

SC95858

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, EX REL.
DR. PATRICK GOLDSWORTHY, DR. ASTON GOLDSWORTHY and PATRICK L.
GOLDSWORTHY, D.C., P.C., RELATORS

vs.

THE HONORABLE JAMES F. KANATZAR, RESPONDENT

RELATORS' BRIEF

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JURISDICTIONAL STATEMENT

Upon application by Relators, this Court issued a Preliminary Writ of Prohibition on September 20, 2016. (Appx. A1). This Court has jurisdiction to adjudicate this matter pursuant to Article V, § 4 of the Missouri Constitution. Relators seek a Permanent Order of Prohibition to prevent the Honorable James F. Kanatzar from taking any further action other than granting Relators' Motion to Dismiss based on the application of the statute of limitations under Missouri Revised Statute § 537.100 and applicable Missouri case law.

STATEMENT OF FACTS

Plaintiffs Paul Lang and Allison Boyer are the surviving children of decedent Michael Lang, who died on or about December 7, 2009. (Appx. A11). Plaintiffs timely filed their initial petition for wrongful death against Relators on December 21, 2010, in the Circuit Court of Jackson County, Missouri at Independence. See Case No. 1016-CV38278 (“Case No. 1”). Case No. 1 was voluntarily dismissed on March 22, 2013. (Appx. 61-62). Plaintiffs then re-filed the case on March 19, 2014. See Case No. 1416-CV06526 (“Case No. 2”). Case No. 2 was dismissed by the trial court on December 29, 2014, after Plaintiffs failed to file an affidavit of merit pursuant to Mo. Rev. Stat. § 538.225. (Appx. A63-A66). Plaintiffs appealed to this Court, which affirmed the trial court’s dismissal on October 13, 2015. *Lang v. Goldsworthy*, 470 S.W.3d 748 (Mo. 2015); (Appx. A2-A10). Plaintiffs then filed suit for the third time on December 1, 2015. See Case No. 1516-CV25560 (“Case No. 3”).

Relators filed a Motion to Dismiss Case No. 3 on January 8, 2016, on the grounds that plaintiffs’ suit was barred by the applicable statute of limitations. (Appx. A11-A18). Specifically, Relators argued that Plaintiffs used the applicable savings statute in order to file Case No. 2, and that long-standing Missouri case law holds that plaintiffs may only receive the benefit of the savings statute one time. (Appx. A11-A18). The Motion was denied by Respondent without explanation on June 27, 2016. (Appx. A18). Relators then filed a Petition for Writ of Prohibition in the Western District Court of Appeals on July 18, 2016, which was denied on July 19, 2016. (Appx. A19-A32 and A33-A34). On August 1,

2016, Relators filed a Petition for Writ of Prohibition in this Court. (Appx. A35-A51). On September 20, 2016, the Court granted a preliminary writ of prohibition. (Appx. A1).

A permanent writ of prohibition is proper in this case because Respondent exceeded his authority in denying Relators' Motion to Dismiss where the Motion demonstrates that all claims for the death of Michael Lang on December 7, 2009 are time-barred.

POINT RELIED ON

**I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING
RESPONDENT FROM DENYING THEIR MOTION TO DISMISS SINCE
PLAINTIFFS' CLAIMS ARE BARRED BY THE APPLICABLE STATUTE
OF LIMITATIONS IN THAT PLAINTIFFS CAN ONLY RECEIVE THE
BENEFIT OF THE SAVINGS STATUTE ONE TIME**

A. Standard of Review

State ex rel. Marianist Province of U.S. v. Ross, 258 S.W.3d 809, 810 (Mo. banc 2008)

State ex rel. KCP&L Greater Mo. Operations Co. v. Cook, 353 S.W.3d 14, 17 (Mo. App. 2011)

State ex rel. Heart of America Council v. McKenzie, 484 S.W.3d 320 (Mo. banc 2016)

State ex rel. City of Blue Springs v. Nixon, 250 S.W.3d 365, 369 (Mo. banc 2008)

State ex rel. Bloomquist v. Schneider, 244 S.W.3d 139, 141 (Mo. banc 2008)

Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338, 341 (Mo. banc 1993)

**B. Long-Standing Precedent Supports that the Savings Statute May Only be
Used Once**

Mo. Rev. Stat. § 537.100

Boland v. Saint Luke's Health System, Inc., 471 S.W.3d 703, 708 (Mo. 2015)

Mo. Rev. Stat. § 538.225

Lang v. Goldsworthy, 470 S.W. 3d 748 (Mo. 2015)

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Heintz v. Swimmer, 922 S.W.2d 772, 776 (Mo. Ct. App. 1996)

C. Statutory Interpretation Supports Relators' Position

Mo. Rev. Stat. § 516.230

Mo. Rev. Stat. § 537.100

Citizens Bank and Trust Co. v. Dir. Of Rev., State of Mo., 639 S.W.2d 833, 835 (Mo. 1982)

Disalvo Properties, LLC v. Bluff View Commercial, LLC, 464 S.W.3d 243, 246 (Mo. Ct. App. 2015)

D. The Court's Opinion in Case No. 2 Supports Relators' Position

Lang v. Goldsworthy, 470 S.W.3d 748 (Mo. 2015)

E. Plaintiffs' Efforts to Distinguish the Savings Statutes are not Persuasive

Thatcher v. De Tar, 351 Mo. 603 (1943)

Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349 (1944)

F. The Second Dismissal is Final When Plaintiffs Have Already Benefited from the Savings Statute

Mayer v. Saint Luke's Hosp. of Kansas City, 430 S.W.3d 260 (Mo. 2014)

Burian v. County Ins. And Financial Services, 263 S.W.3d 785 (Mo. Ct. App. 2008)

G. Other Jurisdictions Support Realtors' Position

Hebertson v. Bank One, Utah, N.A., 995 P.2d 7 (Utah Ct. App. 1999)

Foster v. Pettijohn, 213 S.W.2d 487 (Mo. 1948)

Utah Code Ann. § 78B-2-111 (2008)

Norton v. Hess, 374 P.3d 49 (Utah App. 2016)

Brown v. Solon Pointe at Emerald Ridge, 2013 WL 5969112 (Ohio Ct. App. 2013)

Ohio Rev. Code Ann. § 23015.19 (2009)

Thomas v. Freeman, 680 N.E.2d 997, 999 (Ohio 1997)

Hamrick v. Ramalia, 2012 WL 1566574 *3 (Ohio Ct. App. 2012)

ARGUMENTS AND AUTHORITIES

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING THEIR MOTION TO DISMISS SINCE PLAINTIFFS' CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS IN THAT PLAINTIFFS CAN ONLY RECEIVE THE BENEFIT OF THE SAVINGS STATUTE ONE TIME

A. Standard of Review

A writ of prohibition is appropriate to prevent an abuse of judicial discretion, to avoid irreparable harm or prevent the exercise of extra-jurisdictional power. *State ex rel. Marianist Province of U.S. v. Ross*, 258 S.W.3d 809, 810 (Mo. banc 2008). Additionally, “[p]rohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.” *State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 17 (Mo. Ct. App. 2011).

This Writ comes before the Court upon review of Respondent’s denial of Relators’ Motion to Dismiss. The Court recently held that a writ of prohibition after the denial of a dispositive motion is proper if it will prevent unnecessary, inconvenient, and expensive litigation. *State ex rel. Heart of America Council v. McKenzie*, 484 S.W.3d 320 (Mo. banc 2016); *see also, State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365, 369 (Mo. banc 2008). Moreover, a writ of prohibition is the appropriate remedy for an erroneous decision not to dispose of a time-barred claim. *State ex rel. Bloomquist v. Schneider*, 244 S.W.3d 139, 141 (Mo. banc 2008).

Once a statute of limitations expires and bars a plaintiff's cause of action, the defendant has a vested right to be free from suit. *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. banc 1993). Accordingly, an absolute writ of prohibition is the appropriate remedy to relieve a defendant of the expense and burden of unwarranted litigation when a claim is time-barred. *State ex rel. Marianist Province of U.S. v. Ross*, 258 S.W.3d 809, 810-11 (Mo. banc 2008).

B. Long-Standing Precedent Supports that the Savings Statute May Only be Used Once

Plaintiffs' claims are governed by the statute of limitations in Mo. Rev. Stat. § 537.100, which establishes a three year statute of limitations for wrongful death actions. (Appx. A52). The Court recently confirmed long-standing Missouri case law that a wrongful death claim accrues at the moment of death. *Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703, 708 (Mo. 2015). Therefore, plaintiffs' case accrued on or about December 7, 2009. In light of the three year statute of limitations, plaintiffs needed to file suit prior to December 7, 2012. Case No. 1 was timely filed on December 21, 2010.

Plaintiffs, however, dismissed Case No. 1 on March 22, 2013. The wrongful death statute of limitations includes a "savings statute," which provides that if an action has been commenced within three years and the plaintiff thereafter suffers a non-suit, "such plaintiff may commence a new action from time to time within one year after such non-suit suffered" Mo. Rev. Stat. § 537.100. (Appx. A52). Plaintiffs utilized this savings statute provision to file Case No. 2 on March 19, 2014. Absent the savings statute, Case No. 2 would have been time barred. Case No. 2 was dismissed by the trial court due to Plaintiffs'

failure to file an affidavit of merit as required by Mo. Rev. Stat. § 538.225, a decision which was affirmed by this Court on October 13, 2015. *Lang v. Goldsworthy*, 470 S.W.3d 748 (Mo. 2015). (Appx A2-A10). The filing of Case No. 3 would require the Plaintiffs to utilize the savings statute a second time.

The Court has long held that “a plaintiff may not suffer an indefinite number of nonsuits and institute an indefinite number of actions provided each successive new action be brought within one year of the preceding nonsuit....” *Foster v. Pettijohn*, 358 Mo. 84, 89 (Mo. 1948); *see also, Cady v. Harlan*, 442 S.W.2d 517, 519-520 (Mo. 1969). Consequently, a general rule was established that plaintiffs may only receive the benefit of a savings statute once. *See, Williams v. Southern Union Co.*, 364 S.W.3d 228 (Mo. Ct. App. 2011); *Britton v. Hamilton*, 740 S.W.2d 704 (Mo. Ct. App. 1987); and *Heintz v. Swimmer*, 922 S.W.2d 772, 776 (Mo. Ct. App. 1996). Missouri courts have made no exceptions to this rule. This is rational since an indefinite number of untimely filings would render the limitations period meaningless.

C. Statutory Interpretation Supports Relators’ Position

Williams, *Heintz*, and *Britton* are all cases in which the savings statute under Mo. Rev. Stat. § 516.230 was at issue. That savings statute is part of Chapter 516, which sets forth the statutes of limitations for a variety of actions.

Missouri Revised Statute § 516.230 states:

If any action shall have been commenced within the times respectively prescribed in sections 516.010 to 516.370, and the plaintiff therein 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....

(Appx. A53).

Whether or not Mo. Rev. Stat. §537.100 allows a plaintiff to utilize a savings statute more than once has never been decided by this Court. Missouri Revised Statute § 537.100, which governs the present action, however, contains essentially identical language to § 516.230 regarding the savings statute provision:

...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...

(Appx. A52).

The language of these two statutes is virtually identical, in that, both statutes state that:

“the plaintiff therein . . . suffer a nonsuit . . . such plaintiff may commence a new action from time to time within one year after such nonsuit suffered or such judgment arrested or revised.”

See, §§ 516.230 and 537.100. No meaningful differences exist between the two statutes. In fact, Plaintiffs and Respondent have not pointed out how the substantially similar statutory text could lead to a different result other than indicating that they are not “the same.” The statutes, however, have the same substance, the same content, and therefore, they should produce the same result.

Given that these two savings statutes are essentially identical, the holdings in *Williams*, *Heintz*, and *Britton* govern the present action. There is nothing distinguishable about the savings statute provision governing wrongful death actions, which would allow Plaintiffs to use the savings statute more than once.

Furthermore, when the same or similar words are within the same legislative act and relate to the same or similar subject matter, then the statutes should be construed to achieve a harmonious interpretation. *Citizens Bank and Trust Co. v. Director of Revenue, State of Mo.*, 639 S.W.2d 833, 835 (Mo. 1982). When engaging in statutory interpretation, “it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters. . .” *Disalvo Properties, LLC v. Bluff View Commercial, LLC*, 464 S.W.3d 243, 246 (Mo. Ct. App. 2015).

Given that § 516.230 and § 537.100 are for all practical purposes identical, it does not make sense that one statute would be interpreted to allow multiple dismissals and untimely refilings, while the other has consistently been interpreted to allow only one such dismissal and refiling. Plaintiffs’/Respondent’s interpretation of § 537.100 would

effectively eliminate the statute of limitations in wrongful death actions. Clearly this is not what the legislature intended.

D. The Court's Opinion in Case No. 2 Supports Relators' Position

The Court included language in its opinion concerning Case No. 2 supporting Relators' position:

Here, plaintiffs' second cause of action was dismissed without prejudice for failing to timely file the healthcare affidavit. Due to the passage of time and the three year statute of limitations governing wrongful death claims, they were prohibited from re-filing their claims in a third suit. § 537.100, RSMo. 2000. *Lang v. Goldsworthy*, 470 S.W.3d 748, 751 (Mo. banc 2015)(Appx. A5).

The Court further stated that "because the second action was not filed until nearly a year after the dismissal of the first action, plaintiffs were prevented from filing a third action within the one-year savings provision of § 537.100." *Lang*, 470 S.W.3d at 752. (Appx. 6). The Court concluded that the "root of Plaintiffs' quandary" was that their action was time-barred under § 537.100 after the dismissal of Case No. 2. *Id.*

Respondent is expected to rely on Footnote No. 6 of this Court's opinion. In that footnote, the Court stated:

It is not clear whether a savings statute like the one in § 537.100 may be used more than once. See *Mayes*, 430 S.W.3d at 266 (noting that the plaintiffs in that case did not

argue that their third action was timely filed under § 537.100's savings provision). This Court does not address whether a savings statute could be used a second time by plaintiffs in this action. *Lang*, 470 S.W.3d 748, 753, fn. 6; (Appx. A6).

It appears that this footnote simply was pointing out that the issue of whether § 537.100 would allow another refiling was not before the Court in *Lang*. The text of the opinion, however, clearly sets forth Missouri's long practice of only allowing a savings statute to be utilized one time. In fact, Plaintiffs conceded this point in their appellant's brief to this Court in Case No. 2. In arguing that §538.225 restricted plaintiffs' access to the courts, Plaintiffs stated:

The trial court's Order of Dismissal barred Appellants from use of the courts to pursue their cause of action. Although the dismissal is denominated "without prejudice," it serves as a permanent bar to pursuing their cause of action because the Statute of Limitations prohibits the Appellants from re-filing their case.

(Appx. A55-A56).

It is clearly well established and well understood that the savings statute may be used only once. Without being able to avail themselves of the savings statute, Plaintiffs' claims are barred by the three year statute of limitations set forth in § 537.100.

E. Plaintiffs' Efforts to Distinguish the Savings Statutes are not Persuasive

Plaintiffs/Respondent are expected to assert that wrongful death cases should be treated differently because they deal with the subject of human life. While human life is inarguably sacred, as is the timely administration of justice. Plaintiffs had ample opportunity to pursue their claims during Case No. 1 and Case No. 2.

The legislature determined that a three year statute of limitations was appropriate for wrongful death claims. It recognized the important public policy concern supported by the statute of limitations. The legislative purpose of a statute of limitations is to bar stale claims. *Thatcher v. De Tar*, 351 Mo. 603 (1943). Case No. 3 was filed over 20 months after the first savings statute expired, 35 months after the original statute of limitations expired, and 71 months after Michael Lang's death. It is precisely this type of claim that the statute of limitations was designed to bar.

Statutes of limitations promote justice by preventing surprises through plaintiff's revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). Accepting Plaintiffs' argument that there is no limit to the number of refilings is unsupported and would completely defeat the purpose of the statute of limitations.

The long-standing, general rule has been that a savings statute may only be used once. No good reason exists to deviate from that rule in wrongful death cases only. In fact, allowing an endless limitations period would subvert the legislature's intent to require timely filing.

F. The Second Dismissal is Final When Plaintiffs Have Already Benefited from the Savings Statute

Plaintiffs are also expected to argue that since a dismissal under § 538.225 is deemed without prejudice, they should be allowed to pursue Case No. 3. (Appx. A59-A60). This is also contrary to prior decisions of the Court. In a strikingly similar case, the Court noted that:

[A]t first blush, it seems that the circuit court’s designation of the dismissal of case #2 as without prejudice, as required by section 538.225, is antithetical to the statute of limitations barring the plaintiffs from immediately re-filing their action; however, a dismissal without prejudice does not mean that there is no bar to the re-filing of the action. Rather a dismissal without prejudice permits the party to bring another action for the same cause, unless the action is otherwise barred.

Mayes v. Saint Luke’s Hosp. of Kansas City, 430 S.W. 3d 260 (Mo. banc 2014), fn. 20.

In the present case, Case No. 3 is “otherwise barred” by the statute of limitations.

Finally, in prior briefing, Plaintiffs have argued that Missouri courts recognize a plaintiff’s ability to re-file, no matter how many times a dismissal is suffered. Plaintiffs cite to *Burian v. County Ins. and Financial Services*, 263 S.W.3d 785 (Mo. Ct. App. 2008), for this proposition. *Burian*, however, is clearly distinguishable in that it dealt with five *timely* filings (including four filings in an 11 month period); whereas, the case at bar

concerns *untimely* filings in that Case No. 2 and Case No. 3 were both filed outside the limitations period. Case No. 2, however, was deemed to be “saved” by the savings statute. *Burian* did not deal with multiple uses of a savings statute and is therefore, not instructive in dealing with the issues before the Court.

G. Other Jurisdictions Support Realtors’ Position

In response to Realtors’ Motion to Dismiss, Plaintiffs cited to *Hebertson v. Bank One, Utah, N.A.*, 995 P.2d 7 (Utah Ct. App. 1999) to support their position. *Hebertson* is not instructive and is no longer good law. *Hebertson* was a personal injury action arising out of a slip and fall. The plaintiff’s case in *Hebertson* followed a similar procedural course to the case at hand in that it was dismissed multiple times, the second dismissal was affirmed by the state’s supreme court, and plaintiff continued to file her suit after the supreme court’s affirmation of the previous dismissal. Plaintiff ultimately filed the same cause of action four times.

Hebertson is wholly irrelevant to the current issue because Missouri courts have already analyzed the state’s general savings statute applicable to personal injury cases and held that § 516.230 can only be used one time. In *Hebertson*, Utah courts had not yet undergone this analysis and the issue was one of first impression. Unlike Utah, the issue of how many times a plaintiff may reap the benefits of the state’s savings statute is well established in Missouri.

A footnote included in the *Hebertson* decision speaks directly to Missouri law and is therefore more instructive than the entirety of the case, as it directly relates to Missouri’s rules. The Utah court explicitly noted that *Foster v. Pettijohn*, 213 S.W.2d 487 (Mo. 1948)

interprets Missouri's own savings statute. The Utah Court of Appeals elected not to follow the *Foster* decision because the court in *Foster* interpreted a statute "with language distinct from that in [Utah's] saving statute." *Hebertson*, 995 P.2d 7 at Fn. 5. As admitted and addressed by the Utah Court of Appeals, the language assessed by the Utah Court of Appeals is wholly distinguishable from the language found in Mo. Rev. Stat. §516.230, and therefore is also wholly distinguishable from the language in Mo. Rev. Stat. §537.100.

Furthermore, the *Hebertson* decision has been abrogated by the Utah legislature. Utah's savings statute now provides that "on and after December 31, 2007, a new action may be commenced under this section *only once*." Utah Code Ann. § 78B-2-111 (2008)(emphasis added). The Utah Court of Appeals recently recognized that *Hebertson* was no longer good law in the case of *Norton v. Hess*, 374 P.3d 49 (Utah App. 2016). In *Norton*, the court held that plaintiff could only utilize the savings statute one time. *Id.* Therefore, any reliance upon *Hebertson* is without merit as Utah's savings statute and courts further support Relators' position.

If this Court is to look to outside jurisdictions to inform its decision, *Brown v. Solon Pointe at Emerald Ridge*, 2013 WL 5969112 (Ohio Ct. App. Nov. 7, 2013) is applicable and persuasive. *Brown* analyzes the invocation of a savings statute in the context of medical malpractice and wrongful death claims. The language of the Ohio statute at issue in *Brown* is nearly identical to Missouri's own savings statutes. In *Brown*, the Ohio Court of Appeals disallowed plaintiff from filing her cause of action for a third time after previously taking advantage of the state's savings statute one time and after the applicable statute of limitations had run.

The statute analyzed by the *Brown* court reads as follows:

In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff ... may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

Ohio Rev. Code Ann. § 23015.19 (2009).

The court properly followed prior interpretations of this statute that held “that ‘the savings statute can be used only once to refile a case.’” *Brown*, 2013 WL 5969112 *6 (quoting *Thomas v. Freeman*, 680 N.E.2d 997, 999 (Ohio 1997)). The court supported its decision by addressing the need to prevent plaintiffs from infinitely refiling his or her action because to do so would “effectively eliminate statutes of limitations.” *Id.* (quoting *Hamrick v. Ramalia*, 2012 WL 1566574 *3 (Ohio Ct. App. May 3, 2012)).

Conclusion

The long-standing, general rule has been that a savings statute may only be used once. No good reason exists to deviate from that rule for wrongful death cases only. In fact, allowing an endless limitations period would subvert the legislature’s intent to require timely filing. There is no substantive difference between §516.230 and §537.100, which

would allow the plaintiffs to use the savings statute more than once under §537.100 while plaintiffs are prohibited from doing so under §516.230.

Relators respectfully request that the Court make its writ of prohibition absolute, thereby prohibiting Respondent from taking any action other than granting Relators' Motion to Dismiss all counts as barred by the statute of limitations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was emailed this 21st day of November, 2016, to:

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