

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

IN RE: FRESENIUS	)
GRANUFLO/NATURALYTE DIALYSATE	)
PRODUCTS LIABILITY LITIGATION	)
	)
This Document Relates to:	)
	) MDL No. 1:13-MD-02428-DPW
Case No. 1:14-cv-11965-DPW	)
JAMES E. COBY individually and on	)
Behalf of DECEDENT BEVERLY D. COBY,	)
v.	)
FRESENIUS MEDICAL CARE HOLDINGS,	)
INC., d/b/a FRESENIUS MEDICAL CARE	)
NORTH AMERICA, INC., et al.	)

**DIALYSIS CLINIC, INC.’S, MOTION TO DISMISS PLAINTIFF’S PETITION  
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

COMES NOW Defendant Dialysis Center Inc.’s (“DCI”), by and through its attorneys of record, Baker Sterchi Cowden & Rice, LLC, of Kansas City, Missouri, and moves this Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for its Order dismissing plaintiff’s Petition, or in the alternative for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendant DCI incorporates by reference its Memorandum of Law in Support of its Motion to Dismiss, or in the Alternative for Summary Judgment filed contemporaneously herewith. In further support of this Motion, defendant DCI states and alleges: as follows:

1. Plaintiff claims a right of recovery for injuries allegedly sustained when GranuFlo® and NaturaLyte® were used during a dialysis treatment of decedent, Beverly Coby. He brings this action against Defendants Fresenius Medical Care Holding Inc. d/b/a Fresenius Medical North America, Inc., Fresenius USA, Inc., Fresenius USA Manufacturing and Fresenius USA Marketing, Inc. (collectively “Fresenius”) inadequately designed and manufactured

GranuFlo® and NaturaLyte®, the product designers (“Fresenius”); Dialysis Clinic, Inc., (“DCI”) a dialysis provider and Research Medical Center, a dialysis provider.

2. Plaintiff’s 26-page Petition is primarily focused on allegations against the Fresenius defendants. Only two paragraphs state any factual allegations relating to DCI.

3. Plaintiff’s claims against DCI are rooted in the provision of health care services and, therefore, fall under the applicable health care statutes and common law in Missouri. Plaintiff alleges wrongful death of Beverly Coby resulting from a dialysis treatment she purportedly received in October of 2010. Petition at ¶ 47.

4. Plaintiff’s strict liability, negligent design and breach of warranty claims cannot be maintained against DCI, a health-care provider, under Missouri law as set forth in *Budding v. SSM Health Care System*, 19 S.W.3d 678 (Mo. banc 2000).

5. Missouri law requires that any plaintiff bringing an “action against a health care provider for damages for personal injury or death on the account of the rendering of or failure to render health care services” must file a healthcare affidavit providing the opinion of a legally qualified health care provider that the defendant “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.” R.S.Mo. § 538.225.1. Plaintiff’s claims fall squarely within this provision, and the §538.225 affidavit was required to be filed within 90 days of the filing of the petition. R.S.Mo. § 538.225.5. This deadline passed, as of January 30, 2014. Therefore, plaintiff failed to comply with the requirements of Chapter 538 and his petition must be dismissed.

6. Because plaintiff provided no factual support for his claims against DCI, his petition is also fatally flawed for failure to comply with the pleading requirements of Rule 8(2)(2) of the Federal Rules of Civil Procedure.

7. Plaintiff's allegations under the Missouri Merchandising Practices Act fail to meet the applicable pleading requirements.

8. Plaintiff's warranty claims are legally insufficient because he has not and cannot allege a sufficient seller-purchaser relationship between DCI and the decedent.

9. Alternatively, DCI is entitled to judgment as a matter of law against plaintiff inasmuch as DCI did not provide dialysis treatment to the decedent in October of 2010 as alleged.

**STATEMENT OF MATERIAL FACTS**  
**(for purposes of Defendant DCI's Motion for Summary Judgment)**

1. DCI has provided copies of its medical records of Beverly Coby to plaintiff which reflect and establish that the decedent did not receive dialysis treatment from DCI after September 16, 2010. *See* Affidavit of Pamela Beauford attached hereto as Exhibit A, ¶ 7.

2. Ms. Beauford is an Administrator at DCI located at 6530 Troost Ave., Kansas City, MO 64131. *Id.* at ¶ 2.

3. DCI provides on location dialysis services at three Kansas City area clinics. These clinics are located at: Research Medical Center, 2316 E. Meyer Blvd., Kansas City Missouri, 64132; Rockhill, 6530 Troost Avenue, Kansas City, MO 64131; and Carondelet, 650 Carondelet Dr. Kansas City, MO 64114. *Id.* at ¶ 3.

4. Ms. Beauford reviewed DCI's medical records regarding Beverly Coby's treatment at DCI. *Id.* at ¶¶ 4-5.

5. Attached to Beauford's Affidavit are DCI's medical records regarding Beverly Coby's scheduled dialysis treatments between September 25, 2010, and October 31, 2010. *Id.* at ¶ 5.

6. Beverly Coby primarily received dialysis treatment at DCI's Rockhill location. *Id.* at ¶ 6.

7. DCI's medical records establish that Beverly Coby did not receive any dialysis treatment at any of DCI clinics or any facility at which it provided dialysis treatments after September 16, 2010. *Id.* at ¶¶ 7-10.

8. Beverly Coby was scheduled for, but did not receive dialysis treatments from any DCI provider on September 25, 2010; September 28, 2010; September 30, 2010; October 2, 2010; October 5, 2010; October 7, 2010; October 9, 2010; October 12, 2010; October 14, 2010; October 16, 2010; October 19, 2010; October 21, 2010; October 23, 2010; October 26, 2010; October 28, 2010; and October 30, 2010. *Id.* at ¶ 8.

9. On the dates set forth up to and including October 28, 2010, it is noted that Beverly Coby was in the hospital. *Id.* at ¶ 9.

10. Several flow sheets for missed appointments for dialysis treatment indicate that Beverly Coby was a patient at Shawnee Mission Medical Center. *Id.*

11. DCI does not provide dialysis treatments on-site at Shawnee Mission Medical Center and did not provide dialysis treatments to Beverly Coby from September 25, 2010 through October 31, 2010. *Id.*

12. DCI's medical records for decedent on October 30, 2010, Beverly Coby's next scheduled dialysis treatment, again reflect that the patient did not receive dialysis treatment from DCI as she was in "Hospice." *Id.* at ¶ 10.

13. DCI did not provide dialysis treatment for Beverly Coby on October 30, 2010, or on October 31, 2010, at any location. *Id.*

WHEREFORE, Defendant DCI moves this Court for its Order to Dismiss plaintiff's Petition or, in the Alternative for Summary Judgment, and for all such other and further relief as this Court deems just and proper, including awarding defendant its costs incurred herein.

**BAKER STERCHI COWDEN & RICE, L.L.C.**

/s/ Hal D. Meltzer

Hal D. Meltzer MO #38535

Caroline M. Tinsley MO #49377

2400 Pershing Road, Suite 500

Kansas City, MO 64108

Telephone: (816) 471-2121

Facsimile: (816) 472-0288

Email: meltzer@bscr-law.com

**ATTORNEYS FOR DEFENDANT  
DIALYSIS CLINIC, INC.**

---

**CERTIFICATE OF COMPLIANCE WITH  
U.S.D.C. D. MASS. LOCAL RULE 7.1**

COMES NOW defendant Dialysis Clinic, Inc., by and through its attorneys of record, Baker Sterchi Cowden & Rice, LLC, of Kansas City, Missouri, and hereby certifies that counsel for Dialysis Clinic, Inc., has on several occasions attempted to confer with counsel for plaintiff, Brad Honnold, regarding the dismissal of Dialysis Clinic, Inc., based on the arguments generally set forth in this Motion to Dismiss or, in the Alternative, for Summary Judgment and the Memorandum in Support contemporaneously filed herewith. These good faith attempts to confer to resolve or narrow the issues in this case have been made since early April of 2014 and most recently on October 16, 2014, including both emails and telephone calls. Unfortunately, to date, counsel for plaintiff has not responded to counsel for this defendant's requests to address the issues raised in this Motion to Dismiss or, in the Alternative, for Summary Judgment.

BAKER STERCHI COWDEN & RICE, LLC

/s/ Hal D. Meltzer

Hal D. Meltzer  
2400 Pershing Road, Suite 500  
Kansas City, MO 64108  
Telephone: (816) 471-2121  
Facsimile: (816) 472-0288  
Email: meltzer@bscr-law.com

MO #38535

**ATTORNEYS FOR DEFENDANT  
DIALYSIS CLINIC, INC.**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on October 23, 2014, a copy of the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's CM/ECF system on CM/ECF participants.

/s/ Hal D. Meltzer

---