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

REPLY BRIEF OF RELATOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Missouri Supreme Court Rules

POINTS 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. Plaintiff's Second Amended Petition substituting Relator for John Doe was not a mere correction of a misnomer, and/or change in the name of a party and, therefore, should not relate back to the original filing pursuant to Mo.R.Civ.P. 55.33(c).

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

Johnson v. Delmar Gardens West, Inc., 2011 WL 795818

(Mo. App. E.D. March 8, 2011)

Maddux v. Gardner, 197 S.W.2d 14 (Mo. App. 1945)

Bailey v. Innovative Management and Investment, Inc., 890 S.W.2d 648

(Mo. banc 1995)

Section 537.100, RSMo. 2010

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

II. Relator is entitled to a permanent Writ prohibiting Respondent from allowing the case against Relator to go forward in that Respondent did exceed her authority as a matter of law in that:

A. Missouri Rule Civil Procedure (Mo.R.Civ.P.) 55.33(c) is not relevant in this circumstance because he added a party and, even assuming that it is applicable, the notice requirements of Rule 55.33(c) were not met.

Windscheffel v. Benoit, 646 S.W.2d 354 (Mo. banc 1983)

Johnson v. Delmar Gardens West, Inc., 2011 WL 795818

(Mo. App. E.D. March 8, 2011)

Schultz v. Romanace, M.D., 906 S.W.2d 393

(Mo. App. S.D. 1995)

Mallek v. First Banc Insurors Agency, 220 S.W.3d 324

(Mo. App. E.D. 2007)

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

INTRODUCTION

Respondent raises various issues in her argument that Relator was properly named as a Defendant within the statute of limitations. However, her argument that she accomplished this through correcting a misnomer is unfounded and without merit. Additionally, her attempt to claim that Rule 55.33(c) allowed Plaintiff's claim to relate back to the original filing of the Petition also fails as Rule 55.33(c) is not applicable to this case. Even assuming that it is applicable, Relator provided sufficient information illustrating that the notice requirements of Rule 55.33(c) were not met. As such, each of the Respondent's arguments must fail for the reasons detailed below.

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 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. Plaintiff's Second Amended Petition substituting Relator for John Doe was not a mere correction of a misnomer, and/or change in the name of a party and, therefore, should not relate back to the original filing pursuant to Mo.R.Civ.P. 55.33(c).

Respondent claims Plaintiff was merely correcting a misnomer when he substituted three individuals and a limited liability company for two Doe Defendants. A review of the definition of misnomer reveals that this is not the case. "A misnomer is a misdescription or mistake in some aspect of a party's name. It occurs where a summons is served on the right party, but with the wrong name." *Johnson v. Delmar Gardens West, Inc.*, 2011 WL 795818 at *3 (Mo. App. E.D. March 8, 2011) (citations omitted). In the instant cause of action, there is no misdescription or mistake in an aspect of a party's name. Instead, Plaintiff simply did not know the name of any of the parties whom he now seeks to substitute for the Doe Defendants. Further, a misnomer occurs where a summons *is served* on the right party, but with the wrong name. *Id.* In this case, no summons was served on any party, much less the "right" party.

As Respondent has pointed out to the Court, Plaintiff first contacted Plaintiff's counsel only 24 minutes before the statute of limitations ran. In fact, Plaintiff concedes that "it was not known or knowable to Plaintiff who provided healthcare services to the decedent, only that she went to Barnes-Jewish St. Peters Hospital on a certain day…." Respondent's Brief, p. 14. Thus, this is not a case of mistaken identity of a party. It is a case where Plaintiff simply did not know any identifying information about the substituted Defendants, including whether they participated in the care and treatment of decedent and committed a tort. Plaintiff named John Doe and Jane Doe as Defendants to serve as placeholders in an attempt to circumvent the expiration of the statute of

limitations. As the Southern District Court of Appeals stated in *Schultz v. Romanace, M.D.*, 906 S.W.2d 393, 395 (Mo. App. S.D. 1995), "[t]he reference in the original Petition to acts of fictitious persons was nothing more than a statement that [plaintiff] desired to add additional named parties as defendants if he acquired sufficient information to permit him to do so." As in *Schultz*, Plaintiff is attempting to add parties to the instant cause of action, rather than correct a misnomer. *See also Maddux v. Gardner*, 192 S.W.2d 14 (Mo. App. 1945). By Plaintiff's own admission, he had *no way* to know of the existence of Relator before the statute of limitations expired. Plaintiff then acquired information that Relator's name appears in decedent's medical record and elected to add Relator as a Defendant. This is not a misnomer, but, rather, the addition of a new party after the expiration of the statute of limitations.

Plaintiff did not have any specific physician or other healthcare provider in mind during the quick drafting of his Petition. Had he truly had a specific individual or individuals in mind he would have given a description of their job titles, such as "admitting physician" or "night shift nurse." Rather, Plaintiff used the vague language that John Doe and Jane Doe were "providers of medical services" to decedent on October 1st and 2nd, 2005. This description encompasses any physician, nurse, radiologist, or other healthcare provider who may have provided care to decedent on October 1, 2005 and October 2, 2005. Plaintiff's Petition does not even allege the care provided by the Doe Defendants occurred at Barnes-Jewish St. Peters Hospital. Plaintiff's failure to

provide adequate details on who he had intended to sue causes this case to be one of addition of parties, rather than a misnomer. See Relator's Brief pp. 14-15.

Respondent also claims that the universe of possible defendants was in fact very small and that Relator Holzum should have known that he was the potential defendant referenced as John Doe. This simply is not the case. During the course of decedent's hospitalization, many individuals were involved in her care and could fall underneath the vague umbrella of "provider of medical services." In fact, the medical records for those two days of treatment contain approximately two dozen names that would satisfy the description of "provider of medical services." This description also includes those individuals who provided medical services to decedent, but were not listed in the chart. Further, Plaintiff's description does not limit the universe of possible providers of medical services to those who allegedly treated decedent in the hospital. Thus, Plaintiff's description could encompass a healthcare provider who treated decedent outside of the hospital. Therefore, from Relator's perspective, the description literally could encompass any healthcare provider in St. Charles County and the surrounding communities.

Plaintiff also alleges in his Petition that decedent presented herself to the Doe Defendants. However, decedent never presented herself to Relator, further illustrating he was not considered by Plaintiff to be "John Doe" when filing her initial Petition.

Additional proof that this is not a case of misnomer, is the fact that, while Plaintiff only named a "John Doe" and "Jane Doe," he then proceeded to substitute not just two, but four parties for the two fictitious Defendants. Again, if he had specific defendants in mind, Plaintiff would have listed them in the original Petition as John Doe, Jane Doe I,

Jane Doe II, and Jane Doe III with a description of their jobs as was done in *Schultz*. All of this demonstrates Plaintiff was not correcting a misnomer once discovery identified the correct name of the "John Doe," but adding parties once he had additional information.

The cases Respondent refers to in her Brief are not relevant to the issue at hand. None address Doe Defendants other than *Maddux*. Respondent cites to *Bailey v. Innovative Management and Investment, Inc.*, 890 S.W.2d 648 (Mo. banc 1995). In that case, the plaintiff attempted to correct a corporate name. As with many corporations, the name had changed over time and the plaintiff initially used the original corporate name instead of the name of the successor corporation, which was the proper party. Id. at 650. The Court allowed this change explaining that this was a misnomer and that it was merely correcting the party's name. *Id.* at 652. Similarly, in *Watson v. E.W. Bliss Company*, 704 S.W.2d 667 (Mo. banc 1986), the plaintiffs were confused about the true name of a manufacturing company and, once in receipt of the information, sought to amend the petition accordingly. The Court stated that, due to the corporate history, the plaintiff's misdescription was understandable and allowed the change in party name as a correction of a misnomer. *Id.* at 669-70.

The case at bar is not like *Bailey* or *Watson* because here Plaintiff did not misidentify the name of a physician while meaning to refer to Dr. Holzum. There was no confusion with his name, as with the corporate names in *Bailey* and *Watson*. These cases may have been relevant if Plaintiff would have sued, for instance, a Nate Holzum, M.D. or Neil Holtum, M.D. instead of Neil Holzum, M.D., but not simply "John Doe," a

provider of medical services. Plaintiff did not mistakenly name John Doe instead of Relator – he simply did not, and could not, have known of Relator's existence.

Respondent also refers to *Johnson* as support for her argument. In that case, the plaintiff incorrectly named a nursing home facility in which plaintiff thought the decedent had fallen from his bed and died. The court found that this was not a case of a misnomer because plaintiff was not correcting a misdescription or mistake of the name. *Id.* at *3. Rather, the plaintiff had sued the wrong nursing home. *Id.* The court found that the plaintiff was attempting to add parties, not change the parties through substitution. *Id.* at *4.

In this case, it was not that Plaintiff intended to correct a mistake of identity. Rather, Plaintiff wanted an open-ended time to conduct discovery and determine if he wished to add more parties to this lawsuit. Plaintiff should not be allowed to have a limitless ability to add parties. Under Plaintiff's theory, he could have added 15, 20, or 30 parties based upon his claim that "John Doe" and "Jane Doe" were sufficiently described as providers of medical services. Allowing this would effectively eliminate the statute of limitations. As such, this Court should deem that the statute of limitations bars Plaintiff's claims against Neal Holzum, M.D. because Plaintiff attempted to add Dr. Holzum as a party more than two years after the statute of limitations had expired and did not merely correct a misnomer.

II. Relator is entitled to a permanent Writ prohibiting Respondent from allowing the case against Relator to go forward in that Respondent did exceed her authority as a matter of law in that:

A. Missouri Rule Civil Procedure (Mo.R.Civ.P.) 55.33(c) is not relevant in this circumstance because he added a party and, even assuming that it is applicable, the notice requirements of Rule 55.33(c) were not met.

Respondent contends in her brief that, assuming the substitution of Relator for John Doe constitutes a change of party, Mo.R.C.P. 55.33(c) results in the change of parties relating back to the original date of the filing because Holzum was given sufficient notice. In doing so, Respondent claims that Relator Holzum provided no evidence that he did not receive adequate notice in the required timeframe.

"Rule 55.33(c) only applies to amendments changing the party against whom the 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.* By Plaintiff's own admission, he did not make a mistake in naming John Doe as a defendant. Exactly the opposite is true – he intended to do so. Thus, the issue is whether the Petition properly describes John Doe so as to allow Relator to have understood it was Plaintiff's intent to sue Relator. *See Schultz*, *supra*.; *Maddux*, *supra*.; and Relator's Brief.

However, even if Rule 55.33(c) applies, Respondent still failed to provide adequate notice under the Rule. Contrary to Respondent's assertion, Holzum has raised the issue of notice. In Relator's Brief, as well as in his Motion to Dismiss in the lower court, Relator stated that he had no knowledge or notice of the lawsuit until he was named a Defendant and served the Second Amended Petition in August 2010. Relator's Brief, p. 12; Appendix A40-41. The first time notice was given was when he was served.

Relator has offered no other evidence to disprove notice because one cannot disprove a negative. There is no evidence to show that actual notice was given before this service date.

The cases Respondent references to support his theory that lack of notice was not properly established are distinguishable from the case at bar. Specifically, in *Johnson*, the court determined that the Plaintiff overcame the notice requirement because the original defendant and the subsequently added defendants had the same registered agent, the annual registration reports were filed by the same comptroller, and they shared corporate headquarters as well as attorneys. Id. at *6. Similarly, in *Mallek v. First Banc Insurors Agency*, 220 S.W.3d 324 (Mo. App. E.D. 2007) the court held that the defendants were given adequate notice since the same counsel represented the different various corporate entities sued and all of the corporate entities had common ownership.

Under Rule 55.33(c) notice would be sufficient when "the party actually sued and the party whom Plaintiff meant to sue had a sufficient identity of interest or were so closely connected that notice to one would suffice to inform the other of a pending claim for relief." *Johnson*, 2011 WL 795818 at *5 (citing *Garavaglia v. Mason of Missouri, Inc.*, 733 S.W.2d 53, 55 (Mo. App. E.D. 1987). In this situation, the party actually sued was a fictitious name with a vague description. The only true defendant who could have provided Relator notice was the hospital. However, the hospital is not closely connected with Relator sufficient to satisfy Rule 55.33(c)'s notice requirements. The hospital, as clearly evidenced by the pleadings in this case, has different attorneys than those representing Dr. Holzum and the other newly added Defendants. Additionally, there is

no employment relationship between the hospital and Relator. As such, there is no evidence that Neal Holzum, M.D. in fact had any notice of this lawsuit merely because the hospital had been sued. Rather, he first became aware of this case when he was served in August 2010. Therefore, Relator had no notice of the instant cause of action until he was served with process and, therefore, under Rule 55.33(c), the addition of Relator as a party does not relate back to the date of the original filing of the Petition. As such, Relator respectfully requests that this Court make the preliminary Writ of Prohibition permanent and dismiss Neal Holzum, M.D. with prejudice from the case.

CONCLUSION

As previously presented in Relator's Brief, as well as the above Reply, Plaintiff's naming of Relator as a defendant nearly two years after the statute of limitations has run and five years after the alleged negligence occurred is an attempt to circumvent the statute of limitations. Plaintiff's actions constitute the addition of parties to the suit, not the correction of a misnomer. 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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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing were mailed, with postage prepaid, U.S. Mail this ____ day of April, 2011, to: The Honorable Nancy L. Schneider, Judge of the Circuit Court of St. Charles County, Division No. 2, 300 N. Second Street, St. Charles, MO 63301; Mark T. McCloskey and Patricia N. McCloskey, 4472 Lindell Blvd., St. Louis, MO 63108, P: (314) 721-4000, F: (314) 721-3664, mccloskeylaw@aol.com, Attorneys for Plaintiffs; Peter J. Krane and Jennifer Collins Hansen, Williams, Venker & Sanders, LLC, 100 N. Broadway, 21st Floor, St. Louis, MO 63102, P: (314) 345-5000, F: (314) 345-5055, pkrane@wvslaw.com, jhansen@wvslaw.com, Attorneys for Defendant Barnes-Jewish St. Peters Hospital; and 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.

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CERTIFICATE OF COMPLIANCE

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

This brief is prepared using Microsoft Word 2007, is proportionally spaced, and contains 3,084 words. Also, pursuant to Missouri Supreme Court Rule 84.06, accompanying this Brief is a CD containing full text of this Brief. Undersigned counsel further states that a copy of the diskette has been provided to opposing counsel, that the diskette has been scanned for viruses and that the diskette is virus-free.

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

_____

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