Missouri Court of Appeals
Southern District

In Division

STATE OF MISSOURI EX REL.
BUTLER COUNTY EMS, LLC.,

Relator,

v.

THE HONORABLE KACEY LEE PROCTOR,
JUDGE OF THE CIRCUIT COURT OF
BUTLER COUNTY,

Respondent.

Number SD39365

Filed: July 28, 2026

ORIGINAL PROCEEDING IN MANDAMUS

PRELIMINARY WRIT OF MANDAMUS MADE PERMANENT

Butler County EMS, LLC ("Relator") seeks a permanent writ of mandamus compelling the Honorable Kacey Lee Proctor ("Respondent") to grant Relator's Motion to Dismiss Deanne Vaughn's ("Plaintiff") petition alleging wrongful death claims against Relator. As Plaintiff failed to serve Relator within 180 days as required by § 537.100.2,[1] Counts 1, 3, 5 and 6 of the petition must be dismissed with prejudice. As Count 4 fails to

[1] Unless otherwise indicated, all statutory references are to RSMo (2016), as supplemented.

state a claim for Negligent Infliction of Emotional Distress, it must also be dismissed but we leave it to the trial court's discretion as to whether Plaintiff will be permitted an opportunity to amend such claim. Our preliminary writ of mandamus is made permanent.

Factual Background and Procedural History

Plaintiff's wife ("Decedent") suffered a medical emergency at her home on December 7, 2019. Relator was dispatched to Decedent's home and transported her to Poplar Bluff Regional Medical Center ("PBRMC"). Decedent subsequently passed away on December 8, 2019.

Plaintiff initially filed her petition asserting a single count for wrongful death against Relator and PBRMC on December 5, 2022, in the Circuit Court of Butler County, Missouri. Plaintiff voluntarily dismissed that petition without prejudice on October 23, 2023.

Plaintiff refiled her petition on August 13, 2024, alleging the same facts and the same wrongful death claim. On February 9, 2025, Plaintiff filed a "First Amended Petition For Wrongful Death" (the "Amended Petition") asserting five claims against Relator: 1) Count 1 for "Negligence;" 2) Count 3 for "Pain and Suffering of Decedent Prior to Death (Survival Action);" 3) Count 4 for "Pain and Suffering of Plaintiff (Negligent Infliction of Emotional Distress);" 4) Count 5 for "Loss of Consortium;" and 5)

Count 6 for "Economic Damages." [2] While Plaintiff sought leave from the trial court to file her Amended Petition, such leave was not required as none of the Defendants had served responsive pleadings.[3]

In Count 1, Plaintiff asserts that Relator breached its duty of care and that "as a direct and proximate result of [Relator's] negligence, Decedent suffered fatal injuries…." In Count 3, Plaintiff asserts that due to Relator's "delay, improper treatment and negligence, Decedent experienced conscious significant pain, suffering and emotional distress prior to her death" and seeks damages for such pain and suffering "prior to death." In Count 4, Plaintiff asserts that she "witnessed the delay and incompetence" of Relator and as a result suffered severe emotional distress. In Count 5, Plaintiff seeks damages for the loss of consortium "due to Decedent's untimely passing." In Count 6, Plaintiff seeks lost future wages and support as well as other economic damages due to Relator's negligent acts that "resulted in the death of Decedent."

Relator was served on February 13, 2025, 184 days after the suit was refiled. On February 14, 2025, Plaintiff filed a motion for an extension of time to serve Relator, asserting that under Rule 54.21, the trial court had the discretion to extend the time for

[2] Plaintiff's Count 2 is asserted against PBRMC only and is not at issue in this appeal.

[3] Rule 55.33(a) provides that "[a] pleading may be amended once as a matter of course at any time before a responsive pleading 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."

service of process. Respondent granted the motion and Plaintiff was given an additional ten days to serve Relator.[4]

Relator filed a motion to dismiss with prejudice on May 19, 2025, alleging among other grounds that Plaintiff failed to timely serve Relator within 180 days of the refiling date as required under § 537.100.2, and that Count 4 of the Amended Petition failed to allege that Plaintiff was within the zone of danger required for a claim of negligent infliction of emotional distress. Plaintiff filed a response to Relator's motion claiming there was "some confusion" regarding the issuance of a new Summons and that any "minor delay" in service "does not warrant the harsh remedy of dismissal with prejudice, especially where no prejudice to Defendant has been demonstrated." After Respondent denied Relator's motion to dismiss, Relator moved for a preliminary writ of mandamus which this Court granted on January 23, 2026.

Standard of Review

"Writs of ... mandamus are extraordinary remedies." ***State ex rel. Hanaway v. Curless***, 722 S.W.3d 842, 845 (Mo. App. S.D. 2025) (quoting ***State ex rel. Anderson v. Preyer***, 720 S.W.3d 675, 682 (Mo. App. S.D. 2025)). A writ of mandamus is appropriate "where a court has exceeded its jurisdiction or authority and where there is no remedy

[4] Plaintiff was also granted an extension of time with respect to PBRMC. PBRMC was served on or about February 14, 2025, and filed a motion to dismiss on multiple grounds, including the failure to effectuate service within 180 days of August 13, 2024. On May 28, 2025, the trial court granted PBRMC's motion with prejudice pursuant to § 538.225, § 516.105.2 and § 537.100.2.

through appeal." ***Brick v. Koeppen***, 672 S.W.3d 62, 65 (Mo. App. S.D. 2023) (quoting ***State ex rel. Vacation Mgmt. Sols., LLC v. Moriarty***, 610 S.W.3d 700, 701 (Mo. banc 2020)). "A litigant seeking a writ of mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed." ***Id***. (quoting ***State ex rel. Universal Credit Acceptance, Inc. v. Reno***, 601 S.W.3d 546, 548 (Mo. banc 2020)) (internal quotations omitted). "This right may arise from a statute that creates a right but does not explicitly provide mandamus as a remedy to enforce the right." ***Id***.

This Court's review of the trial court's ruling on a motion to dismiss is generally "limited to the sufficiency of the pleadings on their face." ***James v. School District of Kansas City 33***, 728 S.W.3d 648, 657 (Mo. App. W.D. 2025) (citing ***ADP Dealer Servs. Grp. v. Carroll Motor Co***., 195 S.W.3d 1, 6 (Mo. App. E.D. 2005)). "A motion to dismiss for failure to state a claim on which relief can be granted is solely a test of the adequacy of the petition." ***Farmers Insurance Company, Inc. v. Mabie***, 652 S.W.3d 693, 696 (Mo. App. W.D. 2022) (quoting ***Mitchell v. Phillips***, 596 S.W.3d 120, 122 (Mo. banc 2020)). "In considering whether a petition states a claim upon which relief can be granted, this Court must accept all properly pleaded facts as true, giving the pleadings their broadest intendment, and construe all allegations favorably to the pleader." ***Id***. (internal quotations omitted).

Analysis

As an initial matter, we note that Respondent did not file a brief in this case. While filing a responsive brief is not required and there is no penalty for failing to do so, we must resolve Relator's claims without the benefit of any arguments Respondent may have raised. ***Fowler v. Minehart***, 412 S.W.3d 917, 918 n.1 (Mo. App. S.D. 2013). While Relator asserts two points on appeal, we will focus our analysis on the first Point as it is dispositive of most of Relator's claims.

Wrongful Death Claims

Relator's first Point asserts that a writ is appropriate pursuant to § 537.100.2, which requires the trial court to dismiss wrongful death claims that are not served on a defendant within 180 days of filing a petition. Because this argument only applies to wrongful death claims, we must determine: 1) which of Plaintiff's claims seek relief for wrongful death, and 2) whether the provisions of § 537.100.2 have been met with respect to such claims.

Plaintiff's Amended Petition is titled as a "Wrongful Death Action," and asserts that it "is brought pursuant to §537.080, [RSMo], for the wrongful death of Decedent caused by the negligence of Defendants." The Amended Petition further alleges that "[a]s a direct and proximate result of Defendants' negligence, Decedent's condition worsened, ultimately resulting in her untimely death on December 8, 2019." These allegations are incorporated into each Count of the Amended Petition. In addition, Plaintiff's response to Relator's Motion to Dismiss and her filing in opposition to

Relator's request for a writ repeatedly assert that the claims being asserted in the Amended Petition were not medical negligence claims but were claims asserted under § 537.080 for wrongful death and only under such section.[5]

Plaintiff incorporates the facts from her general allegations into each count of the Amended Petition, as well as incorporating the factual allegations from each preceding count into subsequent ones, without separating out how the specific facts apply to the elements of each individual claim. Thus, we must examine the substance of each individual count to determine if it is a wrongful death claim. *See* ***Interest of J.T.J.***, 635 S.W.3d 566, 571 n.7 (Mo. banc 2021) ("The designation of a filing does not control its legal character."); *see also* ***Labrayere v. Bohr Farms, LLC***, 458 S.W.3d 319, 334-35 (Mo. banc 2015) ("The nature of an alleged cause of action is based on the substance of the pleading, not the title."); and ***Nazeri v. Missouri Valley College***, 860 S.W.2d 303, 317 (Mo. banc 1993) ("As noted by our court of appeals, on a motion to dismiss a court is not required to shape extraneous recitations in other counts into a cause of action to match the rubric for remedy the pleader attributes." (internal quotations and citation omitted)).

[5] In her amended opposition to Relator's Motion to Dismiss, Plaintiff asserted that "allegations against Defendant Butler County EMS, LLC [deal] with administrative, operational and logistical failures; none of which involve medical judgment, diagnosis or treatment; they deal with *general gross negligence under wrongful death standards*." (emphasis added) Further, in her Suggestions in Opposition to Relator's Petition for Mandamus, Plaintiff asserts on two separate occasions that "[b]oth the original petition and the First Amended Petition expressly invoke § 573.080, [RSMo], and only § 537.080."

Count 1 of the Amended Petition states a traditional claim for wrongful death, alleging that Relator breached its duty of care and that "as a direct and proximate result of [Relator's] negligence, Decedent suffered fatal injuries[.]"

> To succeed on their wrongful death claims against the [defendants] on a theory of negligence, the [plaintiffs] were required to show that: (1) the [defendants] owed a duty of care to [decedent]; (2) they breached that duty; (3) the breach was the cause in fact and proximate cause of [decedent's] death; and (4) as a result of the breach, [decedent] suffered damages.

Robinson v. Missouri State Highway and Transp. Com'n, 24 S.W.3d 67, 74 (Mo. App. W.D. 2000). Count 1 of the Amended Petition is a claim for wrongful death.

Count 3 of the Amended Petition is labeled by Plaintiff as a "survival action." Claims for lost chance of survival and wrongful death are traditionally treated as separate claims because:

> The causation requirements for wrongful death and lost chance of survival are different: "In wrongful death actions, plaintiffs must establish that, but for the defendant's actions or inactions, the patient would not have died." ***Sundermeyer v. SSM Reg'l Health Servs.***, 271 S.W.3d 552, 554 (Mo. banc 2008). For a lost chance of recovery or survival claim, however, "it is impossible to establish the patient would have recovered or survived but for the defendant's alleged failure to properly diagnose or treat." ***Markham v. Fajatin***, 325 S.W.3d 455, 460 (Mo. App. E.D. 2010) (citing ***Wollen v. DePaul Health Center***, 828 S.W.2d 681, 685 (Mo. banc 1992)).

Kivland v. Columbia Orthopedic Group, LLP, 331 S.W.3d 299, 305 (Mo. banc 2011).

While Count 3 is labeled as a "survival action," the factual allegations do not support such a claim. Plaintiff incorporates into Count 3 her allegations that the action was brought "pursuant to §537.080, [RSMo], for the wrongful death of Decedent caused

by the negligence of Defendants," and that "[a]s a direct and proximate result of Defendants' negligence" Decedent ultimately died. In addition, Count 3 asserts that due to Relator's "delay, improper treatment and negligence, Decedent experienced conscious significant pain, suffering and emotional distress prior to her death" and seeks damages for such pain and suffering "prior to death."

Count 3 contains no allegation that it is impossible to establish whether Decedent would have recovered or survived but for Relator's alleged failures, and in fact asserts the opposite and directly ties Decedent's death to Relator's conduct. Where a claimant fails to allege that it is impossible to establish that a person died as a result of a defendant's negligence and instead reasserts that but for the negligence of that defendant such person would not have died, it is merely a restatement of a wrongful death claim. ***Kivland***, 331 S.W.3d at 305-306. Thus, Count 3 of the Amended Petition is also a claim for wrongful death.

Count 4 is Plaintiff's claim for negligent infliction of emotional distress. Such a claim is not a derivative claim arising from the injury of another but is instead for the emotional injury of a party arising from the negligent behavior of another. ***Bosch v. St. Louis Healthcare Network***, 41 S.W.3d 462, 465 (Mo. banc 2001). Thus, Count 4 of the Amended Petition is not a claim for wrongful death, and we will analyze such claim separately without consideration of the requirements of § 537.080.

Counts 5 and 6 are claims for "Loss of Consortium" and "Economic Damages."

In Count 5, Plaintiff seeks damages for the loss of consortium "due to Decedent's untimely passing." In Count 6, Plaintiff seeks lost future wages and support as well as other economic damages due to Relator's negligent acts that "resulted in the death of Decedent."

Missouri does not recognize a common law wrongful death claim. ***Dodson v. Ferrara***, 491 S.W.3d 542, 558 (Mo. banc 2016). § 537.090 describes the damages recoverable in a statutory wrongful death action, and states:

> In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, ***having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support*** of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts ***may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued.*** The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable….

(Emphasis added). The damages sought by Plaintiff in Counts 5 and 6 are specifically contemplated as part of a wrongful death action, and the Amended Petition cites no authority, other than § 537.080, for the recovery of such damages. Thus, Counts 5 and 6 of the Amended Petition are also claims for wrongful death.

Having determined that Counts 1, 3, 5 and 6 of the Amended Petition are all wrongful death claims, we next examine whether the requirements of § 537.100.2 have been satisfied with respect to such claims.

The time limit for service for a wrongful death claim is set out in § 537.100.2:

> Any service on a defendant by a plaintiff after the statute of limitations set forth in subsection 1 of this section has expired or after the expiration of any extension of the time provided to commence an action pursuant to law shall be made within one hundred eighty days of the filing of the petition. **If such service is not made on a defendant within one hundred eighty days of the filing of the petition, the court shall dismiss the action against the defendant.** The dismissal shall be without prejudice unless the plaintiff has previously taken or suffered a nonsuit, in which case the dismissal shall be with prejudice.

(Emphasis added).

This Court analyzed nearly identical statutory language in ***Brick***, 672 S.W.3d at 66. In that case, the plaintiff filed the initial medical malpractice lawsuit three days before the statute of limitations was set to run. ***Id***. at 64. The defendants were never served with process and the suit was dismissed. ***Id***. The plaintiff refiled the lawsuit a year later. ***Id***. After the suit was refiled, the defendants were not served with process for over two hundred days. ***Id***. at 65. The defendants filed a motion to dismiss pursuant to § 516.105.2, which the trial court denied because it held the statute conflicted with the discretion accorded the trial court by Rule 54[6] providing only that service must be

[6] All rule references are to Missouri Court Rules (2024).

prompt. ***Id***. This Court held there was no conflict between § 516.105.2 and Rule 54, that the statutory language was unambiguous, and the trial court was required to dismiss the plaintiff's petition because the defendants were not served within 180 days. ***Id***. at 67.

Because the language in § 516.105.2 is nearly identical to the language in § 537.100.2, the ***Brick*** decision informs our analysis in this case.[7] Here, Plaintiff served Relator on February 13, 2025, three days after the 180-day deadline required under § 537.100.2.[8] "When a statute mandates that something be done by providing that it 'shall' occur and also provides what results 'shall' follow a failure to comply with the statute, it is clear that it is mandatory and must be obeyed." ***State ex rel. Tanner v. Nixon***, 310 S.W.3d 727, 731 (Mo. App. W.D. 2010) (quoting ***SSM Health Care St. Louis v. Schneider***, 229 S.W.3d 279, 281 (Mo. App. E.D. 2007)).

The plain language in § 537.100.2 is clear and unambiguous that trial courts must dismiss petitions that are not served on defendants within 180 days of filing. *See*

[7] § 516.105.2 governs the time limit for serving a defendant in a medical malpractice claim:

> Any service on a defendant by a plaintiff after the statute of limitations set forth in subsection 1 of this section has expired or after the expiration of any extension of the time provided to commence an action pursuant to law shall be made within one hundred eighty days of the filing of the petition. If such service is not made on a defendant within one hundred eighty days of the filing of the petition, the court shall dismiss the action against the defendant. The dismissal shall be without prejudice unless the plaintiff has previously taken or suffered a nonsuit, in which case the dismissal shall be with prejudice.

[8] February 9, 2025, is 180 days after August 13, 2024. As that date fell on a Sunday, Plaintiff would have had until February 10, 2025, to complete service.

Harpagon MO, LLC v. Bosch, 370 S.W.3d 579, 583 (Mo. banc 2012) ("if the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and ordinary meaning, then [this Court is] bound by that intent[.]" (internal quotations and citation omitted)). Based on statutory language and our previous analysis in ***Brick***, Respondent did not have the authority to extend the time for service beyond the explicit 180-day limit set forth in § 537.100.2. *See* ***State ex rel. Missouri Highway and Transp. Com'n v. Gillespie***, 86 S.W.3d 459, 465 (Mo. App. W.D. 2002) ("Where the legislative intent is made evident by giving the language employed in the statute its plain and ordinary meaning, we are without authority to read into the statute an intent which is contrary thereto."). Because Plaintiff had previously dismissed her claims voluntarily, § 537.100.2 required Relator to dismiss Plaintiff's Counts 1, 3, 5 and 6 with prejudice due to the failure to effectuate service within the statutorily mandated timeframe.

Negligent Infliction of Emotional Distress Claim

Plaintiff's sole claim against Relator that is not covered under the wrongful death statute is her claim for negligent infliction of emotional distress. The elements of negligent infliction of emotional distress are:

> (1) that the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff, (2) that plaintiff was present at the scene of an injury producing, sudden event, and (3) that plaintiff was in the zone of danger, i.e., placed in reasonable fear of physical injury to her or his own person.

Bosch, 41 S.W.3d at 465. Thus, for a bystander to be entitled to recover for the negligent infliction of emotional distress, they must demonstrate that they were within the zone of danger, meaning that they were "placed in a reasonable fear of physical injury to his or her own person." ***Jarrett v. Jones***, 258 S.W.3d 442, 445 (Mo. banc 2008).

"When considering whether a petition states a claim upon which relief can be granted, the Court reviews the plaintiff's petition to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause of action that might be adopted in th[e] case." ***Nowell-Silman v. Missouri Dep't of Public Safety Veterans' Commission***, 698 S.W.3d 163, 166 (Mo. App. E.D. 2024) (quoting ***Forester v. May***, 671 S.W.3d 383, 386 (Mo. banc 2023)) (internal quotations omitted). Here, Count 4 of the Amended Petition does not allege that Plaintiff was within the zone of danger, or that she reasonably feared physical injury to herself. In fact, Relator states only that her claim is based on witnessing the "delay and incompetence" of Relator. Such allegation is insufficient to assert a claim of negligent infliction of emotional distress, and the trial court should have granted Relator's motion to dismiss on such ground.

Such dismissal, however, is not required to be with prejudice pursuant to § 537.100.2 because Relator's claim for negligent infliction of emotional distress is not a wrongful death claim covered by the statute. While we direct the trial court to dismiss Relator's claim as currently pled, we leave it to the discretion of the trial court to determine whether such dismissal is with or without prejudice and whether Plaintiff

should be allowed an opportunity to amend her claim to assert additional factual allegations.

> Generally, leave to amend a pleading shall be freely given, and can be granted after a dismissal. Rule 55.33(a); Rule 67.06. However, a party does not have an absolute right to file an amended petition. ***Doran v. Chand***, 284 S.W.3d 659, 666 (Mo. App. W.D. 2009). The decision to allow a party to do so is within the discretion of the trial court, and in determining whether to grant leave to amend, the trial court considers four factors: (1) the hardship to the moving party if leave to amend is denied; (2) the reasons the moving party omitted matters from the original pleading; (3) the timeliness of the request; and (4) any injustice that may result to the opposing party if leave is granted. ***Id.*** (quoting ***Moynihan v. City of Manchester***, 203 S.W.3d 774, 776 (Mo. App. E.D. 2006)).

Deloatch v. St. Louis Pub. Schs., 700 S.W.3d 306, 310 (Mo. App. E.D. 2024). In addition, a trial court is within its discretion to deny leave to amend if it determines that an amendment would be futile. *See* ***Sullivan v. City of University City***, 677 S.W.3d 844, 854 (Mo. App. E.D. 2023) (citing ***Suppes v. Curators of Univ. of Mo.***, 613 S.W.3d 836, 857 (Mo. App. W.D. 2020)) ("[W]here an amendment would be futile, the trial court does not abuse its discretion in denying leave to amend.")).

Conclusion

The preliminary writ issued by this Court is made permanent. We order Respondent to set aside the denial of Relator's motion to dismiss and dismiss Counts 1, 3, 5, and 6 of the Amended Petition with prejudice. In addition, we order Respondent to

dismiss Count 4 of the Amended Petition and determine whether such dismissal should be with or without prejudice as set forth in this opinion.

MATTHEW P. HAMNER, J. – OPINION AUTHOR

JEFFREY W. BATES, J. – CONCURS

JACK A.L. GOODMAN, J. – CONCURS