named parties received adequate notice so as not to be prejudiced in maintaining their defense and knew or should have known that, but for the plaintiff’s mistake, the action would

have been brought against them. *Id.* The record contained evidence supporting the court's conclusion that defendants received adequate notice and should have known that but for plaintiff's mistake the action would have been brought against them. *Id.*

Although the *Mallek* court looked to the record to determine whether notice was given, the court decided the issue as a matter of law. The court found that the parties named as defendants in the plaintiff's various pleadings all shared some form of common ownership, based on a form that was submitted with the motion for summary judgment. *Id.* Therefore, proper notice was given.

The instant case is not a summary judgment case but, rather, is before the Court on the pleadings. Missouri courts hold that the pleadings have to describe 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 or him. *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). The courts in both *Maddux* and *Schultz* decided the issue based on the underlying petitions. Here, the facts as pleaded in plaintiff's petition are undisputed. There is nothing in the record that would give David Poggemeier, M.D., Scott L. Landry, M.D., and BC Missouri Emergency Physicians, LLP, notice that they were the "medical providers" referenced in the petition or the first amended petition. Therefore, whether or not plaintiff alleged a sufficient petition against John and Jane Doe in the underlying medical malpractice action is a question of law for this Court to decide.

CONCLUSION

This case does not fit under Rule 55.33(c). This is not a case of suing the wrong party; this is a case of naming—“24 minutes before the statute of limitations ran!” (Resp. Brief, 15) (emphasis in original)—John and Jane Doe defendants and later substituting defendants David Poggemeier, M.D, Scott L. Landry, M.D., and BC Missouri Emergency Physicians, LLP for the fictitious defendants once these individuals became known to plaintiff. Plaintiff’s naming of Doctors Poggemeier and Landry 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—or, as respondent puts it, to toll the statute of limitations “indefinitely”—by adding parties. (Resp. Brief, 17-18.) Plaintiff’s action, if allowed to succeed, would make a mockery of statutes of limitation in general and of the policy considerations underlying them.

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 22 day of April, 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 2,697 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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