SC95858

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IN THE MISSOURI SUPREME COURT

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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

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# RELATORS' REPLY BRIEF

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# TABLE OF CONTENTS

**PAGE**

# I. TABLE OF AUTHORITIES

**AUTHORITY** **PAGE**

**Cases**

**Constitutional and Statutory Provisions**

## II. REPLY TO PLAINTIFFS'/RESPONDENT'S ARGUMENTS

### A. The Court Specifically Concluded that Plaintiffs' Claims Were Precluded by a Second Dismissal

As anticipated in Relators' Brief, Plaintiffs[1] rely extensively upon the Court's Footnote 6 from Case No. 2 in order to argue that their claims are not time barred. *Lang v. Goldsworthy*, 470 S.W.3d 748, FN6 (Mo. 2015). Plaintiffs completely ignore, however, two passages in the body of the opinion, which clearly indicate that Plaintiffs' claims are time barred. This Court held as follows:

> 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)(Relators' Appx. A5)(emphasis added).

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. (Relators' 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.*

[1] To avoid confusion, Respondent is referred to as "Plaintiffs" throughout this Brief.

Footnote No. 6 of this Court's opinion, relied upon by Plaintiffs, states:

> 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).

Plaintiffs seem to interpret this restraint from addressing an issue not before the Court in dicta as a free pass to repeatedly refile their case under Missouri Revised Statute § 537.100. The Supreme Court is not able to decide an issue not before it. Therefore, the Court was unable to extrapolate upon, or fully extinguish, a plaintiff's ability to refile multiple times under § 537.100. Plaintiffs incorrectly assume that the Court "specifically left the door open for Plaintiffs to file this case again." Since it is improper for the Court to decide an issue not before it, footnote 6 in the *Lang* decision has no bearing upon whether plaintiffs are entitled to refile under § 537.100. The text of the opinion, however, clearly sets forth Missouri's long practice of only allowing a savings statute to be utilized one time.

Even Plaintiffs recognized this long understood point of Missouri law 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)(emphasis added).

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.

### B. *Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703 (Mo. 2015), is not Analogous to the Present Action

Plaintiffs place great weight upon this Court's decision in *Boland v. St. Luke's Health System, Inc.*, 471 S.W.3d 703 (Mo. 2015). In *Boland*, the Court observed that while the general statute of limitations in Chapter 516 of the Missouri Revised Statutes contains a tolling provision for fraudulent concealment under the statute of limitations, the complimentary provision found in § 537.100 governing wrongful death claims contains no such tolling provision. Due to this observation and the discrepancies between the plain language of the general personal injury statutes and the wrongful death statues, the Court held that plaintiffs' claims were barred because they were made more than three years after the patients had died, regardless of any fraudulent concealment.

The case at hand is distinguishable from *Boland* in that the savings statute language being compared between Chapters 516 and 537 *both* lack the language at issue – the "one dismissal rule" language that has been repeatedly interpreted to be an intangible, yet

indispensable, element of § 516.230. *See Williams v. Southern Union Co.*, 364 S.W.3d 228, 231 (Mo. App. W.D. 2011)(holding plaintiff may receive the benefit of one-year savings statute only once); *Heintz v. Swimmer*, 922 S.W.2d 772, 776 (Mo. App. E.D. 1996)(holding plaintiff may receive benefit of savings statutes only once in relation to statute of limitations); and *Britton v. Hamilton*, 740 S.W.2d 704, 705 (Mo. App. E.D. 1987)(holding plaintiffs get the benefit of the savings statute only once).

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….

Missouri Revised Statute § 537.100, which governs the present action, contains essentially identical language 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…

Case law interpreting the savings statute under Chapter 516 has consistently held that the savings statute may only be used one time. The savings statute in § 516.230 and that contained in § 537.100 are virtually identical. There is no compelling reason why the courts should allow these virtually identical savings statutes to be interpreted differently and applied inconsistently.

*Boland* is not instructive or binding as plaintiffs would argue because the statutes discussed in that case (§ 516.280 and § 537.100) contain very different language. It is clear from the language of the statutes at issue in *Boland* that the legislature intended to include a fraudulent concealment exception to the statute of limitations under § 516.280. There was no such language contained in § 537.100. In *Boland*, the Court refused to add language to a statute that was not intended by the legislature. This is not an issue in the present action. In the present action, the issue is not one of legislative intent since both § 516.230 and § 537.100 are silent on the "one dismissal" rule. This is not a matter of statutory interpretation, but rather a rule that has been consistently established in Missouri common law. Missouri courts have consistently held that plaintiff may utilize the savings statute only one time. There is nothing different in the language of § 537.100 versus the language in § 516.230 that would allow plaintiffs to use the savings statute more than once under § 537.100 while plaintiffs are concurrently prohibited from doing so under § 516.230.

### C. There is no Meaningful Difference Between the Savings Statute Provisions of § 516.230 and § 537.100

Through rather tortured logic, Plaintiffs attempt to argue that § 537.100 and § 516.230 differ in some meaningful way. As set forth above, both statutes contain the same savings statute language.

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).

It would be nonsensical and highly inconsistent for there to be two different rules for these two essentially identical statutes. As set forth in Relators' Brief, Missouri courts have consistently held that a plaintiff may utilize the savings state under § 516.230 one time. The same rationale should be applied to the virtually identical savings statute contained in § 537.100.

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' interpretation of § 537.100 would effectively eliminate

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

Therefore, those Missouri cases establishing a "one dismissal rule" under § 516.230, cited in Respondent's Brief, should guide this Court to the same conclusion regarding § 537.100.

**D. The Utah Court of Appeals Opinion in *Hebertson v. Bank One, Utah, N.A.*, 995 P.2d 7 (Utah Ct. App. 1998), is not Persuasive and the Case Has Been Specifically Abrogated**

Plaintiffs rely heavily upon the Utah Court of Appeals decision in *Hebertson v. Bank One, Utah, N.A.*, 995 P.2d 7 (Utah Ct. App. 1999) to support their position. It is perplexing that Plaintiffs continue to take this position after Relators pointed out in their Brief that *Hebertson* is not only distinguishable, but is also 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 Utah Supreme Court, and plaintiff continued to file her suit after the 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.

### E. Statutes of Limitations Serve an Important Function and Allowing Plaintiffs to Utilize the Savings Statute in § 537.100 More Than Once Would Effectively Eliminate the Statute of Limitations in Wrongful Death Actions

Plaintiffs entirely ignore the important public policy considerations behind statutes of limitations. Statutes of limitations promote "rapid resolution of disputes, repose for those against whom a claim could be brought, and avoidance of litigation involving lost evidence or distorted testimony of witnesses." *Lane v. Non-Teacher School Employee Retirement System of Missouri*, 174 S.W.3d 626 (Mo. Ct. App. 2005)(quoting *Union Pacific R.R. Co. v. Beckham*, 138 F.3d 325, 330 (8th Cir.1998)). Statutes of limitations promote justice by preventing surprises through plaintiffs' revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. *CTS v. Waldburger*, 134 S.Ct. 2175 (2014). The present action is precisely the type of case that the statute of limitations is designed to protect against. It has now been more than seven years since Michael Lang's death.

If Plaintiffs' position is adopted, there is virtually no limit to the amount of times a wrongful action could be dismissed and refiled. This would completely defeat the purpose of the statute of limitations. It would also allow stale claims to clog the courts for years, delaying the efficient disposition of properly filed claims. The Court should continue to uphold the important policy considerations promoted by the statute of limitations.

### F. Allowing Plaintiffs to Utilize the Savings Statute in § 537.100 More Than Once Would Require This Court to Essentially Overrule Precedent that the Savings Statute in § 516.230 Can Only be Used Once, Opening the Door to Multiple Dismissals and Refilings Under Chapter 516

In light of the fact that § 537.100 and § 516.230 are for all practical purposes identical, allowing multiple refilings under § 537.100 would require this Court to overrule cases interpreting § 516.230. Section 516.230 sets forth the savings statute for actions included in Chapter 516 of the Missouri Revised Statutes. Chapter 516 sets forth the statutes of limitations for a variety of civil actions, including: actions for recovery of lands (§ 516.010); actions for breach of covenant restricting land use (§ 516.095); tort actions against architects, engineers or builders of defective improvement to real property (§ 516.097); actions for errors or omissions involving a survey of land (§ 516.098); actions against health care and mental health providers (§ 516.105); actions upon a written contract (§ 516.110); actions upon express or implied contract, actions for trespass on real estate, actions for taking goods or chattel, actions for personal injury, actions for fraud (§ 516.120); actions against a sheriff, coroner or other officer, an action upon a statute for a penalty or forfeiture (§ 516.130); actions for libel, slander, injurious falsehood, assault, battery, false imprisonment, criminal conversion, malicious prosecution, and actions for unpaid wages (§ 516.140).

Actions governed by Chapter 516 likely make up the vast majority of suits filed in the State of Missouri. If this Court were to conclude that the "one dismissal rule" does not apply to the present action, this would open the door for plaintiffs throughout Missouri to

argue that the "one dismissal rule" also should not apply to § 516.230 since that statute and § 537.100 are virtually identical. Thus, a ruling in Plaintiffs' favor in the present action has the potentially to eliminate the statute of limitations in not only wrongful death actions, but all actions governed by Chapter 516. Such a decision would have devastating consequences to the efficient administration of justice in Missouri.

**G. Section 537.100 is Constitutional**

In Case No. 2, Plaintiffs challenged the constitutionality of § 538.225. Plaintiffs now wish to revisit that issue and to make the identical arguments concerning § 537.100. For the reasons set forth in Relators' Brief and those set forth in Section A-F of Relators' Reply, there is no need for the Court to address Plaintiff's constitutional arguments. As the Court point out in Case No. 2, "[t]his Court will avoid deciding a constitutional question if the case can be resolved fully without reach it." *Lang v. Goldsworthy*, 470 S.W.3d 748, 751 (Mo. banc 2015)(citing *SLAH, L.L.C. v. City of Woodson Terrace*, 378 S.W.3d 357, 361 (Mo. banc 2012)). This matter can clearly be resolved without reaching Plaintiffs' constitutional arguments. To the extent Plaintiffs wish to revisit § 538.225, their argument is improper since that statute is not at issue in the present action. Relators will not rehash all of the arguments supporting the constitutionality of § 538.225.[2] Rather, to

[2] At page 44 of Respondent's Brief, Plaintiffs improperly assert "Here, Dr. Goldsworthy killed Mr. Lang by breaking his neck." Plaintiffs have sued two Dr. Goldsworthys, Dr. Patrick Goldsworthy and Dr. Aston Goldsworthy. It is unclear from this false assertion to which doctor they are referring. Nonetheless, the underlying facts of the case are not at

the extent that the Court wishes to revisit § 538.225, Relators incorporate by reference their arguments set forth in their Respondents' Brief in Case No. SC94814.

Even if the Court were to reach the Plaintiffs' constitutional claims related to § 537.100, these claims are without merit. Missouri courts have long held that statutes of limitations "are looked upon with favor, and will not be held unconstitutional unless they are plainly unreasonable." *Faris v. Moore*, 256 Mo. 123 (Mo. 1914). In *State ex rel. Bier v. Bigger*, 352 Mo. 502 (Mo. 1944), the Missouri Supreme Court held that a statute of limitations that barred probate of a will after one year from the date of first publication of granting letters testamentary or of administrations did not deny due process and was therefore, constitutional.

This Court has further recognized that "the legislative branch of the government has the power to enact statutes of limitations and inherent in that power is the power to fix the date when the statute commences to run." *Laughlin v. Forgrave*, 432 S.W.2d 308, 314 (Mo. 1968)(superseded by statute on other grounds as recognized in *Ambers-Phillips v. SSM DePaul Health Center*, 459 S.W.3d 901 (Mo. 2015). In *Laughlin*, the Court further held that "statutes of limitations are favorites of the law and will not be held

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issue before the Court, nor is there any evidence in the record to support Plaintiffs' assertion. Rather, the evidence developed over two years of extensive discovery revealed that Dr. Aston Goldsworthy never treated the decedent and that Dr. Patrick Goldsworthy last treated the decedent in June 2009, six months before he was found dead in his home of a broken neck.

unconstitutional as denying due process unless the time allowed for commencement of the action and the date fixed when the statute commences to run are clearly and plainly reasonable." *Id.*

In *Green v. Washington University Medical Center*, 761 S.W.2d 688 (Mo. Ct. App. 1988), plaintiff argued that § 516.105 (the medical malpractice statute of limitations), violated his equal protection and due process rights by denying his access to the court system. The court rejected this argument, relying on the reasoning in *Laughlin*, set forth above. *Id.* at 690.

This issue was also raised in *Mayes v. Saint Luke's Hospital of Kansas City*, 430 S.W.3d 260 (Mo. banc 2014), a strikingly similar case to the present action. *Mayes* also involved allegations of wrongful death stemming from medical care. Also like the present action, the plaintiffs in *Mayes* obtained an affidavit of merit pursuant to § 538.225 in the first action, dismissed the case, filed a second action, failed to file the affidavit and defendant obtained a dismissal due to this failure. Plaintiffs then filed a third action. Unlike the present action, however, in *Mayes*, the trial court dismissed case #3 on the grounds that it was barred by the statute of limitations set forth in § 537.100. On appeal to this Court, plaintiffs argued that he would not have had to file case #3 but for case #2 being dismissed as a result of § 538.225. The Court refused to revisit § 538.225 and noted "**the trial court properly dismissed case #3 because, as the plaintiffs admit, their claims were filed outside the statutes of limitations**." *Id.* at 274 (emphasis added). Just as in *Mayes*, the Plaintiffs' Case No. 3 has been filed outside the statute of limitations.

Plaintiffs point to no authority for their position that the statute of limitations set forth in § 537.100 is unconstitutional. Rather, Plaintiffs simply reiterate all of the same arguments that they made in Case No. 2 challenging § 538.225. Section 537.100 is constitutional and supports the important public policy of the timely administration of justice.

## III. CONCLUSION

Missouri courts have long held that plaintiffs may only avail themselves of a savings statute one time. To conclude otherwise would undermine statutes of limitations governing the vast majority of lawsuits filed in Missouri. There is no meaningful difference between the savings statute in § 516.230 and that which applies to wrongful death actions set forth in § 537.100. Therefore, this Court should remain consistent that savings statutes may only be used once regardless if the claim is brought under Chapter 516 or Chapter 537. Statutes of limitations are favored, constitutional and promote the efficient administration of justice. To allow unlimited dismissals and refilings would undermine the effect and purpose of the statute of limitations. Therefore, Relators respectfully urge this Court to make its Writ of Prohibition absolute, ordering the trial court to grant Relators' Motion to Dismiss.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that to the best of my knowledge, information and belief and after reasonable inquiry, this brief complies with the limitations of Rule 84.06(b). There are 4,428 words in this brief.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was emailed this 22nd day of December, 2016, to:

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