

**IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE, MISSOURI**

SAMUEL K. LIPARI)
(Assignee of Dissolved)
Medical Supply Chain, Inc.))
<i>Plaintiff</i>)
) Case No. 0816-cv-04217
vs.)
)
Novation, LLC <i>et al.</i> ,)
<i>Defendants</i>)

**PLAINTIFF’S OPPOSITION TO
DEFENDANT LATHROP & GAGE LLP’S SUGGESTION
IN OPPOSITION TO THE PROPOSED SECOND AMENDED PETITION**

Comes now the plaintiff Samuel K. Lipari appearing *pro se* and objects to the defendant Lathrop & Gage LLP’s suggestion in opposition to the proposed second amended petition for the following reasons:

STATEMENT OF FACTS

1. The petitioner is already the prevailing party in this action as a private attorney general enforcing the antitrust law under *Ellis v. University of Kansas MedicalCenter* 10thCir. Case No. 96-3343a 12/21/1998 when the Husch Blackwell Sanders LLP represented defendant hospital CoxHealth opened its procurement of hospital supplies to suppliers outside of the Novation LLC cartel.
2. Denying amendment will result in another Missouri antitrust complaint being filed in the Independence court against Lathrop & Gage LLP for the subsequent hospital supply antitrust violations after February 28, 2008 of Lathrop & Gage LLP, Joel B. Voran, and Andrew R. Ramirez, an unnecessary use of the court and party’s resources.
3. The second action will create a hardship for the plaintiff who will have to simultaneously appeal the dismissal of his initial petition.
4. The proposed second amended petition cures all pleading sufficiency issues previously raised by the defendants.

SUGGESTION IN OPPOSITION

Where a trial court grants a motion to dismiss and states no reasons for its ruling, an appellate court assumes that the grounds for the ruling are those set out in the motion. *Molasky v. Brown*, 720 S.W.2d

412, 414 (Mo.App. W.D.1986). A motion to dismiss for failure to state a claim upon which relief can be granted is an attack on the plaintiff's pleadings. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 463-64 (Mo. banc 2001). When reviewing the grant of a motion to dismiss for failure to state a claim, this court considers that:

"A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case."

Id. (quoting *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993) (internal citations omitted)).

The initial petition included the elements required under Missouri law to state each claim with supporting averments of specific evidentiary facts. The prior interim orders in other courts against fewer than all antitrust defendants could not have been a basis for claim or issue preclusion. The trial court dismissed defendants in the initial petition erroneously. See, *Terre Du Lac Ass'n v. Terre Du Lac, Inc.*, 737 S.W.2d 206, 216 (Mo.App.1987); *Ebling v. Hardesty*, 354 S.W.2d 348, 350 (Mo.App.1962)(if contentions cannot be substantiated by looking at the petition, then motion to dismiss should not be granted).

The trial court was in error to have granted Lathrop & Gage LLP's motion for a judgment on the pleadings when Lathrop & Gage LLP's Answer to the Petition contested averments in the initial pleading: Rule 74.04(c) provides:

"judgment sought shall be rendered forthwith if the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that any party is entitled to judgment as a matter of law."

Sun Elec. Corp. v. Morgan, 678 S.W.2d 410 (Mo. App.W.D., 1984).

The trial court had previously denied the plaintiff's request for relief from judgment to revise the partial order of dismissal under 74.01(b) to make the dismissal appealable. The trial court previously granted leave to amend the petition to include substantively the same facts as the proposed second amended petition. Under these same circumstances it would be an error to now dismiss the petitioner's cause of action:

"The logical effect of the trial court's granting leave to amend the petition was to revise the 1989 order to make it a dismissal of the petition only and not the action. This the court had authority to do under Rule 74.01(b). *Ward*, 844 S.W.2d at 473[2-3].

In its February 4, 1994, order, the trial court appears to have relied solely on the portion of our dismissal of Wilson's earlier appeal in which this court noted the operation of Rule 67.03 on the March 16, 1989, dismissal. *Wilson*, 791 S.W.2d at 499. What the trial court order overlooks is the latter portion of the Wilson opinion in which this court notes the potential for revision of the dismissal pursuant to Rule 74.01(b). 791 S.W.2d at 500.”

Wilson v. Mercantile Bank of Springfield, 904 S.W.2d 44 at 49 (Mo. App. S.D., 1995)

“Under Missouri Rule of Civil Procedure 55.03(a), leave to amend a pleading ‘shall be freely given unless justice so requires.’” *DeMarr v. Kansas City, Mo., School Dist.*, 802 S.W.2d 537 at 541 (Mo. App.W.D., 1991).

Denial of the leave to amend will impose hardship on the plaintiff. The requirement to have to file a second action with additional or supplemental claims to address the defendants’ unchecked continuing monopolization of the Missouri hospital supply market while having at the same time to prosecute an appeal is recognized as a hardship under Missouri law:

“We agree that the denial of leave to amend resulted in the effective preclusion of Ms. Odum's claim and thereby caused hardship. See *Choate v. Hicks*, 983 S.W.2d 611, 613 (Mo.App. S.D.1999) (trial court's denial of leave to amend pleadings to assert compulsory counterclaim "subjects her to obvious hardship") abrogated, in part, by *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 532 (Mo.banc 2002); *Manzer v. Sanchez*, 985 S.W.2d 936, 939 (Mo.App. E.D.1999) (severe hardship exists where denial of leave to amend results in preclusion of cause of action). We also agree that there is no record evidence suggesting the trial court considered this critical factor.

Unquestionably, Ms. Odum's claim constituted a compulsory counterclaim under Rule 55.32(a).2 Her injuries arose from the same accident forming the basis of Mr. Wilkerson's claim for personal injuries. The purpose of Rule 55.32 is "to serve as a means of bringing all logically related claims into a single litigation, through the penalty of precluding the later assertion of omitted claims." *Joel Bianco Kawasaki*, 81 S.W.3d at 532 (internal quotation omitted) (emphasis in original). Thus, any attempt by Ms. Odum to file a separate lawsuit claiming damages for her personal injuries could properly be met with an affirmative defense asserting Ms. Odum's failure to seek relief by way of a counterclaim in Mr. Wilkerson's suit. See *Id.* at 530-32.”

Sloan-Odum v. Wilkerson, 176 S.W.3d 723 at 725-726 (Mo, 2005).

Lathrop & Gage LLP is in error over the controlling law governing amendment in Missouri:

“Trial courts are not to be stingy in granting leave to amend. See *Bohrmann v. Schremp*, 666 S.W.2d 30, 32 (Mo.App.1984). The trial court has broad discretion to grant a party leave to amend his answer; it is an abuse of discretion not to grant such leave when justice requires. *Rose*, 827 S.W.2d at 739. Prejudice is not measured by whether one party or the other would stand to suffer financial loss as a result of the court ruling. Instead, prejudice is measured by whether a party is deprived of a legitimate claim or defense because the motion for leave to amend caught that party by surprise after it had developed its strategy. See *Id.* In *Rose*, the court noted that the appellants were well aware of the statute of limitations defense sought to be added by amendment because the respondent raised it in the motion for summary judgment. *Id.* The court concluded that "[i]t would be an abuse of discretion to refuse to allow

the respondent to amend its answer to include a statute of limitations defense" where the plaintiffs were "well aware the defense existed." *Id.*

Ferrellgas, Inc. v. Edward A. Smith, P.C., 190 S.W.3d 615 at 619 (Mo. App., 2006).

The second proposed amended complaint adds supplemental averments of fact to support the ultimate fact elements required for each of his existing claims. This is the purpose amendment is permitted:

"The reason for allowing amendments to be made is to enable matters to be presented that were overlooked or were unknown to the party at the time he filed his original pleading. *DeArmon v. City of St. Louis*, 525 S.W.2d 795, 802 (Mo.App.1975)."

Western Cas. and Sur. Co. v. Kansas City Bank and Trust Co., 743 S.W.2d 578 at 581 (Mo. App.W.D., 1988).

The evidence of the fraud and the antitrust claims was supplemented with additional matter to meet the objections of the defendants in their motions to dismiss and for judgment. There is still no discovery yet the plaintiff now has developed his existing claims with material averments of facts:

"The recognized purpose of allowing amendments to pleadings is to allow a party to present evidence that was overlooked or unknown when the original pleading was filed without changing the original cause of action. *Trans World Airlines, Inc. v. Associated Aviation Underwriters*, 58 S.W.3d 609, 624 (Mo.App. E.D. 2001); *Southwestern Bell Yellow Pages, Inc. v. Wilkins*, 920 S.W.2d 544, 550 (Mo.App. E.D. 1996); *Baker* at 329."

Moore v. Firststar Bank, 2003 MO 41 at ¶ 52 (MOCA, 2003).

The proposed second amended petition cures any pleading deficiencies at law for the dismissed claims and therefore must be permitted:

"Factors that should be considered in deciding whether to allow leave for an amendment are hardship to the moving party if leave to amend is not granted, the reasons for failure to include any new matter in earlier pleadings, timeliness of the application, whether the amendment could cure the inadequacy of the moving party's pleading, and the injustice resulting to the party opposing the motion should it be granted. *Western Casualty & Surety Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 582 (Mo.App.1988)."

Curnutt v. Scott Melvin Transport, Inc., 903 S.W.2d 184 at 193 (Mo. App.W.D., 1995).

The defendants in error attempt to prevent the court from giving the allegations in the proposed second amend petition the broadest effect. This argument is contrary to the controlling law of this jurisdiction in *Western Cas. and Sur. Co. v. Kansas City Bank and Trust Co.*, 743 S.W.2d 578 at 581-582 (Mo. App.W.D., 1988).

Respectfully submitted

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CERTIFICATE OF SERVICE

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