NO. SC88829

In the Supreme Court of Missouri

STATE OF MISSOURI *ex rel.*
KENDRA AND BRIAN NIXON,
Relators

v.

THE HONORABLE DAVID DALLY,
Respondent

On Petition for Writ of Prohibition to
The Hon. David Dally, Judge of
The 29th Judicial Circuit

RELATORS' OPENING BRIEF

(Oral Argument Requested)

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JURISDICTIONAL STATEMENT

This is an action in prohibition against a judge of the Circuit Court of Jasper County, Missouri, who had issued his Order that unless prohibited he would order a severance of Plaintiff/Relator's claims against successive tortfeasors who had caused a common injury. The Missouri Court of Appeals, Southern District, denied without opinion Relators' Petition in Prohibition. The Missouri Supreme Court thereafter issued its Preliminary Order in Prohibition, and these proceedings follow. Being an action for an original remedial writ against a lower court, this Court has jurisdiction. Article V, Section 4.1, Missouri Constitution.

STATEMENT OF FACTS

A. Issue Presented

This action in Prohibition presents the general question of whether the permissive joinder provisions of Rule 52.05(a) permit the joinder of two successive tortfeasors, where venue is independently established as to each defendant, where the negligence of the two defendants directly caused or directly contributed to cause a common injury to plaintiff, and where the claims against both defendants include common questions of fact as to plaintiff's injuries and their cause.

The specific question which is presented by Relators' Petition in Prohibition is whether Respondent trial judge abused his discretion and exceeded his jurisdiction in ordering a severance of Plaintiff/Relator's claims against two successive tortfeasors where:

a. Plaintiff is injured when her car is rear-ended by the first defendant on February 15, 2005;

b. Plaintiff's injuries include those to her neck and back, for which she is still under a doctor's care and is still receiving treatment as of the time Plaintiff is rear-ended by the second defendant on December 30, 2005;

c. Both rear-end collisions occur in Jasper County, Missouri, and the two defendants are sued jointly in the Circuit Court of Jasper County, Missouri; and

d. Plaintiff's Petition alleges that the first rear-end collision predisposed plaintiff to suffer the injuries caused in the second rear-end collision; that the second rear-end collision aggravated the injuries sustained in the first rear-end collision, and that the two collisions combined to cause common injuries to plaintiff.

B. Facts Underlying Plaintiff's Claims Against Defendants

Plaintiff's[1] Petition in Damages (A6-10, Tab 2) states that she was injured in two rear-end collisions in 2005. The first occurred when plaintiff was rear-ended on February 15th by defendant Shannon Hayes. The second was when plaintiff was rear-ended on December 30th by defendant William

[1] Relator Kendra Nixon was engaged to Brian Nixon at the time of the first wreck. They were married prior to the second wreck. The original Petition only named Kendra Nixon as plaintiff. However, defendant Gardner sent the husband the notice required by Missouri Supreme Court Rule 66.01(d), and husband joined in his wife's claim against defendant Gardner. Brian Nixon is included as a Relator for the sake of completeness. However Relators will be referred to as "Plaintiff" for the sake of simplicity.

Gardner. Both collisions occurred in Jasper County, Missouri. The Answers of Defendant Hayes (A-11, Tab 3) and Defendant Gardner (A-14, Tab 4) admit the fact of the respective collisions.

Plaintiff describes in her deposition the injuries she received in both collisions, and the treatment she received for those injuries. Her neck and lower back were injured in the first wreck, and she initially sought treatment at a local emergency room (A-109, Tab 19). She later sought treatment from a chiropractic clinic (A-119, Tab 20). Plaintiff stopped after several months of treatment, which she felt was not especially helping. She then saw an osteopathic physician commencing in November, 2005 (A-126, Tab 21).

He administered ostheopathic manipulation and prescribed physical therapy. The therapy records indicate that therapy began on November 16, 2006 (A-127, Tab 22), and continued through December 19, 2005. The therapist's discharge report dated December 29, 2005 states that plaintiff continued to complain of low back and neck pain (A-142, Tab 23).

The second collision occurred on December 30, 2005. Plaintiff had pain in her neck and back, and went from the scene to the emergency room (A-143, Tab 24). After that she returned to the osteopathic physician (A-154, Tab 25), who referred her to a different physical therapist (A-156, Tab

26)) and then a specialist in physical and rehabilitative medicine (A-164, Tab 27).

Following the second wreck, plaintiff's neck pain worsened (A-97, Tab 18). She also feels that her low back was reinjured in the second collision (A-107, Tab 18). When she commenced physical therapy after the second wreck, the therapist recorded that "Her symptoms have changed and increased somewhat…." (A-157, Tab 26). From the second wreck, plaintiff developed new symptoms in her hip and of radiating leg pain which have stayed the same up to the time of the deposition (A-103, 106, Tab 18).

The records from plaintiff's medical providers indicate that the leg pain is probably due to injury to the piriformis muscle located in the hip. (A-164, 187, Tabs 27, 32). The sciatic nerve passes through this muscle, and injury to the muscle can in turn irritate or injure the nerve. Plaintiff's doctor concluded thirteen months following the second wreck that "the patient appears to have achieved a plateau in response to treatment…" (A-188, Tab 32).

C. Procedural History

Suit was filed by plaintiff on February 16, 2007 in the Circuit Court of Jasper County, Missouri. The two motorists who rear-ended plaintiff, Hayes and Gardner, were both made defendants in that lawsuit in accordance with

Rule 52.05 which provides for permissive joinder. A First Amended Petition was filed on March 23, 2007, which simply added a derivative claim on behalf of plaintiff's husband (A6, Tab 2). The Petitions contained allegations that the negligence of each of the defendants caused damages to plaintiff's person. Allegations were then made regarding joint or common liability among both defendants for certain of plaintiff's damages:

> 10. Plaintiff remained symptomatic, and continued to receive medical care and treatment for her injuries sustained in the rear end collision of February 15, 2005, continuing to the rear end collision of December 30, 2005, at which time plaintiff sustained aggravation of her original injuries as well as new injuries to her neck, back and leg.
>
> 11. To the extent that the medical evidence so indicates, the negligence of defendant Hayes and the negligence of defendant Gardner combined to cause plaintiff' injuries where the negligence resulted in common injuries, and the negligence of defendant Hayes predisposed plaintiff to sustain new or worsened injuries in the rear end collision caused by the negligence of defendant Gardner.

Defendant Hayes filed on April 3, 2007, a motion to sever plaintiff's claims against the two defendants. (A-11, Tab 3). Defendant Gardner in his Answer to the petition pled the right to a set-off or credit pursuant to Sec.

537.060, RSMo should plaintiff recover any sums from defendant Hayes (A-18, paragraph 19, Tab 4). Defendant Hayes pled a similar right in her Answer (A-12, paragraph 12, Tab 3).

Plaintiff and defendant Hayes filed several Suggestions regarding the motion to sever (A14 through 38, Tabs 4 through 7). Respondent sustained the motion to sever on August 22, 2007 with an Order stating "After reviewing the suggestions and cases cited the Motion to Sever is sustained. Plaintiff granted thirty days to seek appropriate relief or file amended pleadings." (A39, Tab 7). A motion to reconsider was filed (A40, Tab 8), and overruled on August 22, 2007 without further hearing (A43, Tab 10).

Plaintiff's Petition in Prohibition was denied by the Missouri Court of Appeals, Southern District, on September 19, 2007 (A44, Tab 11). Plaintiff's Petition in Prohibition was then filed with this Court (A-70, Tab 16) and a Preliminary Order in Prohibition was issued on October 30, 2007 (A-78, Tab 17).

POINT ONE

Relator is entitled to an Order prohibiting Respondent from enforcing his Order that Relator's claims against defendants be severed,

Because respondent trial judge exceeded his jurisdiction by ordering that Relator's claims against the two successive joint tortfeasors be severed, even though the requirements for permissive joinder under Rule 52.05 were fully met,

In that: (a) The collision caused by defendant Hayes in February, 2005 and the collision caused by defendant Gardner in December, 2005 constituted a series of transactions or occurrences;

(b) Relator was still undergoing medical treatment for injuries sustained in the first collision at the time of the second collision;

(c) The injuries from the first collision predisposed Relator to suffer additional injuries sustained in the second collision; the second collision aggravated injuries from the first collision; and the two collisions combined to cause common injury to Relator;

(d) There are issues of fact common to both claims as to the extent of the injuries which defendants jointly caused; and

(e) The two collisions occurred in Jasper County, Missouri, and venue exists independently in said county for each claim.

Carlson v. K-Mart Corporation, 979 S.W.2d 145 (Mo. en banc. 1998)

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

State ex rel. Farmers Insurance Company, Inc. v. Murphy, 518 S.W.2d 655 (Mo. en banc. 1975)

Supreme Court Rule 52.05(a)

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(e) The two collisions occurred in Jasper County, Missouri, and venue exists independently in said county for each claim.

ARGUMENT

A. Standard of Revue

The standard of review in an action in prohibition depends upon the particular basis for invoking the remedy:

> Prohibition will lie where there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction. Second, a writ of prohibition will issue to remedy a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated. Finally, departing from jurisdictional grounds, a writ of prohibition will be issued if the party can satisfy a number of conditions, often falling under the rubric of no adequate remedy by appeal. The third category is used in limited situations where some absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to a trial court's order. Prohibition will lie when there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo. en banc. 1994). Because this action in prohibition is based upon a question of law, the Court's review of Respondent's ruling is de novo. *State ex rel. Wolfrum v. Wiesman,* 225 S.W.3d 409, 411 (Mo. banc. 2007).

B. The Permissive Joinder Rule

Permissive joinder in Missouri is governed by Rule 52.05(a), which states:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrences or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiff according to their respective rights to

relief, and against one or more defendants according to their respective liabilities.

The case of *State ex rel. Farmers Insurance Company, Inc. v. Murphy*, 518 S.W.2d 655 (Mo. en banc. 1975) observed that the philosophy behind this rule "is to promote judicial economy, expedite final disposition of litigation, and prevent inconsistent results due to multiple separate lawsuits." (*Id.* at 662). The court also noted that the language of the permissive joinder statute, (which later became the court rule), was the same as that set forth in the Federal Rules of Civil Procedure. The opinion looked at federal decisions which held that the language in the federal joinder rule "may comprehend a series of many occurrences, depending not so much upon the immediacy of their connection as upon their logical relationship. This liberal view is now well established." (*Id.* at 659). The court then concluded "that this court should adopt an interpretation of Rule 52.05(a) which is in accord with the interpretation of the federal rule from which it came." (*Id.* at 662).

That interpretation of the federal rule is discussed in Wright & Miller, 7 Fed. Prac. & Proc. Civ. 3rd § 1657 which explains "Rule 20 has enabled the joinder of defendants in a variety of contexts…. The courts have

permitted the joinder of … original and subsequent tortfeasors in cases alleging the aggravation of original injuries."

Cited by Wright & Miller as an example of such joinder of original and subsequent tortfeasors is *Poster v. Central Gulf Steamship Corp.*, 25 F.R.D. 18 (E.D. Pa. 1960). There a seaman contracted a disease while aboard one vessel. The following winter, he was exposed to and contracted the same disease again while aboard a separate vessel operated by a different company. The seaman brought suit against both companies, and the defendants claimed that they had been improperly joined. This contention was rejected by the court, which held that plaintiff's "claim for relief is based upon two occurrences, the same in nature, and the second of which might result in concurrent liability of both companies." (*Poster*, 25 F.R.D. at 20).

Another example of application of the federal rule regarding permissive joinder is *Diehl v. H.J.Heintz Company,* 901 F.2d 73 (7th Cir. 1990). The plaintiff truck driver was injured at the warehouses of two different companies at events which were separated by six months. The court held that plaintiff's "claim is that the accident at the (2nd) warehouse aggravated the back injury she sustained at the (1st) warehouse. If true, and if both defendants were negligent or otherwise culpable, this would make

them successive joint tortfeasors despite the lack of concert between them. And it is of course proper to sue joint tortfeasors in the same complaint." (*Diehl*, 901 F.2d at 73-4).

The *Diehl* court made an observation which is important in ruling the issues in the present case. The court stated that "the concept of successive injurers is derived from joinder, not tort, principles." (*Diehl,* 901 F.2d at 74).

Missouri cases were ruled in accord with these principles. *Hager v. McGlynn,* 518 S.W.2d 173 (Mo. App. W.D. 1975) arose from the plaintiff being involved in two separate motor vehicle collisions which occurred five months apart. Plaintiff alleged that the second collision aggravated injuries sustained in the first collision, and pled that similar but not identical injuries were caused by each of the two wrecks. The court noted that requiring separate trials of the two claims could easily result in the total recovery by plaintiff being either substantially more or substantially less than the total of his injuries from the two wrecks, and that neither result would be consistent with justice. The court concluded that "when the injuries are alleged to be indivisible, or to have been aggravated in another accident, then joinder is permissible." (*Hager,* 518 S.W.2d at 178).

It is important to note that *Hager* was filed in Jackson County and arose from two collisions, each of which could properly be venued in Jackson County if filed separately.

This Court has affirmed these principles as well as the holding in *Hager*: "[M]odern law has clearly extended permissive joinder to cases in which the injury is indivisible and to successive tortfeasors liable for at least a part of plaintiff's injury." *State ex rel. Allen v. Barker,* 581 S.W.2d 818, 827 (Mo. en banc. 1979). "The case at bar is much like one in which a plaintiff is physically injured by first one defendant, then another, and then another, so that it is extremely difficult or impossible to sort out the injuries attributable to each and joinder is thus the most feasible and economical manner available for plaintiff to pursue his claims." (*Allen,* 581 S.W.2d at 827).

Respondent's Answer to the Petition in Prohibition takes issue with the application of *Allen* in this action, by pointing out that the plaintiff in that case did not make a claim that defendants acted in concert or otherwise committed a joint tort. This objection is answered by the declaration in *Diehl* quoted above, to the effect that the concept of successive tortfeasors derives from principles of joinder, not tort. In other words the two

defendants do not have to be joint tortfeasors in the classic sense, before there can be permissive joinder.

C. Missouri Recognizes Liability for Injuries Predisposing Plaintiff to Future Injury, and for Subsequent Aggravation of Existing Injuries

In *Smart v. Kansas City,* 105 S.W.709 (Mo. 1907) the Supreme Court approved a jury instruction which permitted the jury to award damages against the defendant for aggravation of plaintiff's pre-existing condition, stating "In this state both sick and well men and women have perfect rights to sue and recover damages for injuries received in the condition of health they are in at the time of the injury." (*Id.* at 721). See also, *Schide v. Gottschick,* 43 S.W.2d 777 (Mo. 1931).

The mirror image of *Smart* was involved in *Chaussard v. Kansas City Southern Railway Company,* 536 S.W.2d 822 (Mo. App. W.D. 1976). There the plaintiff was injured when a KCS train ran into a rail car on which he was working. Ten months later, plaintiff sustained a back injury while lifting a tank at work. At trial, plaintiff's doctors testified that the injury caused by the train contributed to cause the subsequent work related injury, and that the work injury was simply the straw that broke the camel's back. The trial court instructed the jury that they were to award plaintiff any damages they believed plaintiff sustained in the first incident, and also such

damages as plaintiff sustained in the second incident if the jury believed that those later injuries were either caused or contributed to be caused by the first incident.

On appeal the railroad contended that the second incident was an independent occurrence for which defendant was not liable. The court disagreed, holding that "Missouri follows the general rule that a person injured due to the negligence of another is entitled to recover all damages proximately traceable to the original negligence, including subsequent aggravation which the law regards as a natural occurrence of the original injury, even though some intervening agency may have contributed to the result." (*Chaussard*, 536 S.W.2d at 829). To same effect, see *Lockwood v. Schreimann*, 933 S.W.2d 856 (Mo. App. W.D. 1996).

Chaussard and *Lockwood* were relied upon by the Supreme Court when it decided *Carlson v. K-Mart Corporation*, 979 S.W.2d 145 (Mo. en banc. 1998). There the plaintiff was injured when she was shopping in defendant's store and boxes fell from the shelves onto plaintiff's head and back. Six months later plaintiff was in a motor vehicle collision in which she was rear-ended by a drunk driver who was trying to evade the police. She was taken from the scene of the automobile collision by ambulance, and she told the driver that her back hurt somewhat more than it had previously.

Plaintiff complained on appeal that the verdict directing instruction given to the jury permitted the jury to find for plaintiff if defendant's negligence "contributed to cause" injury, but the damages instruction only permitted the jury to award damages which were a "direct result" of defendant's negligence. In particular, the plaintiff contended that the jury should have been instructed that it should award damages for those injuries which defendant's negligence contributed to cause, including damages sustained in the subsequent rear end collision. Plaintiff's theory of the case was that either the falling merchandise in defendant's store was entirely responsible for her back injuries, or that the store incident and the rear end collision combined to cause injury to her back.

The Supreme Court agreed with plaintiff, holding "The general rule is that if a defendant is negligent and his negligence combines with that of another, or with any other independent, intervening cause, he is liable, although his negligence was not the sole negligence or the sole proximate cause, and although his negligence, without such other independent intervening cause, would not have produced the injury." (*Carlson*, 979 S.W.2d at 147). See also, *Shannon v. Wal-Mart Stores, Inc.*, 974 S.W.2d 588, 591 (Mo. App. W.D. 1998).

It is noteworthy that in *Carlson* there was no suggestion that the injuries sustained by the falling merchandise, in any manner caused the rear-end collision. The issue is not whether the first event somehow created the second event. Rather, the question is whether the injuries sustained in the second event were contributed to be caused by the violence of or injuries sustained in the first incident.

More recent is *Criswell v. Short,* 70 S.W.3d 592, 594 (Mo. App. S.D. 2002), holding that "a defendant is generally liable for the aggravation of pre-existing conditions caused by his negligence or a statutory violation."

It is clear, then, that a negligent defendant can be held responsible if his negligence aggravates a pre-existing injury. It is equally clear that a negligent defendant is responsible if the injuries he causes are subsequently aggravated by an unrelated event. In the former, the defendant must take the plaintiff in whatever condition plaintiff might be. In the latter, a subsequent aggravation is held to be a foreseeable result of the original negligently inflicted injury.

Applying these rules to the case presently before the Court, the law holds that defendant Hayes is responsible for the injuries directly sustained in the first collision. Defendant Hayes is also responsible for those injuries sustained in the second collision which the first collision contributed to

cause. This liability would include damages sustained because of the first collision having predisposed plaintiff to suffer the injuries that occurred in the second wreck. It would also include liability for any aggravation of the original injuries, which the second wreck caused.

These same rules mean that defendant Gardner is liable for aggravating the injuries which plaintiff sustained in the first wreck. Thus, both defendants share a common liability for the aggravation of the original injuries caused by the second collision. The two defendants also share a common liability for those injuries which plaintiff would not have sustained but for the combination of the two collisions.

D. Plaintiff's Claims Are Factually Within the Permissive Joinder Rule

The Petition in the action below (A-6, Tab 2) alleges that Plaintiff Kendra Nixon was injured in two respective rear-end collisions which occurred on February 15 and December 30 of 2005, in Jasper County, Missouri. The Answers of the two defendants (A-11, Tab 3; and A-14, Tab 4) admit the fact of the two collision. The Petition sets out Plaintiff's position regarding the joint and common liability of the two defendants:

> 10. Plaintiff remained symptomatic, and continued to receive medical care and treatment for her injuries sustained in the rear end collision of February 15, 2005, continuing to the rear end collision of

December 30, 2005, at which time plaintiff sustained aggravation of her original injuries as well as new injuries to her neck, back and leg.

11. To the extent that the medical evidence so indicates, the negligence of defendant Hayes and the negligence of defendant Gardner combined to cause plaintiff' injuries where the negligence resulted in common injuries, and the negligence of defendant Hayes predisposed plaintiff to sustain new or worsened injuries in the rear end collision caused by the negligence of defendant Gardner.

(A-8 & 9, Tab 2).

The medical records concerning the injuries sustained in the two wrecks, and the deposition of the plaintiff Kendra Nixon, establish that the above- quoted allegations are made in good faith. Plaintiff went to the emergency room the same day as the first rear-end collision (A-109, Tab 19). There, she was diagnosed with sprain and strain of the neck and low back. She received chiropractic treatment for those same injuries, commencing on April 13, 2005 (A-119, Tab 20).

Several months of chiropractic treatment did not resolve the problems, so plaintiff sought medical treatment from a family doctor on November 10, 2005 (A-126, Tab 21). He prescribed physical therapy, which was started on November 16, 2005 (A-127, Tab 22). The therapy was terminated on

December 29, 2005 after plaintiff advised the therapist that she would seek other treatment (A-124, Tab 23). Plaintiff was rear-ended by defendant Gardner the following day.

Plaintiff returned to her family doctor on January 10, 2006, and he prescribed physical therapy with a different therapist (A-154, Tab 25). That therapist noted plaintiff's unresolved injuries from the first wreck, the fact of the second wreck, and that "Her symptoms have changed and increased somewhat with most of her pain originating around the right hip and SI region with pain radiating proximally and distally on the right side." (A-157, Tab 26).

Plaintiff underwent multiple session of physical therapy, as well as epidural injections and treatment by a physical medicine specialist. (A-164 through 188, Tabs 27 through 32). On January 12, 2007, her doctor concluded that she had reached a plateau in her condition. (A-188, Tab 32).

Defendants have been provided with the repair bill for plaintiff's car following the first rear end collision, showing damaged in the approximate sum of $3,000. In her deposition, plaintiff testified that the damage the car she was driving at the time of the second collision, was between five and six thousand dollars (A-95, Tab 18).

Plaintiff also testified that immediately before the second wreck, she was still having stiffness in her neck and pain in a band across her low back. (A-97, Tab 18). Following the second collision plaintiff's neck tightened, she continued to have pain and discomfort in her low back, and she developed a new problem of pain in her hips and right leg. (A-103, 106; Tab 18). She believes that the second wreck re-injured her low back (A-107, Tab 18).

These facts demonstrate that plaintiff is making a good-faith claim that the first wreck pre-disposed her to suffer some of the injuries suffered in the second wreck, and that the second wreck aggravated plaintiff's injuries from the first wreck.

E. The Line of Cases On Which Defendant's Motion to Sever Is Based Originally Held Only That Joinder Does Not Create Venue, and Appellate Courts Later Misinterpreted the Supreme Court Decisions

Defendant below, and Respondent trial judge, rely upon a line of cases which began with considerations of the relationship between joinder upon venue. The first of these was *State ex rel. Turnbough v. Gaertner,* 589 S.W.2d 290 (Mo. en banc. 1979). There the plaintiff was injured in a motor vehicle collision while in the employ of Frisco Railroad. Later, plaintiff was injured in a motor vehicle collision which occurred in Cape Girardeau

County. Venue against Frisco was proper in the City of St. Louis. Considered alone, venue for the suit for injuries sustained in the second collision could only be in Cape Girardeau County. The court ruled that joinder could not create venue where it did not otherwise exist, and that simply joining the two claims into one suit in the City of St. Louis did not create venue against the second motorist.

The *Turnbough* decision did not address the issue of joinder, because the opinion declared that joinder could not create venue against the second defendant where venue did not otherwise exist. This Court did discuss *Hager* and ruled that *Hager* did not support the creation of venue. The opinion did note that venue in Hager was valid in Jackson County against each of the two defendants, and that the earlier case was decided solely on the issue of whether joinder of the two claims was proper under Rule 52.05.

There is no question but that venue is determined solely by statute. *State ex rel. Smith v. Gray,* 979 S.W.2d 190, 191 (Mo. en banc. 1998). Rule 51.01 also provides that "These Rules shall not be construed to extend or limit the jurisdiction of the courts of Missouri, or the venue of civil actions therein." Therefore Rule 52.05(a) can be relied upon to support joinder of claims and defendants, but not to create venue not otherwise provided for by statute.

Sperry Corporation v. Corcoran, 657 S.W.2d 619 (Mo. en banc. 1983) involved a plaintiff who was injured by farm machinery in Barry County, and then received negligent medical care in Greene County. The farm machinery was manufactured by Sperry, which had its registered agent in the City of St. Louis, and suit against all defendants was filed there. This Court held that the case was controlled by *Turnbaugh* and that venue in the City of St. Louis was improper.

Sperry was expressly overruled three years later in *State ex rel. Biting v. Adolf,* 704 S.W.2d 671 (Mo. en banc. 1986). Plaintiff was injured in a motor vehicle collision in the County of St. Louis. She then received negligent medical care in the City of St. Louis. She filed suit against all defendants in the City of St. Louis. The court held that in that situation, where the defendants may be jointly and severally liable for a portion of plaintiff's damages, venue was proper in any location where any defendant was located. Hence, the St. Louis County defendant who caused the car wreck could be sued in the City of St. Louis.

The next in this line of cases was *State ex rel. Jinkerson v. Koehr,* 826 S.W.2d 346 (Mo. en banc. 1992). *Jinkerson* framed the issue it decided as "whether the Circuit Court of the City of St. Louis has venue over the cause of action stated by Jinkerson." (*Jinkerson*, 826 S.W.2d at 347). The court

resolved the issue by holding that "Simply joining the two separate causes of action in a single petition does not create venue over both actions. Therefore, the [plaintiffs] must establish venue for each cause of action independently." (*Id.* at 348).

Defendant Hayes below, and Respondent in sustaining defendant Hayes' motion to sever, rely upon what is between the *Jinkerson* court's statement of the issue and the resolution of that issue. In two brief sentences, unsupported by authority, the court said that where a motorist is injured in two separate collisions, one in St. Louis City and the other in St. Louis County, "the facts do not call for the application of joint liability. Further, Jinkerson could not have foreseen the risk of the [plaintiffs] being involved in a second automobile collision approximately one year later." (*Jinkerson,* 826 S.W.2d at 348).

The *Jinkerson* Court did not overrule *Biting.* Instead, it distinguished that case by stating its holding there "was based on the legal principle that a person who negligently causes an accident is liable for all foreseeable damaged caused by the accident, including malpractice damages for any negligent treatment of the resulting injuries." (*Jinkerson,* 826 S.W.2d at 348). The court also ruled that its decision was controlled by *Turnbaugh.* This is confusing since *Sperry* was expressly decided on the basis of

Turnbaugh and *Sperry* was then expressly overruled by *Biting.* This would seem to mean that *Turnbaugh* had also been overruled. But *Jinkerson* makes clear that neither *Turnbaugh* nor *Biting* were overruled.

It must be noted that appellate decisions from the Eastern and Western Districts have ruled that *Jinkerson* did impliedly overrule *Hager*. *Carlton v. Phillips,* 926 S.W.2d 8, 11 (Mo. App. W.D. 1996) ("Without citation or discussion, this pronouncement effectively overruled *Hager v. McGlynn.*…"); *State ex rel. Sims v. Sanders,* 886 S.W.2d 718 (Mo. App. E.D. 1994). But no Supreme Court decision has expressly overruled that portion of the *Hager* decision discussed in these Suggestions (the holding excluding evidence of alcohol consumption was overruled, along with similar holdings in numerous other cases, by *Rodriguez v. Suzuki Motor Corporation,* 936 S.W.2d 104 (Mo. en banc. 1996)). In light of the Supreme Court's pronouncement in *BJC Health System*, analyzed later herein, the appellate court pronouncement regarding *Hager* is subject to question.

F. Resolving Any Apparent Conflicts

Since the two defendants who rear-ended Relator share a common liability for a portion of plaintiff's damages, the claims against them may be combined in one action under the permissive joinder rule. But Respondent ruled that *Jinkerson* precludes joinder. Does *Jinkerson* actually so hold? If

so, can *Jinkerson* be resolved with *Carlson*? Or instead must one of them be overruled?

There is no conflict in the cases if *Jinkerson* is understood as being a venue case and not a joinder case. This Court has itself construed *Jinkerson* as being a venue case: "[C]ommon or joint liability, not joinder, is the touchstone for the determination of whether venue may be predicated on the residence of a co-defendant. For the purposes of determining venue, the term 'common or joint liability' does not include liability for injuries that are separate and distinct, but does include liability for injuries that are inseparable and indistinguishable." *State ex rel. BJC Health System v. Neill,* 121 S.W.3d 528, 529 (Mo. en banc. 2003). The Court cited in support of that statement not only *Jinkerson* but also *Biting*, *Turnbaugh*, and *Allen*.

In other words, *Jinkerson* and similar cases are concerned with whether proper venue can be created simply by the use of permissive joinder. Those cases are not concerned with joinder of claims where venue is independently established as to each defendant. With the extension of joinder authorized by *Biting*, the decision in *Jinkerson* was necessary to prevent joinder from destroying all limits on venue. When read in this context, there is no conflict in the cases.

It makes no sense to interpret *Jinkerson* in any other fashion. If plaintiff had filed separate suits against defendants Hayes and Gardner, the trial court could properly order the two cases consolidated. *Allen v. Yeaman,* 440 S.W.2d 138 (Mo. App. 1969). If plaintiff had sued Hayes alone, then Hayes could bring Gardner into the suit by way of a third party petition. *State ex rel. Tarrasch v. Crow,* 622 S.W.2d 928 (Mo. banc 1981). To construe the permissive joinder rule to prohibit joinder where the same principles of judicial economy and logical relationship would permit consolidation and third-party practice, is not logical.

If *Jinkerson* is instead read as defendant Hayes and Respondent interpret it, then there is an irreconcilable conflict between it and *Carlson* as well as other decisions of this Court. Because *Carlson* is the more recent of the two decisions, it must then be read as overruling *Jinkerson.* This is true both as to *Jinkerson's* holding regarding joinder, but also its unsupported statement that a subsequent motor vehicle collision is not foreseeable. *Carlson* certainly holds to the contrary. And if *Jinkerson* were construed literally, it would obliterate the law of product liability as concerns crashworthiness claims. See, e.g., *Gerow v. Mitch Crawford Holiday Motors*, 987 S.W.2d 359, 362 (Mo. App. W.D. 1999).

At least one writer strongly states that *Jinkerson* is in substantial conflict with other decisions concerning joinder. See, e.g, Blanke, *Another Venue Dilema: Common Liability or Joiner?*, 52 J. Mo. B. 297 (1996). Another author writes that while previously there would have to be concurrent venue for all defendants before there could be permissive joinder, the new venue provisions of Sec. 508.010, RSMo expand actually expressly expands venue in cases such as the one presently before the Court. Achtenberg, *Venue in Missouri After Tort Reform,* 75 U.M.K.C. L. Rev. 593 at 623-4 (2007). If this is correct, then the courts would not be faced with questions of venue when having to interpret or apply the permissive joinder rule.

It is worth observing also that *Jinkerson* was decided at a time when there were other judicial opinions seeking to impose some limits on venue, opinions which also had unintended consequences which had to be later corrected. See, e.g., the discussion of the "St. Louis two-step" in Schoenbeck, *The ongoing Venue Saga: Linthicum After Three Years*, Journal of the Missouri Bar, March-April 2005. If the venue ruling in *Jinkerson* was inadvertently overbroad and spilled over into the law of joinder, then the legislative changes made in 2006 to the general venue statute, §508.010, RSMo., should prompt a reconsideration of the need for

such any expansive restriction upon joinder. All of these concerns, however, do not occur if *Jinkerson* is understood as only holding that venue must be independently established as to each defendant even when the defendants are otherwise properly joined.

CONCLUSION

Venue exists independently as to both defendant Hayes and defendant Gardner, in that both collisions occurred in Jasper County. Because the two collisions contributed to cause common injuries, and because there are common factual questions concerning liability, damages, and causation, plaintiff is entitled to join both defendants in one action pursuant to Rule 52.05(a). Respondent's Order of August 22, 2007 deprives plaintiff of that right, and Respondent has thereby acted in excess of his jurisdiction.

The Writ of Prohibition should be made permanent, and Respondent be prohibited from enforcing his Order severing plaintiff's claims against the two defendants who share common liability for some of plaintiffs' injuries and as to whom there exist common questions of fact.

RESPECTFULLY SUBMITTED,

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CERITIFICATES OF COMPLIANCE

Comes now Glenn R Gulick, Jr., attorney for Relators, and hereby certifies that the above and foregoing Brief on Appeal complies with the limitations of Supreme Court Rule 84.06(b); that the number of words contained in said Brief as defined by Rule 84.06(b) and as calculated by the Microsoft Word 2007 program with which the Brief was written, is 6,838.

Counsel further certifies that Supreme Court Rule 84.06(g) and Special Rule 13 of this Court have been complied with in that the CD-ROM accompanying the original and nine copies of the written brief filed with this Court, contains a digital copy of this Brief prepared in Microsoft Word 2007; that the digital file was scanned with the current version of Norton Anti-Virus; and that the digital file was found to be virus free.

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