

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

CARA L. LEE, surviving spouse  
and wrongful death beneficiary of  
RICHARD GERALD LEE, deceased,

Plaintiff,

v.

No. 03-2403

MARY CATHERINE LOWDERMILK,  
personal representative of the  
ESTATE OF GREGORY H.  
LOWDERMILK, M.D., deceased,

Defendant.

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ORDER GRANTING PLAINTIFF'S MOTION FOR TRANSFER AND DENYING  
DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE  
FOR SUMMARY JUDGMENT

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This diversity action involves allegations of medical malpractice regarding the death of Richard Gerald Lee. Plaintiff Cara L. Lee is the surviving spouse and wrongful death beneficiary of the deceased. The current Defendant is Mary Catherine Lowdermilk, named as the personal representative for the estate of Dr. Gregory H. Lowdermilk, deceased, whose alleged negligence led to the death of Mr. Lee.

According to the complaint, Lee suffered from cystic fibrosis for most of his life. In order to extend Lee's life expectancy, his physician, Dr. Gregory A. Hanissian, recommended that he have a lung transplant. After being on a donor transplant list for some time, on February 1, 1998, Lee underwent a double lung transplant by Dr. Lowdermilk at the Baptist Memorial Central Hospital in Memphis, Tennessee. Plaintiff alleges that Dr. Lowdermilk, while performing the surgery, erroneously transplanted a left lung into Lee's right lung cavity.

When the mistake was discovered, further surgery was attempted, but efforts to correct the problem failed and Lee died on February 2. Apparently, the alleged negligence of Dr. Lowdermilk was not uncovered and revealed until November 2000. In the interim, Dr. Lowdermilk himself died. His estate was probated in St. Louis, Missouri, where Dr. Lowdermilk lived at the time of his death, and the estate was closed on July 8, 2002.

While Dr. Lowdermilk's estate was still open, the Plaintiff filed a malpractice lawsuit against it and others in state court in Memphis, Tennessee. On June 3, 2002, the suit was voluntarily dismissed without prejudice. The instant litigation was initiated on May 28, 2003. Defendant filed a Motion to Dismiss or in the Alternative for Summary Judgment on September 22, 2003 for insufficiency of service of process, lack of personal jurisdiction, and failure to state a claim. In her motion, the Defendant argued that her late husband's estate was already closed and that she no longer served in any representative capacity for the estate. Furthermore, she argued that she could not be held personally liable for his actions because she had performed no activities in Tennessee for which she could be held responsible. On October 24, 2003, the Plaintiff responded to Defendant's motion and also filed a motion to transfer venue to the United States District Court for the Eastern District of Missouri. Lee sought to have the Missouri federal court appoint a defendant ad litem in lieu of Lowdermilk pursuant to Missouri statutory law. This Court, on January 6, 2004, denied Plaintiff's motion to transfer without prejudice because the Plaintiff had not briefed issues regarding whether transfer under 28 U.S.C. 1406(a) was appropriate. Lee has now filed a renewed motion for transfer of venue under § 1406(a) to which a response has been filed. Plaintiff's motion to transfer and

Defendant's motion to dismiss or in the alternative for summary judgment are now appropriate for disposition.

## ANALYSIS

### I. Plaintiff's Motion to Transfer under 28 U.S.C. § 1406(a).

Section 1406(a) provides that “[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a). Unlike a transfer under 28 U.S.C. § 1404(a) which provides for a transfer of venue for the convenience of the parties, § 1406(a) allows a transfer to cure obstacles that prevent an adjudication on the merits. De La Fuente v. Interstate Commerce Comm’n, 451 F. Supp. 867, 872 (N.D. Ill. 1978). “[A] district is ‘wrong’ within the meaning of § 1406 whenever there exists an ‘obstacle (to) . . . an expeditious and orderly adjudication’ on the merits.” Taylor v. Love, 415 F.2d 1118, 1120 (6th Cir. 1969) (quoting Dubin v. United States, 380 F.2d 813, 815 (5th Cir. 1967)). Impediments under § 1406(a) are not limited strictly to improper venue, but may cover other hindrances such as an inability to perfect service on a defendant. Id. Before deciding to transfer a case, the transferor court must determine if the suit “could have been brought” in the venue to which the party seeks to have the case transferred. 28 U.S.C. § 1406(a). The court must then examine whether it is in the “interest of justice to grant such a transfer” rather than dismiss. Naegler v. Nissan Motor Co., Ltd., 835 F. Supp. 1152, 1158 (W.D. Mo. 1993). Additionally, when a court transfers venue under § 1406(a), the transferee court applies its own choice of law rules, unlike § 1404(a) where a transferee court applies the law of the transferor court. GBJ Corp. v. Eastern Ohio Paving Co., 139 F.3d 1080, 1084-85 (6th Cir. 1998).

Because Dr. Lowdermilk's estate has been closed, Lee does not seek to proceed against the estate but instead asks the court to apply a Missouri statute that would allow the appointment of a defendant ad litem. Under Missouri law, a plaintiff may join a "defendant ad litem" in a tort action against a decedent's estate, notwithstanding that the estate may have been settled and terminated. See Mo. Ann. Stat. § 537.020; Mo. Ann. Stat. § 537.021. This joinder procedure would permit a plaintiff to recover from the decedent's liability insurer in the absence of an open estate. Lee submits that a transfer under § 1406(a) is necessary because the statute is procedural and therefore could not be applied by a federal court in Tennessee. See Spence v. Miles Laboratory, Inc., 37 F.3d 1185, 1188 (6th Cir. 1994) (in diversity cases, procedural law of the forum generally applies); Pfeffer v. Kerr, 693 S.W.2d 296, 299 n.1 (Mo. Ct. App. 1985) (holding Mo. Ann. Stat. § 537.021 as procedural in nature).

The threshold issues then are whether this Court could apply the Missouri statute or appoint a defendant ad litem under some other applicable law, and if not, whether a grant of transfer would remove the obstacles which may prevent the Plaintiff from having the case expeditiously and orderly decided on the merits. Lee maintains that this Tennessee federal Court could not apply the Missouri statute because it is procedural in nature as has been held by several Missouri decisions. See, e.g., Smith v. Tang, 926 S.W.2d 716, 721 (Mo. Ct. App. 1996) (stating § 537.021 is "a procedural statute . . . provid[ing] the options of seeking appointment of a personal representative or of a plaintiff *ad litem* to prosecute the claim"); Pfeffer, 693 S.W.2d at 299 n.1 (declaring "§ 537.021 . . . a procedural part of the Wrongful Death Act").

When a federal court entertains a case based on diversity jurisdiction, it applies the Federal Rules of Civil Procedure. See Hanna v. Plumer, 380 U.S. 460, 471-72, 85 S.Ct. 1136, 1144-45, 14

L.Ed.2d 8 (1965). Rule 17, Federal Rule of Civil Procedure, which governs the capacity of persons to be sued states that:

[t]he capacity of an individual, *other than one acting in a representative capacity*, to sue or be sued shall be determined by the law of the individual's domicile. . . . In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . . .

Fed. R. Civ. P. 17(b) (emphasis added). Therefore, because the Defendant, either as a personal representative of the estate or as a defendant ad litem, is “acting in a representative capacity,” this Court looks to the law of Tennessee to determine her capacity to be sued. Fed. R. Civ. P. 17(b).

Tennessee Code Annotated § 30-1-109(a) provides for the appointment of an Administrator Ad Litem in “probate or chancery courts, or any other court having chancery jurisdiction, where the estate of a deceased person must be represented, and there is no executor or administrator of such estate.” Tenn. Code Ann. § 30-1-109 (2001). However, Plaintiff does not ask to reopen Dr. Lowdermilk's estate, but instead seeks to utilize the Missouri statute which would allow her to proceed against the malpractice insurance proceeds which would have covered Dr. Lowdermilk. See Mo. Ann. Stat. § 537.021(2). The Tennessee statute does not specifically provide that an Administrator Ad Litem may be appointed for claims only against insurance proceeds. See Tenn. Code Ann. § 30-1-109(a). Additionally, it is unclear whether a federal court in Tennessee could reopen an estate probated in Missouri since the probation of an estate is generally considered an in rem proceeding. See Green v. Higdon, 870 S.W.2d 513, 520 (Tenn. Ct. App. 1993) (“[a] proceeding for probate is not an action between parties, but an action *in rem* involving the distribution of the *res*”); Estate of Cannon v. Thomas, 622 S.W.2d 752, 754 (Mo. Ct. App. 1981) (the administration of an estate is “deemed one

proceeding for purposes of jurisdiction [and] [s]uch entire proceeding is a proceeding in rem”). Furthermore, Tennessee Code Annotated § 30-1-102 and § 32-2-101, specifying the place where an estate or will is to be probated, both require the proceedings to take place “in the probate court where the testator had the testator’s usual residence at the time of the testator’s death . . . .” See also Tenn. Code Ann. § 30-1-301 (2001) (stating only the “chancery court of the county in which any person resided at the time of the decedent’s death, or in which the decedent’s estate, goods, and chattels or effects were at the time of the decedent’s death, may appoint an administrator . . . .”). Thus, these state statutes appear to control the appointment of estate representatives of persons who reside in Tennessee at their death. Additionally, neither party has presented any authority establishing that this Court sitting in Tennessee could appoint an administrator of an estate probated in another state. Therefore, this difference in Tennessee law as well as the local nature of probate will likely pose an obstacle to the expeditious and orderly adjudication of Plaintiff’s claim if pursued in the Western District of Tennessee.

The question then becomes whether a district court in Missouri would be able to apply the Missouri procedural statute appointing a defendant ad litem. In Resolution Trust Corp v. Fiala, 870 F. Supp. 962, 978 (E.D. Mo. 1994), the District Court for the Eastern District of Missouri specifically recognized that a federal district court in Missouri has the authority to appoint a defendant ad litem pursuant to Mo. Ann. Stat. § 537.021. Id. Furthermore, the court stated that the plain language of the statute allows the court to appoint a defendant ad litem in “any such action” “where a deceased wrongdoer was insured against liability for damages.” Id. The court also rejected the defendant’s argument that a defendant ad litem could only be appointed by a probate court. Id. A Missouri Federal District Court, applying Rule 17 of the

Federal Rules of Civil Procedure, would be directed to look to Missouri law regarding the capacity of a person to be sued “in a representative capacity.” See Fed. R. Civ. P. 17(b). Thus, this Court finds transferring the case to the United States District Court for the Eastern District of Missouri at St. Louis meets the purpose of § 1406(a). Additionally, the District Court for the Eastern District of Missouri is a court in which this action “could have been brought” because the Plaintiff could have sued Ms. Lowdermilk there in a representative capacity based on that court’s in rem jurisdiction over Dr. Lowdermilk’s estate. See 28 U.S.C. § 1406(a). Venue is also proper under 28 U.S.C. § 1391(a) because the Defendant resided in the Eastern District of Missouri.<sup>1</sup> Furthermore, the Defendant has not alleged prejudice if a transfer was granted whereas a dismissal would be detrimental to the Plaintiff because an attempted refiling of the suit at this date might be subject to a statute of limitations defense. See Sinclair v. Kleindienst, 711 F.2d 291, 293-94 (D.C. Cir. 1983) (stating that the “Supreme Court has inferred a congressional purpose underlying section 1406(a) favoring the transfer of cases” and that “[t]ransfer is particularly appropriate where, as here, without a transfer the cause of action would be barred by the running of the applicable statute of limitations”) (quoting Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466-67, 82 S.Ct. 913, 915-16, 8 L.Ed.2d 39 (1962) and citing Burnett

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<sup>1</sup> Section 1391(a) provides that:

A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a).

v. N.Y. Cent. R.R. Co., 380 U.S. 424, 430, 85 S.Ct. 1050, 1055, 13 L.Ed.2d 941 (1965)); see also Naeglar, 835 F. Supp. at 1158. Therefore, this Court GRANTS Plaintiff's Motion to Transfer.

## II. Defendant's Motion to Dismiss or in the Alternative for Summary Judgment.

Ms. Lowdermilk argues that she is no longer the personal representative for the Estate of Dr. Gregory H. Lowdermilk and as a result cannot now be sued in her representative capacity. Likewise, she claims that service of process was insufficient because it was made on a non-agent of the purported wrongdoer. Consequently, Defendant argues that in her personal capacity the Court lacks personal jurisdiction over her since she had no contacts with the State of Tennessee.<sup>2</sup> However, a transfer under § 1406(a) would remove the various defenses which the Defendant asserts. Section 1406 transfer has been used to cure insufficient service of process and lack of personal jurisdiction over a party. Taylor, 415 F.2d at 1120 (stating that § 1406(a) is utilized to remove the obstacle of inability to perfect service of process on a defendant); see also Sinclair, 711 F.2d at 293-94 (holding that lack of personal jurisdiction is a procedural impediment which may be removed by a transfer under § 1406(a)). Moreover, the district court in Missouri will be able to appoint a defendant ad litem who can be properly served with

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<sup>2</sup> The Defendant in her Response to Plaintiff's Renewed Motion to Transfer raised for the first time the defense of statute of limitations. The Court will not consider the argument since that defense has not been presented in a required responsive pleading or motion to dismiss as set forth in Rule 12. See Fed. R. Civ. P. 12(b). Moreover, Tennessee has adopted a discovery rule which extends Tennessee's statute of limitations for medical malpractice actions to one year from the date of the discovery of the alleged injury or the discovery that a cause of action exists. See Tenn. Code Ann. § 29-26-116(a)(2) to (a)(3) (2000). Under the facts alleged in this case, the Plaintiff did not apparently discover Dr. Lowdermilk's alleged negligence and cover-up until November 15, 2000 and commenced the initial suit less than a year later. Therefore, even if the statute of limitations was a defense available to the Defendant, it would not likely be a successful one.



process. See Resolution Trust Corp., 870 F. Supp. at 978. Finally, Ms. Lowdermilk argues that Lee has failed to state a claim for which relief can be granted and therefore, must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure. However, this argument is without merit as the Plaintiff has clearly alleged a prima facie case of negligence against Dr. Lowdermilk, alleging that he breached his duty of care owed to Lee while performing the lung transplant which resulted in the Plaintiff's death. See Bradshaw v. Daniel, 854 S.W.2d 865, 869 (Tenn. 1993) (stating the elements of a prima facie case for negligence) (citations omitted). Furthermore, by the transfer, the question of who would be the proper defendant upon whom a claim can be based can be resolved. Thus, the Court DENIES Defendant's Motion to Dismiss or in the Alternative for Summary Judgment.

#### CONCLUSION

For the reasons stated above, Plaintiff's motion for transfer is GRANTED and Defendant's motion to dismiss or in the alternative for summary judgment is DENIED.

IT IS SO ORDERED this \_\_\_\_ day of April, 2005.

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J. DANIEL BREEN  
UNITED STATES DISTRICT JUDGE