

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

JOY R. WEBSTER,

Appellant,

v.

OTWO I, INC. et al.,

Respondent.

DOCKET NUMBER WD70478

Date: October 27, 2009

Appeal from:
Jackson County Circuit Court
The Honorable Thomas C. Clark, Judge

Appellate Judges:
Division One: Alok Ahuja, Presiding Judge, James M. Smart and Lisa White Hardwick, Judges

Attorneys:
Bradley D. Honnold, Esq., Leawood, KS, for appellant.
Christopher B. Turney, Esq., Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

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JACKSON COUNTY

Before Division One Judges: Alok Ahuja, Presiding Judge, James M. Smart and Lisa White Hardwick, Judges

Patrick and Lynn Kronin initially filed suit against Otwo I, Inc. in their own names on August 26, 2005, in the Circuit Court of Jackson County (the “Kronin action”). The Petition in the Kronin action alleged that Otwo was liable for personal injuries that Mr. Kronin sustained on September 13, 2001, when he slipped and fell on the floor while at work.

When the Kronin action was filed, the Kronins had a personal Chapter 7 bankruptcy case pending in the United States Bankruptcy Court for the Middle District of Georgia. Joy R. Webster was the bankruptcy trustee for the Kronins’ bankruptcy; in that capacity, she moved to intervene or be substituted as plaintiff in the Kronin action.

On September 6, 2007, the circuit court issued its Judgment and Order dismissing the Kronin action, without prejudice, on the basis that the Kronins lacked standing. The Court also ordered that Webster’s “Motion to Substitute as a Plaintiff, or in the Alternative, Intervene, . . . is hereby deemed moot, as the court is without jurisdiction to address the motion.” In a memorandum accompanying the judgment, the circuit court in the Kronin action stated “the court’s order dismissing the case without prejudice does not preclude a party with proper standing from re-filing Plaintiffs’ claims pursuant to the savings clause provided for in Mo. Rev. Stat. § 516.230.”

Webster filed this suit on September 5, 2008, almost seven years after Patrick Kronin’s injuries allegedly occurred, but within one year of the dismissal of the Kronin action, alleging that she had standing as the Kronins’ bankruptcy trustee to re-assert the claims originally alleged in the Kronin action. The circuit court dismissed the petition as time barred, and Webster appeals.

AFFIRMED.

Division One holds:

The present suit was not filed within five years of Patrick Kronin’s injuries, and is therefore time-barred under § 516.120, RSMo, unless Webster can take advantage of the one-year savings provision found in § 516.230, RSMo. Section 516.230 provides that, where a suit is timely filed “and the plaintiff therein suffer a nonsuit, . . . such plaintiff may commence a new action . . . within one year after such nonsuit suffered.”

Webster cannot rely on § 516.230, however, because she was not the plaintiff in the Kronin action previously dismissed. Under our earlier decision in *Aufenkamp v. Grabill*, 165 S.W.3d 191 (Mo. App. W.D. 2005), the right to bring a subsequent action is given only to the plaintiff in the original suit. Where a subsequent action is brought by a party suing in a different capacity than the earlier plaintiff, and that earlier plaintiff lacked standing to sue, the later plaintiff cannot take advantage of § 516.230’s savings provision. The fact that the circuit court in the earlier action observed that a proper plaintiff could take advantage of the savings statute is irrelevant, since that statement was essentially dicta, and Otwo cannot be bound by the statement because it had no right to appeal the dismissal of the Kronin action without prejudice. Further, where Webster does not fall within § 516.230’s literal terms, this Court cannot enlarge the statute’s savings provision on the Court’s own assessment of public policy and the equities of a particular case.

Opinion by: Alok Ahuja, Judge

October 27, 2009

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