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STATEMENT OF FACTS

The facts in this case are not in dispute and are, for the most part, adequately stated in Relator's Brief. Relator's Brief also admits additional facts that, although not expressly pleaded in the First Amended Petition¹, can be directly inferred from the pleaded facts. These admitted facts are: (1) Defendant Donald Henley and Relator Pansy Henley were using their car to move personal belongings as a cost saving measure instead of hiring professional movers, (2) Pansy Henley required to aid of her husband to lift heavy items while they were moving, (3) Pansy Henley needed Donald Hanley's help to move her belongings because she could not do it herself, (4) Pansy Henley and Donald Henley had to make several trips to move the belongings from one house to another, and (5) Donald Henley was the "designated" driver on the date of the accident. *Relator's Brief*, pgs. 8-9. In the context of the pleaded, admitted, and inferred facts in this case, the Court must determine whether those facts invoke principles of

¹ The First Amended Petition will hereafter be referred to as the "Petition."

substantive law, meeting the elements of a recognized cause of action or a cause of action that might be adopted in the case.

POINT RELIED ON I

The Petition Pleads Facts Which, If Proven, Would Make Pansy Henley Jointly and Severally Liable For The Negligence of Donald Henley Because That Petition Pleads All Elements Establishing A Joint Venture/Enterprise Between Pansy Henley And Her Husband In That They Were Mutually Involved In The Undertaking Of Personally Moving Their Belongings From One Home To Another To Avoid The Cost Of Hiring Professional Movers.

Bach v. Winfield-Foley, 257 S.W.3d 605 (Mo. banc 2008)

Stover v. Patrick, 459 S.W.2d 393 (Mo. banc. 1970)

POINT RELIED ON II

**The Petition Pleads All The Elements For Joint Venture/
Enterprise Liability In That It Is Alleged That Relator Was
Engaged With Her Husband In The Undertaking Of Personally
Moving All Their Belongings From One Home To Another For
Purposes Of Saving Money, Such That She Had An Equal Right Of
Control In The Move, And All Acts In Furtherance Of The Move.**

Dickey v. Nations, 479 S.W.2d 208 (Mo.App. 1972)

Johnson v. Pacific Intermountain Exp. Co., 662 S.W.2d 237

(Mo. banc 1983)

McCrory v. Bland, 197 S.W.2d 669 (Mo. banc 1946)

Restatement (Second) of Torts § 492

POINT RELIED ON III

**The Petition Pleads Facts Engendering An Inference of A
Principle-Agent Relationship Between Realtor And Her Husband
In That Relator Would Have Had A Right Of Control In The Move
Itself And The Law Does Not Require That She Have The Right To
Control The Physical Movements of Her Husband In Order To
Have A Principal-Agent Relationship.**

Jones v. Brashers, 107 S.W.3d 441 (Mo.App. S.D. 2003)

Plato Reorganized School Dist. V. Interlocutory Elec. Co-op,

425 S.W.2d 914 (Mo. banc 1968)

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ARGUMENT

POINT RELIED ON I

The Petition Pleads Facts Which, If Proven, Would Make Pansy Henley Jointly and Severally Liable For The Negligence of Donald Henley Because That Petition Pleads All Elements Establishing A Joint Venture/Enterprise Between Pansy Henley And Her Husband In That They Were Mutually Involved In The Undertaking Of Personally Moving Their Belongings From One Home To Another To Avoid The Cost Of Hiring Professional Movers.

A. Standard of Review

The trial court denied Relator's motion to dismiss for failure to state a cause of action. A motion to dismiss for failure to state a cause of action is an assertion that, while taking all factual allegations as true, the petition is insufficient to establish a cause of action. *Grewell v. State Farm Mut. Auto Ins. Co., Inc.*, 102 S.W.3d 33, 35-36 (Mo banc 2003). The court reviews *de novo* the denial of a motion to dismiss. *Moynihan v. Gunn*, 204 S.W.3d 230, 233 (Mo.App. E.D. 2006). "A motion to dismiss for failure to state a claim is solely a test of the

adequacy of the plaintiff's petition.” *Summer Chase Second Addition Subd. Homeowner's Ass'n v. Taylor-Morley, Inc.*, 146 S.W.3d 411, 415 (Mo.App. E.D. 2004). The scope of review for a motion to dismiss requires an examination of the pleadings, allowing them their broadest intendment, treating all facts alleged as true, construing allegations favorably to the plaintiff, and determining whether the petition invokes principles of substantive law. *Lipton Realty, Inc. v. St. Louis Hous. Auth.*, 705 S.W.2d 565, 568 (Mo.App. E.D. 1986).

The reviewing court reviews the petition to determine if the alleged facts meet the elements of a recognized cause of action and does not attempt to weigh whether or not alleged facts are credible or persuasive. *Summer Chase Second Addition Subd. Homeowner's Ass'n.*, 146 S.W.3d at 415. 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 of action that might be adopted in the case. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). If the plaintiff's allegations invoke principles of substantive law which may entitle it to relief, the petition

is not to be dismissed. *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 494 (Mo.App. E.D. 1990).

The ruling on a motion to dismiss is ordinarily confined to the face of the petition, which must be given liberal construction. *Matt v. Burrell*, 892 S.W.2d 796, 798 (Mo.App. S.D. 1995). If the facts pleaded and the reasonable inferences to be drawn therefrom, viewed most favorably from the plaintiff's standpoint, show any ground upon which relief may be granted, the plaintiff has the right to proceed. *Y.G.*, 795 S.W.2d at 494.

B. Relator's Liability Is Not Based Solely On Her Marital Status Or Her Status As A Joint-Owner And Passenger In A Vehicle Driven By Her Husband; Instead Liability Is Based On Other Facts And Theories Which Give Rise To Liability.

The question in this case is whether the factual allegations of the Petition, coupled with the additional facts conceded by Relator, establish a basis for imposing liability on Pansy Henley for her husband's negligence. More particularly, the question presented is whether an agreement, express or implied, among spouses to participate in a joint undertaking of moving all their belongings from one home to

another, using their mutual efforts and jointly owned vehicle rather than employing professional movers, all as a means of saving money, engenders a joint venture/enterprise or principal-agent relationship among the spouses, such that a negligent act committed by one spouse in furtherance of the undertaking is imputed to the other.

The pertinent facts are that Pansy Henley and her husband, Donald Henley, needed to move their household contents from their home in Jericho Springs to a new home in Joplin. They chose to perform the move themselves rather than hire professional movers. They knew it would take several trips to complete the move, but wanted to do it themselves to save money. The couple participated in moving the belongings together. Pansy Henley needed her husband's assistance in the move because she could not do it herself. On the day of the collision in question, Mr. and Mrs. Henley were in the process of moving their belongings from the Jericho Springs home to the Joplin home. They chose to use their jointly owned passenger car to haul their belongings. Mr. Henley was the designated driver for the move. Mrs. Henley was a passenger in the vehicle. While en route from Jericho Springs to Joplin, Mr. Henley failed to stop for a stop sign at an

intersection and proceeded into the path of a motorcycle carrying Respondents. Respondents suffered injuries in the ensuing collision. These facts sufficiently give rise to a joint venture/enterprise and/or a principal-agent relationship between Pansy and Donald Henley; the venture/agency having been created for the purpose of moving household belongings from one home to another.

At the outset, Respondents wish to dispel the confusion that has plagued Relator's pleadings in this writ. Respondents are not contending that liability should be imputed to Pansy Henley for the negligence of her husband solely by virtue of the spousal relationship. *See Relator's Brief, pg. 24.* It has long been the rule in Missouri that "[m]ere existence of the husband and wife relationship does not cause negligence of one spouse to be imputed to the other. *Stover v. Patrick*, 459 S.W.2d 393, 398 (Mo. banc. 1970). Respondents are also not contending that Pansy Henley's status as a co-owner passenger in the vehicle *alone* serves as a basis for imputing negligence to her. *See Relator's Brief, pg. 14-15.* This Court's prior rulings have held that mere evidence of co-ownership of a vehicle *alone* does not create a

basis for imposing liability on a passenger-spouse for the negligence of her driver-husband. *Id.* at 401.

It does not follow from *Stover*, however, that a joint-owner passenger of a vehicle is never liable for the negligence of the driving owner. *Stover* found quite the opposite, stating that there may exist “other facts which would establish a basis for imposing liability on a passenger wife for acts of her driver-husband . . .” *Id.* at 401. It also does not follow from *Stover* that co-ownership of the vehicle carries no weight in determining whether the co-owner spouse has some element of control when the vehicle is used in furtherance of a joint venture/enterprise with other spouse, or for determining the existence of a principal-agent relationship. This Court recently reaffirmed this principle in *Bach v. Winfield-Foley*, 257 S.W.3d 605, 609 (Mo. banc 2008), where it noted that *Stover*’s holding that co-ownership does not give a realistic right of control over its movement to a passenger-owner, is limited to “where there is an ‘absence of evidence of other facts which establish a basis for imposing liability on a passenger-wife for acts of her driver-husband.’” Indeed, it is generally held that that the presence of the owner in a vehicle being operated by another person

raises an inference or presumption that the owner has the right of control over the vehicle and, consequently, the operator. 37 A.L.R. 4th 565; *Campbell v. Fry*, 439 S.W.2d 545, 548 (Mo.App. 1969) [“Proof of ownership and occupancy of the car, together with evidence that the car was being operated by another with the acquiescence of the owner, is enough to raise a presumption that the driver was operating the vehicle as the agent of the owner and within the scope of his agency.”]

In her Brief, Relator focuses almost exclusively on the marital relationship and joint ownership facts in arguing that there is no basis for holding her jointly and severally liable for her husband’s negligence. *Relator’s Brief*, pg. 17. Toward that end, Relator relies heavily on *Stover*. As with all cases Relator cites, *Stover* involved an appeal from a judgment entered after a full evidentiary trial, not a motion to dismiss at the pleading stage. Moreover, Relator largely ignores the “other facts” giving rise to a joint venture/enterprise relationship and a principle/agent relationship, both of which provide a basis for imposing liability on her for her husband’s negligence. Such “other facts” can be found, as here, where two persons, married or not, enter into a joint venture/enterprise, the object of which is to personally

transport and move all their personal belongings between homes as a cost saving measure to avoid paying professional movers.

These “other facts” appear in the Petition, the admitted facts contained in Relator’s Brief, and the reasonable inferences to be drawn from those facts. As will be shown in Points Relied on 2 and 3, Mr. and Mrs. Henley had either an express or implied agreement, the subject of which was to personally move all their belongings from one home to another, using their mutual efforts and jointly owned vehicle, all as a cost saving measure to avoid having to hire professional movers. They both were active participants in the move and would both derive a mutual benefit, namely, saving money. As such, Relator participated in the venture, used her efforts and property, and therefore had a right of control over the venture regardless of whether she had the right to control the details of her husband’s driving, which was only a small part of the venture. Relator can therefore be held jointly and severally liable for her husband’s negligence under the doctrine of joint venture/enterprise and/or principle-agent liability. The trial court correctly denied the motion to dismiss.

POINT RELIED ON II

The Petition Pleads All The Elements For Joint Venture/Enterprise Liability In That It Is Alleged That Relator Was Engaged With Her Husband In The Undertaking Of Personally Moving All Their Belongings From One Home To Another For Purposes Of Saving Money, Such That She Had An Equal Right Of Control In The Move, And All Acts In Furtherance Of The Move.

A. The Joint Venture/Enterprise Doctrine

The Petition alleges that at the time of the accident, Relator and her husband were engaging in a joint venture/enterprise, namely the undertaking to move all their personal belongings from their home in Jericho Springs to their new home in Joplin. A joint venture has been defined as “an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge.” *McCrary v. Bland*, 197 S.W.2d 669, 672 (Mo. banc 1946). The essential elements of a joint venture are: (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3)

a community of pecuniary interests in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control. *Manley v. Horton*, 414 S.W.2d 254, 260 (Mo. banc 1967). The doctrine of joint venture/enterprise may be used to create liability of a non-operator of a vehicle to a third person. *Id.*

A joint venture may be established “without any specific formal agreement to enter into a joint enterprise; it may be implied or proven by facts and circumstances showing such enterprise was in fact entered into.” *McCrary*, 197 S.W.2d at 672. “There must be some active participation in the enterprise, some control over the subject-matter thereof *or property engaged therein.*” *Id.* (emphasis added.)

Cases generally use the terms joint venture and joint enterprise interchangeably without distinction. See, *McCrary*, 197 S.W. 2d at 672-673; *Perricone v. DeBlaze*, 655 S.W.2d 724, 725 (Mo. App. E.D. 1983). Some courts, however, have distinguished a joint enterprise from a joint venture on the basis that a joint enterprise is an undertaking for the mutual benefit or pleasure of the members, while a “joint venture” refers to a business enterprise, generally limited to only a

single transaction or course of transactions. *McCrory* 197 S.W.2d at 673. In the non-business context, it is said that a pecuniary benefit need not be proven, instead the members need only derive a mutual benefit. See, *Perricone* at 725; *Dickey v. Nations* 479 S.W.2d 208, 210, n. 2. (Mo.App. 1972). In either case, there is a mutual agency among the venturers for activities within the scope of the venture. *Johnson v. Pacific Intermountain Exp. Co.*, 662 S.W.2d 237, 241 (Mo. banc 1983). Thus, the members of a joint venture/enterprise are jointly and severally liable for torts committed within the scope of the enterprise. *Firestone v. VanHolt*, 186 S.W.3d 319, 324 (Mo.App. W.D. 2005).

The joint venture/enterprise doctrine is set forth in the Restatement (Second) of Torts § 491, which has been adopted in Missouri. *Manley*, 414 S.W.2d at 260. Comment (b) to § 491 explain the nature of a joint venture/enterprise as follows:

“A ‘joint enterprise’ includes a partnership, but it also includes less formal arrangements for cooperation, for a more limited period of time and a more limited purpose. It includes an undertaking to carry out a small number of activities or objectives, or even a single one, entered into by

members of the group under such circumstances that all have a voice in directing the conduct of the enterprise. The law then considers that each is the agent or servant of the others, and that the act of any one within the scope of the enterprise is to be charged vicariously against the rest.

While it is by no means impossible that the principle may be applied to other activities, the very great majority of the decisions applying it have involved the use of motor vehicles.”

Comment (g) to § 491 explains that the scope of the venture will generally determine which activities are part of the enterprise for which all members are mutually interested and, thus, vicariously liable. As Comment (g) explains:

“When the journey on which the plaintiff and the driver of the vehicle are participating is itself a part of a business enterprise in which the parties are mutually interested, the two are engaged in a joint enterprise. It is immaterial that the particular journey is a single transaction and is not a part of the general course of a business in which they are

associated as partners or otherwise. It is also immaterial whether the car is owned or hired by the one or the other or by both jointly; the use of the car as a part of a common business enterprise makes each responsible for the manner in which it is operated[.]” Thus, if two farmers by prior arrangement or on a particular occasion use the car of one to transport their produce to market, the drive is itself a joint business enterprise, even though thereafter the sale of the produce is the separate business of each.”

Missouri law is consistent with the principles of the Restatement in that “each member is responsible for the negligent acts of another if within the scope and object of the joint undertaking.” *McCrary*, 197 S.W.2d at 673; *Johnson*, 662 S.W.2d at 241-242.

The Restatement’s example of the two farmers is particularly relevant in this case. The trip Relator and her husband were on at the time of the accident was not the enterprise itself, but a part of it. The enterprise was moving. All acts that are part of the undertaking to move are part of that enterprise. Thus, it is not necessary that Relator have control over operation of the vehicle, so long as she had an equal

voice in the direction of the move. The decisive question then is not whether Relator had equal control of her jointly-owned vehicle, but whether she had a *right to control* the direction of the *enterprise*. See, *Johnson* 662 S.W.2d at 241-242.

In *Johnson*, a freight broker was held vicariously liable as a joint venturer for an accident caused by a co-venturer truck driver, even though the broker did not own the truck, was not present in the truck at the of the accident, was not the driver's employer, and did not have control over the details of operating the truck. For a commission, the broker had arranged for the truck driver to haul a load of steel. Finding a joint venture existed, this Court noted that the parties undertook the project "for mutual benefit and profit," and stated that "[t]here is mutual agency among the ventures for activities within the scope of the venture, and all have equal right of control." *Id.* at 241. This Court specifically noted that control over the driving duties was not essential for the broker to be vicariously liable as a joint venturer, stating that "[broker], of course, could not exercise effective control while the truck was on the highway but, as is usual in joint ventures, the participants had their assigned roles in the total project." *Id.* at 242. Thus, the

broker's right of control arose by operation of law from the parties' arrangements toward hauling a load of steel for their mutual benefit and profit.

The facts of the present case are analogous. It can reasonably be inferred from the Petition that Mr. and Mrs. Henley, either formally or informally, agreed to move their personal belongings themselves so as to profit by not having to hire professional movers. The purpose of the venture was broader than driving alone, it was moving their personal belongings. The use of their vehicle was an essential tool, but was not the object of the venture, the object being the transportation of their belongings. There was a community of interest in getting their belongings moved to their new home and in saving money. Mrs. Henley would have had an equal right of control in the venture in that she would have had input as to how many trips they made each day, what to move during any given trip, and how late they would have worked each day. Thus, it can be reasonably inferred she had an equal right to a voice in the direction of the enterprise.

Dickey v. Nations, 479 S.W.2d 208 (Mo.App. 1972), explained the requisite "mutual benefit" needed for establishing a joint enterprise

between husband and wife. In that case, the plaintiff's husband picked her up at a doctor's in the couple's jointly owned automobile intending to drive her home. On the way, the husband ran a red light and collided with another vehicle driven by the defendant. Plaintiff sued the defendant alleging he was negligent in the operation of his vehicle. Defendant alleged contributory negligence on the part of plaintiff's husband in running the stop sign, and argued that such negligence was imputable to plaintiff because she was a joint owner and had joint control of the vehicle. *Id.* at 210. At trial, the court allowed an erroneous instruction which assumed the issue of joint control by the plaintiff. After a verdict in favor of defendant, plaintiff appealed. Acknowledging that joint ownership of a vehicle alone is insufficient to impose negligence on a passenger-spouse, the defendant argued that the instruction was proper because the husband and wife were engaged in a joint enterprise. The court explained that "mutual benefit" implies an "identity of purpose." The court noted, however, that plaintiff and her husband's trip "served no business purpose and was not prompted by any profit motive . . ." *Id.* at 210, n.2. The court added that while it may have been to the couple's concurrent advantage to reach their

home, that inference did not mean they had a common purpose in reaching it or that their arrival would have been mutually beneficial to them. *Id.*

Dickey implied, however, that where husband and wife embark on a trip in a jointly owned car for a mutual benefit or a profit motive, then a joint enterprise can be found. *Id.* Such are the facts in the present case. Mr. and Mrs. Henley had embarked on a trip for a mutual benefit, namely moving their household belongings from one home to another. Moreover, this endeavor had a profit motive of avoiding the expense of hiring professional movers. A joint venture/enterprise can be inferred from this arrangement. The petition need not allege a specific agreement between Mr. and Mrs. Henley, as a joint venture may be established without any specific formal agreement, “it may be implied or proven by facts and circumstances showing such enterprise were in fact entered into.” *McCrory*, 197 S.W.2d at 672.

Relator asserts that a joint venture cannot be created for an “activity of household maintenance.” *Relator’s Brief*, pg. 21. Yet, Relator makes no attempt to define an “activity of household maintenance,” citing only *McCrory v. Bland*. *McCrory*, however, does

not purport to foreclose joint venture/enterprise liability between a husband and wife for “activities of household maintenance,” it simply found a lack of evidence to support a joint venture/enterprise in that case. The holding in *McCrorry* is quite narrow:

“In this record there is no showing that the husband, P.H. McCrorry, knew that his wife would place the mop in the basement stairway or that her act in doing so was the result of a conference between them. We, therefore, are of the opinion that the trial court erred in overruling appellant P.H. McCrorry’s motion for directed verdict.”

Id. at 673. Thus, *McCrorry* indicated that if there had been a conference between husband and wife about placement of the mop or an agreement that the mop would be placed in a certain place, the husband’ liability might ensue. Moreover, routine cleaning of a home is a far cry from the major and infrequent undertaking of moving all belongings from one home to another. The decision to move, the logistics of the moving process, and whether to hire professional movers or attempt the undertaking alone using the family car unquestionably would have been

the result of a conference and agreement between Mr. and Mrs. Henley. *McCrary* is therefore distinguishable.

Relator next argues that the Petition fails to plead a pecuniary interest to establish the existence of a joint venture/enterprise in this case. *Relator's Brief, pg. 23*. As mentioned above, a pecuniary interest is only required in the business context, not where the parties undertake a joint enterprise with mutual benefit. Nevertheless, Realtor has admitted that a pecuniary interest was involved in that Mr. and Mrs. Henley chose to move themselves instead of hiring professional movers, *all as a cost saving measure. Relator's Brief, pg 8*. Saving money is a sufficient pecuniary benefit. Mr. and Mrs. Henley also assumed the risk that the frequent trips in their passenger car and their investment of time and effort would, in the end, cost more than the cost of hiring movers and, as such, they would have shared in this loss. Mr. and Mrs. Henley's undertaking is no different than the Restatement (Second) example of the two fruit farmers, or if two college roommates, unrelated to each other, agreed to jointly move their personal belongings into the college dorm using one of the roommates vehicles rather than using movers.

Relator argues that a finding of joint venture/enterprise under the facts of this case would “re-define marriage” to be a perpetual joint venture for all activities of daily life. *Relator’s Brief*, pg. 24. This is a ludicrous and contorted interpretation of Respondents’ claim.

Respondents recognize that the marital relationship itself does not provide a basis for imposing joint and several liability on one spouse for the torts of the other, however, that relationship also does not insulate a spouse from liability where liability would otherwise exist against unmarried parties.

Whether the elements of a joint venture/enterprise are met so as to give each member an equal voice is generally for the jury. *Manley*, 414 S.W.2d at 260. All those elements were pleaded in the Petition. The trial court correctly denied the motion to dismiss.

POINT RELIED ON III

The Petition Pleads Facts Engendering An Inference of A Principle-Agent Relationship Between Realtor And Her Husband In That Relator Would Have Had A Right Of Control In The Move Itself And The Law Does Not Require That She Have The Right To Control The Physical Movements of Her Husband In Order To Have A Principal-Agent Relationship.

A. The Principle-Agent Relationship Is Closely Aligned With Joint Venture/Enterprise Liability.

Relator next suggests that a principal-agent relationship can never be found among married persons. *Realtor's Brief*, pg. 26. No authority is cited for this proposition and, indeed, it runs contrary to Missouri law. See, *Sanfilippo v. Bolle*, 432 S.W.2d 232, (Mo. 1958). An agency relationship is a "relationship where the principal only has the right to control the ends of the agent's activities; the principal does not have the right to control or direct the physical movements of her agent in accomplishing the final result." *Bach*, 257 S.W.3d at 608. Neither a contract nor an express appointment and acceptance is necessary, but consent may be manifested and the relationship may be created by

words and conduct. *Id.* “Compensation is not essential to the creation or existence of the relationship; agency may be a wholly gratuitous undertaking.” *Id.* An agency relationship may still exist even if the parties did not intend to create the legal relationship or to subject themselves to the liabilities that the law imposes as a result. *Id.*

“Generally, the relationship of principal-agent is a question of fact to be determined by the jury when, from the evidence adduced on the question, there may be a fair difference of opinion as to the existence of the relationship.” *Jones v. Brashers*, 107 S.W.3d 441, 445 (Mo.App. S.D. 2003).

In *Sanfilippo v. Bolle*, 432 S.W.2d 232, this Court found sufficient facts to create a jury question as to whether a wife was the agent of her husband when she was involved in an accident while driving to the store to buy fruit for the family market. The wife testified that she and her husband were engaged in the operation of a produce market, and that at the time of the accident she was returning from a trip down the street to pick up produce to bring to the market. *Id.* at 234. This Court found that such evidence created a jury question as to whether the wife was the husband’s agent. *Id.*

For the same reasons that the pleaded and admitted facts give rise to liability under the joint venture/enterprise doctrine, liability is also created under principle-agent analysis. Principal-agent liability is closely aligned with the doctrine of joint venture/enterprise. If Mr. and Mrs. Henley were engaged in the undertaking of moving all their belongings, then a joint venture/enterprise was created and they were acting as each other's agent at the time of the accident.

Relator's reliance on *McAuliff v. Vondera*, 494 S.W.2d 692 (Mo.App. 1973) is misplaced. The husband and wife in that case were involved in a collision while driving to a restaurant to eat. The evidence at trial showed no participation by the wife in the decision where to eat, the route to take when driving, or any other matter. *Id.* at 693. The drive was purely for pleasure. Because there was no evidence on which to base an agency relationship, the court held that it was error to submit the agency instruction at trial.

The present case, in contrast, does not come before the Court after a full evidentiary trial. Relator, instead, is contending that a husband and wife do not have control over one another for purposes of finding a principal-agent relationship. The element of control,

however, is not and need not be found in the act of driving itself, which was only a part of the overall enterprise of moving. It can be said that Mrs. Henley, as an active participant in the move, had control over the moving process. As one of two participants in the move, she would have a voice in how many trips were made on a given day, what to move during each trip, etc. She would have also had a voice concerning whether to hire movers or not. It cannot be said at the pleading stage that Mrs. Henley was just a passive observer, much like the wife in *McAuliffe*.

The liability proposed in the Petition is not novel. The liability imposed is not based on the marital relationship, it exists independent of that relationship. If Mr. and Mrs. Henley were strangers and Mr. Henley agreed to help Mrs. Henley move her belongings because she could not do it alone, he would become her agent. Parties to a joint venture/enterprise are responsible for negligence of the either in the course of the enterprise, whether they are related or not. If Don Henley were on a specific errand for his spouse, he would be liable even if she was not in the car.

B. Even If The Petition States Some Allegations In Conclusory Form, Respondents Are Entitled To All Reasonable Inferences From The Pleadings And Facts, And Furthermore, Can Rely Upon Conclusions Where the Facts Are Peculiarly Within The Defendants' Knowledge.

Defendant cites *Westphal v. Lake Lotawana Ass'n, Inc.*, 95 S.W.3d 144, (Mo.App. W.D. 2003), for the proposition that bare conclusions of law are insufficient to state a cause of action. *Westphal* is inapposite as that case dealt with a plaintiff's attempt to plead state action on the part of a quasi-government entity. *Id.* at 152. Moreover, the court could not decipher from the petition "what principles of law plaintiff was invoking." *Id.* at 150. Nonetheless, *Westphal* explained that "where a petition contains only conclusions and does not contain the ultimate facts or any allegations from which to infer those facts, a motion to dismiss should be granted. *Id.* at 152 (emphasis added.).

Here, the Petition pleads the nature of the joint venture/enterprise, i.e. moving, that Relator and her husband were actively engaged in the venture at the time of the accident, that Relator owned the property to be moved and the car that was used, and that

Relator was a passenger in the car at the time of the accident. Relator has admitted that the venture was for the purposes of moving, that both were active participants, and that there was a pecuniary benefit in that the Henley's were attempting to save money by moving themselves rather than hiring professional movers. These facts, and the inferences to be drawn therefrom, clearly invoke principles of substantive law, namely joint venture doctrine and principle-agent liability.

Furthermore, the specific nature of the actions, conversations and agreements among Donald and Pansy Henley are peculiarly within their knowledge, and Plaintiffs cannot be expected to know the intimate details of same at the pleading stage. Where facts are peculiarly within the defendant's knowledge and control it is not necessary that plaintiff state the specific facts underlying defendant's negligence. See, *Plato Reorganized School Dist. v. Interlocutory Elec. Co-op*, 425 S.W.2d 914, 918 (Mo. banc 1968). The Petition did plead sufficient facts to invoke principles of substantive law and, as such, states a claim upon which relief can be granted. The motion to dismiss was properly denied.

**C. If The Court Finds The First Amended Petition Deficient,
Plaintiffs Should Be Granted Leave To Amend To State Additional
Facts Establishing An Agency And Joint Enterprise Between Mr.
And Mrs. Henley**

The First Amended Petition is Respondents' first attempt to plead a claim against Pansy Henley. Should this Court somehow find the Petition deficient in any respect, Respondents should be given leave to amend so as to plead additional facts to support their theory. Rule 55.03 states that "leave [to amend] shall be freely given when justice so requires."

CONCLUSION

The petition pleads sufficient facts to invoke principles of substantive law which may entitle Respondents' to relief from Relator on the grounds that she was the joint venturer or principal of Donald Henley. Those facts are show that Realtor and her husband were engaged in the venture of moving their personal belongings so as to avoid the expense of hiring professional movers. Relator would have had an equal right of control in that overall venture, and, as such, she would be jointly and severally responsible for the negligence of other members in furtherance of that venture. The trial court's denial of the motion to dismiss was correct and the Writ of Prohibition should not issue. Should this court find Respondents' Petition lacking in any factual allegations, however, Respondents request that leave be given to allow them amend the Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Respondent's Brief includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words in this brief is 5,878.

The undersigned further certifies that the disk filed with this brief was scanned for viruses and was found virus-free through the Norton anti-virus program.

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