

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.)	
DR. NEAL HOLZUM,)	
)	
Relator,)	
)	
v.)	No. 91434
)	
HONORABLE NANCY L. SCHNEIDER,)	
Judge of the Circuit Court of the)	
County of St. Charles, Missouri, Div. 2,)	
)	
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. 95797**

BRIEF OF RELATOR

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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).

Relator previously filed a petition for writ of prohibition before the Missouri Court of Appeals, Eastern District. The court of appeals denied Relator's petition without opinion on November 23, 2010. A denial of a writ petition without opinion is not appealable. Accordingly, Relator filed a new petition for writ of prohibition in this Court to prohibit Judge Schneider's order of October 5, 2010, denying Relator's motion to dismiss. Relator 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. Relator seeks 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 Relator’s Motion to Dismiss Plaintiff’s Second Amended Petition against Relator. (Appendix, p. A1). Relator’s motion to dismiss asserted that the statute of limitations ran on the wrongful death claim alleging medical negligence by Relator in treating Alverna Katz in 2005. (Appx., p. A19, A38)

On November 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, Count I, and paragraph 7,).

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 III, paragraph 17). The second amended petition, unlike the first amended petition, also provides more details regarding the allegations against this defendant. (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. (Appx., p. A19, Appx., p. A38). On October 5, 2010, Respondent entered an order denying the motions to dismiss. (Appx., p. A1).

On November 10, 2010, Relator 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 Relator's petition of prohibition. (Appx., p. A47).

On January 6, 2011, Relator filed a petition for writ of prohibition with this Court to prohibit Judge Schneider's Order. On January 5, 2011, this Court issued a preliminary writ of prohibition. (Appx., p. A48). On February 22, 2011, Respondent filed his Return to the preliminary writ in prohibition with this Court. (Appx., p. A49).

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

POINT RELIED ON

I. Relator is entitled to a permanent writ prohibiting Respondent from allowing the case against Relator 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 Relator to the lawsuit in August 2010 was improper; and

(B) This case should have been dismissed because the allegations against Relator 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, 197 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. Relator is entitled to a permanent writ prohibiting Respondent from allowing the case against Relator to go forward, because Respondent exceeded her authority as a matter of law in that:

A. The status of limitations had run in this lawsuit by October 2, 2008 under Section 537.100; therefore, adding Relator to the lawsuit in August 2010 was improper; and

B. This case should have been dismissed because the allegations against Relator 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. Relator requests this court make permanent its preliminary writ of prohibition because Plaintiff did not name Relator Neal Holzum, 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 SW2d 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. Teehey 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. Relator requests a writ of prohibition because based on the pleadings, the action is time barred and Relator's 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, Relator will suffer irreparable harm if the trial is allowed to proceed and final judgment is rendered on a matter outside the statute of limitations.

Relator seeks prohibition to prohibit Respondent from doing anything other than vacating her order of October 5, 2010 and to present this case from going forward against Relator. Granting Relator's 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 RELATOR TO THE LAWSUIT IN AUGUST 2010 WAS IMPROPER.

Relator is 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 Relator Neal Holzum, M.D. until nearly two years after the statute of limitations had run and five years after the

alleged negligence occurred. Relator had no knowledge or notice of the lawsuit for the death of Alverna Katz until he was named a defendant 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 going anything other than vacating her order of October 5, 2010, to prevent the case from going forward against Relator.

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

Pursuant to *Schultz v. Romanace, M.D.*, 906 S.W.2s 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 Relator and the allegations against Relator does 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 55.32² provides as follows:

(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

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

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 Relator Neal Holzum, M.D. 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 applied 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.” 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 Roe and Richard Roe to the specifically named engineer and fireman. *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. 1984) (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 Neal Holzum, M.D. on notice that he was 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 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 Relator.

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 on 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.

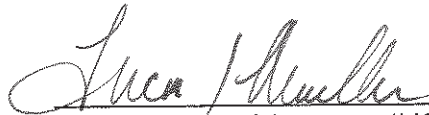
The only distinction between *Schultz* and this case is that plaintiff in *Schultz* never dropped “John and Jane Doe” defendants from the amended petition, while plaintiffs here removed “John and Jane Doe” defendants from the second amended petition. Plaintiff presumably maintains that since the unidentified 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, Neal Holzum, M.D. 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 Relator.

CONCLUSION

Plaintiff's attempt to name Relator 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, Relator respectfully requests this Court make permanent a preliminary writ of prohibition to prohibit the order of October 5, 2010, denying Relator's motion to dismiss on grounds that Respondent exceeded her authority because the statute of limitations had run pursuant to Section 537.100. Additionally, Relator respectfully requests 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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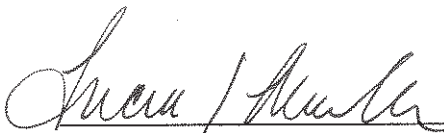
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed, with postage prepaid, U.S. Mail this 24 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 Terese A. Drew and Kara L. Kezios, Hinshaw & Culbertson LLP, Gateway One, 701 Market Street, Suite 1300, St. Louis, MO 63101, P: (314) 241-2600, F: (314) 241-7428, kkezios@hinshawlaw.com, tdrew@hinshawlaw.com, Attorneys for Defendants BC Missouri Emergency Physicians, LLP, Scott Landry, M.D., and David Poggemeier, M.D.

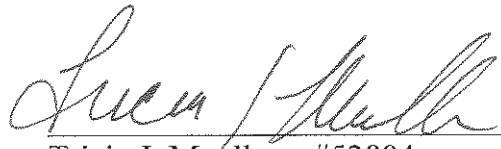

Tricia J. Mueller #52884

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 3,899 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.


Tricia J. Mueller #52884

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Eric Katz et al

VS.

IN THE
CIRCUIT COURT
County of St. Charles, Missouri

No. 0911-CV11523

Barnes-Jewish St Peters
Hosp. et al

10/5/10

Order

The Court now issues rulings on the following matters under submission:

1. Defendant Barnes-Jewish St. Peters Hospital's motion to dismiss paragraphs 10(d) and 10(e) of Count I of Plaintiff's Second Amended Petition is denied.
2. Defendants BC Missouri Emergency Physicians LLP, Jandry, Poggenmeier and Holzner's motion to dismiss due to statute of limitations is denied.
3. Defendant Barnes-Jewish St. Peters Hospital's motion to compel Plaintiff's Medical Authorizations is denied as it is overly broad in time and scope.

So Ordered 10/5/10

Wendy Schneider
Judge Div 2

FILED
OCT 5 9 30
JUDY ZERR
CIRCUIT CLERK
ST. CHARLES CO.

Attorney

A1

Attorney

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

ERIC KATZ, AS SON OF
ALVERNA KATZ, DECEASED,

Plaintiff,

vs.

BARNES-JEWISH ST. PETERS
HOSPITAL
Hold For Service

and

THE WASHINGTON UNIVERSITY, AND/OR
WASHINGTON UNIVERSITY MEDICAL
CENTER,
Hold for Service

and

JOHN DOE

and

JANE DOE

Defendants.

Cause No.

Division No.

PETITION

COMES NOW Eric Katz, as Son of Alverna Katz, Deceased, and for his Petition against Defendants would state as follows:

1. Eric Katz (hereinafter "Plaintiff") is an individual who is a citizen of the State of Missouri, and who at all times relevant hereto was the son of Alverna Katz, a deceased person (hereinafter "Decedent").

2. Barnes-Jewish St. Peters Hospital is a Missouri not-for-profit corporation doing business in this judicial district and which at all times hereinafter mentioned was engaged in the provision of medical care and services to the consuming public including Decedent for a fee.

3. That at all times relevant hereto, Defendant The Washington University and/or Washington University Medical Center (hereinafter "The Washington University") was a Missouri not-for-profit corporation operating within the City of St. Louis engaged in the business of providing medical services and was, at all times mentioned herein, acting by and through its agents, servants and employees.

7. 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.

8. That on or about October 1 through October 2, 2005, Decedent presented herself to Defendants and through their negligent treatment died on October 2, 2005.

COUNT I

(Negligence/Wrongful Death - Against All Defendants)

COMES NOW Plaintiff as of the Deceased and states that Defendants were negligent in their treatment of Decedent and by and through such negligence caused the death of Decedent on or about October 2, 2005.

WHEREFORE, Plaintiff seeks judgment in his favor on this wrongful death action against the above-referenced Defendants in such amount as is fair and reasonable and within the jurisdictional limits of this Court, together with punitive damages in such amount is will in fact, be punitive and act as a deterrent to such Defendants and others similarly situated, together with costs of suit, interest and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

McCLOSKEY, P.C.

By: 

Mark T. McCloskey, #36144
Patricia N. McCloskey, #36153
8112 Maryland Avenue, Suite 350
St. Louis, Missouri 63105
Tel. 314/721-4000
Fax: 314/721-3664
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

ERIC KATZ, AS SON OF
ALVERNA KATZ, DECEASED,

Plaintiff,

vs.

BARNES-JEWISH ST. PETERS
HOSPITAL, INC. D/B/A BARNES-
JEWISH ST. PETERS HOSPITAL

Serve:

Debra A. Shylanski
10 Hospital Drive
St. Peters, MO 63376
and

THE WASHINGTON UNIVERSITY, AND/OR
WASHINGTON UNIVERSITY MEDICAL
CENTER,

Serve:

Dr. William Peck
660 S. Euclid Ave.
St. Louis, MO 63108

and

JOHN DOE

and

JANE DOE

Defendants.

Cause No. 08SL-CC04171

Division No. 2

FILED

APR 21 2009

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

FILED

JUL 14 2009

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

AMENDED PETITION

COMES NOW Eric Katz, as Son of Alverna Katz, Deceased, and for his Petition against

Defendants would state as follows:

1. Eric Katz (hereinafter "Plaintiff") is an individual who is a citizen of the

State of Missouri, and who at all times relevant hereto was the son of Alverna Katz, a deceased person (hereinafter "Decedent").

2. Barnes-Jewish St. Peters Hospital, Inc. d/b/a Barnes-Jewish St. Peters Hospital is a Missouri not-for-profit corporation doing business in this judicial district and which at all times hereinafter mentioned was engaged in the provision of medical care and services to the consuming public including Decedent for a fee.

3. That at all times relevant hereto, Defendant The Washington University and/or Washington University Medical Center (hereinafter "The Washington University") was a Missouri not-for-profit corporation operating within the City of St. Louis engaged in the business of providing medical services and was, at all times mentioned herein, acting by and through its agents, servants and employees.

7. 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.

8. That on or about October 1 through October 2, 2005, Decedent presented herself to Defendants and through their negligent treatment died on October 2, 2005.

COUNT I

(Negligence/Wrongful Death - Against All Defendants)

COMES NOW Plaintiff as of the Deceased and states that Defendants were negligent in their treatment of Decedent and by and through such negligence caused the death of Decedent on or about October 2, 2005.

WHEREFORE, Plaintiff Eric Katz, as son of Alverna Katz, deceased seeks judgment in his favor on this wrongful death action against the above-referenced Defendants in such amount as is fair and reasonable and within the jurisdictional limits of this Court, together with punitive damages in such amount as will in fact, be punitive and act as a deterrent to such Defendants and others similarly situated, together with costs of suit, interest and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

McCLOSKEY, P.C.

By: 

Mark T. McCloskey, #36144
Patricia N. McCloskey, #36153
811/2 Maryland Avenue, Suite 350
St. Louis, Missouri 63105
Tel. 314/721-4000
Fax: 314/721-3664
Attorneys for Plaintiff



IN THE 21ST JUDICIAL CIRCUIT COURT, ST. LOUIS COUNTY, MISSOURI

Received by BJSPH
Administration8/11/09
9 a m

Judge or Division: MAURA B MCSHANE	Case Number: 08SL-CC04171	RECEIVED ____ A.M. ____ P.M. AUG 10 2009 SHERIFF ST. CHARLES CO., MO (Date File Stamp)
Plaintiff/Petitioner: ERIC KATZ	Plaintiff's/Petitioner's Attorney/Address MARK T. MCCLOSKEY SUITE 350 8112 MARYLAND AVE. ST. LOUIS, MO 63105	
Defendant/Respondent: BARNES-JEWISH ST PETERS HOSPITAL INC	Court Address: ST LOUIS COUNTY COURT BUILDING 7900 CARONDELET AVE CLAYTON, MO 63105	
Nature of Suit: CC Wrongful Death		

Summons in Civil Case

The State of Missouri to: BARNES-JEWISH ST PETERS HOSPITAL INC
Alias:DEBRA A SHYLANSKI
10 GHOSPITAL DRIVE
ST PETERS, MO 63376

COURT SEAL OF



ST. LOUIS COUNTY

You are summoned to appear before this court and to file your pleading to the petition, a copy of which is attached, and to serve a copy of your pleading upon the attorney for Plaintiff/Petitioner at the above address all within 30 days after receiving this summons, exclusive of the day of service. If you fail to file your pleading, judgment by default may be taken against you for the relief demanded in the petition.

15-JUL-2009
Date

Clerk
Further Information:
JDG

Sheriff's or Server's Return

Note to serving officer: Summons should be returned to the court within thirty days after the date of issue.

I certify that I have served the above summons by: (check one)

- ☐ delivering a copy of the summons and a copy of the petition to the Defendant/Respondent.
- ☐ leaving a copy of the summons and a copy of the petition at the dwelling place or usual abode of the Defendant/Respondent with _____ a person of the Defendant's/Respondent's family over the age of 15 years.
- ☐ (for service on a corporation) delivering a copy of the summons and a copy of the petition to _____ (name) _____ (title).

☐ other _____

Served at _____ (address)

in _____ (County/City of St. Louis), MO, on _____ (date) at _____ (time).

Printed Name of Sheriff or Server

Signature of Sheriff or Server

Must be sworn before a notary public if not served by an authorized officer:

Subscribed and sworn to before me on _____ (date).

(Seal)

My commission expires: _____ Date _____ Notary Public

Sheriff's Fees, if applicable

Summons	\$ _____
Non Est	\$ _____
Sheriff's Deputy Salary	
Supplemental Surcharge	\$ 10.00
Mileage	\$ _____ (_____ miles @ \$ _____ per mile)
Total	\$ _____

A copy of the summons and a copy of the petition must be served on each Defendant/Respondent. For methods of service on all classes of suits, see Supreme Court Rule 54.

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THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

Twenty-First Judicial Circuit

NOTICE OF ALTERNATIVE DISPUTE RESOLUTION SERVICES

Purpose of Notice

As a party to a lawsuit in this court, you have the right to have a judge or jury decide your case. However, most lawsuits are settled by the parties before a trial takes place. This is often true even when the parties initially believe that settlement is not possible. A settlement reduces the expense and inconvenience of litigation. It also eliminates any uncertainty about the results of a trial.

Alternative dispute resolution services and procedures are available that may help the parties settle their lawsuit faster and at less cost. Often such services are most effective in reducing costs if used early in the course of a lawsuit. Your attorney can aid you in deciding whether and when such services would be helpful in your case.

Your Rights and Obligations in Court Are Not Affected By This Notice

You may decide to use an alternative dispute resolution procedure if the other parties to your case agree to do so. In some circumstances, a judge of this court may refer your case to an alternative dispute resolution procedure described below. These procedures are not a substitute for the services of a lawyer and consultation with a lawyer is recommended. Because you are a party to a lawsuit, you have obligations and deadlines which must be followed whether you use an alternative dispute resolution procedure or not. **IF YOU HAVE BEEN SERVED WITH A PETITION, YOU MUST FILE A RESPONSE ON TIME TO AVOID THE RISK OF DEFAULT JUDGMENT, WHETHER OR NOT YOU CHOOSE TO PURSUE AN ALTERNATIVE DISPUTE RESOLUTION PROCEDURE.**

Alternative Dispute Resolution Procedures

There are several procedures designed to help parties settle lawsuits. Most of these procedures involve the services of a neutral third party, often referred to as the "neutral," who is trained in dispute resolution and is not partial to any party. The services are provided by individuals and organizations who may charge a fee for this help. Some of the recognized alternative dispute resolutions procedures are:

(1) Advisory Arbitration: A procedure in which a neutral person or persons (typically one person or a panel of three persons) hears both sides and decides the case. The arbitrator's decision is not binding and simply serves to guide the parties in trying to settle their lawsuit. An arbitration is typically less formal than a trial, is usually shorter, and may be conducted in a private setting at a time mutually agreeable to the parties. The parties, by agreement, may select the arbitrator(s) and determine the rules under which the arbitration will be conducted.

IN THE CIRCUIT COURT OF ST. CHARLES COUNTY
STATE OF MISSOURI

ERIC KATZ, AS SON OF
ALVERNA KATZ, DECEASED,

Plaintiff,

vs.

BARNES-JEWISH ST. PETERS HOSPITAL,
INC. D/B/A BARNES-JEWISH ST. PETERS
HOSPITAL,

BC MISSOURI PHYSICIANS, L.L.C.,

Serve Registered Agent:

The Corporation Company

120 S. Central

St. Louis, Missouri 63105

SCOTT L. LANDRY, M.D.,

Serve At:

The Corporation Company

120 S. Central

St. Louis, Missouri 63105

DAVID POGGEMEIER, M.D.

Serve At:

The Corporation Company

120 S. Central

St. Louis, Missouri 63105

and

NEAL W. HOLZUM, M.D.

Serve At:

2 Progress Point Parkway, Suite A

O'Fallon, Missouri 63368

Defendants.

Cause No. 0911-CV11523

Division No. 2

PLAINTIFF'S SECOND AMENDED PETITION

COMES NOW Plaintiff, Eric Katz, as Son of Alverna Katz, Deceased, and for his

Second Amended Petition would state as follows:

1. Eric Katz (hereinafter "Plaintiff") is an individual who is a citizen of the State of Missouri, and who at all times relevant hereto was the son of Alverna Katz, a deceased person (hereinafter "Decedent").
2. Barnes-Jewish St. Peters Hospital, Inc. d/b/a Barnes- Jewish St. Peters Hospital is a Missouri not-for-profit corporation doing business in this judicial district and which at all times hereinafter mentioned was engaged in the provision of medical care and services to the consuming public including Decedent for a fee.
3. That at all times relevant to this action, BC Missouri Physicians, L.L.C. was a Missouri Limited Liability Company which, amongst other things, provided emergency medical physicians and emergency medical care to patients at Barnes-Jewish St. Peters Hospital and, upon information and belief, employed, provided, or otherwise supervised, managed, and arranged for the provision of medical services to patients of Barnes-Jewish St. Peters Hospital through, amongst others, Scott L. Landry, M.D. and David Poggemeier, M.D.
4. At all times relevant to this action, Scott L. Landry, M.D. ("Dr. Landry") and David Poggemeier, M.D. ("Dr. Poggemeier") were employees, agents, assigns, or otherwise providing medical services under the direction, control, management or other auspices of BC Missouri Physicians, L.L.C. and provided medical care to patients of Barnes-Jewish St. Peters Hospital, including but not limited to the Decedent, Alverna Katz.
5. At all times relevant to this action, Neal W. Holzum, M.D. ("Dr. Holzum") was a medical physician offering medical care to the public, including but not limited to Decedent, Alverna Katz.

6. That on or about October 1 through October 2, 2005, Decedent, Alverna Katz, presented herself to the Barnes-Jewish St. Peters Hospital Emergency Room where she came under the care of the Defendants and as a result of their negligent treatment of her, died on October 2, 2005.

COUNT I

COMES NOW Plaintiff, Eric Katz, as Son of Alverna Katz, Deceased, and for Count I of his Second Amended Petition would state as follows:

7. Plaintiff repeats and realleges the material allegations of paragraphs 1 through 6 above and incorporates the same herein by reference for all purposes.

8. That at the time that Alverna Katz arrived at Barnes-Jewish St. Peters Hospital, she had suffered a fall striking her head.

9. That at the time that she presented to Barnes-Jewish St. Peters Hospital, the Defendants, and each of them, knew or should of known that Alverna Katz was an elderly woman who was on an anticoagulation regimen and would be at a high risk for bleeding subsequent to head trauma.

10. That at that time Barnes-Jewish St. Peters Hospital, by and through its physicians, staff, employees, agents and assigns, failed to exercise that degree of skill and learning ordinarily exercised by members of such Defendant's profession and was thereby negligent in one or more of the following respects:

- a) by failing to appropriately diagnose and treat Alverna Katz's intracranial hemorrhage;
- b) by failing to appropriately reverse Alverna Katz's anticoagulation status;

- c) by failing to perform appropriate diagnostic studies, including but not limited to CT scans, in a timely fashion, so as to detect the presence of and provide an opportunity for treatment of Alverna Katz's intracranial bleed;
- d) by negligently delegating emergency room services at Barnes-Jewish St. Peters Hospital to BC Missouri Physicians, L.L.C. and its agents, employees and assigns, under circumstances where Barnes-Jewish St. Peters Hospital knew or reasonably should have known that such entity's emergency room physicians would provide negligent care; and/or
- e) by failing to appropriately supervise, observe, or otherwise control the actions of BC Missouri Physicians, L.L.C. and its employees, assigns, and physicians, so as to detect, prevent, or cure BC Missouri Physicians, L.L.C.'s negligent practice of medicine, including but not limited to its failure to diagnose and treat Alverna Katz's intracranial bleed.

11. As a direct and proximate result of one or more of the above-referenced negligent acts on the part of Barnes-Jewish St. Peters Hospital, Plaintiff Eric Katz has suffered the following actual damages:

- a. For pain, suffering, fright and shock endured by the Decedent prior to her death;
- b. For the loss of the value of services which the Decedent would have performed for her survivors during her lifetime;
- c. For the loss of such contributions as the Decedent would have made for the support of her survivors during her natural lifetime;

- d. For the funeral and administrative expenses arising out of her death; and/or
- e. For the loss of care, nurture, guidance, love and affection suffered by the Decedent's survivors.

WHEREFORE, for the foregoing reasons, Plaintiff Eric Katz, as Son of Alverna Katz, Deceased, respectfully prays for damages in his favor and against Barnes-Jewish St. Peters Hospital, Inc., in such amount as is fair and reasonable, and in excess of the jurisdictional minimums of this Court, together with costs, interest, and such other and further relief as this Court deems just and proper.

COUNT II

COMES NOW Plaintiff, Eric Katz, as Son of Alverna Katz, Deceased, and for Count II of his Second Amended Petition would state as follows:

12. Plaintiff repeats and realleges the material allegations of paragraphs 1 through 11 above and incorporates the same herein by reference for all purposes.

13. BC Missouri Physicians, L.L.C. and its agents, employees and assigns, including Dr. Landry and Dr. Poggemeier are substituted herein in Plaintiff's Second Amended Petition for the "Jane Doe" Defendant in that BC Missouri Physicians, L.L.C. and Drs. Landry and Poggemeier were the entity and its agents, employees and assigns against whom suit was brought in Plaintiff's original Petition under the name "Jane Doe".

14. That BC Missouri Physicians, L.L.C. by and through its employees, agents and assigns, including but not limited to Drs. Landry and Poggemeier, in its provision of medical services to Alverna Katz, failed to exercise that degree of skill and learning ordinarily exercised by members of Defendant's profession under the same or similar circumstances and was thereby

negligent in one or more of the following respects:

- a) by failing to appropriately diagnose and treat Alverna Katz's intracranial hemorrhage;
- b) by failing to appropriately reverse Alverna Katz's anticoagulation status;
- c) by failing to perform appropriate diagnostic studies, including but not limited to CT scans, in a timely fashion, so as to detect the presence of and provide an opportunity for treatment of Alverna Katz's intracranial bleed; and/or
- d) by BC Missouri Physicians, L.L.C.'s failure to appropriately supervise, observe, or otherwise control the actions of Drs. Landry and Poggemeier so as to detect, prevent, or cure Drs. Landry and Poggemeier's failure to diagnose and treat Alverna Katz's intracranial bleed.

15. As a direct and proximate result of one or more of the above-referenced negligent acts on the part of BC Missouri Physicians, L.L.C., Scott L. Landry, M.D. and David Poggemeier, M.D., Plaintiff Eric Katz has suffered the following actual damages:

- a. For pain, suffering, fright and shock endured by the Decedent prior to her death;
- b. For the loss of the value of services which the Decedent would have performed for her survivors during her lifetime;
- c. For the loss of such contributions as the Decedent would have made for the support of her survivors during her natural lifetime;
- d. For the funeral and administrative expenses arising out of her death; and/or
- e. For the loss of care, nurture, guidance, love and affection suffered by the Decedent's survivors.

WHEREFORE, for the foregoing reasons, Plaintiff Eric Katz, as Son of Alverna Katz, Deceased, respectfully prays for damages in his favor and against BC Missouri Physicians, L.L.C., Scott L. Landry, M.D. and David Poggemeier, M.D., in such amount as is fair and reasonable, and in excess of the jurisdictional minimums of this Court, together with costs, interest, and such other and further relief as this Court deems just and proper.

COUNT III

COMES NOW Plaintiff, Eric Katz, as Son of Alverna Katz, Deceased, and for Count III of his Second Amended Petition would state as follows:

16. Plaintiff repeats and realleges the material allegations of paragraphs 1 through 15 above and incorporates the same herein by reference for all purposes.

17. Neal W. Holzum, M.D. is substituted herein in Plaintiff's Second Amended Petition for the "John Doe" Defendant in that Dr. Holzum was the treating physician against whom suit was brought in Plaintiff's original Petition under the name of "John Doe".

18. That Neal W. Holzum, M.D., by and through his medical care and treatment of Alverna Katz, failed to exercise that degree of skill and learning ordinarily exercised by members of Dr. Holzum's profession, and was thereby negligent in one or more of the following respects:

- a) by failing to appropriately diagnose and treat Alverna Katz's intracranial hemorrhage;
- b) by failing to appropriately reverse Alverna Katz's anticoagulation status;
- c) by failing to perform appropriate diagnostic studies, including but not limited to CT scans, in a timely fashion, so as to detect the presence of and provide an opportunity for treatment of Alverna Katz's intracranial bleed; and/or

- d) by admitting Alverna Katz to an unmonitored hospital room;
- e) by failing to provide reasonable surveillance of or monitoring of Alverna Katz's medical condition; and
- f) by failing to detect the signs and symptoms of intracranial bleed in Alverna Katz's brain resulting in a failure to diagnose such condition until treatment options were foreclosed.

19. As a direct and proximate result of one or more of the above-referenced negligent acts on the part of Neal W. Holzum, M.D., Plaintiff Eric Katz has suffered the following actual damages:

- a. For pain, suffering, fright and shock endured by the Decedent prior to her death;
- b. For the loss of the value of services which the Decedent would have performed for her survivors during her lifetime;
- c. For the loss of such contributions as the Decedent would have made for the support of her survivors during her natural lifetime;
- d. For the funeral and administrative expenses arising out of her death; and/or
- e. For the loss of care, nurture, guidance, love and affection suffered by the Decedent's survivors.

WHEREFORE, for the foregoing reasons, Plaintiff Eric Katz, as Son of Alverna Katz, Deceased, respectfully prays for damages in his favor and against Neal W. Holzum, M.D., in such amount as is fair and reasonable, and in excess of the jurisdictional minimums of this Court, together with costs, interest, and such other and further relief as this Court deems just and proper.

Respectfully submitted,

McCLOSKEY, P.C.

By: 

Mark T. McCloskey, #36144
Patricia N. McCloskey, #36153
The Niemann Mansion
4472 Lindell Blvd.
St. Louis, Missouri 63108
Tel. 314/721-4000
Fax: 314/721-3664
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent via first-class U.S. mail, this 27th day of July, 2010 to **Steven S. Wasserman**, Williams Venker & Sanders LLC, Bank of America Tower, 100 North Broadway, 21st Floor, St. Louis, Missouri 63102, Attorneys for Defendant Barnes-Jewish St. Peters Hospital, Inc. d/b/a Barnes-Jewish St. Peters Hospital.



IN THE CIRCUIT COURT OF ST. CHARLES COUNTY

STATE OF MISSOURI

ERIC KATZ, as son of ALVERNA
KATZ, Deceased,

Plaintiff,

v.

BARNES-JEWISH ST. PETERS
HOSPITAL, BC MISSOURI
PHYSICIANS, LLC., SCOTT LANDRY,
M.D., DAVID POGGEMEIER, M.D.,
and NEAL W. HOLZUM, M.D.

Defendants.

Cause No. 0911-CV11523

Division No. 2

DEFENDANT NEAL W. HOLZUM, M.D.'S MOTION TO DISMISS

Defendant Neal W. Holzum, M.D., for his Motion to Dismiss Plaintiff's Second Amended Petition, states as follows:

1. This is a wrongful death case claiming alleged medical negligence by Defendants in their treatment of Alverna Katz.
2. On October 2, 2008 Plaintiff originally filed a Petition alleging medical negligence against Barnes-Jewish St. Peters Hospital, Washington University, John Doe, and Jane Doe. See Plaintiff's Petition, attached hereto as Exhibit A.
3. In the original Petition, Plaintiff alleged that Alverna Katz's death occurred on October 2, 2005. See Exhibit A, ¶ 8.
4. Additionally, Plaintiff alleged "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." See Exhibit A, ¶ 7. Plaintiff's Petition contains no further description of the Doe Defendants.

5. The only allegation of negligence in the Petition states that "the Defendants were negligent in their treatment of Decedent and by and through such negligence caused" her death on October 2, 2005. See Exhibit A, Count I.

6. 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. See Plaintiff's Amended Petition, attached hereto as Exhibit B.

7. The Amended Petition is identical in its description, or lack thereof, of the John Doe and Jane Doe Defendants as well as the allegations of negligence. See Exhibit B, ¶ 7, and Count I.

8. Neither Plaintiff's Petition nor his First Amended Petition identified any reference to the location or the timeframe during which the Doe Defendants treated decedent.

9. On August 6, 2010, Plaintiff filed his Second Amended Petition.

10. In the Second Amended Petition, Plaintiff added BC Missouri Physicians, LLC, Scott Landry, M.D., David Poggemeier, M.D., and Neal Holzum, M.D. and removed Washington University and John and Jane Doe. See Plaintiff's Second Amended Petition, attached hereto as Exhibit C.

11. In Count III of Plaintiff's Second Amended Petition, Plaintiff alleges that Dr. Holzum was substituted for the John Doe Defendant and that Dr. Holzum was the treating physician against whom the suit was brought in Plaintiff's original Petition under the name of John Doe. See Exhibit C, Count III, ¶ 17.

12. Additionally, in Count II, Plaintiff alleged that he was substituting the Jane Doe Defendant for BC Missouri Physicians, LLC, Dr. Landry, and Dr. Poggemeier. See Exhibit C, Count II, ¶ 13.

13. Under Section 537.100 R.S.Mo., a wrongful death claim must be filed within three years from the date of the death.

14. Pursuant to Schultz v. Romanace, M.D., 906 S.W.2d 393 (Mo. App. 1995) and Maddux v. Gardner, 192 S.W.2d 14 (Mo. App. 1945), this case should be dismissed as the statute of limitations has run against Dr. Holzum since it has been almost 5 years from the date of the death and Plaintiff's original Petition fails to provide identifying information about John Doe to give Dr. Holzum the required notice.

15. In support of the Motion, Defendant Neal Holzum, M.D. files herewith a Memorandum in Support of his Motion to Dismiss.

WHEREFORE, Defendant Neal Holzum, M.D. respectfully requests this Court enter an order dismissing Dr. Holzum and to dismiss Count III of Plaintiff's Petition at Plaintiff's costs, and for such further relief as is just and proper under the circumstances.

Michael J. Smith #42973
Tricia J. Mueller #52284
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939
(314) 621-6844/Fax

Attorneys for Defendant Neal Holzum, M.D.

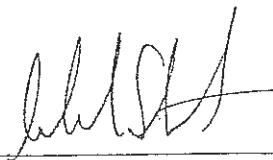
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the above and foregoing was served via fax transmission this 10 day of September, 2010 to:

Mark T. McCloskey
McCloskey, P.C.
The Niemann Mansion
4472 Lindell Blvd.
St. Louis, MO 63108
Fax No. 314-721-3664
Attorneys for Plaintiff

Steven S. Wasserman
Peter Krane
Williams, Venker & Sanders, LLC
100 N. Broadway, 21st Floor
St. Louis, MO 63102
Fax No. 314-345-5055
Attorneys for Defendant Barnes-Jewish St. Peters Hospital

Terese Drew
Hinshaw & Culbertson
701 Market Street, Suite 1300
St. Louis, MO 63101
Fax No. 314-241-7428
Attorneys for Defendants BC Missouri Physicians, Dr. Landry, and Dr. Poggemeier



IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

ERIC KATZ, AS SON OF
ALVERNA KATZ, DECEASED,

Plaintiff,

vs.

BARNES-JEWISH ST. PETERS
HOSPITAL
Hold For Service

and

THE WASHINGTON UNIVERSITY, AND/OR
WASHINGTON UNIVERSITY MEDICAL
CENTER,
Hold for Service

and

JOHN DOE

and

JANE DOE

Defendants.

Cause No.

Division No.

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08SL-0004171

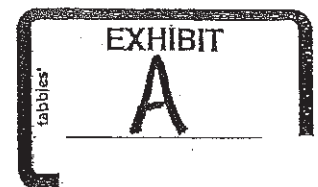
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PETITION

COMES NOW Eric Katz, as Son of Alverna Katz, Deceased, and for his Petition against
Defendants would state as follows:

1. Eric Katz (hereinafter "Plaintiff") is an individual who is a citizen of the
State of Missouri, and who at all times relevant hereto was the son of Alverna Katz, a deceased
person (hereinafter "Decedent").

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2. Barnes-Jewish St. Peters Hospital is a Missouri not-for-profit corporation doing business in this judicial district and which at all times hereinafter mentioned was engaged in the provision of medical care and services to the consuming public including Decedent for a fee.

3. That at all times relevant hereto, Defendant The Washington University and/or Washington University Medical Center (hereinafter "The Washington University") was a Missouri not-for-profit corporation operating within the City of St. Louis engaged in the business of providing medical services and was, at all times mentioned herein, acting by and through its agents, servants and employees.

7. 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.

8. That on or about October 1 through October 2, 2005, Decedent presented herself to Defendants and through their negligent treatment died on October 2, 2005

COUNT I

(Negligence/Wrongful Death - Against All Defendants)

COMES NOW Plaintiff as of the Deceased and states that Defendants were negligent in their treatment of Decedent and by and through such negligence caused the death of Decedent on or about October 2, 2005.

WHEREFORE, Plaintiff seeks judgment in his favor on this wrongful death action against the above-referenced Defendants in such amount as is fair and reasonable and within the jurisdictional limits of this Court, together with punitive damages in such amount is will in fact, be punitive and act as a deterrent to such Defendants and others similarly situated, together with costs of suit, interest and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

McCLOSKEY, P.C.

By: 

Mark T. McCloskey, #36144
Patricia N. McCloskey, #36153
8112 Maryland Avenue, Suite 350
St. Louis, Missouri 63105
Tel. 314/721-4000
Fax: 314/721-3664
Attorneys for Plaintiff

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IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

ERIC KATZ, AS SON OF
ALVERNA KATZ, DECEASED,

Plaintiff,

vs.

BARNES-JEWISH ST. PETERS
HOSPITAL, INC. D/B/A BARNES-
JEWISH ST. PETERS HOSPITAL

Serve:

Debra A. Shylanski
10 Hospital Drive
St. Peters, MO 63376
and

THE WASHINGTON UNIVERSITY, AND/OR
WASHINGTON UNIVERSITY MEDICAL
CENTER,

Serve:

Dr. William Peck
660 S. Euclid Ave.
St. Louis, MO 63108

and

JOHN DOE

and

JANE DOE

Defendants.

Cause No. 08SL-CC04171

Division No. 2

FILED

APR 21 2009

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

AMENDED PETITION

COMES NOW Eric Katz, as Son of Alverna Katz, Deceased, and for his Petition against

Defendants would state as follows:

1. Eric Katz (hereinafter "Plaintiff") is an individual who is a citizen of the

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EXHIBIT

R

State of Missouri, and who at all times relevant hereto was the son of Alvema Katz, a deceased person (hereinafter "Decedent").

2. Barnes-Jewish St. Peters Hospital, Inc. d/b/a Barnes-Jewish St. Peters Hospital is a Missouri not-for-profit corporation doing business in this judicial district and which at all times hereinafter mentioned was engaged in the provision of medical care and services to the consuming public including Decedent for a fee.

3. That at all times relevant hereto, Defendant The Washington University and/or Washington University Medical Center (hereinafter "The Washington University") was a Missouri not-for-profit corporation operating within the City of St. Louis engaged in the business of providing medical services and was, at all times mentioned herein, acting by and through its agents, servants and employees.

7. 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.

8. That on or about October 1 through October 2, 2005, Decedent presented herself to Defendants and through their negligent treatment died on October 2, 2005.

COUNT I

(Negligence/Wrongful Death - Against All Defendants)

COMES NOW Plaintiff as of the Deceased and states that Defendants were negligent in their treatment of Decedent and by and through such negligence caused the death of Decedent on or about October 2, 2005.

WHEREFORE, Plaintiff Eric Katz, as son of Alverna Katz, deceased seeks judgment in his favor on this wrongful death action against the above-referenced Defendants in such amount as is fair and reasonable and within the jurisdictional limits of this Court, together with punitive damages in such amount as will in fact, be punitive and act as a deterrent to such Defendants and others similarly situated, together with costs of suit, interest and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

McCLOSKEY, P.C.

By: 

Mark T. McCloskey, #36144
Patricia N. McCloskey, #36153
8112 Maryland Avenue, Suite 350
St. Louis, Missouri 63105
Tel. 314/721-4000
Fax: 314/721-3664
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF ST. CHARLES COUNTY
STATE OF MISSOURI

ERIC KATZ, AS SON OF
ALVERNA KATZ, DECEASED,

Plaintiff,

vs.

BARNES-JEWISH ST. PETERS HOSPITAL,
INC. D/B/A BARNES-JEWISH ST. PETERS
HOSPITAL,

BC MISSOURI PHYSICIANS, L.L.C.,

Serve Registered Agent:

The Corporation Company

120 S. Central

St. Louis, Missouri 63105

SCOTT L. LANDRY, M.D.,

Serve At:

The Corporation Company

120 S. Central

St. Louis, Missouri 63105

DAVID POGGEMEIER, M.D.

Serve At:

The Corporation Company

120 S. Central

St. Louis, Missouri 63105

and

NEAL W. HOLZUM, M.D.

Serve At:

2 Progress Point Parkway, Suite A

O'Fallon, Missouri 63368

Defendants.

Cause No. 0911-CV11523

Division No. 2

PLAINTIFF'S SECOND AMENDED PETITION

A29

COMES NOW Plaintiff, Eric Katz, as Son of Alverna Katz, Deceased, and for his

EXHIBIT

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Second Amended Petition would state as follows:

1. Eric Katz (hereinafter "Plaintiff") is an individual who is a citizen of the State of Missouri, and who at all times relevant hereto was the son of Alverna Katz, a deceased person (hereinafter "Decedent").
2. Barnes-Jewish St. Peters Hospital, Inc. d/b/a Barnes-Jewish St. Peters Hospital is a Missouri not-for-profit corporation doing business in this judicial district and which at all times hereinafter mentioned was engaged in the provision of medical care and services to the consuming public including Decedent for a fee.
3. That at all times relevant to this action, BC Missouri Physicians, L.L.C. was a Missouri Limited Liability Company which, amongst other things, provided emergency medical physicians and emergency medical care to patients at Barnes-Jewish St. Peter's Hospital and, upon information and belief, employed, provided, or otherwise supervised, managed, and arranged for the provision of medical services to patients of Barnes-Jewish St. Peters Hospital through, amongst others, Scott L. Landry, M.D. and David Poggemeier, M.D.
4. At all times relevant to this action, Scott L. Landry, M.D. ("Dr. Landry") and David Poggemeier, M.D. ("Dr. Poggemeier") were employees, agents, assigns, or otherwise providing medical services under the direction, control, management or other auspices of BC Missouri Physicians, L.L.C. and provided medical care to patients of Barnes-Jewish St. Peters Hospital, including but not limited to the Decedent, Alverna Katz.
5. At all times relevant to this action, Neal W. Holzum, M.D. ("Dr. Holzum") was a medical physician offering medical care to the public, including but not limited to Decedent, Alverna Katz.

6. That on or about October 1 through October 2, 2005, Decedent, Alverna Katz, presented herself to the Barnes-Jewish St. Peters Hospital Emergency Room where she came under the care of the Defendants and as a result of their negligent treatment of her, died on October 2, 2005.

COUNT I

COMES NOW Plaintiff, Eric Katz, as Son of Alverna Katz, Deceased, and for Count I of his Second Amended Petition would state as follows:

7. Plaintiff repeats and realleges the material allegations of paragraphs 1 through 6 above and incorporates the same herein by reference for all purposes.

8. That at the time that Alverna Katz arrived at Barnes-Jewish St. Peters Hospital, she had suffered a fall striking her head.

9. That at the time that she presented to Barnes-Jewish St. Peters Hospital, the Defendants, and each of them, knew or should of known that Alverna Katz was an elderly woman who was on an anticoagulation regimen and would be at a high risk for bleeding subsequent to head trauma.

10. That at that time Barnes-Jewish St. Peters Hospital, by and through its physicians, staff, employees, agents and assigns, failed to exercise that degree of skill and learning ordinarily exercised by members of such Defendant's profession and was thereby negligent in one or more of the following respects:

- a) by failing to appropriately diagnose and treat Alverna Katz's intracranial hemorrhage;
- b) by failing to appropriately reverse Alverna Katz's anticoagulation status;

- c) by failing to perform appropriate diagnostic studies, including but not limited to CT scans, in a timely fashion, so as to detect the presence of and provide an opportunity for treatment of Alvema Katz's intracranial bleed;
- d) by negligently delegating emergency room services at Barnes-Jewish St. Peters Hospital to BC Missouri Physicians, L.L.C. and its agents, employees and assigns, under circumstances where Barnes-Jewish St. Peters Hospital knew or reasonably should have known that such entity's emergency room physicians would provide negligent care; and/or
- e) by failing to appropriately supervise, observe, or otherwise control the actions of BC Missouri Physicians, L.L.C. and its employees, assigns, and physicians, so as to detect, prevent, or cure BC Missouri Physicians, L.L.C.'s negligent practice of medicine, including but not limited to its failure to diagnose and treat Alvema Katz's intracranial bleed.

11. As a direct and proximate result of one or more of the above-referenced negligent acts on the part of Barnes-Jewish St. Peters Hospital, Plaintiff Eric Katz has suffered the following actual damages:

- a. For pain, suffering, fright and shock endured by the Decedent prior to her death;
- b. For the loss of the value of services which the Decedent would have performed for her survivors during her lifetime;
- c. For the loss of such contributions as the Decedent would have made for the support of her survivors during her natural lifetime;

- d. For the funeral and administrative expenses arising out of her death; and/or
- e. For the loss of care, nurture, guidance, love and affection suffered by the Decedent's survivors.

WHEREFORE, for the foregoing reasons, Plaintiff Eric Katz, as Son of Alverna Katz, Deceased, respectfully prays for damages in his favor and against Barnes-Jewish St. Peters Hospital, Inc., in such amount as is fair and reasonable, and in excess of the jurisdictional minimums of this Court, together with costs, interest, and such other and further relief as this Court deems just and proper.

COUNT II

COMES NOW Plaintiff, Eric Katz, as Son of Alverna Katz, Deceased, and for Count II of his Second Amended Petition would state as follows:

12. Plaintiff repeats and realleges the material allegations of paragraphs 1 through 11 above and incorporates the same herein by reference for all purposes.

13. BC Missouri Physicians, L.L.C. and its agents, employees and assigns, including Dr. Landry and Dr. Poggemeier are substituted herein in Plaintiff's Second Amended Petition for the "Jane Doe" Defendant in that BC Missouri Physicians, L.L.C. and Drs. Landry and Poggemeier were the entity and its agents, employees and assigns against whom suit was brought in Plaintiff's original Petition under the name "Jane Doe".

14. That BC Missouri Physicians, L.L.C. by and through its employees, agents and assigns, including but not limited to Drs. Landry and Poggemeier, in its provision of medical services to Alverna Katz, failed to exercise that degree of skill and learning ordinarily exercised by members of Defendant's profession under the same or similar circumstances and was thereby

negligent in one or more of the following respects:

- a) by failing to appropriately diagnose and treat Alverna Katz's intracranial hemorrhage;
- b) by failing to appropriately reverse Alverna Katz's anticoagulation status;
- c) by failing to perform appropriate diagnostic studies, including but not limited to CT scans, in a timely fashion, so as to detect the presence of and provide an opportunity for treatment of Alverna Katz's intracranial bleed; and/or
- d) by BC Missouri Physicians, L.L.C.'s failure to appropriately supervise, observe, or otherwise control the actions of Drs. Landry and Poggemeier so as to detect, prevent, or cure Drs. Landry and Poggemeier's failure to diagnose and treat Alverna Katz's intracranial bleed.

15. As a direct and proximate result of one or more of the above-referenced negligent acts on the part of BC Missouri Physicians, L.L.C., Scott L. Landry, M.D. and David Poggemeier, M.D., Plaintiff Eric Katz has suffered the following actual damages:

- a. For pain, suffering, fright and shock endured by the Decedent prior to her death;
- b. For the loss of the value of services which the Decedent would have performed for her survivors during her lifetime;
- c. For the loss of such contributions as the Decedent would have made for the support of her survivors during her natural lifetime;
- d. For the funeral and administrative expenses arising out of her death; and/or
- e. For the loss of care, nurture, guidance, love and affection suffered by the Decedent's survivors.

WHEREFORE, for the foregoing reasons, Plaintiff Eric Katz, as Son of Alvema Katz, Deceased, respectfully prays for damages in his favor and against BC Missouri Physicians, L.L.C., Scott L. Landry, M.D. and David Poggemeier, M.D., in such amount as is fair and reasonable, and in excess of the jurisdictional minimums of this Court, together with costs, interest, and such other and further relief as this Court deems just and proper.

COUNT III

COMES NOW Plaintiff, Eric Katz, as Son of Alvema Katz, Deceased, and for Count III of his Second Amended Petition would state as follows:

16. Plaintiff repeats and realleges the material allegations of paragraphs 1 through 15 above and incorporates the same herein by reference for all purposes.

17. Neal W. Holzum, M.D. is substituted herein in Plaintiff's Second Amended Petition for the "John Doe" Defendant in that Dr. Holzum was the treating physician against whom suit was brought in Plaintiff's original Petition under the name of "John Doe".

18. That Neal W. Holzum, M.D., by and through his medical care and treatment of Alvema Katz, failed to exercise that degree of skill and learning ordinarily exercised by members of Dr. Holzum's profession, and was thereby negligent in one or more of the following respects:

- a) by failing to appropriately diagnose and treat Alvema Katz's intracranial hemorrhage;
- b) by failing to appropriately reverse Alvema Katz's anticoagulation status;
- c) by failing to perform appropriate diagnostic studies, including but not limited to CT scans, in a timely fashion, so as to detect the presence of and provide an opportunity for treatment of Alvema Katz's intracranial bleed; and/or

- d) by admitting Alverna Katz to an unmonitored hospital room;
- e) by failing to provide reasonable surveillance of or monitoring of Alverna Katz's medical condition; and
- f) by failing to detect the signs and symptoms of intracranial bleed in Alverna Katz's brain resulting in a failure to diagnose such condition until treatment options were foreclosed.

19. As a direct and proximate result of one or more of the above-referenced negligent acts on the part of Neal W. Holzum, M.D., Plaintiff Eric Katz has suffered the following actual damages:

- a. For pain, suffering, fright and shock endured by the Decedent prior to her death;
- b. For the loss of the value of services which the Decedent would have performed for her survivors during her lifetime;
- c. For the loss of such contributions as the Decedent would have made for the support of her survivors during her natural lifetime;
- d. For the funeral and administrative expenses arising out of her death; and/or
- e. For the loss of care, nurture, guidance, love and affection suffered by the Decedent's survivors.

WHEREFORE, for the foregoing reasons, Plaintiff Eric Katz, as Son of Alverna Katz, Deceased, respectfully prays for damages in his favor and against Neal W. Holzum, M.D., in such amount as is fair and reasonable, and in excess of the jurisdictional minimums of this Court, together with costs, interest, and such other and further relief as this Court deems just and proper.

Respectfully submitted,

McCLOSKEY, P.C.

By: 

Mark T. McCloskey, #36144

Patricia N. McCloskey, #36153

The Niemann Mansion

4472 Lindell Blvd.

St. Louis, Missouri 63108

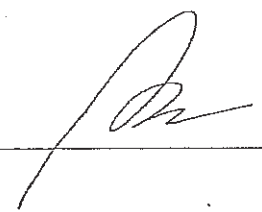
Tel. 314/721-4000

Fax: 314/721-3664

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent via first-class U.S. mail, this 27th day of July, 2010 to Steven S. Wasserman, Williams Venker & Sanders LLC, Bank of America Tower, 100 North Broadway, 21st Floor, St. Louis, Missouri 63102, Attorneys for Defendant Barnes-Jewish St. Peters Hospital, Inc. d/b/a Barnes-Jewish St. Peters Hospital.



IN THE CIRCUIT COURT OF ST. CHARLES COUNTY

STATE OF MISSOURI

ERIC KATZ, as son of ALVERNA
KATZ, Deceased,

Plaintiff,

v.

BARNES-JEWISH ST. PETERS
HOSPITAL, BC MISSOURI
PHYSICIANS, LLC., SCOTT LANDRY,
M.D., DAVID POGGEMEIER, M.D.,
and NEAL W. HOLZUM, M.D.

Defendants.

Cause No. 0911-CV11523

Division No. 2

DEFENDANT NEAL W. HOLZUM, M.D.'S MEMORANDUM OF SUPPORT OF HIS
MOTION TO DISMISS

Defendant Neal W. Holzum, M.D., for his Memorandum of Support of his Motion to Dismiss, states as follows:

I. Statement of Facts

This is a wrongful death case for alleged medical negligence by Defendants in treating Alverna Katz. On October 2, 2008 Plaintiff originally filed a Petition alleging the medical negligence against Barnes-Jewish St. Peters Hospital, Washington University, John Doe, and Jane Doe. Plaintiff's Petition is very vague with respect to the Doe Defendants as well as the allegations claimed against those Defendants. Plaintiff states in the Petition 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." See Exhibit A, ¶ 7, attached to Defendant Neal

Holzum, M.D.'s Motion to Dismiss. Additionally, the allegations of negligence are only one paragraph in the Petition:

COMES NOW Plaintiff as of the Deceased and states that Defendants were negligent in their treatment of Decedent and by and through such negligence caused the death of Decedent on or about October 2, 2005.

See Exhibit A, Count I. Plaintiff does not further identify John Doe and Jane Doe or give any identifying information to describe what their role was in the care and treatment of decedent that resulted in her death on October 2, 2005.

Subsequently, 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. However, the Amended Petition again provides no more information regarding the Defendants or the allegations against them. In fact, the Amended Petition is identical in its description of John and Jane Doe as well as the allegations of negligence. See Exhibit B, ¶ 7, and Count I, attached to Defendant Neal Holzum, M.D.'s Motion to Dismiss. Again, Plaintiff fails to provide identifying information about John Doe and Jane Doe other than to state that they are providers of medical services to Decedent. See Exhibit B.

On August 6, 2010, almost two years after filing his Petition, Plaintiff filed his Second Amended Petition. This time, Plaintiff added BC Missouri Physicians, LLC, Scott Landry, M.D., David Poggemeier, M.D., and Neal Holzum, M.D. as Defendants and removed Washington University and John and Jane Doe. Unlike the last two petitions, the Second Amended Petition not only identifies more Defendants, but also provides more details regarding the allegations against these Defendants. In the Second Amended Petition, Plaintiff claims that Dr. Holzum was a medical physician that offered medical care to the public including but not

limited to Decedent Alverna Katz. See Exhibit C, ¶ 5, attached to Defendant Neal Holzum, M.D.'s Motion to Dismiss. Additionally, Plaintiff alleges that Dr. Holzum was substituted for the John Doe Defendant and that Dr. Holzum was the treating physician against whom the suit was brought in Plaintiff's original Petition under the name of John Doe. See Exhibit C, Count III, ¶ 17. Plaintiff alleges that Dr. Holzum was negligent in the following respects:

- a) by failing to appropriately diagnose and treat Alverna Katz's intracranial hemorrhage;
- b) by failing to appropriately reverse Alverna Katz's anticoagulation status;
- c) by failing to perform appropriate diagnostic studies, including but not limited to CT scans, in a timely fashion, so as to detect the presence of and provide an opportunity for treatment of Alverna Katz's intracranial bleed; and/or
- d) by admitting Alverna Katz to an unmonitored hospital room;
- e) by failing to provide reasonable surveillance of or monitoring of Alverna Katz's medical condition; and
- f) by failing to detect the signs and symptoms of intracranial bleed in Alverna Katz's brain resulting in a failure to diagnose such condition until treatment options were foreclosed.

See Exhibit C, Count III, ¶ 18.

Additionally, in Count II, Plaintiff alleged that he was substituting the Jane Doe Defendant for BC Missouri Physicians, LLC, Dr. Landry, and Dr. Poggemeier. See Exhibit C, Count II, ¶ 13.

While Plaintiff has attempted to add Dr. Holzum as a Defendant in this case, he does so beyond the statute of limitations for a wrongful death cause of action. Dr. Holzum has had no knowledge or notice of this lawsuit for the death of Alverna Katz until he was served on August

11, 2010. This was almost 5 years after the date of the death of Ms. Katz and two years beyond the statute of limitations for a wrongful death lawsuit.

II. Argument

Under Section 537.100 R.S.Mo., a wrongful death claim must be filed within three years from the date of the death. Pursuant to Schultz v. Romanace, M.D., 906 S.W.2d 393 (Mo. App. 1995) and Maddux v. Gardner, 192 S.W.2d 14 (Mo. App. 1945) this case should be dismissed as the statute of limitations has run against Dr. Holzum and the allegations against Dr. Holzum does not relate back to the original filing date because of Plaintiff's vague identifying information about the fictitious Defendants, John Doe and Jane Doe.

In Maddux v. Gardner, plaintiff originally brought suit against multiple defendants including a "John Doe" and a "Richard Roe." 192 S.W.2d at 17. In the original petition Plaintiff described "John Doe" as the engineer of the train in question and "Richard Roe" as the fireman on the train. Id. Plaintiff subsequently filed a petition amending by interlineations the names John Doe and Richard Roe to the specifically named engineer and firemen. Id. The defendant engineer then filed a motion to dismiss claiming that the statute of limitation had run. Id.

The court held that Plaintiff was not adding another party to the cause of action, but was merely substituting names. Id. at 18. Further, it stated that the suit was actually brought against the individually named engineer when the initial petition was filed against John Doe. Id. The court elaborated that the initial petition *specifically described* him to be the engineer and that it was the intention of the plaintiff to sue the engineer based upon the language in the original petition. Id. As such, the amendment related back to the time of the filing of the petition, and the statute of limitations had not yet run. Id.

Unlike Maddux, Plaintiff in this case failed to provide any identifying information about John Doe or Jane Doe. Rather, the case at bar is similar to the more recent case of Schultz v. Romanace, M.D., 906 S.W.2d 393 (Mo. App. 1995). In that case, plaintiff brought a medical malpractice action against seven named individuals and six additional defendants identified as Jane Doe I, Jane Doe II, Jane Doe III, John Doe I, John Doe II, and John Doe III. Id. at 394. Plaintiff alleged:

John Does I, II, III, and Jane Does I, II, 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.

Plaintiff then filed an amended petition after the statute of limitations had run, renaming the previously named defendants and also naming Dr. Romanace and Mr. Carnagey as defendants. Id. Defendants filed a motion claiming that the actions were barred by statute of limitations. Id. Plaintiff, however, argued that Defendants Romanace and Carnagey were the John Doe defendants named in the original and timely filed petition and, therefore, it was within the statute of limitations. Id.

The court held that the original petition in that case did not sufficiently describe the conduct from which Mr. Carnagey or Dr. Romanace could be identified as persons whose treatment produced the plaintiff's injuries. Id. at 395. Further, it stated that the reference in the original petition to acts of fictitious persons was nothing more than a statement that the plaintiff desired to add additional named parties if he acquired sufficient information to permit him to do so. Id. The pleading did not state facts that would notify Dr. Romanace or Mr. Carnagey that

they were the persons against whose claims were made concerning their treatment of plaintiff.

Id.

In this case, Plaintiff also did not allege any identifying facts which would have put Dr. Holzum on notice that it was his actions that were the alleged negligent conduct described in the original Petition or even the Amended Petition as is required pursuant to Maddux or Schultz. Unlike the plaintiff in Maddux who described the John Doe defendant as an engineer in his original petition, Plaintiff does not state that the John Doe was even a physician or the type of medical service provided. Plaintiff does 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, he merely states that John Doe was a provider of medical services. This description could have described virtually any individual who ever provided any medical service to decedent at any time during her life.

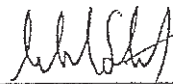
Unlike Maddux, it cannot be presumed that it was Plaintiff's intention to sue Dr. Holzum in his original Petition and that he just did not have the actual name of the physician. In fact, Plaintiff presumably had the medical records of decedent for years and could have easily identified Dr. Holzum as a defendant years ago since the medical records are electronic and typed. This is not a case where he could not read the signature since the record clearly identifies Dr. Holzum as the admitting physician. See medical record of Barnes-Jewish St. Peters Hospital, attached hereto as Exhibit D. As such, Plaintiff could have easily identified Dr. Holzum or at the very least identified him as "the admitting physician" in the original Petition.

Plaintiff was merely using John Doe and Jane Doe in an attempt to have an open-ended Petition to add Defendants and to bypass the statute of limitations. Evidence of this is the fact that he is trying to replace the two fictitious names with four defendants – Dr. Holzum, Dr.

Landry, Dr. Poggemeier, and BC Missouri Physicians, L.L.C. He did not have a particular person in mind when he named John Doe as a defendant in the original Petition because if he had, he could have described that person in more detail. As such, it was only Plaintiff's intention to attempt to bypass the statute of limitations for wrongful death by inserting the John Doe and Jane Doe in the original Petition.

Like in Schultz, Plaintiff's language regarding the Doe Defendants was insufficient in describing the conduct from which Dr. Holzum could be later identified as the person whose treatment allegedly caused decedent's death and did not put him on notice that claims were made concerning his treatment of her. Therefore, this Court should dismiss Dr. Holzum due to the running of the statute of limitations as was done in Schultz.

WHEREFORE, Defendant Neal Holzum, M.D. respectfully requests this Court enter an order dismissing Dr. Holzum and to dismiss Count III of Plaintiff's Petition at Plaintiff's costs, and for further relief as is just and proper under the circumstances.



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Attorneys for Defendant Neal Holzum, M.D.

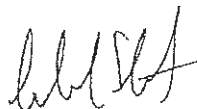
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the above and foregoing was served via fax transmission this 10th day of September, 2010 to:

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McCloskey, P.C.
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Fax No. 314-241-7428
Attorneys for Defendants BC Missouri Physicians, Dr. Landry, and Dr. Poggemeier



Barnes-Jewish St. Peters Hospital - St. Peters, MO 63376

Patient:	KATZ, ALVERNA	DOB:	1/7/1931
MR #:	340737	Age/Gender:	74y F
DOS:	10/1/2005 12:04	Acct #:	00110774874
Private Phys:		ED Phys:	Scott L. Landry, MD

MAR reviewed for this patient TLK 10/01/05 17:56 <TLK 10/1/2005 17:56>
 No new complaints at this time. skin clammy vs stable notified primary care nurse
 TLK 10/01/05 17:57 <TLK 10/1/2005 17:57>

DIAGNOSIS

Syncope

Hypothyroidism

<DJB>David J. Brewer, DO 10/01/05 16:33>

DISPOSITION

Nursing

Disposition - Admit <SEL1 10/01/05 18:52>

Time of bed request: Saturday, October 1, 2005 18:52 <SEL1 10/01/05 18:52>

Patient assigned to MSS 2280-1 <SEL1 10/1/2005 19:03>

Report called to Teresa, RN <MAC1 10/01/05 19:48>

Transportation to bed: Patient was transferred to a bed by PCT via stretcher. Equipment in use includes cardiac monitor <MAC1 10/1/2005 19:48>

Physician

Disposition - admit: Admit the patient to Uncovered Telemetry. The patient's condition is satisfactory. The patient admit type is Routine. Admitting Physician: Neal W. Holzm, MD, MED.(314) 317-0600 { <DJB 10/1/2005 18:11>

General Admit Orders: Oxygen therapy per protocol;

Troponin X2 at q 6 hour intervals;

Saline lock / routine flushes;

Vital signs every __ hour(s);

Intake/Output every __ hr/min;

Bedrest

Cardiac diet;

Sequential Compression Device <DJB 10/1/2005 18:12>

General Admit Order Form <DJB 10/01/05 18:15>

NURSING NOTES

10/01/05 12:13	Temp(F)	Rt.	Pulse	Resp	Syst	Diast	Pos.	O2 Sat	O2 L/M	Pain Sc
										0

10/01/05 12:33	Temp(F)	Rt.	Pulse	Resp	Syst	Diast	Pos.	O2 Sat	O2 L/M	Pain Sc
	97.4	0	98	20	155	67	S	96	ra	0

10/01/05 12:33 IV/Med flowsheet

Site # 1 Per EMS

Meds

Cath size/Type/Device 20g

Dose

Attempt

Rate

KVO

Site

L hand

Action

infusing

Fluid type

NS 0.9%

Equipment

Amount

1000 ml

A46



NOV 24 2010

Witness File
Block



In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

STATE OF MISSOURI, ex rel.,)	No. ED95797
DR. NEAL HOLZUM,)	
)	
Relator,)	Writ of Prohibition and/or
)	Mandamus
)	0911-CV11523
)	
vs.)	
)	
THE HONORABLE NANCY L. SCHNEIDER,)	
Judge of the Circuit Court of St. Charles County,)	
Missouri,)	
)	
Respondent.)	

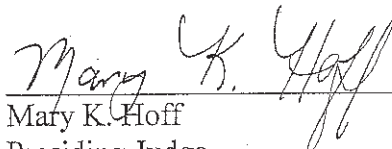
ORDER

Relator has filed a Petition for Writ of Prohibition and/or Mandamus along with Suggestions in Support and Exhibits. Respondent filed Suggestions in Opposition to Relator's Petition for Writ of Prohibition and/or Mandamus.

Being duly advised in the premises, the Court hereby DENIES Relator's Petition for Writ of Mandamus.

SO ORDERED.

DATED: 11/23/10



Mary K. Hoff
Presiding Judge
Writ Division Four
Missouri Court of Appeals -- Eastern District

cc: Honorable Nancy L. Schneider Michael J. Smith
Mr. Mark T. McCloskey Steven S. Wasserman
Terese A. Drew

IN THE SUPREME COURT OF MISSOURI
EN BANC

January Session 2011

State ex rel. Neal W. Holzum, M.D.,

Relator,

No. SC91434 **PRELIMINARY WRIT OF PROHIBITION**

The Honorable Nancy L. Schneider,

Respondent.

THE STATE OF MISSOURI

to

The Honorable Nancy L. Schneider,


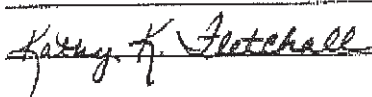
Greetings:

WHEREAS, it has been represented to the Supreme Court of Missouri on the part of Relator, Neal W. Holzum, M.D., as indicated and set forth in the petition for writ of prohibition filed herein, and the Court being willing to maintain the rights of the State of Missouri and the laws and customs thereof;

NOW, THEREFORE, you, the said Honorable Nancy L. Schneider, Judge, Circuit Court of St. Charles County, are COMMANDED to file a written return to the petition in this Court on or before February 24, 2011, and show cause, if any you have, why a writ of prohibition should not issue prohibiting you from doing anything other than vacating that portion of your order of October 5, 2010, overruling Relator's motion to dismiss, in cause No. 0911-CV11523, entitled Eric Katz, as Son of Alverna Katz, Deceased, Plaintiff, v. Barnes-Jewish St. Peters Hospital, Inc. D/B/A Barnes-Jewish St. Peters Hospital, BC Missouri Physicians, L.L.C., Scott L. Landry, M.D., David Poggemeier, M.D., and Neal W. Holzum, M.D., Defendants, and in lieu thereof entering an order sustaining Relator's motion to dismiss, and you, the said Honorable Nancy L. Schneider, are COMMANDED in the meantime to take no further action in said cause, other than as set forth above, until the further order of this Court.

Herein fail not at your peril.

Given under my hand and seal of
said Court, at the City of Jefferson,
this 25th day of January, 2011.


Clerk
 D.C.



FEB 23 2011

Witness File
Block

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI

THOMAS F. SIMON
CLERK

TELEPHONE
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65102
February 22, 2011

Mr. Mark T. McCloskey
Ms. Patricia N. McCloskey
4472 Lindell Boulevard
St. Louis, MO 63108

In Re: State ex rel. Neal W. Holzum, M.D., Relator, vs. The Honorable Nancy L. Schneider,
Respondent.
Missouri Supreme Court No. SC91434

Dear Counsel:

This will acknowledge receipt of Respondent's return to the preliminary writ in prohibition which was ordered filed "as is" on this date. Please see Rule 81.18.

Please see Rule 84.24 (i) regarding briefing schedules in writ proceedings.

Very truly yours,

THOMAS F. SIMON

Cynthia L. Turley
Deputy Clerk, Court en Banc

cc:

~~Mr.~~ Michael J. Smith, Ms. Tricia J. Mueller
Mr. Peter Krane, Ms. Jennifer C. Hansen
Ms. Terese A. Drew, Ms. Kara L. Kezios
The Honorable Nancy L. Schneider

Missouri Revised Statutes

Chapter 537 **Torts and Actions for Damages** **Section 537.100**

August 28, 2010

Limitation of action--effect of absence of defendant and nonsuit.

537.100. Every action instituted under section 537.080 shall be commenced within three years after the cause of action shall accrue; provided, that if any defendant, whether a resident or nonresident of the state at the time any such cause of action accrues, shall then or thereafter be absent or depart from the state, so that personal service cannot be had upon such defendant in the state in any such action heretofore or hereafter accruing, the time during which such defendant is so absent from the state shall not be deemed or taken as any part of the time limited for the commencement of such action against him; and provided, that if any such action shall have been commenced within the time prescribed in this section, and the plaintiff therein take or suffer a nonsuit, or after a verdict for him the judgment be arrested, or after a judgment for him the same be reversed on appeal or error, such plaintiff may commence a new action from time to time within one year after such nonsuit suffered or such judgment arrested or reversed; and in determining whether such new action has been begun within the period so limited, the time during which such nonresident or absent defendant is so absent from the state shall not be deemed or taken as any part of such period of limitation.

(RSMo 1939 § 3656, A.L. 1955 p. 778, A.L. 1967 p. 663, A.L. 1979 S.B. 368)

Prior revisions: 1929 § 3266; 1919 § 4221; 1909 § 5429

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Missouri General Assembly

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Missouri Revised Statutes

Chapter 537 Torts and Actions for Damages Section 537.080

August 28, 2010

Action for wrongful death--who may sue--limitation.

537.080. 1. Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured, which damages may be sued for:

(1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;

(2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;

(3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem. Such plaintiff ad litem shall be appointed by the court having jurisdiction over the action for damages provided in this section upon application of some person entitled to share in the proceeds of such action. Such plaintiff ad litem shall be some suitable person competent to prosecute such action and whose appointment is requested on behalf of those persons entitled to share in the proceeds of such action. Such court may, in its discretion, require that such plaintiff ad litem give bond for the faithful performance of his duties.

2. Only one action may be brought under this section against any one defendant for the death of any one person.

(RSMo 1939 §§ 3652, 3653, A.L. 1955 p. 778 § 537.070, A.L. 1967 p. 663, A.L. 1979 S.B. 368, A.L. 1991 H.B. 236)

Prior revisions: 1929 §§ 3262, 3263; 1919 §§ 4217, 4218; 1909 §§ 5425, 5426

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Clerk Handbooks

Supreme Court Rules

Subject:	Rule 55 - Rules of Civil Procedure - Rules Governing Civil Procedure in the Circuit Courts - Pleadings and Motions	Section/Rule:	55.33
		Publication / Adopted Date:	January 19, 1973
Topic:	Amended and Supplemental Pleadings	Revised / Effective Date:	January 1, 1994

55.33. Amended and Supplemental Pleadings

(a) A pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the pleading may be amended at any time within thirty days after it is served. Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would cause prejudice in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(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 a mistake concerning the identity of the proper party, the action would have been brought against the party.

(d) **Supplemental Pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit service of a supplemental pleading setting forth transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(Adopted Jan. 19, 1973, eff. Sept. 1, 1973. Amended June 24, 1986 and Dec. 1, 1986, eff. Jan. 1, 1987; June 1, 1993, eff. Jan. 1, 1994; Sept. 28, 1993, eff. Jan. 1, 1994.)

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