

Summary of SC93012, Wanda Mayes, et al. v. St. Luke's Hospital of Kansas City, et al., consolidated with SC93254, Wanda Mayes, et al. v. St. Luke's Hospital of Kansas City, et al.

Appeals from the Jackson County circuit court, Judge Charles H. McKenzie and Judge John M. Torrence

Argued and submitted October 23, 2013; opinion issued May 27, 2014

Attorneys: In both cases, the Mayes survivors were represented by Jonathan Sternberg of Jonathan Sternberg, Attoney, PC in Kansas City, (816) 292-7000, and Leland F. Dempsey and Austin Bradley of Dempsey and Kingsland in Kansas City, (816) 421-6868. The hospital was represented by Sarah S. Ruane, Thomas W. Wagstaff and Adam S. Davis of Wagstaff & Cartmell LLP in Kansas City, (816) 701-1100. Mid-America Heart & Lung Surgeons and Dr. Richard Stuart were represented by Charles H. Stitt and Gregory P. Forney of Shafer Lombardo Shurin in Kansas City, (816) 931-0500.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Surviving family members of a man who died after a surgical procedure appeal the trial court's judgments dismissing their second and third cases filed against the hospital, surgeon and surgeon's employer, alleging wrongful death and lost chance of recovery as well as asserting state constitutional objections to a particular statute. In a 6-1 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the judgments. The trial court did not err in dismissing the second case. The survivors failed to preserve their constitutional challenges to the statute, and they failed to show substantial compliance with the statute's requirements. The trial court also did not err in dismissing the third case, correctly applying the statutes of limitations in finding the claims were time-barred.

Facts: Dr. Richard Stuart, who works for Mid-America Heart & Lung Surgeons PC, performed a surgical procedure on Ira Mayes at St. Luke's Hospital of Kansas City to remove a sternal wire from a prior aortic valve replacement surgery. The procedure left an open wound on Mayes' chest. An infection developed at the wound site and spread to his chest, and Mayes died March 28, 2008. On March 4, 2010, Mayes' wife and five children sued the surgeon, the hospital and Mid-America, alleging claims for wrongful death and lost chance of recovery. In the petition, they also raised "constitutional objections" to various statutes relating to medical malpractice actions, including asserting that the requirements in section 538.225, RSMo, violated their state constitutional rights to open courts and to a trial by jury. Despite their constitutional objections, the survivors timely filed – in compliance with section 538.225 – a separate health care affidavit for each defendant from an expert witness stating the defendants failed to use such care that a reasonable, prudent and careful health care provider would have used under similar circumstances and that such failure caused or contributed to cause the damages the Mayes family claimed in their petition. Their expert witness was deposed during the discovery phase of this case. In August 2011, the Mayes survivors voluntarily dismissed their first case without prejudice and filed a second case five days later, asserting the same claims and constitutional objections but failing to include the health care affidavits. In August 2012, the health care

defendants moved to dismiss the second case for the survivors' failure to file the required affidavits. Following a hearing, the trial court in October 2012 dismissed the second case without prejudice as required by section 538.225 due to the failure to file the health care affidavits. On October 30, 2012 – before filing their notice of appeal in their second case – the Mayes family members filed a third case with the same allegations and claims as in the two prior cases and including the requisite affidavits. The health care defendants moved to dismiss the third case on the ground that it was barred by the statutes of limitations. The trial court sustained their motions and dismissed the third case. The survivors appeal the dismissals of the second and third cases.

AFFIRMED.

Court en banc holds: (1) The trial court did not err in dismissing the second case.

(a) The dismissal of the second case was a final and appealable judgment. Generally, when a party elects to file another petition after a dismissal without prejudice, the dismissal is not appealable. But by the time the court entered its judgment dismissing the second case without prejudice, both the two-year statute of limitations for the claim for lost chance of recovery and the three-year statute of limitations for the wrongful death claims already had run. If a dismissal is such that refiling the petition at that time would be a futile act, then the dismissal without prejudice is appealable.

(b) The Mayes survivors failed to preserve their constitutional challenges to section 538.225. While they asserted constitutional objections in their petition, these statements alone were insufficient to raise constitutional claims because the petition contained only conclusory statements that various statutes were unconstitutional with no application to the facts. They could have raised the issue to the court when the defendants moved to dismiss pursuant to section 538.225, but they did not. As such, the survivors failed to present the claims to the court so that the court could have an opportunity to identify and rule on the constitutional claims. By not asserting the claims in their responses to the defendants' motions to dismiss, the Mayes family members failed to preserve for appeal the issues of whether section 538.225 violates their constitutional rights to open courts and to a trial by jury. By asserting their challenges only in a hearing on a post-judgment motion – rather than presenting them to the court in their response to the motion to dismiss – their claims are not preserved for review, and there is no ground for this Court to review their unpreserved constitutional claims, for plain error or otherwise.

(c) The Mayes survivors failed to show substantial compliance with the affidavit requirements of section 538.225. This Court has allowed substantial compliance under a statutory directive to construe a statute liberally or under a statute that expressly allows for substantial compliance, while it has refused to allow substantial compliance when it would be contrary to the statute's unambiguous language. There is no statute directing the courts to construe section 538.225 liberally, and the statute lacks any language indicating that a plaintiff's health care affidavit may contain substantially similar information. Rather, the statute's language regarding the affidavit requirement is unambiguous and mandatory – the plaintiff "shall file an affidavit with the court" and, if the plaintiff fails to do so, "the court shall ... dismiss the action." Before 2005, the statute stated that a court

“may” dismiss the action if the plaintiff fails to file the affidavit, but then it was amended to require mandatory dismissal. The statute’s current language demonstrates the legislature intended the requirement that a plaintiff file an affidavit with the court to be mandatory. And in any event, the Mayes survivors’ actions do not constitute substantial compliance. The affidavits they filed in the first case cannot constitute an attempt to comply with the affidavit requirement for the second case because they dismissed the first case voluntarily – as if it never had been filed. The deposition testimony of the expert witness in the first case also does not amount to substantial compliance with the statute because it never was filed with the trial court.

(2) The trial court correctly applied the statutes of limitations in finding the claims in the third case were time-barred – a fact the Mayes survivors admit. The statute of limitations governing their wrongful death action required the claims to be filed within three years after Mayes’ death. As such, the statute of limitations expired March 28, 2011 – but the survivors did not file their third case until more than a year later, in October 2012. The statute of limitations for medical malpractice claims governs the survivors’ claim for lost chance of recovery, which it required to be filed within two years of Mayes’ death. As such, the time period in which the survivors could bring this claim also expired before they initiated the third case.