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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 of the vehicle, which is necessary in order to plead joint venture under Missouri law.

Greenwood v. Bridgeways, 243 S.W.2d 111 (Mo.App. 1951)

Johnson v. Pacific Intermountain Express Company, 662 S.W.2d 237 (Mo. banc. 2003)

Stover v. Patrick, 459 S.W.3d 393 (Mo.banc. 1970)

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.

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

Greenwood v. Bridgeways, 243 S.W.2d 111 (Mo.App. 1951)

McCrory v. Bland, 197 S.W.2d 669, 673 (Mo. en 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.

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

Sanfilippo v. Bolle, 432 S.W.2d 232 (Mo. 1968)

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 of the vehicle, which is necessary in order to plead joint venture under Missouri law.

An essential element to a claim of liability arising out of a joint venture is that the joint venturer had an 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 (Mo. 1967). However, the Amended Petition fails to state any facts from which, if proven, a jury can infer that Relator had a right of control over the alleged joint venture.

Respondent argues in his Brief that liability against Relator "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." Respondent's Brief, p. 11[1]. Respondent argues that Relator and her husband's activity of

[1] Respondent has acknowledged that mere co-ownership of a vehicle in which said co-owner is a passenger does not, in and of itself, establish that the co-owner/passenger had a right of control over the operation of the vehicle. Respondent's Brief, p. 13-14, *citing Stover v. Patrick*, 459 S.W.3d 393 (Mo.banc. 1970).

moving "all their personal belongings between homes as a cost saving measure to avoid paying professional movers" gave rise to these "other" theories of liability. Respondent's Brief, p. 15-16[2]. But the fact that Relator and her husband were moving their personal belongings does not give rise to any reasonable inference that Relator had a right to control the activity. At best, these allegations establish that Relator was a participant in the activity. To hold her vicariously liable, though, there must be something more.

As previously stated, there are four elements that must be plead to allege joint venture liability: (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 538, 541 (Mo.App. S.D. 2000). The facts set forth in the Amended Petition and in Respondent's Answer pertaining to the activity of moving their personal belongings establish the second and third elements, namely that there was a common purpose to be carried out by the group and (as Respondent argues and Relator disputes) there was a pecuniary interest in that purpose. Because "right of control" is a separate element, it follows that there must be some

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[2] Relator notes to the Court that Point Relied On 2 establishes that moving personal belongings is not an activity that is recognized under Missouri law as a "venture" for purposes of joint venture liability.

allegation other than the common purpose and pecuniary interest to establish right of control. If right of control could be established merely by alleging a common purpose and a pecuniary interest, Missouri courts would not identify right of control as an element of joint venture.

This point is highlighted by *Greenwood v. Bridgeways*, 243 S.W.2d 111 (Mo.App. 1951). In *Greenwood*, the plaintiff's husband was driving, with plaintiff as a passenger, to the store to purchase a toy box for their children. *Id*. at 112. The defendant argued that the husband/driver's negligence could be imputed to the plaintiff under the theory of joint enterprise. *Id*. at 115. The Court rejected this notion on the grounds that "where all that appears in the case is that the wife was merely riding with her husband in the family automobile, which he was driving at the time, and that their purpose was merely to serve their mutual pleasure or to *transact the usual and ordinary affairs of the family*, with no right of joint control disclosed, then the trip is not to be regarded as a joint enterprise or venture in the sense that the husband's negligence, if any, is to be imputed to his wife." *Id*. (*citing Silsby v. Hinchey*, 107 S.W.2d 812, 815 (Mo.App. 1937)(emphasis added)). Therefore, absent some additional allegation establishing a right of joint control, allegations establishing that a husband and wife are transacting the usual and ordinary affairs of the family are not sufficient to establish a joint venture.

Greenwood is analogous to the present case. The allegations relating to moving personal belongings establish that Relator and her husband's purpose was to transact the usual and ordinary affairs of the family. It is true that it is not a frequent occurrence for a family to move their residence, in that moving is not a daily, weekly, or monthly

occurrence. If frequency were the test, the result in *Greenwood* would likely have been different, since buying a toy box is certainly not a frequent occurrence – but it is "usual and ordinary". Similarly, it is usual and ordinary to expect that a family will, at some point, move their residence at least once, if not on multiple occasions. Because there is no additional allegation that shows Relator had a right of control, there are no facts alleged upon which a jury could find that Relator was engaged in a joint venture with her husband.

Respondent's Brief argues under "Point Relied On II"[3] that Relator had a right to control the activity of moving Relator and her husband's personal belongings. Respondent's Brief, pp. 21-22. Relying on *Johnson v. Pacific Intermountain Express Company*, 662 S.W.2d 237 (Mo. banc. 2003), Respondent states that Relator had some right to control the direction of the moving enterprise. Respondent's Brief, p. 22-23. However, *Johnson* is distinguishable from the present case.

In *Johnson*, the Court determined that there was a joint venture between a freight broker and a truck driver (and/or the owner of the truck for whom the driver worked). *Id*. at 242. The freight broker, Marlo Transportation Company ("Marlo"), arranged for an independent truck driver to transport a load of steel for a steel plant. *Id*. at 240. Marlo was not affiliated with either the truck driver or the steel plant. *Id*. As part of its arrangement, Marlo paid an advance to the truck driver before the trip began. *Id*. Marlo

[3] Although this argument by Respondent is not directed at Relator's Point Relied On 1, it is relevant to this Point and will be addressed here.

was supposed to collect the freight charges from the steel plant, from which he would retain 25% and remit the balance to the owner of the truck. *Id*. Marlo argued that there was no evidence that it had control or a right of control over the driver, on the grounds that it had retained the driver (or the owner) as an independent contractor. *Id*. at 241. Finding that Marlo was liable as a joint venturer with the truck driver, the Court noted that Marlo was "instrumental in launching and directing the truck journey". *Id*. at 242. The Court also found that "there is a distinct tendency to find that truck operators are agents or servants rather than independent contractors." *Id*. at 242. Marlo's right of control over the operation can be inferred from these facts. "The usual rule holds those who engage in business for profit liable in damages, on the usual negligence principles, to those who are injured in the course of the business operations. There is no reason to relieve Marlo of this normal and usual liability." *Id*.

Unlike Marlo, there is no allegation that Relator was "instrumental in launching and directing" the activities of moving personal belongings. In addition, whereas the tendency to find that truck operators are agents or servants lead to an inference of Marlo's right to control the truck operator, there is no such tendency with regard to a husband and wife moving personal belongings. Finally, the most glaring distinction between *Johnson* and the present case is that *Johnson* involved joint venturers who engaged in a commercial joint venture to earn a profit. Even if Respondent's allegation that Relator and her husband were moving their personal belongings as a cost-saving measure (See, Respondent's Answer/Return to Preliminary Writ of Prohibition, p. A43, A50), such a fact is quite different from a company engaging in a joint venture for the

purpose of earning a profit in the commercial world. Because *Johnson* is materially distinguishable from the present case, it leads no weight to Respondent's otherwise unsupported assertion that Relator's activity of moving personal belongings with her husband conferred some right to control the activity upon her.

Because there are no alleged facts from which a jury could determine that Relator had a right to control the activity of moving personal belongings, the Amended Petition fails to state a claim against Relator under the theory of joint venture.

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.

Relator's Point Relied On 2 is based on the fact that the activity of moving personal belongings by a husband and wife is not an activity that is recognized as "venture" for purposes of joint venture liability. This is because 1) there cannot be an "agreement" between a husband and his wife to engage in an activity of normal household maintenance, as each is already contractually bound to do so; and 2) the activity of moving personal belongings does not involve a pecuniary interest. Respondent's argument fails to contradict Relator's argument on these points.

Respondent cites numerous cases to establish that the "agreement" required for a joint venture can be an informal or formal agreement. Respondent's Brief, p. 18. Yet he fails to address the long-standing proposition that it is a legal impossibility for a husband and wife to agree to do something that they were already contractually bound to do by virtue of the marital contract, such as maintain their household. *McCrory v. Bland*, 197 S.W.2d 669, 673 (Mo. en banc. 1946).

Respondent attempts to distinguish *McCrory* from the present case because the McCrory Court noted that there was no evidence that the husband knew his wife was going to place the mop in the stairway[4], nor was there evidence that she placed the mop in the stairway as a result of a conference between them. Respondent's Brief, p. 26. Respondent suggests that, had there been such a conference, the husband may be held liable. Respondent's Brief, p. 26. This is a completely incorrect representation of the holding in *McCrory*. *McCrory* unequivocably states that a husband and wife cannot agree to perform an act, such as maintaining a household, that he and she were contractually bound to perform. *Id*. Therefore, the husband's participation in the maintenance of the household does not create a joint venture. *Id*. The Court's reference to the husband's lack of knowledge has no bearing on this holding.

A careful reading of *McCrory* reveals that, after making the above described holding, the Court went on to reference the case of *Mack v. Mackiewicz*, a case from the New Jersey Supreme Court. *Id*. In that case, the New Jersey Supreme Court found that a husband could not be liable for the negligent acts his wife committed while cleaning their home since there was no proof to show that he had knowledge of the fact that she was cleaning, nor was there evidence that she was cleaning as a result of a conference between the two of them. *Id*. The *McCrory* Court then went on to note that there was no evidence in the case at bar that the husband knew his wife would leave the mop in the

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[4] The *McCrory* plaintiff, a laundress, ha dalleged that the wife negligently left a mop in the stairway, and the plaintiff tripped over it, resulting in injury. *Id*. at 671.

stairway or that her act in doing so was the result of a conference between them. *Id*. This discussion was had in dicta, and did not form the basis for the Court's holding. The husband's knowledge, or lack thereof, has no effect on his incapacity to "agree" to maintain the household with his wife. Therefore, Respondent's attempt to distinguish *McCrory* from the present case is without merit.

Respondent further attempts to distinguish *McCrory* from the present case, on the grounds that "routine cleaning of a home is a far cry from the major and infrequent undertaking of moving all belongings from one home to another." Respondent's Brief, p. 26. However, *McCrory* was not limited to activities of "routine cleaning"; it applies to all activities which the marital contract requires a husband and wife to perform, such as maintaining a household. *Id*. at 673. There are few activities more fundamental to maintaining a household than the act of moving a husband and wife's personal belongings into their home. Obviously, Relator and her husband cannot maintain their household without their belongings, so they had to move their belongings into their new home. As such, the act of moving personal belongings from the home that Relator and her husband no longer resided in to the home they were residing clearly constitutes maintenance of the household.

Point Relied On 2 of Relator's Brief also shows that the act of moving personal belongings by a husband and wife is not a "venture" that is recognized by Missouri law because there is no pecuniary interest. Relator's Brief, p. 23-24.

Respondent suggests that the Amended Petition does not have to establish a "pecuniary interest", it need only establish that there was a "mutual benefit" derived from

the act of moving their personal belongings. Respondent's Brief, p. 19. Respondent relies on the case of *Dickey v. Nations*, 479 S.W.2d 208 (Mo.App. 1972) to support its claim that a joint enterprise is established if there is a mutual benefit between a husband and wife. Respondent's reliance on this case is misplaced.

The issue presented to the *Dickey* Court was whether a jury instruction that assumed a joint venture was proper where the only evidence adduced at trial was that the plaintiff's husband was driving the plaintiff in their jointly-owned vehicle. *Id*. at 209. The defendant argued that it was "quite clear" that the plaintiff was engaged in a joint venture with her husband. *Id*. at 210. The Court noted that this conclusion assumes that "a man who extends to his wife the courtesy of driving her home from town has somehow involved her in a venture of grave legal implications and potentially distressful consequences. [footnote omitted] *It would be interesting to examine that proposition further, but there is no necessity for doing so in this case*." *Id*. at 210-11 (emphasis added). In dicta in a footnote, the Court noted the defendant "may be confusing mutual benefit, which is so essential to a finding of joint enterprise, with concurrent benefit, which is another thing entirely." *Id*. at 210, n.2.

Respondent suggests this Court should infer from this dicta that *Dickey* stands for the proposition that when a husband and wife embark on a trip in a jointly owned car for a mutual benefit then a joint enterprise can be found. Respondent's Brief, p. 25. There is nothing in *Dickey* that holds or suggests this, and again it grossly distorts the purpose and intent of the joint venture doctrine. Further, such a proposition was clearly rejected in the case of *Greenwood v. Bridgeways*, 243 S.W.2d 111. In *Greenwood*, the plaintiff's

husband was driving, with plaintiff as a passenger, to the store to purchase a toy box for their children. *Id*. at 112. The court found that there was no joint enterprise established because the husband and wife were transacting the usual and ordinary affairs of the family. *Id*. at 115 (*citing Silsby v. Hinchey*, 107 S.W.2d 812.

Just like the wife in *Greenwood*, the automobile accident in the present case occurred when Relator was merely riding in her husband's vehicle while transacting the usual and ordinary affairs of the family. As discussed in more detail above, the activity of moving household belongings to a new residence is a "usual and ordinary" occurrence for a family because it is usual and ordinary to expect that a family will, at some point, move their residence at least once, if not on multiple occasions. *See, supra*, Point Relied On 1, pp. 7-8.

Essentially, Respondent's claim can be summed up as follows: Because Relator and her husband were engaged in an activity that benefited each of them, they are both liable for the negligent acts of the other. By this argument, <u>any</u> activity that benefited both a husband and his wife would be deemed a joint venture. This includes activities such as: grocery shopping, if the groceries are to be brought to the home for the family to eat; family vacations; all activities of child rearing; etc. This is a direct application of Respondent's claim, and not a "ludicrous and contorted interpretation" thereof, as claimed by Respondent. Respondent's Brief, p. 28.

Missouri case law makes it clear that activities such as maintaining a household and transacting the usual and ordinary affairs of the family do establish a joint venture. Moving personal belongings constitutes both maintenance of a household and a usual and

ordinary affair of Relator's family. Therefore, the Amended Petition fails to allege joint venture because the only activity alleged was the activity of moving the personal belongings of Relator and her husband.

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.

A "master-servant" relationship is essential to make a claim of vicarious liability under the theory of *respondeat superior*. *Trinity Lutheran Church v. Lipps*, 68 S.W.3d 552, 557 (Mo.App.E.D. 2001). To establish the master-servant relationship, there must be a showing that the "master" had some power to control the "servant". *McAuliff v. Vondera*, 494 S.W.2d 692, 694 (Mo.App. 1973).

At the outset, Respondent's argument in response to Point Relied On 3 misses the mark. Respondent makes the bold and untrue statement that Relator argues that the principal-agent relationship can never be found among married persons. Respondent's Brief, p. 29. This is NOT the point made by Relator. Instead, Relator addressed the fact that there is no agency between a husband and wife merely because of the marital relationship, and she cited *Branson Land Company v. Guillams*, 926 S.W.2d 524, 527 (Mo.App.S.D. 1996) as authority for this proposition. Relator's Brief, p. 26. As set out in detail in Relator's Brief, neither the marital relationship nor any of the other facts Respondent has asked this Court to infer, establish Relator had a right to control her

husband while they were moving their personal belongings and, because right of control is essential to establish that her husband was her agent, no agency relationship has been plead.

Respondent cites *Sanfilippo v. Bolle*, 432 S.W.2d 232 (Mo. 1968), for the proposition that Relator's husband was her agent while they were moving their personal belongings. In *Sanfilippo*, an automobile accident occurred after the wife had gone to the store to purchase some produce for the produce market she and her husband operated. *Id*. at 234. The Court noted that this fact was sufficient to create a jury issue of agency, noting that the wife could have been her husband's partner or agent. *Id*. *Sanfilippo* is readily distinguishable from the present case because the wife was a partner (or possibly employee) running errands for the business. *Id*. Inherent in a partnership or an employment relationship is the right of the partner or employer to control the other. However, there is no such presumption in a marital relationship. *See, Branson Land Co.*, 926 S.W.2d at 527. And, despite Respondent's unfounded conclusion otherwise, there is nothing inherent in the activity of moving personal belongings that conferred on Relator a right of control over her husband.

The more analogous case, as cited by Relator in her Brief, is *McAuliff v. Vondera*, 494 S.W.2d 692. Respondent attempts to distinguish *McAuliff* from the present case, because McAuliffe was an appeal from the denial of an after-trial motion. *Id*. at 693. Respondent's distinction is immaterial. The *McAuliff* Court found that the evidence at trial did not establish a joint venture because there was no right of control established, Relator has shown that the evidence plead is not sufficient to state a claim of joint venture

because, even if the allegations are proven at trial, the evidence will not establish a joint venture because there is no right of control. Therefore, the holding in *McAuliff* is analogous to the present case, despite the difference in procedural posture.

Respondent also attempts to distinguish *McAuliff* on the grounds that the *McAuliff* evidence showed no participation by the wife in the decision of where to eat, the route to be taken, or "any other matter". Respondent's Brief, p. 31. First, this is not a correct summary of the facts of *McAuliff*. In fact, the Court specifically found that both the husband and the wife "decided they were hungry and that they should stop to eat", *Id*. at 694; and that "they both agreed after finding the restaurant [at which they intended to eat] closed that they would go on to Sullivan to find another restaurant." *Id*. The Court based its decision that she lacked control over her husband sufficient to create agency liability on the fact that there was no evidence that she participated or was consulted on the decisions relating to the route the car would take to Sullivan, Missouri and her husband had sole control of the car. *Id*. Respondent argues that, as a participant in the move, Relator had control over the moving process. Respondent's Brief, p. 32. Yet the control he cites, relating to the number of trips to make in a given day, the items to move, whether to hire movers, etc., is no different than the *McAuliff* wife's participation in the decision of whether to go to a restaurant and which restaurant to go to. Therefore, Respondent's attempt to distinguish *McAuliff* from the present case is without any merit and should be disregarded.

Because the Amended Petition does not state any facts from which a jury could infer that Relator had a right to control her husband, the Amended Petition fails to state a claim against Relator under the theory of respondeat superior.

CONCLUSION

As set forth in Relator's Brief, Plaintiffs' Amended Petition fails to state a cause of action against Relator Pansy Henley, and the defects in Plaintiffs' Amended Petition are not such that a simple amendment to the pleading will correct the defect. Relator Pansy Henley therefore 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 4,464 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.

By:_____

John D. Hammons, Jr., MO Bar # 38668
Paula S. Green, MO Bar # 51050
901 St. Louis Street, Suite 600
The Hammons Tower
Springfield, MO 65806-2505
(417) 866-5091

Attorneys for Relator Pansy Henley

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
Hershewe Law Firm, PC
431 Vigrinia 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 ____ day of January, 2009.

_____
Attorney of Record