

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE, MISSOURI**

JEFF AND VICTORIA KRAMER,	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1116-CV04188
	)	
BIOLIFE PLASMA SERVICES L.P.,	)	Division: 5
Defendant.	)	

**ORDER**

Now on this day, the Court takes up (1) Defendant Biolife Plasma Services L.P.'s ("Defendant") Motion to Dismiss, filed May 10, 2011, and (2) Defendant's Motion for Extension of Time to Respond to Plaintiff Jeff and Victoria Kramer's ("Plaintiff's) Motion for Enforcement of Discovery.

Procedural History

On September 10, 2007, Plaintiff Jeff Kramer was allegedly injured during a visit to Defendant's Independence, Missouri location. On September 1, 2009, Plaintiffs filed their first Petition for Damages ("2009 Petition") alleging (1) Medical Malpractice – Negligence, (2) Loss of Consortium, and (3) Aggravating Circumstances – Punitive Damages. On April 6, 2010, the Court granted Defendant's Motion to Dismiss the 2009 Petition for failure to file a healthcare affidavit as required under Mo. Rev. Stat. §538.225.

On July 23, 2010, Plaintiffs filed their Petition for Damages ("2010 Petition") alleging (1) Medical Malpractice – Negligence, (2) Loss of Consortium, and (3) Aggravating Circumstances – Punitive Damages. On December 1, 2010, the Court granted Defendant's Motion to Dismiss the 2010 Petition for failure to timely file a healthcare affidavit as required under Mo. Rev. Stat. §538.225. On December 6, 2010, Plaintiffs filed a Motion to Reconsider Order Dismissing Case for Failure to File a Healthcare Affidavit. On January 27, 2011, the Court Denied Plaintiff's Motion to Reconsider Order Dismissing Case for Failure to File a Healthcare Affidavit.

On February 24, 2011, Plaintiffs filed the present Petition for Damages ("2011 Petition") alleging (1) Medical Malpractice – Negligence, (2) General Negligence, (3) Loss of Consortium, and (4) Aggravating Circumstances – Punitive Damages. On May 10, 2011, Defendant filed a

Motion to Dismiss and Suggestions in Support. On May 19, 2011, Plaintiffs filed an Opposition to Defendant's Motion to Dismiss and Suggestions in Support. On June 8, 2011, Defendant filed a Reply Brief in Support of its Motion to Dismiss.

On October 5, 2011, Plaintiff filed a Motion for Enforcement of Discovery. On October 17, 2011, Defendant filed a Motion for Extension of Time to Respond to Plaintiff's Motion for Enforcement of Discovery.

On October 26, 2011, Plaintiff Victoria Kramer filed a voluntary Motion to Dismiss her counts (Loss of Consortium) against Defendant without prejudice.

### Analysis

#### *Exhibits to Defendant's Motion to Dismiss*

Plaintiffs assert the Defendant relies on evidence beyond the pleadings, and that this motion should be treated as a Motion for Summary Judgment. Plaintiff supports this argument by directing the Court's attention to the exhibits attached to the Motion to Dismiss of which Defendant asks the Court to take judicial notice. In support of Defendant's Motion to Dismiss, Defendant asks this Court to take judicial notice of the procedural history of this case. Defendant argues this Court is not considering issues beyond the pleading themselves. Defendant's Reply in Support points out that the mere existence of attached exhibits does not render the Motion to Dismiss as one for Summary Judgment. This Court agrees.

A court may take judicial notice of records of other cases in connection with a Motion to Dismiss without converting it to a Motion for Summary Judgment. *Vogt v. Emmons*, 158 S.W.3d 243, 247 (Mo. App. E.D. 2005). Thus, this Court reviews the pending Motion as a Motion to Dismiss.

#### *Statute of Limitations – Medical Malpractice*

In the 2009 and 2010 Petitions, Plaintiffs set forth three counts in asserting a medical malpractice claim. In both petitions, Plaintiffs specifically allege, among other things, that Defendant is a medical facility. When asserting medical malpractice claims against a healthcare

provider, the action must be brought within two years from the date of the occurrence. Mo. Rev. Stat. § 516.105.

Plaintiff alleges that Jeff Kramer was injured on September 10, 2007. Thereafter, on September 1, 2009, Plaintiffs timely filed their first Petition for Damages. On April 6, 2010, the Court granted Defendant's Motion to Dismiss the Petition for failure to file a healthcare affidavit.

Pursuant to Mo. Rev. Stat. § 516.230, commonly referred to as the "savings statute", Plaintiff was afforded the opportunity to re-file their Petition within one year of the non-suit. Mo. Rev. Stat. § 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."

The Missouri Court of Appeals in reviewing this statute determined that "The savings statute requires that (1) the action . . . "commenced" within the applicable period of limitations; (2) plaintiff suffer[ed] a non-suit; and (3) plaintiff commence a new action within one year of the non-suit." *Korman v. Lefholz*, 890 S.W.2d 771 (Mo. Ct. App. 1995).

Here, Plaintiff suffered a non-suit of their 2009 Petition on April 6, 2010. This dismissal allowed Plaintiff to commence a new action within one year of the non-suit. Thus, pursuant to Mo. Rev. Stat. § 516.230, Plaintiffs had until April 6, 2011 to re-file their action for medical malpractice.

Plaintiffs filed their 2010 Petition for Damages on July 23, 2010. This second filing was well within the one year period afforded by the Missouri savings statute. Thus, Plaintiff had met the requirements to invoke the Missouri savings statute. *Id.* at 774. Plaintiffs filed their 2011 Petition for Damages on February 24, 2011. The current 2011 Petition is also clearly within the one-year period that the savings statute afforded to the Plaintiff as it was commenced before April 6, 2011. *Id.*

Defendant's Motion to Dismiss seems to argue that the Plaintiff is only allowed to file one petition for damages within the one-year period provided by the savings statute. Defendant argues since the Court granted Defendant's Motion to Dismiss the 2010 Petition on December 1, 2010, during the one-year period, the Plaintiff's claims were forever time barred because "...the

savings statute can only be used *once* if the statute of limitations for an action has expired." Defendant cites *Heintz v. Swimmer*, 922 S.W.2d 772, 777 (Mo. App. 1996) in support of its position.

Defendant's interpretation of *Heintz* in this regard is misplaced. The limitation on the Missouri savings statute refers only to the one-year time period, not the number of actions that are filed within that time period. The Missouri Supreme Court specifically reviewed this issue holding that the savings statute "...permits more than one action to be filed, so long as the first as well as any subsequent suit is brought within the single one-year period provided by the statute after a nonsuit." *Cady v. Harlan*, 442 S.W.2d 517, 520 (Mo. 1969). In discussing this issue, the Court stated that if a plaintiff were limited to bringing a single action within the one-year period following a non-suit, the statute's language containing the phrase "such plaintiff may commence a new action *from time to time*, within one year after such nonsuit" would serve no apparent purposed (emphasis added). *Id.* at 520.

Although not binding, the Court finds persuasive the Tennessee Court of Appeals' holding in *Freeman v. CSX Transportation, Inc., et al*, 2011 Tenn. App. LEXIS 172 (2011), which cited to the Missouri Supreme Court's holding in *Cady*. In *Freeman*, the Court held that the Tennessee Savings Statute, which also contains the phrase "from time to time," "...does not restrict a plaintiff from filing multiple lawsuits within one year of its last non-merits dismissal of a suit filed within the statute of limitations." *Freeman*, at 32.

Plaintiffs filed their 2011 Petition for Damages on February 24, 2011. This action is clearly within the one-year period that the savings statute afforded the Plaintiff as it was commenced before April 6, 2011.

#### *Statute of Limitations - General Negligence*

Pursuant to Mo. Rev. Stat. § 516.120, actions for any injury to the person must be brought within five years of the date of the occurrence. Plaintiff Jeff Kramer alleges that on September 10, 2007, he was injured during a visit to Defendant's place of business. On February 24, 2011, Plaintiff's filed the 2011 Petition for Damages in this matter. This petition alleges a new cause of action for General Negligence. In Count II of its Petition, Plaintiffs allege that Defendant is *not* a healthcare provider.

A Plaintiff may pursue a negligence cause of action against a defendant-physician in two ways: (1) a claim based on medical negligence, also referred to as medical malpractice; or (2) a claim based on general negligence. *Brown v. Bailey*, 210 S.W.3d 397 (Mo. Ct. App. 2006). Missouri Supreme Court Rule 55.10 states the following:

“A party may set forth two or more statements of a claim . . . alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.”

In *Millard v. Corrado*, 14 S.W.3d 42 (Mo. App. E.D. 1999), the Missouri Court of Appeals held that a plaintiff was entitled to assert both a general negligence claim and medical malpractice claim, though both claims arose from the same incident.

The Court notes that Defendant has pled in its Motion to Dismiss, and continues to maintain, that it is not a healthcare provider and does not provide healthcare. However, in arguing that Plaintiff is time barred from bringing a general negligence claim, Defendant argues that the Statute of Limitations for medical malpractice claims is applicable. For the reasons outlined above, Plaintiffs have adequately pled in the alternative and have filed their action for Medical Negligence and General Negligence in a timely manner.

#### *Res Judicata and Claim Preclusion*

Defendant asserts that all of Plaintiffs' claims are barred under the doctrine of *res judicata*, which seeks to avoid re-litigation of previously decided issues or issues that could have been raised in a first action. *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 496, 501 (Mo. banc 1991). In support of their theory, Defendants argue that the 2009 and 2010 petitions, which were dismissed without prejudice, are actually final dispositions with prejudice due to the running of the applicable statute of limitations. Further, Defendants argue the 2010 petition was allowed only by virtue of the savings statute contained in Mo. Rev. Stat. § 516.230.

Defendant argues the effect of the dismissal of that petition was a final adjudication sufficient to invoke the doctrine of *res judicata*, because the savings statute can only be used

once if the statute of limitations for an action has expired. Defendant further argues that although a dismissal without prejudice generally will not bar a subsequent re-filing of the same cause of action, Missouri courts recognize an exception to that general rule, specifically that a cause of action dismissed without prejudice will carry the effect of claim preclusion if the dismissal occurs after the statute of limitations has run. Defendant's argument on this point relies on a footnote in *Zerjav v. Schneider*, 998 S.W.2d 44 (Mo. App. E.D. 1999), a Per Curiam Order. Defendant asserts the expiration of a claim under one Statute of Limitations (a two-year limitation period for medical malpractice) can be boot-strapped onto another claim governed by a different Statute of Limitations ( a five-year limitation period for general negligence) when the claim arises out of the same set of facts or occurrences. The statement in *Zerjav* does not support such a proposition (notwithstanding the prohibition of the use of Per Curiam Orders as cited authority under Missouri Supreme Court Rule 84.16(b)). Defendant's theory is further flawed by its own representation that it is not a healthcare provider (*See* Defendant's Motion to Dismiss and Suggestions in Support, filed May 10, 2011).

Both prior dismissals were without prejudice. The issues of this case have not been litigated and there has been no final adjudication on any of the previous claims or petitions in this matter. Therefore *res judicata* or claim preclusion is not applicable. *Burian v. Country Insurance and Financial Services*, 263 S.W.3d 785 (Mo. App. E.D. 2008).

Being duly advised of the premises, and for good cause shown, the Court finds as follows:

Defendant Biolife Plasma Services L.P.'s Motion to Dismiss is **DENIED**.

Defendant Biolife Plasma Services L.P.'s Motion for Extension of Time to Respond to Plaintiff's Motion for Enforcement of Discovery is **GRANTED**. The Court accepts Defendant's Response filed October 31, 2011.

**IT IS SO ORDERED.**

Nov. 15, 2011  
Date

  
JUDGE JAMES F. KANATZAR

I hereby certify that copies of the foregoing were  
duly faxed/mailed this day to all counsel of record.

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