

NO. SC88829

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*In the Supreme Court of Missouri*

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

v.

THE HONORABLE DAVID DALLY,  
*Respondent*

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

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**RELATORS' REPLY BRIEF**

*Including Supplemental Appendix  
pp. A-189 thru A-215*

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## **SUPPLEMENTAL STATEMENT OF FACTS**

Respondent's brief attempts to try the issue of plaintiff's damages, as well as their causation and apportionment. This, of course, is beyond any issues before the Court. But because Respondent has raised these issues, a brief response is appropriate.

After Relators' Opening Brief was filed, the deposition of one of her primary treating physicians, Dr. Melvin Karges, was taken. Dr. Karges is a board certified specialist in physical medicine (A-193, Tab 35). At the time of the second rear-end collision, plaintiff Kendra Nixon had been referred to Dr. Karges for treatment of the injuries arising from the first rear-end collision, but the initial appointment happened to be scheduled on a date after the second collision occurred (A-210, Tab 35). Dr. Karges' history and treatment includes the injuries sustained in both rear-end collisions (A-195, Tab 35).

Plaintiff's medical treatment for injuries suffered in the first rear-end collision include emergency room, chiropractic, and physical therapy treatment (A-195, 201, Tab 35). The repair bill for the damages to plaintiff's car sustained in the first collision exceeds \$3,000 (A-214-5, Tab 36).

Dr. Karges was shown photographs of the vehicles involved in the two collisions, and the repair bills for plaintiff's vehicle (A-193-4, Tab 35). The

physician testified that the damage to the vehicles is consistent with the injuries which plaintiff sustained in the two collisions (A-201, Tab 35).

Plaintiff herself completed a pain diagram two months after the first collision (A-189, Tab 33), and another diagram following the second collision (A-190, Tab 34). The forms were supplied by different medical offices and so are not identical, but they are useful for demonstrating which injuries are common to both collisions and which are not. Both pain diagrams reveal symptoms in the neck (cervical), upper back (thoracic), and lower back (lumbar) regions. The diagram completed after the second wreck does demonstrate new symptoms in the buttocks and right leg which were not present following the first wreck.

Dr. Karges was asked to give his opinion as to which injuries he attributed to each of the wrecks. He answered:

Obviously, that's - it's difficult since I hadn't seen her prior to the first wreck or between the first and the second. So we're having to use other information to piece together an opinion. From her reports and from her treatment records, she apparently was responding to treatment for the neck and upper back, and that was apparently what most of her complaints were that she related to me as well. And this apparently was showing some improvement while she was still in therapy. The second

accident appears to have precipitated more back and lower extremity problems, predominately in the right leg, and then some sacroiliac pain symptoms. So it appears that in terms of dividing, in general symptoms, it appears that the first wreck certainly was primary trigger of the neck and shoulder symptoms. The second accident, undoubtedly, aggravated that, but appears to have actually created more of the lumbar and right lower extremity symptoms. And that's not a perfect division and I think it would be very difficult to sort it all out.

(A-196, Tab 35). Dr. Karges also explained the relationship between the first wreck having set up the likelihood of a worse injury from the second wreck, and the second wreck having aggravated the injuries sustained in the first wreck:

Q. Okay, and Doctor, I think you pointed something out. The – while you attribute mostly the neck and upper back problems to the first wreck, there was some aggravation of that in the second, correct?

A. I would assume that to be true, yes.

\* \* \* \* \*

Q. ...did the first wreck make any of the problems from the second wreck more likely to occur to her?

A. Certainly in the neck and the upper back where she was already having symptoms, we would expect her to have a more pronounced response because of the second accident, yes.

(A-196, Tab 35).

It is even a possibility that the first collision was a causative factor in the sciatic pain which runs from the buttock to the knee and which did not appear until the second collision (A-207, Tab 35).

The injuries to plaintiff Kendra Nixon's neck, upper back, low back, and sciatic nerve, are not constant but are permanent (A-201, Tab 35). In other words, the young plaintiff will have recurrent flare-ups of these injuries throughout the remainder of her life.

## REPLY POINT ONE

**Relator is entitled to an Order prohibiting Respondent from enforcing his Order that Relator's claims against each of the two defendants be severed due to alleged improper joinder,**

**Because Respondent trial judge exceeded his jurisdiction by ordering that the claims against the two motorists who had rear-ended plaintiff be severed when there were no discretionary grounds to do so, in that the motion to sever was not based upon any discretionary grounds and the Order sustaining defendant's motion to sever did not recite any discretionary grounds; and**

**Because in the absence of discretionary grounds, Respondent acted in excess of his jurisdiction in sustaining the motion to sever in that plaintiff satisfied all requirements of the Permissive Joinder rule, Rule 52.05(a), and joinder was not needed for venue, which was independently established against both defendants.**

*State ex rel. Tarrasch v. Crow*, 622 S.W.2d 928 (Mo. banc 1981).

*Schiles v. Schaefer*, 710 S.W.2d 254 (Mo. App. E.D. 1988).

*Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983).

*Schumacher v. Leslie*, 232 S.W.2d 913 (Mo. banc 1950).

## ARGUMENT

*A. The motion to sever which defendant filed did not invoke any discretionary grounds, and the Order which Respondent entered sustaining said motion did not reflect any exercise of discretion, and therefore as a matter of law Respondent had no discretion to sustain the motion.*

Respondent's brief contains numerous references to the "discretion" of the trial court. Respondent did not exercise any discretion in this matter, and thus there can be no deference to Respondent's discretion.

Defendant Hayes' Motion to Sever (A-20, Tab 5) and the various Suggestions filed in support of that motion (A-29, Tab 7 and A-42, Tab 8), were exclusively based upon the claim that permissive joinder of the claims against the two defendants was not proper in the first instance.

Rule 52.05(b) does grant a trial court the right to order separate trials (as opposed to the severance of claims during discovery). But defendant never requested a separate trial under that rule, and never alleged or argued any factual basis for invoking that discretionary rule.

The only issue which was presented to Respondent by any party, was whether plaintiff's claims against the defendants who caused the two rear-end collisions could be permissively joined under Rule 52.05(a). Because the question of whether two defendants are subject to permissive joinder is one of

law, Respondent's ruling is not subject to an abuse of discretion standard.

Therefore, Respondent cannot now argue for deference to his discretion which was never requested and never exercised.

*B. Respondent's position is unsupported by the facts and law,  
and would eliminate permissive joinder of defendants*

Respondent asserts that permissive joinder is only allowed when there is a singular indivisible injury for which all defendants have joint liability. Claims that would fit that requirement, however, would share the same ultimate facts and must normally be brought within one action or else are barred under the doctrine of claim preclusion. *Kesterson v. State Farm Fire & Casualty Co.*, SC88648 (Mo. 2008). Because such claims fall within the compulsory joinder provisions of Rule 52.04, there would be no cases falling within the permissive joinder rule if Respondent's position were correct. Obviously since there is a permissive joinder rule, it should be interpreted as intending that a plaintiff can join claims where joinder is not otherwise mandatory. If this is done, Respondent's position cannot be correct.

Plaintiff's treating physician, Dr. Karges, testified that he could not separate out how much of plaintiff's neck and upper back injuries were attributable to each wreck (A-199, Tab 35). While those injuries originated with the first collision and were aggravated by the second, Dr. Karges could not

separate out the injuries beyond that (A-196, Tab 35). The first collision caused plaintiff Kendra Nixon to have a “more pronounced response because of the second accident” (A-196, Tab 35).

The facts and the law both refute Respondent’s contention that there is no common liability between defendants for any of plaintiff’s injuries. Since this is the essential lynchpin of Respondent’s position, then the absence of merit to Respondent’s position is obvious.

As is explained in Relator’s Opening Brief, an original tortfeasor is liable for a subsequent aggravation of the injuries he or she inflicts. *Carlson v. K-Mart Corporation*, 979 S.W.2d 145 (Mo. banc 1998). Likewise the second tortfeasor is liable for the aggravation which he or she causes to a pre-existing injury. *Criswell v. Short*, 70 S.W.3d 592 (Mo. App. S.D. 2002).

For the aggravation of the upper back and neck injuries which plaintiff sustained, both the first and the second tortfeasors are liable. “Where the concurrent or successive negligence of two persons, combined together, results in an injury to a third person, he may recover damages from either or both and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury.” *Schiles v. Schaefer*, 710 S.W.2d 254, 267 (Mo. App. E.D. 1988). Here the successive negligence of the two defendants

combined to cause the injury to which the first wreck predisposed plaintiff and the second wreck aggravated.

The permissive joinder rule does not require that plaintiff's claim be identical against both defendants. The rule states quite the contrary: "A plaintiff or defendant need not be interested in obtaining or defending against all of the relief demanded."

Respondent's brief subtly misinterprets those cases which mention the need for a "single indivisible injury." Those cases do not hold, as Respondent suggests, that joinder exists only where defendants share liability for the entirety of plaintiff's damages. If this were true, there could never be joinder of an original tortfeasor and a subsequent negligent healthcare provider who negligently aggravated that injury. Respondent suggests in his brief that there cannot be such common liability, and bases his entire argument upon that contention (*Brief of Respondent*, p. 21). But the law has been to the contrary for a very long time.

In *Schumacher v. Leslie*, 232 S.W.2d 913 (Mo. banc 1950) the court stated that where an injury is negligently inflicted by one tortfeasor and is aggravated by subsequent negligent medical care of another, "the two are joint tort-feasors with respect to the aggravation." (*Schumacher* at 917). *State ex rel. Tarrasch v. Crow*, 622 S.W.2d 928, 935 (Mo. banc 1981) held that as

between the original tortfeasor and a physician who later provided negligent medical care, there is a “common liability” for the damages caused by the negligent care. And a suit joining plaintiff’s claims against a negligent motorist and a later negligent healthcare provider was held proper on the basis that the defendants could be held jointly liable as to a part of plaintiff’s damages. *State ex rel. Biting v. Adolph*, 704 S.W.2d 671 (Mo. banc 1986).

In addition to misstating the law regarding the joint responsibility of successive tortfeasors, Respondent also makes significant omissions when discussing the case of *Beaulieu v. The Concord Group Insurance Co.*, 208 F.R.D. 478 (D. N.H. 2002). *Beaulieu* did not purport to overrule those cases which Relator cites in her opening brief. Nor was *Beaulieu* even a case involving successive tortfeasors. In that case, the court specifically found that plaintiff was *not* making a claim that the two negligent drivers were successive tortfeasors. More importantly, the *Beaulieu* court based its decision upon the fact that plaintiff was not even asserting a negligence claim arising from the first car wreck, and instead was pursuing a contract claim for that occurrence and a negligence claim for the second. That case is clearly of no help to Respondent’s position.

When read logically and consistent within the context of the reported decisions, any requirement that joinder be founded upon the existence of a

single indivisible injury is met where both defendants share common liability for at least part of the plaintiff's injuries. There is simply no prerequisite that all defendants share the identical liability, before the claims against the defendants can be joined in one action. Both the allegations in the petition, and the deposition testimony of the treating physician Dr. Karges, bring this case within the existing case law declaring that both defendants are joint tortfeasors as to the aggravation the second collision caused to the original injuries.

*C. There is no longer a need to restrict joinder in order to avoid an expansion of venue, and permissive joinder should be governed by the principles of judicial economy, fairness, and consistency.*

Respondent did not even attempt to refute, other than by hyperbolic histrionics, the explanation in Relator's brief that the decisions in this State do distinguish between joint liability when deciding questions of venue, and joint liability for purposes of permissive joinder. This Court itself made such a distinction in *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528 at 529 (Mo. banc. 2003).

Now that the vexing issues concerning venue have been addressed by the legislature, the issue presented by this case should be controlled by the general trend favoring joinder of various claims. See, e.g., *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215 (Mo. App. 2007).

It should be recognized that either the line of cases relied upon by Respondent were limited to deciding issues of venue, or else were strongly influenced by concerns about how they might be interpreted to expand venue. Those concerns are now gone, and the law should be brought into alignment with principles of judicial economy and the fairness that is inherent in having all of the issues decided in one action. This State made significant advance in having issues of liability and apportionment of fault decided in one proceeding with *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983). It is neither fair nor rational to have apportionment of damages tried in separate suits with duplication of costs and the possibility of inconsistent verdicts.

## CONCLUSION

Both the facts and long-standing principles of law establish that the two defendants in the proceeding below, share a joint or common liability for plaintiff Kendra Nixon's injuries which were aggravated or exacerbated in the second collision. A rule which allows joinder of the claims against the two negligent motorists promotes justice, economy, and consistency. A rule which prohibits joinder defeats all of these goals.

The Writ of Prohibition issued by the Court should be made permanent.

Respectfully submitted,

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## CERTIFICATES OF COMPLIANCE

COMES NOW Glenn R. Gulick, Jr., attorney for Relators, and hereby certifies that the above and foregoing Reply Brief complies with the limitations of Supreme Court Rule 84.06(b); that the number of words contained in said Reply Brief as defined by Rule 84.06(b) and as calculated by the Microsoft Word 2007 program with which the Reply Brief was written is 2,483.

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 Reply Brief filed with this Court contains a digital copy of this Reply 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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