

**IN THE MISSOURI SUPREME COURT**

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**Case No. SC85132**

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**STATE EX REL., DAVID H. TRIMBLE ET AL.,**

**Relators**

**v.**

**THE HONORABLE MARGARET M. NEILL,**

**Respondent.**

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**On Petition for Writ of Mandamus and/or Prohibition**

**Directed To**

**Honorable Margaret M. Neill  
Circuit Judge, Missouri Circuit Court  
Twenty-Second Judicial Circuit**

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**RELATORS' BRIEF**

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### **JURISDICTIONAL STATEMENT**

**This Petition for Mandamus and/or Prohibition is an action involving the question of whether Respondent failed to enforce a clear, unequivocal, preexisting, and specific right of Relators when Respondent split a wrongful death cause of action and transferred venue as to one of two, jointly liable tortfeasors where venue is clearly appropriate as to the other joint tortfeasor. This Court has jurisdiction pursuant to Article V, §4.1 of the Missouri constitution to consider application for, and issue of, remedial writs.**

**Relators state that they sought a writ of mandamus and/or prohibition in a lower appellate court, and on January 23, 2002, the Missouri Court of Appeals, Eastern District, denied Relators' application. (A6.)**

## STATEMENT OF FACTS

Plaintiffs in the wrongful death cause of action below, David H. Trimble, Roger D. Trimble, Thomas A. Trimble, Timothy A. Trimble, Daniel K. Trimble, and Patricia D. Wilson (“Trimbles”), Relators herein, are the spouse and natural children of decedent Hazel I. Trimble. *See* Relators’ Petition for Writ of Mandamus And/Or Prohibition, (hereinafter “Petition”), Exhibit 1 p. 1-2. In the case below, Relators allege that Defendants BJC Health System (“BJC”) and Missouri Baptist Medical Center (“MBMC”) negligently caused the death of Hazel Trimble. *See* Petition, Ex. 1 p. 4. Relators allege that BJC and MBMC are jointly liable for Mrs. Trimble’s death, *see* Petition, Ex. 1 p. 4, at ¶ 8, and Respondent found such allegations sufficient to state a claim. *See* Petition, Ex. 2 p. 3.

Both Defendants BJC and MBMC are nonprofit corporations. The nonprofit venue statute, Mo. Rev. Stat. § 355.176.4 (1996), states in pertinent part:

Suits against a nonprofit corporation shall be commenced only in one of the following locations:

- (1) The county in which the nonprofit corporation maintains its principal place of business;
- (2) The county where the cause of action accrued;
- (3) The county in which the office of the registered agent for the nonprofit corporation is maintained.

Here, the cause of action accrued at MBMC in St. Louis County. *See* Petition, Ex. 1 p. 4, at ¶ 8. MBMC and BJC have their registered agents in St. Louis County. *See* Petition, Ex. 2 p. 3. The principal place of business of BJC, however, is in the City of St. Louis, *see* Petition, Ex. 1 p. 2, at ¶ 3, and this fact has never been disputed. *See* Petition, Ex. 2. p. 4, at n.2. Beyond question, if the present case were filed against BJC, whether as the sole defendant or as a co-defendant with an individual or a for-profit corporation, venue would unquestionably be proper in the City of St. Louis. § 355.176.4(1); *State ex rel. SSM Healthcare St. Louis v. Neill*, 78 S.W.3d 140, 145 (Mo. banc 2002).

Defendants MBMC and BJC argued before Respondent that venue was improper because § 355.176.4 could not be reconciled as to each Defendant individually. *See* Petition, Ex. 3 p. 3, at ¶ 8; Petition, Ex. 4 p. 2, at ¶ 6; Petition, Ex. 2 p. 3. In other words, the Defendants effectively asked Respondent to resolve the issue of venue as if two cases were before her, one against BJC and one against MBMC.

Additional facts are set forth here, not because they are directly pertinent to this writ, but to avoid confusion created by the record. The Trimbles filed Responses to Defendants BJC and MBMC’s Motions to Dismiss or in the alternative to Transfer (*see* Petition, Ex. 12; Petition, Ex. 13), and the parties filed their respective memoranda in support or in opposition thereof (*see* Petition, Ex. 14; Petition, Ex. 15). Respondent initially found that all Defendants, including BJC and MBMC, had waived objection to venue by failing to raise the issue timely. (A2.) Defendants BJC and MBMC sought a writ in the Court of Appeals, and Relators herein filed their Suggestions in opposition thereto. *See* Petition, Ex. 17; Petition,

**Ex. 18.** The Eastern District found that the “basis” for Respondent’s denial, that BJC and MBMC’s motions were filed untimely, was erroneous, and ordered Respondent to set aside her order and rule on the merits of Defendants BJC and MBMC’s motions. *See* Petition, Ex. 19 p. 2. Thereafter, Respondent considered the merits of BJC and MBMC’s motions and issued her order of November 27, 2002, ruling on the merits of those motions. *See* Petition, Ex. 2 p. 1. The Court of Appeals then denied Defendants BJC and MBMC’s petition for an extraordinary writ. *See* Petition, Ex. 20. Thus, the issue of waiver is not before this Court.

On consideration of the merits of Defendants BJC and MBMC’s motions, Respondent acknowledged considerable confusion regarding the proper interpretation of § 355.176.4, and decided that venue was proper as to MBMC in St. Louis County. *See* Petition, Ex. 2 p. 3-4. BJC’s motion to transfer, however, was denied since it was undisputed that its principal place of business is in St. Louis City. *See* Petition, Ex. 2 p. 4. The Trimbles and Defendants then sought relief from the Court of Appeals over the Respondent’s November 27 Order, which was denied. *See* Petition, Ex. 5-10; A6-7. Relators herein challenge only those parts of Respondent’s Order requiring separate trials and transferring the case against MBMC to St. Louis County.

Thus, the issue before this Court is squarely presented: when there are two nonprofit corporations properly alleged to be jointly liable for a single harm and venue is unquestionably proper as to one defendant (BJC), is venue proper as to the other defendant (MBMC)? This Court should answer this question affirmatively.

**POINTS RELIED ON**

**I. RELATORS ARE ENTITLED TO A WRIT OF MANDAMUS AND/OR PROHIBITION, COMPELLING RESPONDENT TO VACATE HER ORDER OF NOVEMBER 27, 2002, AND PROHIBITING RESPONDENT FROM TRANSFERRING ANY PART OF THE CAUSE OF ACTION, BECAUSE SHE FAILED TO RESOLVE THE CONTINGENT QUESTION OF VENUE UNDER MISSOURI’S LAW OF JOINDER, WHICH DOES NOT REQUIRE A SEPARATE ANALYSIS OF VENUE AS TO JOINT TORTFEASORS WHEN VENUE IS CLEARLY PROPER IN THE CITY OF ST. LOUIS UNDER § 355.176.4 AS TO JOINT TORTFEASOR BJC, IN THAT SHE IGNORED HER OWN FINDINGS OF ADEQUATELY PLEADED JOINT LIABILITY, DETERMINED VENUE SEPARATELY AS TO EACH DEFENDANT, ORDERED SEPARATE TRIALS FOR DEFENDANTS BJC AND MBMC, AND IMPROPERLY TRANSFERRED THE CASE AGAINST MBMC TO ST. LOUIS COUNTY.**

*State ex rel. Allen v. Barker*, 581 S.W.2d 818 (Mo. banc 1979)

*State ex rel. Webb v. Satz*, 561 S.W.2d 113 (Mo. banc 1978)

*State ex rel. SSM Healthcare St. Louis v. Neill*, 78 S.W.3d 140 (Mo. banc 2002)

*State ex rel. Sims v. Sanders*, 886 S.W.2d 718 (Mo. App. E.D. 1994)

Mo. Rev. Stat. § 355.176.4 (1996)

**II. RELATORS ARE ENTITLED TO A WRIT OF MANDAMUS AND/OR PROHIBITION, COMPELLING RESPONDENT TO VACATE HER ORDER OF NOVEMBER 27, 2002, AND PROHIBITING RESPONDENT FROM TRANSFERRING PART OF THE CAUSE OF ACTION, BECAUSE A WRONGFUL DEATH CLAIM UNDER MISSOURI LAW IS A SINGLE, INDIVISIBLE CLAIM THAT MAY NOT BE SPLIT AND TRIED PIECEMEAL, IN THAT RESPONDENT ERRONEOUSLY ORDERED SEPARATE TRIALS AS TO TWO, JOINTLY LIABLE DEFENDANTS IN A WRONGFUL DEATH CASE AND IMPROPERLY TRANSFERRED THE CLAIMS AGAINST ONE SUCH JOINTLY LIABLE DEFENDANT.**

*State ex rel. Kansas City Stock Yards Co. of Maine v. Clark*, 536 S.W.2d 142  
(Mo. banc 1976)

*State ex rel. Todd v. Romines*, 806 S.W.2d 690 (Mo. App. E.D. 1991)

*State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994)

Mo. Rev. Stat. §§ 537.080 *et seq.* (1991)

## ARGUMENT

I. **RELATORS ARE ENTITLED TO A WRIT OF MANDAMUS AND/OR PROHIBITION, COMPELLING RESPONDENT TO VACATE HER ORDER OF NOVEMBER 27, 2002, AND PROHIBITING RESPONDENT FROM TRANSFERRING ANY PART OF THE CAUSE OF ACTION, BECAUSE SHE FAILED TO RESOLVE THE CONTINGENT QUESTION OF VENUE UNDER MISSOURI'S LAW OF JOINDER, WHICH DOES NOT REQUIRE A SEPARATE ANALYSIS OF VENUE AS TO JOINT TORTFEASORS WHEN VENUE IS CLEARLY PROPER IN THE CITY OF ST. LOUIS UNDER § 355.176.4 AS TO JOINT TORTFEASOR BJC, IN THAT SHE IGNORED HER OWN FINDINGS OF ADEQUATELY PLEADED JOINT LIABILITY, DETERMINED VENUE SEPARATELY AS TO EACH DEFENDANT, ORDERED SEPARATE TRIALS FOR DEFENDANTS BJC AND MBMC, AND IMPROPERLY TRANSFERRED THE CASE AGAINST MBMC TO ST. LOUIS COUNTY.**

A. **Standard For Issuance of Extraordinary Writ.**

Mandamus lies to compel the undoing of a thing wrongfully done. *State ex rel. Todd v. Romines*, 806 S.W.2d 690, 691 (Mo. App. E.D. 1991). Prohibition lies to remedy an abuse of discretion by the trial court. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo. banc 2001). The distinction between prohibition and mandamus is at best blurred and there is a great degree of overlap in the subject matter to which the two writs apply. *Todd*, 806 S.W.2d at 691. Missouri Appellate Courts have relied on both mandamus and prohibition to remedy erroneous transfer to another venue. *Palmer v. Palmer*, 8 S.W.3d 193, 196 (Mo. App. E.D. 1999). Mandamus is proper directing the transferring judge to vacate the transfer order and reinstate the case in the county of original venue. *Palmer*, 8 S.W.3d at 196 (citing *State ex rel. Watts v. Hanna*, 868 S.W.2d 549, 551 (Mo. App. S.D. 1994)). Prohibition lies to direct a judge to whom a case was improperly transferred to retransfer that case to the county of original venue. *Palmer*, 8 S.W.3d at 196 (citing *State ex rel. Uptergrove v. Russell*, 871 S.W.2d 27, 30 (Mo. App. W.D. 1993)). In order to effectuate and facilitate full relief, the appellate courts may also join as a party the presiding judge of the county to which the relator's action was improperly transferred. *Palmer*, 8 S.W.3d at 197 (citing *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 194 (Mo. banc 1998); *Uptergrove*, 871 S.W.2d at 30).

B. **Venue as to one defendant properly alleged to be jointly liable is venue as to all such defendants.**

Respondent, in discussing resolution of the venue issue in this case stated:

What is unclear to this Court is whether venue against Missouri Baptist may be predicated on BJC's having its principal place of business in the City of St. Louis, where Plaintiff has pleaded a basis for joint liability. If venue against Missouri Baptist may not be based on BJC's presence, does this mean that where more

than one not-for-profit corporation is sued venue lies only where venue is proper as to all non-profit corporations and may not be predicated on venue being proper as to another? What if there is no one venue which is proper as to all non-profit Defendants?

*See* Petition, Ex. 2 p. 8-9.

Because a separate analysis of venue as to each defendant properly alleged to be jointly liable is not required under Missouri law, Respondent should have ruled that venue as to BJC made venue good as to MBMC. Instead, Respondent retained the cause as to BJC and sent the case against MBMC to St. Louis County.

This Court has held that “[t]he question of proper venue must be resolved by the statutes relating to venue and by the rules relating to the propriety of joinder of defendants, for the question of venue is contingent upon proper joinder of parties defendant.” *State ex rel. Allen v. Barker*, 581 S.W.2d 818, 825 (Mo. 1979) (emphasis added). Common or joint liability “is the touchstone for the determination of whether venue may be predicated upon the residence of a co-defendant.” *State ex rel. Farrell v. Sanders*, 897 S.W.2d 125, 126 (Mo. App. E.D. 1995) (citing *State ex rel. Sims v. Sanders*, 886 S.W.2d 718, 721 (Mo.App. E.D. 1994)).

In the absence of joint liability of the Defendants, venue against each Defendant must be analyzed separately. *State ex rel. Sims v. Sanders*, 886 S.W.2d 718, 720-21 (Mo. App. E.D. 1994) (citing *State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290 (Mo. banc 1979)) (rule is “entirely consistent with *Turnbough’s* holding that common or joint liability, not joinder, is the touchstone for the determination of whether venue may be predicated on the residence of a co-defendant”). However, where as here, the Defendants share joint liability in a single action, venue as to one Defendant establishes venue as to the other. *Todd*, 806 S.W.2d at 691-92.

It is, therefore, not necessary to employ a separate analysis into the propriety of venue on each presented claim. *Sims*, 886 S.W.2d at 721. Similar holdings are consistent with the general line of cases which discuss the interrelation of the venue statutes and the rules governing joinder of claims. *State ex rel. Bitting v. Adolf*, 704 S.W.2d 671, 673 (Mo. banc 1986) (citing *State ex rel. Farmers Insurance Co., Inc. v. Murphy*, 518 S.W.2d 655 (Mo. banc 1975)). The relationship between the venue statutes and the statutes and rules pertaining to joinder is well established and is applicable when determining venue, even under a special venue statute. *State ex rel. City of Springfield Through Bd. of Public Utilities v. Barker*, 755 S.W.2d 731, 733 (Mo. App. S.D. 1988). The principles developed in this line of cases, therefore, clearly apply with equal validity to any analysis concerning Relators’ choice between multiple “permissible venues,” *SSM v. Neill*, 78 S.W.3d at 144, under Mo. Rev. Stat. § 355.176.4, where there is common liability among the defendants.

For purposes of this writ it must be assumed that Relators have joined both Defendants properly and that they are joint tortfeasors. *Green Acres Land & Cattle Co., Inc. v. State*, 766 S.W.2d 649, 651 (Mo. App. W.D. 1998) (court will assume all well-pleaded facts). Defendants BJC and MBMC, in their Suggestions in

**Opposition, admit that Relators have properly pleaded joint liability. See Respondent’s Suggestions in Opposition to Relators’ Petition for Mandamus and/or Prohibition p. 8. Defendant BJC filed a motion to dismiss Plaintiffs’ allegations against it for failure to state a claim upon which relief could be granted under Rule 55. See Petition, Ex. 3. This motion was denied, see Petition, Ex. 2 p. 3), and any fair reading of the petition affirms this denial. See Petition, Ex. 1. Plaintiffs claim is against BJC and MBMC as joint tortfeasors and as such, a separate basis for venue is not necessary as to MBMC. Sims, 886 S.W.2d at 721; City of Springfield, 755 S.W.2d at 734.**

3. Venue as to one non-profit corporation is venue as to all under § 355.176.4

It is beyond question that a court has venue over all corporate defendants properly joined if there is venue over any one of them. *State ex rel. Webb v. Satz*, 561 S.W.2d 113, 115 (Mo. banc 1978). Respondent’s order transferring the case against MBMC is contrary to this Court’s holding in *Satz*, decided under Mo. Rev. Stat. § 508.040 (1939) and to Missouri law as set forth in the above line of cases. *Id.* In *Satz*, the corporate (for-profit) defendants made the same argument advanced by the nonprofit defendants in this case. In *Satz*, plaintiffs did not file suit in the county where the cause of action accrued, and only one defendant of several had an office for its business in the plaintiffs’ chosen venue. The defendants argued that plaintiffs were required to file in the county where venue was good as to each individual defendant, for example, where the cause of action accrued. *Id.* at 113-14.

This Court carefully examined the language of § 508.040, giving meaning to the broad language and plurality of certain words:

We observe that the statute commences in broad terms by stating that “Suits against corporations shall be commenced”; this language refers both to a suit against a single corporation or against several corporations. There is nothing which would in the ordinary understanding of these words limit their application to one or the other and not include both. The statute then . . . goes on to provide that venue will also lie “in any county where such corporations” have certain offices or agents. The words “in any county” are plain enough. What is meant by the next succeeding words, “where such corporations”?

These words refer back to the corporations against which suits can be commenced mentioned at the beginning of the sentence and, as said, this can be either one or more. Accordingly, the meaning is that any county where one or more of the corporations has an office or agent of the specified type is a county where an action against corporations can be commenced. The statute applies, true, when the only defendant is a single corporation, but to declare that it has no application when there are plural defendants, all corporations, is to ignore the broad language with which the statute begins.

*Id.* at 115 (emphasis added).

The Court in *Satz* readily divined the legislature’s intent that venue as to one corporation is venue as to all by its use of the plural, “corporations.” The nonprofit venue statute is no different, as long as it is correctly interpreted.

**1. The non-profit venue statutes define corporation in the plural.**

As noted, § 355.176.4 begins, “suits against a nonprofit corporation shall be commenced . . .” (emphasis added). Throughout this section “corporation” is singular. However, the legislature in its wisdom defined “corporation” for us. Mo. Rev. Stat. § 355.066 (1997), “Definitions,” provides in pertinent part: “Unless the context otherwise requires or unless otherwise indicated, as used in this chapter the following terms mean: . . . (6) ‘Corporation,’ public benefit and mutual corporations.” (emphasis added to point out the plural).

Thus, wherever “corporation” appears it must be read to mean “corporations.” Under *Satz*, venue as to one nonprofit defendant is venue as to all nonprofit defendants properly joined.

The nonprofit defendants may well argue that the context of the singular “corporation” requires that it not be read to mean the plural, so that the definition of § 355.066(6) does not control. The obvious question would be: Why? Surely the legislature was mindful of this Court’s decision in *Satz* when it instructed readers of Chapter 355 to consider “corporation” in its plural form. The legislature also was aware of the distinction – for purposes of determining venue – between defendants who are properly joined and defendants who are improperly joined solely to create venue.

Despite this precedent, Defendants may argue that Relators must find that one venue where the hospitals’ proverbial moons collide, and file suit there. This is exactly the argument made by the defendants in *Satz*, an argument this Court rejected. *Satz*, 561 S.W.2d at 114 (“it is claimed by the . . . defendants . . . that s[ection] 508.040, RSMo1969, requires actions against multiple corporate Defendants to be brought either in the county where all such Defendants maintain an office or agent or in the county where the cause of action accrued.”)

**2. The Court has determined that § 355.176.4 applies to suits against more than one non-profit corporation.**

In *SSM v. Neill*, this Court noted that § 508.040 and § 355.176.4 are “similarly worded.” *State ex rel. SSM Healthcare St. Louis v. Neill*, 78 S.W.3d 140, 143 (Mo. banc 2002). The Court’s analysis, in *SSM v. Neill*, however, did not address the issue presented here, but rather “whether the special nonprofit corporation statute . . . or the general venue statute . . . governs when a nonprofit corporate defendant is joined with an individual or corporate for-profit defendant.” *Id.* at 142. The Court’s analysis of the venue statutes in *SSM v. Neill* concentrated on the presence of the word “only” in § 355.176.4, but did not include the phrase “suits against a nonprofit corporation.” *Id.* at 144. The Court unquestionably held, however, that § 355.176.4 applied in suits against more than one nonprofit defendant. *Id.*

When interpreting a statute the “Court is required to give meaning to every word of the legislative enactment.” *Id.* An interpretation that renders a term “mere surplussage, included for no reason” is disfavored. *Id.* The Court, mindful of this canon of statutory interpretation, has already interpreted § 355.176.4 such that its opening phrase “[s]uits against a nonprofit corporation . . .” does not limit the statute’s effect only to suits against a single nonprofit corporation. The meaning of “a” in the opening phrase cannot, therefore, be limited to the singular and must mean “any one of a great number” and be applicable to more than one individual object. Black’s Law Dictionary, 1 (6th ed. 1990) (emphasis added).

The statute’s opening language must then be read as broadly as that of the corporate venue statute § 508.040. Any succeeding references to a nonprofit corporation logically and necessarily refer back to any one of the corporations sued and this can mean “one or more,” *Satz*, 561 S.W.2d at 115. Therefore, a consistent reading of the statute requires that the portion delineating the “permissible

venues,” *SSM v. Neill*, 78 S.W.3d at 145, must refer back to any nonprofit corporation sued under the statute. Venue as to one corporate defendant under such a statute, is venue as to all such corporate defendants. *Satz*, 561 S.W.2d at 115.

This interpretation of the statute does not conflict with the Court’s analysis regarding the word “only.” This Court has made plain in *SSM v. Neill*, that the legislature intended in § 355.176.4, to limit the “permissible venues for suit against nonprofit corporations [plural] only to one of the three locations designated in the statute, even when other defendants, including individuals, are also sued.” *SSM v. Neill*, 78 S.W.13 at 145 (emphasis added, bracket to point out the plural). The City of St. Louis, here, is one of those locations. Logically, where there are two nonprofit corporations the same statute would determine venue, just as § 508.040 applies to all actions against corporations, unless an individual is also joined. In the latter circumstance the difference between the court’s interpretation of § 355.176.4 and § 508.040 is merely that the nonprofit corporate statute controls even if an individual is added. Nowhere in the nonprofit venue statute, however, is there any suggestion that venue must be addressed separately as to multiple nonprofit defendants. Quite to the contrary, to do so would flout this Court’s well-reasoned *Satz* decision.

Further, what evidence exists that § 355.176.4 was intended to frustrate the Plaintiff’s ability to select between multiple “permissible venues” authorized under the statute? Plaintiffs are permitted latitude in the choice of the forum both at common law and under the various venue statutes. *State ex rel. Clark v. Gallagher*, 801 S.W.2d 341, 342 (Mo. banc 1990). There is nothing in the wording of the statute to suggest that one basis for venue is preferred over another. Section 355.176.4 is unique among the “special venue statutes,” providing for multiple bases for venue, and is to be distinguished from the venue statute considered in *State ex rel. Bell v. St. Louis County*, the county venue statute that provides for venue only in one place, “in the circuit court of such county.” *State ex rel. Bell v. St. Louis County*, 879 S.W.2d 718, 719 (Mo. App. E.D. 1994). Further, as in *SSM v. Neill*, in *Bell*, there was only one defendant subject to the special venue statute at issue. *Bell*, 879 S.W.2d at 718-20.

What of the case in which there is no one venue that satisfies the nonprofit venue statute as to both Defendants? Respondent herself postulated this: “This situation could arise if plaintiff was treated successively at hospitals in Boone County and in the City of St. Louis, there is a single injury caused by the co-mingled negligence of each, and neither hospital has its registered agent in the County in which the other is located.” See Petition, Ex. 2 p. 9, at n. 8. In such a circumstance, Plaintiffs would without question be allowed to choose which venue would apply. *City of Springfield*, 755 S.W.2d at 734; *Bell*, 879 S.W.2d at 719. Under a statute that provides multiple “permissible venues” for each non-profit corporate defendant, any one of which would suffice against a jointly liable, non-profit co-defendant however, and it is not necessary to employ such an exception.

In sum, this Court should follow its decision in *Satz* that venue as to a properly joined defendant under a statute that provides multiple permissible venues, is venue as to all such defendants. This Court has already held that § 355.176.4 is not limited to suits against a single non-profit corporation. *SSM v. Neill*, 78 S.W.3d at 144. A reading which interprets the statute’s opening phrase broadly to include corporations (plural), but then limits the applicability of the succeeding enumerated basis for venue on a singular basis, corporation by corporation, is internally inconsistent. The reading of § 355.176.4, which the Court’s analysis in *Satz* requires, gives consistent meaning to all the statute’s words and associated definitions, and harmonizes joinder and venue in a manner not achieved by Respondent’s order.

**A. There is no jurisdictional bar to venue in the City of St. Louis under longstanding Missouri law.**

Although Relators have shown that venue here is indeed proper under Missouri law in the City of St. Louis, Defendants BJC and MBMC may offer a tautological argument that the trial court acted in “excess of its jurisdiction” based on *SSM v. Neill*, 78 S.W.3d at 142 (citing *State ex rel City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. banc 1985)). Such an argument assumes “improper venue,” which as shown above, does not apply in the present case. In addition, the *Kinder* case, cited by this Court in *SSM v. Neill*, 78 S.W.3d at 142, for the proposition that venue is jurisdictional, was decided before *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994). *DePaul* expressly overruled the “quirk” in Missouri law melding venue and personal jurisdiction. 870 S.W.2d at 821-22. Further, the primary case cited by the Court in *Kinder*, was *State ex rel. Wasson v. Schroeder*, 646 S.W.2d 105, 106 (Mo. banc 1983), which was also expressly overruled by this Court in *DePaul*. *DePaul*, 870 S.W.2d at 822. The pre *DePaul* concept of venue and jurisdiction is not supported under longstanding Missouri law and, if resurrected, would be an unwarranted step backward resulting in such difficulties as defective service of process. No Defendant here has ever questioned service of process, nor have Defendants questioned personal jurisdiction, merely venue. Venue is proper in the City of St. Louis under longstanding Missouri law, and this Court should issue its Writ accordingly.

**II. RELATORS ARE ENTITLED TO A WRIT OF MANDAMUS AND/OR PROHIBITION, COMPELLING RESPONDENT TO VACATE HER ORDER OF NOVEMBER 27, 2002, AND PROHIBITING RESPONDENT FROM TRANSFERRING PART OF THE CAUSE OF ACTION, BECAUSE A WRONGFUL DEATH CLAIM UNDER MISSOURI LAW, IS A SINGLE, INDIVISIBLE CLAIM THAT MAY NOT BE SPLIT AND TRIED PIECEMEAL, IN THAT RESPONDENT ERRONEOUSLY ORDERED SEPARATE TRIALS AS TO TWO JOINTLY LIABLE DEFENDANTS IN A WRONGFUL DEATH CASE AND IMPROPERLY TRANSFERRED THE CLAIMS AGAINST ONE SUCH JOINTLY LIABLE DEFENDANT.**

1. Standard for Issuance of Extraordinary Writ.

As previously stated, mandamus lies to compel the undoing of a thing wrongfully done. *Todd*, 806 S.W.2d at 691. Prohibition lies to remedy an abuse of discretion by the trial court. *Linthicum*, 57 S.W.3d at 856-57. The distinction between prohibition and mandamus is at best blurred and there is a great degree of overlap in the subject matter to which the two writs apply. *Todd*, 806 S.W.2d at 691.

**B. Respondent's Order Impermissibly Split the Plaintiffs' Indivisible Cause of Action.**

The second abuse of discretion evident in Respondent's order of November 27, 2002, is in the "splitting" of Plaintiffs' cause of action in a way that Plaintiffs – even if they desired – could not do. Respondent's order requires an indivisible wrongful death cause of action to be divided; the issue of which part of Mrs. Trimble's death was caused by BJC will be tried in the City of St. Louis, while a St. Louis County jury will be empaneled to decide which part of Mrs. Trimble's death was caused by MBMC.

Death is one injury, caused, as properly alleged in this case, by the multiple concurrent acts of negligence of BJC and MBMC. The cause of action cannot be split. Missouri's wrongful death statute, Mo. Rev. Stat. §§ 537.080 *et seq.* (1991), provides for only "one indivisible claim for the death of a person which accrues on the date of death." *State ex rel. Kansas City Stock Yards Co. of Maine v. Clark*, 536 S.W.2d 142, 145 (Mo. banc 1976). A claimant may not split a cause of action and try a single claim piecemeal against defendants one by one. *Todd*, 806 S.W.2d at 691. The test for determining whether a claim has been improperly split is whether the cause of action against both defendants arises out of the same events and the parties, subject matter, and evidence necessary to sustain the claims against each are the same. *Hagen v. Rapid American Corp.*, 791 S.W.2d 452, 455 (Mo. App. E.D. 1990).

Here, the party Plaintiffs would be the same in both cases. These Plaintiffs represent all persons entitled to recover for the death of Hazel Trimble. Because they are the surviving spouse and children of the decedent, they are "Class I" beneficiaries and, therefore, recover to the exclusion of all others. Mo. Rev. Stat. § 537.080.1. The party Defendants, under Respondent's order, would be different in the City and the County actions, but Plaintiffs have properly alleged they are joint tortfeasors and each is, therefore, required as a defendant in Relators' cause of action. *Todd*, 806 S.W.2d at 691. Specifically, Plaintiffs have alleged that:

"BJC holds itself out to the public as an integrated delivery system employing more than 25,000 people who work to provide health care services at its member institutions, which include Missouri Baptist Medical Center, and that BJC maintains control over these institutions, including control and oversight of the adoption, promulgation and use of standards, protocols, and procedural guidelines. Further, BJC provides health care services at these institutions for consideration to the general public through its employees, agents and health care facilities, including Missouri Baptist, . . . and that BJC maintains its principal place of business in the City of St. Louis."

*See* Petition, Ex. 1 p. 2-3.

Plaintiffs have also alleged Hazel Trimble came under the care and treatment of Defendants BJC and MBMC, that each of them "undertook to provide medical, cardiology, and interventional cardiology care and treatment to decedent," and that "as a direct and proximate result of the negligence and carelessness of defendants, and each of them . . . decedent sustained injuries, damages, and on or about June 14, 2000 ultimately death . . ." *See* Petition, Ex. 1 p. 4-5. (emphasis added).

Further, in their responses to BJC and MBMC's motions to dismiss or transfer, Relators attached statements from BJC's website at [www.bjc.org](http://www.bjc.org), showing that information available at the time the petitions in this case were filed supported the allegations contained in the petitions, including the

allegation that BJC “employs” the 25,000 people who work at its member institutions. *See* Petition, Ex. 12 p. 2, ex. 1 of Petition, Ex. 12; Petition, Ex. 13 p. 4, ex. 1 of Petition, Ex. 13.

Respondent’s order of November 27, 2002, recognized that Plaintiffs had sufficiently pleaded their cause of action and, therefore, denied BJC’s motion to dismiss:

[P]laintiffs alleged in their petition that BJC Health System maintained control over Missouri Baptist Medical Center,” and that Mrs. Trimble “died while under the care of both BJC Health System and Missouri Baptist Medical Center. Whether plaintiff’s allegations are true and whether plaintiff will be able to adduce evidence of BJC Health System’s control is beyond the scope of a motion to dismiss for failure to state a claim and is an issue that is more appropriate for summary judgment or to be resolved at trial. Thus, the Court finds that BJC Health System’s motion to dismiss for failure to state a claim must be denied.

*See* Petition, Ex. 2 p. 2-3. (emphasis added).

The facts, allegations, and procedural posture of the present case differ in these crucial respects from those in *State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138 (Mo. App. E.D. 2002). Here, Respondent has denied BJC’s motion to dismiss and found that Plaintiffs have properly pleaded a basis for joint liability. *See* Petition, Ex. 2 p. 3. Relators’ allegations here are not made solely “by virtue of the affiliation agreement” between BJC and MBMC. 86 S.W.3d at 140-41. In addition, the Court of Appeals for the Eastern District in *BJC v. Neill* did not discuss the fact that BJC and Barnes-Jewish Hospital were each subject to venue in the City of St. Louis under § 355.176.4, under the principal place of business as to both, and further did not reach the question of venue as to properly joined joint tortfeasors under the non-profit venue statute.

Plaintiffs here, have clearly alleged that both BJC and MBMC are jointly liable for the single, indivisible claim arising from the death of Hazel Trimble. *See* Petition, Ex. 1 p. 4. Had Plaintiffs filed a wrongful death action in the City of St. Louis, and later filed a cause of action in St. Louis County, the first cause of action would control. *Palmer*, 8 S.W.3d at 195; *State ex rel. E.I. du Pont de Nemours and Co., Inc. v. Mummert*, 890 S.W.2d 367, 369 (Mo. App. E.D. 1994). Likewise, had some of the Class I members of the Trimble family not been named plaintiffs initially, they could not later bring a second separate cause of action elsewhere. *Kansas City Stock Yards*, 536 S.W.2d at 145.

In sum, if the rule against splitting a cause of action has any teeth, a party Plaintiff clearly may not be forced to split his or her cause of action. This is particularly true in a wrongful death case. Any settlements in a death case must be approved by the court, and here two different judges may be asked to approve a settlement and enter judgment. Likewise, if both cases proceed to trial, different juries would be faced with the same task, i.e., deciding the loss that any particular family member has suffered. A jury in St. Louis County might find the damages to be dramatically different than those determined by the St. Louis City jury. Two separate awards over the same death would be undesirable and probably unprecedented. There is no reason for this to occur. Venue in this case is properly before Respondent in the City of St. Louis.

#### CONCLUSION

Respondent’s Order of November 27, 2002, transferring Relators’ cause of action against MBMC is an abuse of discretion because venue is clearly proper in the City of St. Louis as to

Defendant BJC, and both Defendants are properly alleged to be jointly liable for the death of Hazel Trimble. The contingent question of proper venue must be resolved not only under the venue statutes but also under the rules relating to the propriety of joinder of defendants. A court has venue over all corporate defendants properly joined and alleged to be jointly liable if venue is proper over any one of them. Venue and jurisdiction address entirely separate issues, and there is no jurisdictional bar to maintaining the present cause of action in the City of St. Louis under longstanding Missouri law. In addition, Respondent's Order impermissibly split Relators' indivisible wrongful death cause of action. Relators' cause of action as to both BJC and MBMC arises out of the same events and the parties, subject matter and evidence necessary to sustain the claims against each are the same. Venue is proper in the City of St. Louis, the cause may not be split, and this Court should issue its writ accordingly.

Respectfully submitted,

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Certificate of Service

I hereby certify that two copies of Respondent's Brief and a disk with a copy of Respondent's Brief was mailed this 30<sup>th</sup> day of May, 2003, by depositing same in the U.S. Mail, first class, postage prepaid, and addressed as follows:

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**RULE NO. 84.06(b) and (g) CERTIFICATE**

**I hereby certify that this Brief complies with the limitations contained in Rule No. 84.06(b) and that this brief contains 5844 words according to the word count of Corel Word Perfect Version 9.**

**I hereby certify that this disk has been checked for viruses in compliance with Rule No. 84.06(g) and that it is virus free.**

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**APPENDIX**

**1. Orders Appealed from:**

**Order of Hon. Margaret M. Neill, 7/31/02.....A1 - 5**

**Order of Hon. William H. Crandall, Jr., Missouri Court of Appeals, 1/23/03A6**

**Order of Hon. Clifford H. Ahrens, Missouri Court of Appeals, 1/17/03.....A7**

**2. Statutes Relied upon:**

**Mo. Rev. Stat. § 355.066 (1997) .....A8-10**

**Mo. Rev. Stat. § 355.176.4 (1996) ..... A11-12**

**Mo. Rev. Stat. § 508.040 (1939) ..... A13**

**Mo. Rev. Stat. §§ 537.080 *et seq.* (1991) ..... A14**