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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this original proceeding, pursuant to Article V, Section 4.1 of the Missouri Constitution, which provides that the Missouri Supreme Court may issue and determine original remedial writs, in that this is an original proceeding seeking to prohibit Respondent, Honorable James R. Bickel, Circuit Judge of Dade County, Missouri, from proceeding in a case against Relator Pansy Henley. This proceeding arose in the context of a suit, filed by Plaintiffs James and Connie Graves, to recover damages from Relator Pansy Henley for the alleged negligence of Defendant Donald Henley, under the theory of joint venture or *respondeat superior*, which case is pending before Respondent. Respondent denied Relator's timely filed Motion to Dismiss for failure to state a claim. Relator Pansy Henley filed an application for writ of prohibition with the Missouri Court of Appeals, Southern District, which was denied. Therefore, this matter is properly before this Court.

STATEMENT OF FACTS

1. Relator Pansy Henley is an individual who was named as a defendant in the case styled *James and Connie Graves v. Donald Henley*, Case No. 07DD-CV00034 (“the Lawsuit”), in the Circuit Court of Dade County, Missouri. Petition for Writ of Prohibition, ¶1, p. A1.

2. Respondent, the Honorable James R. Bickel, is the judge presiding over the above referenced case. Petition for Writ of Prohibition, ¶2, p. A1.

3. On February 6, 2007, Plaintiffs James Graves and Connie Graves filed a petition against Defendant Donald Henley in the Lawsuit. The petition alleged that Plaintiffs sustained damages due to Defendant Donald Henley’s negligent operation of a motor vehicle. Petition for Writ of Prohibition, ¶4, p. A1-2.

4. On May 2, 2008, Plaintiffs filed a motion for leave to amend the petition. The proposed amended petition (“Amended Petition”) included a count against Defendant Pansy Henley. A copy of the Amended Petition is attached hereto as Exhibit 1. Petition for Writ of Prohibition, ¶5, p.A2.

5. Prior to filing the Amended Petition, Plaintiffs took Defendant Donald Henley’s and Relator Pansy Henley’s depositions. Relator Pansy Henley had not been named as a Defendant at that time. Relator Pansy Henley’s Suggestions in Support of her Petition for Writ of Prohibition, p. A29.

6. Relator Pansy Henley has been married to Defendant Donald Henley for approximately 62 years. Relator Pansy Henley’s Suggestions in Support of her Petition

for Writ of Prohibition Exhibit, Defendant's Opposition to Plaintiffs' Motion for Leave to Amend, p. A29.

7. The Amended Petition arose out of an automobile accident between Defendant Donald Henley and Plaintiffs James and Connie Graves on November 8, 2006. Petition for Writ of Prohibition Exhibit 1, Amended Petition, ¶8, 14, pp. 9, 10.

8. Regarding Relator Pansy Henley, the proposed Amended Petition alleged that:

(a) "At all relevant times Defendant Donald E. Henley and Pansy Henley were husband and wife and joint owners of a 2006 Toyota Camary (sic), Missouri license no. 3NZY (sic)." Petition for Writ of Prohibition Exhibit 1, Amended Petition, ¶4, p. A8;

(b) "Defendant Donald E. Henley and Pansy Henley were engaged in a joint venture and/or joint journey at the time of the collision which gives rise to this action such that both defendants are jointly and severally responsible for the negligence of defendant (sic) Donald E. Henley. Defendant Pansy Hensley (sic) was a passenger in the 2006 Toyota Camary (sic) at the time of the collision and, as such, was entitled to right of control over the operation of the vehicle." Petition for Writ of Prohibition Exhibit 1, Amended Petition, ¶5, pp. A8-9;

(c) "At all times relevant, Defendant Donald E. Henley was the agent of Defendant Pansy Henley and was acting within the course and scope of said agency so as to make Defendant Pansy Henley vicariously liable for Defendant Donald E. Henley's negligence under the doctrine of respondeat superior." Petition for Writ of Prohibition, Exhibit 1, Amended Petition, ¶6, p. A9 (*italics in original*).

(d) “At the time [of the alleged accident], Defendant Donald E. Henley was operating a 2006 Toyota Camary (sic) southbound on Route D in Dade County. Defendant Pameley (sic) Hensley (sic) was a passenger in the Toyota Camary (sic) being driven by defendant (sic) Donald E. Henley.” Petition for Writ of Prohibition Exhibit 1, Amended Petition, ¶10, p. A9.

(e) “On the above mentioned date at (sic) time, Defendant Donald E. Henley and Pansey (sic) Henley were moving personal belongings from their home in Jerico Springs to a new home in Joplin.” Petition for Writ of Prohibition Exhibit 1, Amended Petition ¶11, p. A9.

9. On the date of the accident, Defendant Donald Henley and Relator Pansy Henley had been packing some of their belongings at the Jericho Springs home, and were returning to Joplin with some of those belongings in the above referenced 2006 Camry. Petition for Writ of Prohibition Exhibit 1, Amended Petition ¶11, p. A9; Relator Pansy Henley’s Suggestions in Support of Her Petition for Writ of Prohibition, p. A29..

10. Defendant Donald Henley and Defendant/Relator Pansy Henley opposed the motion for leave, on the grounds that the proposed Amended Petition failed to state a cause of action against Relator Pansy Henley. Petition for Writ of Prohibition, ¶8, p. A3. A copy of Defendant’s Opposition to Plaintiffs’ Motion for Leave to Amend is attached to Petition for Writ of Prohibition as Exhibit 2, p. A17.

11. Despite Defendants’ opposition, the trial court granted Plaintiffs’ Motion for Leave on June 23, 2008. Petition for Writ of Prohibition, ¶9, p. A3.

12. On June 30, 2008, Defendant Donald Henley and Relator/Defendant Pansy Henley filed a Motion to Dismiss the Amended Petition, as to Relator/Defendant Pansy Henley. Petition for Writ of Prohibition, ¶10, p. A3.

13. Defendants' Motion to Dismiss was heard by the Court on July 28, 2008, at which time the Court denied Defendant's Motion. Petition for Writ of Prohibition, ¶11, p. A4.

14. On September 9, Relator Pansy Henley filed a Petition for Writ of Prohibition with the Missouri Court of Appeals, Southern District. The Petition was denied by the Southern District's Order, dated September 11, 2008. Petition for Writ of Prohibition, ¶12, p. A4. A copy of that Order is attached to Petition for Writ of Prohibition as Exhibit 3, p. A26.

15. In his Answer, Respondent suggests the following facts, which Relator has not denied:

(a) Defendant Donald Henley was the "designated" driver on the date of the accident. Respondent's Answer/Return to Preliminary Writ of Prohibition, p. A43.

(b) 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. Respondent's Answer/Return to Preliminary Writ of Prohibition, p. A43, A50.

(c) Relator Pansy Henley required the aid of her husband to lift heavy items while they were moving. Respondent's Answer/Return to Preliminary Writ of Prohibition, p. A50.

(d) Relator Pansy Henley needed Defendant Donald Henley's help to move her belongings because she could not do it herself. Respondent's Answer/Return to Preliminary Writ of Prohibition, p. A52

(e) Relator Pansy Henley and Defendant Donald Henley had to make several trips to move the belongings from one house to another. Respondent's Answer/Return to Preliminary Writ of Prohibition, p. A52.

16. Respondent intends to proceed with the Lawsuit against Relator Pansy Henley despite the fact that the Circuit Court lacks jurisdiction to hear the Lawsuit against Relator Pansy Henley. Petition for Writ of Prohibition, ¶15, p. A5.

17. Relator Pansy Henley lacks any other remedy to address Respondent's improper exercise of jurisdiction. Petition for Writ of Prohibition, ¶18, p. A6.

POINTS RELIED ON

POINT RELIED ON 1: Relator Pansy Henley is entitled to an order prohibiting Respondent from proceeding in the case of *James and Connie Graves v. Donald Henley*, Case No. 07DD-CV00034 against her as a defendant, because the trial court lacks jurisdiction to hear the case against her due to the failure of Plaintiffs' Amended Petition to state a cause of action against her, in that the Amended Petition does not allege that she had a right of control over the operation the vehicle, which is a necessary in order to plead joint venture under Missouri law.

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

Manley v. Horton, 414 S.W.2d 254 (Mo. 1967)

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

Westphal v. Lake Latawana Ass'n, Inc., 95 S.W.3d 144 (Mo.App. W.D. 2003)

POINT RELIED ON 2: Relator Pansy Henley is entitled to an order prohibiting Respondent from proceeding in the case of *James and Connie Graves v. Donald Henley*, Case No. 07DD-CV00034 against her as a defendant, because the trial court lacks jurisdiction to hear the case against her due to the failure of Plaintiffs' Amended Petition to state a cause of action against her in that the Amended Petition alleges Relator Pansy Henley and Defendant Donald Henley were moving their personal belongings at the time of the accident, and that activity by a husband and wife is not an activity that is recognized under Missouri law as a "venture" for purposes of joint venture liability.

Manley v. Horton, 414 S.W.2d 254 (Mo. 1967)

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

POINT RELIED ON 3: Relator Pansy Henley is entitled to an order prohibiting Respondent from proceeding in the case of *James and Connie Graves v. Donald Henley*, Case No. 07DD-CV00034 against her as a defendant, because the trial court lacks jurisdiction to hear the case against her due to the failure of Plaintiffs' Amended Petition to state a cause of action against her, in that it does not allege a master-servant relationship between Relator Pansy Henley and Defendant Donald Henley, which is necessary to allege respondeat superior liability against Relator under Missouri law.

Branson Land Co. v. Guilliams, 926 S.W.2d 524 (Mo.App. S.D. 1996)

McAuliff v. Vondera, 494 S.W.2d 692 (Mo.App. 1973)

Trinity Lutheran Church v. Lipps, 68 S.W.3d 552 (Mo.App. E.D. 2001)

Westphal v. Lake Latawana Ass'n, Inc., 95 S.W.3d 144 (Mo.App. W.D. 2003)

ARGUMENT

POINT RELIED ON 1: Relator Pansy Henley is entitled to an order prohibiting Respondent from proceeding in the case of *James and Connie Graves v. Donald Henley*, Case No. 07DD-CV00034 against her as a defendant, because the trial court lacks jurisdiction to hear the case against her due to the failure of Plaintiffs' Amended Petition to state a cause of action against her, in that the Amended Petition does not allege that she had a right of control over the operation the vehicle, which is a necessary in order to plead joint venture under Missouri law.

Relator Pansy Henley, 81 years old, has been married to Defendant Donald Henley for 62 years. Relator Pansy Henley's Suggestions in Support of her Petition for Writ of Prohibition ("Writ Suggestions"), p. 29. In 2006, Mr. and Mrs. Henley moved from their home in Jericho Springs, Missouri to Joplin, Missouri. On November 8, 2006, Mr. and Mrs. Henley had been packing some of their belongings at the Jericho Springs home, and were returning to Joplin with some of those belongings in their car, a 2006 Camry. Petition for Writ of Prohibition Exhibit 1, Amended Petition ("Amended Petition"), ¶11, p. A9. Defendant Donald Henley was driving, while Relator Pansy Henley was merely riding in the car as a passenger. Amended Petition ¶10, p. A9. On the way home, Defendant Donald Henley was involved in a motor vehicle accident with the Plaintiffs, James and Connie Graves. Amended Petition ¶11, p. A9.

Plaintiffs filed a petition against Defendant Donald Henley, alleging that he caused damages to Plaintiffs when he negligently operated his vehicle. Petition for Writ of

Prohibition (“Writ Petition”) ¶4, p. A1-2. After completing discovery, including taking the depositions of Defendant Donald Henley and Relator Pansy Henley (who was not named as a defendant at the time of the deposition), Plaintiffs moved the trial court for leave to file the Amended Petition. Writ Petition, ¶5, p. A2; Writ Suggestions, p. a29. The Amended Petition sought to add Relator Pansy Henley as a defendant. Writ Petition, ¶5, p. A2. The Amended Petition alleged that she is liable for the alleged negligence of Defendant Donald Henley under the theories of joint venture and/or agency, even though she was a mere passenger at the time of the accident. Amended Petition, p.A8-14. It should be noted that the Amended Petition does not plead any allegedly negligent action on behalf of Relator Pansy Henley – it relies only on a conclusory allegation that she is liable for the negligent acts of her husband under the theories of joint venture/joint journey and agency.¹ Amended Petition, p. A8-14. However, the allegations in the Amended Petition do not establish either a joint venture or an agency relationship.

¹ Defendant Donald Henley objected to the Motion for Leave to Amend, on the grounds that it did not serve the interest of justice to allow Plaintiff to amend the original Petition with an Amended Petition that did not state a claim upon which relief can be granted. Defendant Donald Henley noted to the trial court that Plaintiffs had deposed Relator Pansy Henley, and the deposition failed to provide information sufficient to impose liability on Relator Pansy Henley. Writ Petition ¶8, p. A3, Writ Petition Exhibit 2, Defendant’s Opposition to Plaintiff’s Motion for Leave to Amend, p. 17-25.

In order to establish a joint venture, Plaintiffs must allege that (1) there was an agreement, whether express or implied; (2) and a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among its members; and (4) equal right to a voice in the direction of the enterprise, which gives equal right of control to each member. *Manley v. Horton*, 414 S.W.2d 254, 260 (Mo. 1967); *Mitchem v. Gabbert*, 31 S.W.3d 538, 541 (Mo.App. S.D. 2000). The Amended Petition does not allege that Relator Pansy Henley had an equal right of control of the vehicle.

A. A passenger/co-owner of a vehicle lacks a right of control over the vehicle.

Plaintiffs' Amended Petition fails as a matter of law because status as a mere passenger and co-owner does not establish a right of control over the vehicle sufficient to

Despite Defendant Donald Henley's objection, the trial court granted Plaintiffs leave to amend the Petition. Writ Petition, ¶9, p. A3. In response, Relator Pansy Henley filed a Motion to Dismiss the Amended Petition. Writ Petition, ¶10, p. A3. Briefly (and explained in greater detail below), Relator Pansy Henley argued to the trial court that that the Amended Petition failed to state a cause of action against her as a matter of law.

Relator Pansy Henley's Motion to Dismiss the Amended Petition was denied by the trial court, despite the fact that the Amended Petition fails to state a claim.

On September 9, 2008, Relator Pansy Henley filed a Petition for Writ of Prohibition with the Missouri Court of Appeals, Southern District, which was denied by Order on September 11, 2008. Writ Petition, ¶12, p. A4; Writ Petition Exhibit 3, Order, p. A26.

create a joint venture. Missouri has long recognized that mere presence in a vehicle is not sufficient to confer upon a passenger “a right of control” over the operation of the vehicle. “As a general rule, the negligence of a driver of an automobile will not be imputed to a mere guest or passenger who has no control or authority over the automobile or over the driver.” *Mitchem*, 31 S.W.3d at 542 (citing, *Tannehill v. Kansas City, C. & S. Ry. Co.*, 279 Mo. 158, 213 S.W. 818, 822 (Mo. 1919)); *Counts v. Thomas*, 63 S.W.2d 416, 419 (Mo.App.1933). Therefore, Respondent’s allegation that Relator Pansy Henley was present in the car as a passenger is insufficient as a matter of law to confer upon her a right of control over the vehicle.

Further, allegations that Mrs. Henley is a joint owner of the automobile do not establish that she had any level of control over the operation of the vehicle. In *Stover v. Patrick*, 459 S.W.2d 393 (Mo. banc 1970), this Court rejected the notion that a husband’s negligence while driving a vehicle he owned jointly with his wife was imputable to the wife. In that case, the husband and wife were travelling to a wedding when they were involved in an automobile accident. *Id.* at 394. This Court, citing cases from other jurisdictions, noted that a joint owner does not have any appreciable control over the operation of the vehicle when it is being driven by someone else. *Id.* at 399-400.

Quoting the Oregon Supreme Court, this Court noted that mere co-ownership does not entitle the nondriving co-owner to interfere with the operation of the vehicle, nor does it entitle the nondriving co-owner the “unequivocable right to designate destination, route, course, or manner of operation, speed and other factors indicating control in the more

remote sense”. *Id.* at 399 (citing *Parker v. McCartney*, 338 P.2d 371, 372 (Or. 1959)).

Citing the Supreme Court of Michigan, this Court noted:

Divorcing ourselves, as we must if we are to do justice, from the baleful influence of a pernicious fiction, what control or right of control has a passenger, even though he may be a co-owner, as the car speeds down the highway, driven by the other co-owner? Any attempted exercise of the right of control by wresting the wheel from the driver would be foolhardly. Equally menacing to the driver’s efficient operation of the machine are raucous reproaches, strident denunciations, or even persistent unctuous admonitions from the back seat.

Id. at 399-400 (citing *Sherman v. Korff*, 91 N.W.2d 485, 486 (Mich. 1958)).

In Respondent’s Answer/Return to Preliminary Writ of Prohibition, Respondent cites to the presumption that the “presence of the owner in a vehicle being operated by another raises an inference or presumption that the owner has a right of control over the vehicle and, consequently, the operator.” Respondent’s Answer, p. A46. Respondent goes on to suggest that, based on this presumption, the allegation that Relator Pansy Henley “was a co-owner of the vehicle and a passenger at the time of the collision, is sufficient to state a cause of action”. Respondent’s Answer, p. A46-47. However, Respondent’s conclusion is incorrect, because the presumption does not apply in the present case. The presumption has only been applied in cases where the driver was NOT also an owner. *See Bach v. Winfield-Foley Fire Protection Dist.*, 257 S.W.3d 605 (Mo. 2008)(where nephew was driving a vehicle owned by his aunt); *Perricone v. DeBlaze*,

655 S.W.2d 724 (Mo.App. E.D. 1983)(where acquaintance of the owner was driving). In cases where the driver is a co-owner with the passenger, such as in the present case and in *Stover*, this presumption is not applicable.

Plaintiffs have to allege evidence that shows some equal right of control of the vehicle. *Mitchum*, 31 S.W.3d at 542. Because Plaintiffs have only alleged that Relator Pansy Henley was a passenger and a co-owner with the driver of the vehicle, they have not, as a matter of law, established any facts upon which a jury could find that she had any control over the operation of the vehicle.² As such, the Amended Petition fails, as a matter of law, to state a claim against Relator Pansy Henley.

B. Conclusory statements are not allegations of fact.

Plaintiffs' Amended Petition makes only conclusory allegations that Relator Pansy Henley had an equal right to a voice in the direction of the enterprise or an equal right of control. The Amended Petition states: "Defendant Pansy Henley was a passenger in the 2006 Toyota Camary (sic) at the time of the collision and, as such, was entitled to right of control over the operation of the vehicle." Amended Petition, ¶5, pp. A8-9. However,

² Respondent argues in Respondent's Answer that Defendant Donald Henley was Relator Pansy Henley's agent, and, as the principal, Relator Pansy Henley had a right of control sufficient to establish a joint venture. Respondent's Answer, p. 10. However, neither the facts alleged in the Amended Petition, nor a reasonable inference from those facts, establish that Defendant Donald Henley was Relator Pansy Henley's agent. See, Point Relied Upon No. 3.

Plaintiffs do not allege a single fact that shows how Relator Pansy Henley had this right of control. A plaintiff is required to state a “short and plain statement of the facts showing that the pleader is entitled to relief”. MO.R.CIV.PRO., Rule 55.05. The mere conclusion that Relator Pansy Henley had a right of control over the operation of the vehicle is not sufficient to survive a motion to dismiss. *Westphal v. Lake Latawana Ass’n, Inc.*, 95 S.W.3d 144, 152 (Mo.App.W.D. 2003); *Hayward v. City of Independence*, 967 S.W.2d 650, 653 (Mo.App.W.D. 1998)(where allegation that plaintiff sustained “irreparable damage” was insufficient to state a claim upon which relief may be granted).

In *Westphal*, the plaintiff filed suit against Defendant Lake Latawana Association, Inc. alleging violation of substantive and procedural due process under the United States and Missouri Constitutions, violation of equal protection under the Missouri Constitution, violation of 42 U.S.C. § 1983; and inverse condemnation. *Id.* at 147. The trial court dismissed these counts against the defendant, on the ground that the plaintiff had failed to plead an essential element of each of these allegations, namely that they failed to plead any state action. *Id.* at 148. In affirming the lower court’s dismissal, the Court of Appeals noted that the plaintiff plead that the defendant “at all times relevant hereto acted under color of the statutes, laws, customs, ordinances and usage of the state of Missouri.” *Id.* at 152. Addressing this allegation, the Court stated “[t]his allegation, however, is not a fact. Instead, it is a conclusion that the Association acted under the color of state law. Nowhere in his petition does Mr. Westphal allege any facts that demonstrate how or why the Association acted under color of state law.” *Id.*

Similar to the petition in *Westphal*, Plaintiffs' broad allegation that Relator Pansy Henley "was entitled to right of control over the operation of the vehicle" is a mere conclusion. Plaintiffs do not, and cannot, allege any facts that, if proven, would establish Relator Pansy Henley's right of control as recognized under Missouri law.

C. Prohibition is the appropriate remedy.

Prohibition is the appropriate remedy to prohibit a lower court from acting extra-judicially by hearing a case over which it lacks jurisdiction. It is well established that the trial court does not have jurisdiction where a petition fails to state a cause of action, as there is no subject matter upon which the court can take jurisdiction. *State ex rel Union Electric Co v. Dolan*; 256 S.W.3d 77, 81 (Mo. 2008)(citing *Adkisson v. Dir. of Revenue*, 891 S.W.2d 131, 132 (Mo. banc 1995) and *Commercial Bank of St. Louis County v. James*, 658 S.W.2d 17, 21 (Mo. banc 1983)). As such, prohibition lies where a petition fails to state a cause of action. *Id.* (citing *State ex rel. Johnson v. Sevier*, 339 Mo. 483, 98 S.W.2d 677, 680 (1936); *State ex rel. Barthelette v. Sanders*, 756 S.W.2d 536, 539 (Mo. banc 1988); and *State ex rel. Diehl v. Kintz*, 162 S.W.3d 152 (Mo.App.2005)).

In the present case, the Amended Petition fails to allege that Relator Pansy Henley had a right of control over Defendant Donald Henley, whether by direct allegation or by inference from the facts plead. As such, the Amended Petition fails to state a claim and the Circuit Court has no subject matter jurisdiction. Because Respondent intends to proceed with the Lawsuit, despite the fact that the Circuit Court lacks subject matter jurisdiction, and because Relator Pansy Henley lacks any other remedy to address

Respondent's improper exercise of jurisdiction, a writ of prohibition is the only appropriate remedy.

POINT RELIED ON 2: Relator Pansy Henley is entitled to an order prohibiting Respondent from proceeding in the case of *James and Connie Graves v. Donald Henley*, Case No. 07DD-CV00034 against her as a defendant, because the trial court lacks jurisdiction to hear the case against her due to the failure of Plaintiffs' Amended Petition to state a cause of action against her in that the Amended Petition alleges Relator Pansy Henley and Defendant Donald Henley were moving their personal belongings at the time of the accident, and that activity by a husband and wife is not an activity that is recognized under Missouri law as a "venture" for purposes of joint venture liability.

Plaintiffs Amended Petition alleged that Defendant Donald Henley caused an automobile accident while he and Relator Pansy Henley were moving their personal belongings from one home to another. Amended Petition, pp. A8-15. But the act of moving personal belongings is an activity of household maintenance, and as such is not the type of activity that is recognized as a joint venture under Missouri law.

In order to establish a joint venture, Plaintiffs must allege that (1) there was an agreement, whether express or implied; (2) and a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among its members; and (4) equal right to a voice in the direction of the enterprise, which gives equal right of control to each member. *Manley v. Horton*, 414 S.W.2d at 260; *Mitchem v. Gabbert*, 31 S.W.3d at 541. Because they were engaged in an activity of household maintenance, Relator Pansy Henley and Defendant Donald Henley cannot, as a matter of law, have had

an “agreement”, nor was there a pecuniary interest, that was sufficient to establish a joint venture.

A. Plaintiffs cannot establish an agreement between husband and wife.

To state a claim based on the theory of joint venture, Plaintiffs must allege that there was an agreement between the Henleys to accomplish a common purpose. *Id.* However, the facts alleged in the Amended Petition establish that Defendant Donald Henley and Relator Pansy Henley were engaged in an activity of normal household maintenance, and, as such, no agreement was possible. *State ex rel. McCrory v. Bland*, 197 S.W.2d 669 (Mo. banc 1946).

In *McCrory v. Bland*, the plaintiff, a laundress for the McCrory’s, alleged that she tripped over a mop that was negligently left in her path by Mrs. McCrory, resulting in her fall down a flight of stairs. *Id.* at 710. The plaintiff attempted to impute liability for Mrs. McCrory’s negligence to Mr. McCrory under the theory of joint adventure or joint enterprise, because the husband paid plaintiff for the services she was rendering in the McCrory’s home. *Id.* at 710-11. The Court found that the husband and wife could not have been engaged in a joint venture, stating:

Under the common law as well as under the statutes a husband is bound to furnish reasonable support for his wife and minor children. [citations omitted] So the maintaining of a home by a husband and wife is not the result of an agreement or contract between them. It is the result of their marital status, a duty the husband owes his wife under the law. It therefore

cannot be a joint adventure because a joint adventure can arise only by contract or agreement between the parties.

Id. at 712.

Defendant Donald Henley, pursuant to his marital obligation to assist in the support and maintenance of their joint household, and Relator Pansy Henley were moving their mutual belongings, thereby fulfilling their mutual duties to maintain their home. As in *McCrary*, the Henleys could not enter into an agreement, express or implied, to fulfill an obligation that each of them was already bound by their marital contract to fulfill. Therefore, Plaintiffs cannot show that there was an agreement between the Henleys.

B. Amended Petition does not allege a pecuniary interest.

A pecuniary interest exists when the parties have a right to share in the profits and a duty to share in the losses of the “venture”. *Jones v. St. Charles County*, 181 S.W.3d 197, 202 (Mo.App. E.D. 2005); *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126, 138 (Mo.App. E.D. 1999).

In the present case, Plaintiffs allege that Defendant Donald Henley and Relator Pansy Henley were moving their personal belongings from their home in Jericho Springs to a new home in Joplin; they were using their own car as a cost-saving measure; they both had an interest in moving their belongings and saving money; and Relator Pansy Henley required her husband’s aid to lift heavy items. Respondent’s Answer, p. A50. Even if a husband and wife could “agree” to maintain their household (which they cannot, See Point III.A, above), there are simply no cases where Missouri Courts have

found that engaging in the normal activities of maintaining a household, such as moving personal belongings to a new residence, forms the basis for a “pecuniary interest”. This is for obvious reasons: To do so would re-define marriage to be a perpetual joint-venture where the spouses become joint venturers in all activities of day-to-day life.

This flaw in the Amended Petition is highlighted by Respondent’s own argument.

In Respondent’s Answer, he states:

Under these facts, Pansy Henley would be liable for the negligence of her husband, who was her agent, even if she were not a passenger in the vehicle at the time of the collision. Her presence in the vehicle is not required to prove agency or joint enterprise.

Respondent’s Answer, p. A50 (emphasis in original). As evidenced by Respondent’s own argument, the end result would make husbands and wives guarantors for the liabilities of their spouses. However, Missouri has long stood by the principal that a wife cannot be held liable for the torts of her husband based on the marital relationship alone. *See, McCrory v. Brand*, 355 Mo. at 710, 197 S.W.2d at 671-72; *Link v. Cox*, 529 S.W.2d 189, 191 (Mo.App. 1975).

Plaintiffs’ Amended Petition does not allege any fact that suggests a real pecuniary interest: the Henleys were not transporting property for profit, nor were they engaged in any commercial or business venture. Thus, the Plaintiffs have not alleged that the Henleys had any pecuniary interest in the alleged venture.

C. Prohibition is the appropriate remedy.

Prohibition is the appropriate remedy to prohibit a lower court from acting extra-judicially by hearing a case over which it lacks jurisdiction. It is well established that the trial court does not have jurisdiction where a petition fails to state a cause of action, as there is no subject matter upon which the court can take jurisdiction. *Union Electric Co*; 256 S.W.3d at 81 (citing *Adkisson*, 891 S.W.2d at 132 and *Commercial Bank of St. Louis County*, 658 S.W.2d at 21). As such, prohibition lies where a petition fails to state a cause of action. *Id.* (citing *Johnson*, 98 S.W.2d at 680; *Barthelette*, 756 S.W.2d at 539; and *Dieh*, 162 S.W.3d 152).

In the present case, the Amended Petition cannot impose vicarious liability upon Relator Pansy Henley because Missouri law does not recognize the activity of maintaining a household as a joint venture between a husband and wife. As such, the Amended Petition fails to state a claim and the Circuit Court has no subject matter jurisdiction. Because Respondent intends to proceed with the Lawsuit, despite the fact that the Circuit Court lacks subject matter jurisdiction, and because Relator Pansy Henley lacks any other remedy to address Respondent's improper exercise of jurisdiction, a writ of prohibition is the only appropriate remedy.

POINT RELIED ON 3: Relator Pansy Henley is entitled to an order prohibiting Respondent from proceeding in the case of *James and Connie Graves v. Donald Henley*, Case No. 07DD-CV00034 against her as a defendant, because the trial court lacks jurisdiction to hear the case against her due to the failure of Plaintiffs' Amended Petition to state a cause of action against her, in that it does not allege a master-servant relationship between Relator Pansy Henley and Defendant Donald Henley, which is necessary to allege respondeat superior liability against Relator under Missouri law.

The First Amended Petition purports to make a claim of vicarious liability against Relator Pansy Henley under the theory of respondeat superior. Plaintiffs' Amended Petition fails as a matter of law to establish an agency relationship between Defendant Donald Henley and Relator Pansy Henley.

A. Marital relationship does not create an agency relationship.

The Amended Petition alleges that Defendant Donald Henley was driving his wife to Joplin, Missouri, after they had packed some of their personal belongings from their home in Jericho Springs. Amended Petition ¶P 10, 11, p. A9. The only "relationship" alleged is the marital relationship. Under Missouri law, "[t]here is no agency between a husband and wife merely because of the marital relationship and neither is empowered to act as agent for the other simply because they are married." *Branson Land Co. v. Williams*, 926 S.W.2d 524, 527 (Mo.App. S.D. 1996).

B. Amended Petition does not allege a right of control.

A petition alleging vicarious liability under an agency theory must show a “master-servant relationship”. See *Trinity Lutheran Church v. Lipps*, 68 S.W.3d 552, 557 (Mo.App. E.D., 2001). Without the power to control, no master-servant relationship exists and the purported master incurs no liability for the purported agent’s negligent acts. *Id.* (cited by *Summer Chase Second Addition Subdivision Homeowners Ass'n v. Taylor-Morley, Inc.*, 146 S.W.3d 411, 417 (Mo.App. E.D. 2004)).

In *McAuliff v. Vondera*, a wife and her husband were on their honeymoon. 494 S.W.2d 692, 693 (Mo.App. 1973). The husband was driving to Sullivan, Missouri to find a restaurant at which to stop and eat when there was a collision with the defendant. *Id.* There was no evidence of the wife’s control over the husband on that trip: the parties had agreed to travel to Sullivan, Missouri; there was no evidence that the wife determined the route they would take to Sullivan; nor did she control the operation of the car. *Id.* at 694. Because an agency relationship results when one person consents that another should act on his behalf and be subject to his control, and there was no evidence of the wife’s control, the Court held there was no evidence upon which the jury could have made a finding of an agency relationship between the wife and husband. *Id.*

Nowhere in Plaintiffs’ Amended Petition do they allege that Defendant Donald Henley was subject to Relator Pansy Henley’s control while they were on the drive from Jericho Springs to Joplin. Therefore, they have not and cannot establish any agency relationship between the Henleys based on the facts plead in the Amended Petition.

C. Conclusory statements are not allegations of fact.

Instead of pleading any facts to establish Relator Pansy Henley's control, Plaintiffs' Amended Petition merely states that Defendant Donald Henley was Relator Pansy Henley's agent. Amended Petition, ¶6, p. A9. This is a mere conclusion, and does not satisfy the Rule 55.05 requirement that a petition contain a short plain statement of fact. *Westphal*, 95 S.W.3d at 152. See argument set forth in Point I.B.

D. Moving household belongings does not create a master-servant relationship.

Respondent's Answer attempts to argue that the Amended Petition alleged facts, the inference from which establish an agency between Relator Pansy Henley and Defendant Donald Henley. Specifically, Respondent references the allegations that Relator Pansy Henley and Defendant Donald Henley were moving personal belongings from their home in Jericho Springs to a new house in Joplin, Missouri. Respondent's Answer, p. A48. From this allegation, Respondent asks the Court to infer that the Henley's

[H]ad an informal agreement with the common purpose of using the car to move their belongings from their old home to a new home, as a cost saving measure instead of hiring professional movers. Both Mr. and Mrs. Henley had an interest in getting their belongings moved and saving money. Mrs. Henley required the aid of her husband to lift heavy items as part of this endeavor. Use of the car for the purpose of moving their belongings was part of the joint enterprise, in fact a requisite tool. Both parties, as joint owners, had a presumptive right to control the car.

Respondent's Answer, p. A50. However, even making this inference, there is still nothing to suggest that Relator Pansy Henley had a right of control over Defendant Donald Henley, therefore Defendant Donald Henley could not have been her "agent" for purposes of moving their mutual belongings from one household to another.

E. Prohibition is the appropriate remedy.

Prohibition is the appropriate remedy to prohibit a lower court from acting extra-judicially by hearing a case over which it lacks jurisdiction. It is well established that the trial court does not have jurisdiction where a petition fails to state a cause of action, as there is no subject matter upon which the court can take jurisdiction. *Union Electric Co*; 256 S.W.3d at 81 (citing *Adkisson*, 891 S.W.2d at 132 and *Commercial Bank of St. Louis County*, 658 S.W.2d at 21). As such, prohibition lies where a petition fails to state a cause of action. *Id.* (citing *Johnson*, 98 S.W.2d at 680; *Barthelette*, 756 S.W.2d at 539; and *Dieh*, 162 S.W.3d 152).

In the present case, the Amended Petition fails to allege that Defendant Donald Henley was the agent of Relator Pansy Henley at the time of the automobile collision, whether by direct allegation or by inference from the facts plead. As such, the Amended Petition fails to state a claim and the Circuit Court has no subject matter jurisdiction. Because Respondent intends to proceed with the Lawsuit, despite the fact that the Circuit Court lacks subject matter jurisdiction, and because Relator Pansy Henley lacks any other remedy to address Respondent's improper exercise of jurisdiction, a writ of prohibition is the only appropriate remedy.

CONCLUSION

Plaintiffs' Amended Petition fails, for the various reasons set forth above, to state a cause of action against Relator Pansy Henley. Further, the defects in Plaintiffs' Amended Petition are not such that a simple amendment to the pleading will correct the defect. Respondent suggests that Plaintiffs can remedy the deficiencies in the Amended Petition by alleging additional facts, such as "Pansy Henley needed her husband's help to move her belongings because she could not do it herself, [and] that Mr. and Mrs. Henley had to make several trips to move the belongings from one house to another." Respondent's Answer, p. A52. These facts, however, do not remedy any deficiency in the Amended Petition, as they do not lead to any inference that Relator Pansy Henley had a right of control or that Defendant Donald Henley was her agent. The Court can assume, based on Plaintiffs' failure to allege facts that actually do state a cause of action, that no such facts exist. Allowing such unnecessary litigation to proceed is extremely unfair to Relator Pansy Henley. As such, Relator Pansy Henley respectfully requests this Court to make absolute its preliminary order of prohibiting Hon. James R. Bickle from denying the Motion to Dismiss and proceeding with the case against Relator Pansy Henley.

CERTIFICATE PURSUANT TO RULE 84.06(c)

The undersigned certifies as follows:

1. Respondent's Brief includes the information required by Rule 55.03;
2. Respondent's Brief complies with the limitations contained in Rule 84.06(b);
3. Respondent's Brief contains 6,782 words; and
4. The floppy disk filed herewith pursuant to Rule 84.06(g) has been scanned for viruses and is virus-free.

ELLIS, ELLIS, HAMMONS & JOHNSON, P.C.

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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing and appendix and one CD containing the foregoing in Microsoft Word was served upon the attorneys of record for each party to this action, to-wit:

Honorable James R. Bickel
Dade County Circuit Court
300 W. Water
Greenfield, MO 65661
Respondent

and

Patrick Martucci
Hershowe Law Firm, PC
431 Virginia Ave
Joplin, MO 64801
Attorney for Plaintiffs James and Connie Graves

by depositing same in the United States mail at Springfield, Missouri, postage prepaid, duly addressed to said attorneys on this 23rd day of December, 2008.

Attorney of Record