

Missouri Supreme Court Enforces the Health Care Affidavit Requirement for Medical Negligence Cases

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On October 13, 2015, the Missouri Supreme Court issued its opinion in *Lang v. Goldsworthy*, No. SC94814. In this case, the trial court granted defendants' motion to dismiss plaintiffs' Petition when they failed to file a health care affidavit required by R.S.Mo. §538.225 within the 180 day deadline. The Missouri Supreme Court affirmed this decision.

Section 538.225 (1) provides in pertinent part: "In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services, the plaintiff or the plaintiff's attorney shall file an affidavit with the court stating that he or she has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition."

The affidavit must be filed no later than 180 days after filing the Petition. R. S.Mo. §538.225 (5). "If the plaintiff or his attorney fails to file such affidavit the court shall, upon motion of any party, dismiss the action against such moving party without prejudice." *Id.* (6).

The Appellants initially filed their Petition with a health care affidavit and then voluntarily dismissed. The Appellants timely refiled within the one year savings statute, but failed to attach the health care affidavit to the Petition. The Appellee defendants moved to dismiss after the 180 day deadline and the trial court dismissed the action without prejudice. Since the Appellants had already voluntarily dismissed, the dismissal acted as a dismissal with prejudice.

In their appeal, the Appellants argued §538.225 was unconstitutional in that it barred their access to the courts, violated their right to trial by jury and was an impermissible special law. However, the Missouri Supreme Court did not address the constitutional arguments because it was able to resolve the case without doing so. Essentially, the court held that section 538.225 did not prevent the appellants from accessing the courts because the statute did not prevent appellants from filing a third suit. The one year savings statute prevented the appellants from refiling their cause of action. The Supreme Court held that the savings statute was the root of their problem yet this issue was not raised (and as a result not addressed) on appeal.

This opinion will help support trial courts' decisions to dismiss actions without prejudice even though a second dismissal without prejudice may act as a dismissal with prejudice if the plaintiff has already refiled the action. However, since the Missouri Supreme Court did not need to address the constitutional arguments raised by the appellants in this case, the door is open for another appeal attacking the constitutionality of section 538.225.

By Olivia Watters

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