

NO. SC88829

IN THE SUPREME COURT OF MISSOURI

**STATE OF MISSOURI *ex rel.*
KENDRA NIXON 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**

BRIEF OF RESPONDENT
(Oral Argument Requested)

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ARGUMENT

POINT I.

1. PROHIBITION SHOULD NOT ISSUE AS RESPONDENT DID NOT ERR IN SEVERING RELATORS' ACTIONS AGAINST TWO SEPARATE DEFENDANTS INVOLVED IN TWO SEPARATE MOTOR VEHICLE ACCIDENTS OCCURRING ALMOST ELEVEN MONTHS APART IN THAT RELATORS DO NOT HAVE AN INDIVISIBLE INJURY AND THE TWO SEPARATE DEFENDANTS ARE NOT JOINTLY AND SEVERALLY LIABLE TO RELATORS AND RELATORS HAVE SEPARATE AND DISTINCT CAUSES OF ACTION AGAINST EACH ALLEGED TORTFEASOR WHICH ALLOWS FOR A FULL AND COMPLETE RECOVERY.

Standard of Review

Relators seek a writ of prohibition on the basis that Respondent exceeded his jurisdiction by ordering Relators' causes of action against two alleged successive tortfeasors to be severed. "Prohibition is a discretionary writ that lies only to prevent 'an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power.'" *State ex rel. Kinder v. McShane*, 87 S.W.3d 256, 260 (Mo. banc 2002), quoting *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001). Moreover, "The general rule is that, if a court is 'entitled to exercise discretion in the matter before it, a writ of prohibition cannot prevent or control the manner of its exercise, so long as the exercise is within the jurisdiction of the court.'" *State ex rel. Kinder v. McShane, supra*, at 260, quoting *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc

1999). “A writ of prohibition is an extraordinary remedy and should be used with ‘great caution, forbearance, and only in cases of extreme necessity.’” *State ex rel. Garrett v. Dally*, 188 S.W.3d 111, 113 (Mo.App.S.D.2006) quoting *Mo. Dep’t. of Soc. Servs. v. Admin. Hearing Comm’n.*, 826 S.W.2d 871, 873 (Mo.App.1992).

Argument

Kendra Nixon alleged, in her First Amended Petition in Damages, that she was involved in two separate and distinct motor vehicle accidents at two different times, at two different locations and involving two separate parties. The first accident occurred on or about February 15, 2005, in Joplin, Jasper County, Missouri, when her vehicle was allegedly struck in the rear by a vehicle operated by Shannon Hayes. (A6, 7, par. 5, Relators’ App.). The second accident occurred almost eleven months later, on or about December 30, 2005, and again in Joplin, Jasper County, Missouri, when her vehicle was allegedly struck in the rear by a vehicle operated by William Gardner. (A7, par. 6, Relators’ App.). Relators do not allege that all of Nixon’s injuries are indivisible. Instead, Nixon alleges that the collision of December 30, 2005, resulted in new injuries to her neck, back and leg and also aggravated her original injuries. (A8, par. 10, Relators’ App.). Nixon then pleads that **“To the extent that the medical evidence so indicates, the negligence of defendant Hayes and the negligence of defendant Gardner combined to cause plaintiff’s 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.”** [Emphasis added]. (A9, par. 11, Relators’ App.). In her prayer for

relief, Nixon requests judgment against Hayes and Gardner jointly and severally. (A9, Relators' App.).

From the deposition of Nixon it is clear that the first accident (with Hayes) was a minor impact with minimal resulting damage to the vehicle. (A 187, p. 27 – 28, Relators' App.). The second accident (Gardner) was a much harder impact. (A 102, p. 86, Relators' App.). Nixon told the police investigating the first accident at the scene that she was not hurt. (A 187, p. 28, 29, Relators' App.). Both cars were driven from the scene after the first accident. (A 87, p. 27 – 29, Relators' App.). Later, Nixon's neck and low back started hurting and she sought medical treatment. (A 87, p. 29, Relators' App.). Nixon was asked what injury she had from the first accident, answering it was her neck and a lower back strain and no other injuries. (A 88, p. 32, 33, Relators' App.). She started a treatment regimen and, after the first accident and before the second, was able to work as a nanny for her attorney, Glenn Gulick (A 90, p. 40, 41, Relators' App.), and work as a teacher's aide. (A 90, p. 40; A 91, p. 43, Relators' App.). She was also able to finish her college classes, maintain her grades, and graduate from college in May, 2005. (A 91, p. 42, Relators' App.). After the first accident and before the second, Nixon also married and honeymooned in Cancun (A 93, p. 50, Relators' App.); took a road trip to Chicago in August, (A 93, p. 51, Relators' App.), and another road trip to Nebraska. (A 93, p. 51, Relators' App.). In December, before the second accident, she really wasn't having any problems with her neck. (A 98, p. 72, Relators' App.). When asked what injuries she had from the second accident, Nixon stated that her neck tightened; she continued to have pain in her lower back; she had right leg pain and she

had hip pain. (A 103, p. 90, Relators' App.). Obviously, Nixon can differentiate what injuries she had and from what accident. From her deposition testimony and from her pleadings, it is clear that the alleged injury is not indivisible. Moreover, and as discussed below, Hayes and Gardner are not joint tortfeasors. Respondent was correct in his ruling severing the two claims.

This Court, in *State ex rel. Jinkerson v. Koehr*, 826 S.W.2d 346 (Mo.banc 1992) decided the very issue raised by Relators. In that case, the Ayusos were involved in two separate automobile accidents. The first accident occurred March 12, 1986, in St. Louis County and involved Ronnie Jinkerson. The second accident occurred eleven months later on February 26, 1987, in the City of St. Louis and involved Richard Matthews. The Ayusos sued Matthews in the City of St. Louis Circuit Court and eventually added Jinkerson and others to their lawsuit. After settlements with various parties and other procedural matters, the issue that came before the Court was whether the Circuit Court of the City of St. Louis had venue over the cause of action stated against Jinkerson. In order to address the venue issue, the Court had to look at whether joinder of the parties was appropriate in the first instance. On that issue, respondent relied on *State ex Rel. Bitting v. Adolf*, 704 S.W.2d 671 (Mo.banc 1986) arguing that successive acts of negligence resulting in serious and permanent injuries may be combined for venue purposes. *Bitting* involved medical malpractice claims following a motor vehicle accident with injuries. In that type of factual situation, Missouri law is clear that the tortfeasor in the motor vehicle accident would be liable for all damages caused by that accident, and those damages would include those resulting from subsequent

medical malpractice as the accident gave rise to the need for the medical treatment. The law in that regard is “...based on the legal principle that a person who negligently causes an accident is liable for all foreseeable damages caused by the accident, including malpractice damages for any negligent treatment of the resulting injuries.” *State ex rel. Jinkerson v. Koehr, supra*, at 348. This Court then went on to distinguish *Bitting*, stating the following, at 348:

“Unlike *Bitting*, Jinkerson does not share liability with the defendants involved in the second accident. The Ayusos’ petition alleged that the injuries sustained in the two accidents were not separate and distinct but inseparable and indistinguishable thereby creating common liability among all of the named defendants. However, the facts do not call for the application of joint liability. Further, Jinkerson could not have foreseen the risk of the Ayusos being involved in a second automobile accident approximately one year later. Because there is no common liability among the defendants, the Ayusos should not be allowed to join the two accidents in one petition despite the language of Rule 52.05(a) regarding permissive joinder.”

The court noted that the two accidents alleged in the Ayusos’ petition did not arise out of the same transaction or occurrence, but rather each defendant was responsible for the injuries caused in the accident in which he or she was involved. *State ex rel. Jinkerson v. Koehr, supra*, at 348.

The Western District Court of Appeals, in *Carlton v. Phillips*, 926 S.W.2d 8 (Mo.App.W.D.1996) followed this same rule of law. In that case, Tina Carlton was involved in an auto accident on June 13, 1986, with William Corlew and two months later, on August 9, 1986, was involved in a second motor vehicle accident with Phillips. Carlton filed a petition alleging that the successive negligent acts of Phillips and Corlew in operating their vehicles caused a single, indivisible injury for which each defendant's individual responsibility could not be separately ascertained and sought a judgment against each. There had been no objection to the joinder of the claims by either of the defendants. Carlton then settled with Corlew and released him. There was deposition testimony from medical doctors that they could not separate appellant's symptoms and complaints to attribute them to one accident or the other within a reasonable degree of medical certainty. Phillips then filed a motion for summary judgment admitting his involvement in the second accident with Carlton. The question presented was whether common or joint liability may arise from a pattern of successive automobile accidents. The court held that it did not believe current Missouri law provided for common or joint liability between Phillips and Corlew. *Carlton v. Phillips, supra*, at 11. The court discussed the *Jinkerson* opinion and noted that the crux of the opinion dealt with the issue of venue and the fact that simply joining two separate causes of action in one cause of action in a single petition did not create venue over both actions. The Western District went on to state the following, at page 12:

“It is apparent from these cases that multiple defendants in separate, unrelated, yet successive auto accidents cannot be held jointly liable under Missouri law

as it now stands. While appellant cites several cases in support of her position that where two or more persons acting independently are guilty of consecutive acts of negligence causing an indivisible injury which cannot reasonably be apportioned between the negligent defendants, both tortfeasors are jointly and severally liable for all the injured party's damages, many of these cases do not involve the specific fact scenario of successive, yet separate auto accidents. Those cases cited by appellant that do involve successive accidents are also unpersuasive as the fact situations involved indicate that the separate accidents were either part of a chain of accidents or, at the very least, part of the same series of transactions or occurrences that was not established by the facts in *Jinkerson, Sims*, or in the case at bar." [Footnotes omitted].

The court felt that the substantive law would not affect the remedies available to appellant and that she was merely being required to meet her burden of proof when it stated the following, at 12 – 13:

"This is not to say that appellant does not have a cause of action against Phillips and against Corlew separately. If appellant is able to establish that she suffered injury as a result of the alleged negligence of the individual opposing defendant, she may recover from that defendant in that action. Once she satisfied the elements of her claim, it becomes the burden of the individual defendants to challenge the extent of appellant's injuries directly attributable to their own negligence." [Footnote omitted].

The omitted footnote in the above quote notes that appellant's right to recover would include the right to bring an action against Phillips (second accident) for aggravation of any pre-existing injury. *Carlton v. Phillips, supra*, at 12, n.3.

It is important to note that the *Hager v. McGlynn*, 518 S.W.2d 173 (Mo.App. 1975) case relied upon by Relators was from the Kansas City District, now Western District, Appellate Court. The importance is found in the fact that the same Western District specifically stated that *Hager v. McGlynn, supra*, was effectively overruled by *Jinkerson. Carlton v. Phillips, supra*, at 11. Moreover, it should be noted that Relators herein seek to hold Hayes and Gardner jointly and severally liable. Such a claim was not made in *Hager*. "Here the plaintiff was asserting only several liability against the two defendants and made no attempt to allege any joint liability;..." *Hager v. McGlynn, supra*, at 175.

The Eastern District Court of Appeals also discussed and followed the rule of substantive law discussed in the *Jinkerson* decision. In *Sims v. Sanders*, 886 S.W.2d 718 (Mo.App.E.D.1994) the plaintiff in the underlying action was involved in a motor vehicle accident with Sims in St. Louis County on April 27, 1992. The underlying plaintiff was then involved in a second motor vehicle accident three months later on July 24, 1992, in St. Louis County with an uninsured motorist. Plaintiff filed a petition joining Sims and State Farm Mutual Automobile Insurance Company in the same action as co-defendant's. State Farm was the plaintiff's own insurance carrier and the claim against it was for uninsured motorist coverage as a result of the acts of the driver in the second of the two accidents. The plaintiff alleged that her injuries were superimposed, one upon another, so that she was unable to

separate the injuries and damages sustained from each of the collisions and therefore sought recovery from each of the defendants, jointly and severally. The issue of joint or common liability had to be addressed. After discussing the *Jinkerson* opinion, the Eastern District went on to state the following, at 720-21:

“The [*Jinkerson*] court further held that joinder was not permitted under Rule 52.05(a) because the cause of action arising out of the two accidents did not arise out of the same transaction or occurrence. Rather, each defendant was responsible only for the injuries caused in the accident in which he or she was involved. Thus, to the extent that *Hager v. McGlynn* holds that permissive joinder is available in successive accident cases, it is contrary to the Missouri Supreme Court’s holding in *Jinkerson* and should no longer be followed.”
[Footnote omitted].

The omitted footnote in the above-referenced quote provides the following, at page 721, n.5.:

“Further, contrary to Respondent’s contention in this case, the causes of action do not arise out of the ‘same...series of occurrences.’ Because each defendant’s liability, if any, arises out of a separate occurrence, it follows that neither defendant’s liability arises out of a ‘series of occurrences,’ and thus could not possibly arise out of the *same* series of occurrences. See Comment, *Expansion of Permissive Joinder of Defendants in Missouri*, 41 Mo.L.Rev. 199, 210-14 (1977).”

The only remaining appellate district not discussed is the Missouri Southern District Court of Appeals. It too has discussed the *Jinkerson* opinion. In *State ex rel. Quest Communications Corp., v. Baldrige*, 913 S.W.2d 366 (Mo.App.S.D.1996) it had to distinguish *Jinkerson* and did so in a footnote to its opinion. The Southern District stated that the *Jinkerson* court held that the permissive joinder rule did not allow a plaintiff to join two separate accidents in one petition because common liability was lacking among the defendants. *State ex rel. Quest Communications Corp., v. Baldrige, supra*, at 371, n.6.

This Court had the opportunity to revisit *Jinkerson* and distinguish it on this very issue in *State ex rel. Smith v. Gray*, 979 S.W.2d 190 (Mo.banc 1998). In *Gray*, a dump truck had come to a stop obstructing a lane on a snow covered highway causing the plaintiff to come to a stop, but plaintiff's car slid on snow and onto the right shoulder near a rock embankment. Within minutes, and while plaintiff was trying to push his vehicle back onto the road, he was struck by a tractor trailer unit operated by Paul Adcock and owned by his employer, Hahn & Phillips Grease Company. The unidentified dump truck left the scene. Plaintiff sued in one action his own carrier for uninsured motorist coverage based on the acts of the dump truck along with Adcock and his employer. The respondent judge transferred the case from Jackson County to Saline County and the plaintiffs sought mandamus in the Supreme Court to prevent that transfer. This Court stated the following, at 193:

“Respondent contends that Adcock and Hahn & Phillips do not have common liability with Shelter and cannot be defendants in the same suit. In fact, the alleged negligence of the unidentified dump truck driver and of the tractor

trailer driver (Adcock) combined to produce one injury to Larry Smith. [Citations omitted]. The cases of *State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290 (Mo.banc 1979), and *Jinkerson v. Koehr*, 826 S.W.2d 346 (Mo.banc 1992) are distinguishable because there, the separate liabilities arose from two separate automobile accidents, occurring six days and eleven months apart, respectively. These and similar cases cited by respondent are unpersuasive here, where the events causing a single, indivisible injury occurred within minutes.”

This substantive rule of law noted in *Jinkerson* regarding joinder and joint liability being improper when there are two separate and distinct motor vehicle accidents separated in time is not new law in Missouri. In 1976, sixteen years before *Jinkerson*, this Court, in *Barlow v. Thornhill*, 537 S.W.2d 412 (Mo banc 1976), decided a case in which the Barlows had been involved in two separate rear end collisions. The collisions occurred very close in time, and on the same date and at the same location. The first accident occurred while plaintiff was a passenger in the right rear seat of Lewis’s vehicle on Highway 40 in St. Louis County. Lewis’s vehicle was struck in the rear by Thornhill. Lewis’s vehicle ended up in the median. Drivers and passengers got out of the cars to exchange information. Because it began raining they got back into their vehicles. Within ten to fifteen minutes a vehicle operated by Pierce struck Thornhill’s vehicle and then hit the rear end of the Lewis vehicle. The Court discussed a similar case, *Brantley v. Couch*, 383 S.W.2d 307 (Mo.App. 1964), and the rule of law that if all of the evidence established that plaintiff’s injury resulted solely

from the second accident then plaintiff must show that the tortfeasor sought to be held responsible must have been the sole, or at least a concurring, cause of that second accident.

The court then stated the following, at 418:

“Or if the two accidents were widely separated as to time and distance, and it was possible to identify with some definiteness the injuries suffered in each, the burden of proving in which accident an injury was sustained would be on the plaintiff.” [Citation omitted].

A number of Missouri cases were discussed indicating that when two or more independently acting persons are consecutively negligent in a closely related period of time and the cause of injury is such that the trier of fact cannot reasonably apportion it between the accidents, then the tortfeasors may be jointly and severally liable for all the damages directly and proximately resulting from the negligence. *Barlow v. Thornhill, supra*, at 419.

The Court stated the following, at 419:

“There is no arbitrary time limit the court could promulgate as being the ‘cutoff point’ for application of the rule. The gist of the rule with respect to injuries is not so much the time separating the collisions as it is the impossibility of definitely attributing a specific injury to each collision. Each case must be judged in the circumstances of the case. The fifteen-minutes differential in the instant case does not preclude the application of the indivisible-injury rule.”

This “indivisible-injury rule” was also discussed in *State ex rel. Retherford v. Corcoran*, 643 S.W.2d 844 (Mo.App.E.D.1982), a case decided ten years before *Jinkerson*. In fact, the *Corcoran* decision cited *Hager v. McGlynn*, *supra*. In *Corcoran*, there were three separate automobile accidents. The first was with Nenninger and occurred May 25, 1977, the second with Lane Service Company occurring June 25, 1977, and the third was with Brostoski occurring October 25, 1978. All three separate drivers were sued in the same lawsuit. There was an allegation of difficulty of causal separation by plaintiff of the degree of injuries between the three accidents. With apologies for the length of the quote, the following was stated, at 846:

“Here there are three separate accidents widely disparate in time and place. It is the burden of Ms. Greathouse to establish as to each defendant the injuries which she sustained in the accident involving that defendant. [Citation omitted]. Those damages may include aggravation of pre-existing injuries, [citation omitted], which may create proof problems in differentiating the severity of injuries attributable to each accident. **But difficulty of proof does not create joint liability for these independent and unrelated torts. Each defendant has liability for, and only liability for, the injuries sustained by plaintiff as a result of that defendant’s accident.** Lane Service Company cannot be held liable for injuries incurred in the Nenninger or the Retherford accident nor can those defendants be held liable for injuries sustained in the

Lane Service accident. There is no common liability among the defendants and no right of contribution therefore exists.

Respondent seeks to invoke the ‘single indivisible result’ rule applied in *Glick v. Valentine Produce, Inc.*, 396 S.W.2d 609 (Mo. 1965) [3-6] appeal dismissed, 385 U.S. 5, 87 S.Ct. 44, 17 L.Ed.2d 5 (1966); and *Brantly v. Couch, supra*, [1, 2]. That doctrine applies to accidents which occur in such close proximity in time and place that it is impossible to identify with any definiteness the injuries sustained in each accident and plaintiff is therefore allowed to recover against the defendants jointly and severally the full amount of damages. The defendants are treated as concurrent tortfeasors despite the fact their negligence is successive. *Brantley, supra*, which involved a chain collision, is an example. Here the accidents were widely separated in time and place. In *Barlow v. Thornhill*, 537 S.W.2d 412 (Mo. banc 1976) [4], the court stated that no arbitrary time limit could be promulgated as a ‘cut-off’ point for application of the indivisible injury rule, and that each case must be judged on its own circumstances. There the time was fifteen minutes... Greathouse alleged that each collision caused specific injury which included aggravation and reinjury of the prior injury. She did not allege that the collisions combined to cause a single injury. Having in mind the purpose and limited applicability of the indivisible injury rule, we cannot find the requisite impossibility of attributing a *specific injury* to each collision. The difficulty facing the parties

in this case is not in establishing what injury was sustained in each accident, but the severity of each injury attributable to each accident.” [Bold emphasis added, italics in original].

This Court and all appellate courts of this state have followed and have been able to follow without difficulty the substantive law regarding successive tortfeasors involved in separate and distinct accidents separated in time and place. *Jinkerson* does not make any change in the law in that regard. The substantive law before *Jinkerson* is consistent with the law applied by *Jinkerson* and the law applied post *Jinkerson*. When there are successive independent acting alleged tortfeasors, whose acts are separated by time and place, they are not jointly responsible to the plaintiff. This has been a long standing rule in Missouri law and *Jinkerson* did nothing to change it. Relators’ complaint here is not with the law, but with the facts of their case and the fact that their burden of proof may be more difficult in separate cases. Clearly, in the case at bar the accidents are widely disparate in time and place. Nixon testified that she suffered different injuries in the different accidents. She does not allege a single indivisible injury. She does not testify in her deposition to a single indivisible injury. Relators argue that the Appellate Courts of this state have all misinterpreted *Jinkerson*. (Relators’ Brief, p. 24). If so, they have all done so consistently. If so, they have done so in a manner consistent with Missouri law prior to *Jinkerson*.

Moreover, when looking at this case strictly from Gardner’s view it is clear that he cannot be held responsible for injury to Nixon occurring only from the first accident. Gardner was the driver in the second accident. He has no liability for injury caused solely

from the first accident, almost eleven months prior to his involvement. Even in the successive tortfeasor cases involving an alleged act of negligence resulting in injury followed by malpractice by a physician, the physician is not responsible for the injury caused solely by the original tortfeasor. *State ex rel. Baldwin v. Gaertner*, 613 S.W.2d 638, 640 (Mo. banc 1981). If Gardner can't be held responsible for injury that preceded the accident he was in, how can he be jointly and severally responsible with Hayes? Hayes and Gardner are not joint tortfeasors. They are not jointly and severally responsible to Nixon. Each is responsible, if at all, only for that injury he or she caused or contributed to cause. It is Nixon's burden to prove.

Respondent did not err when ordering the severance of the parties. In fact it may well have been error had he not ordered severance. This is seen in *State ex rel. Heffner v. Moran*, 928 S.W.2d 426 (Mo.App.W.D.1996). In that case Andrea Nixon sued American Lodging, Inc. for injuries she alleged occurred when she slipped and fell on December 20, 1992. The estate of John Bray was later substituted as a defendant in the place of American Lodging. On March 9, 1993, three months after her fall, Andrea was involved in a motor vehicle accident with Heffner. In her amended petition Andrea added Heffner as a party defendant and alleged that the motor vehicle accident aggravated injuries she received in the slip and fall accident and that the injuries from the two separate and distinct accidents were indivisible. Heffner filed a motion requesting the judge to set aside and withdraw the order that allowed plaintiff to amend her petition to join Heffner as a defendant or, in the alternative, for an order dismissing Heffner from the lawsuit or severing and bifurcating the

claim against Heffner from the lawsuit with Bray. This request was overruled and eventually a petition for writ of mandamus was presented to the Western District Court of Appeals with Heffner arguing that the judge's order authorizing her joinder was improper. After discussing *Jinkerson* and various other cases, the court quoted from the *Carlton* opinion and noted the fact that multiple defendants in separate, unrelated, yet successive accidents cannot be held jointly liable under Missouri law. It went on to hold that the respondent judge erred in granting joinder of defendant Heffner in a case with Bray. An Order of Prohibition was entered directing the respondent judge to refrain from all action against Heffner in that lawsuit.

From an overall reading of Relators' argument in this case, it appears that the underlying premise for their position is that the case of *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo.banc 1998) is somehow in conflict with the above-noted line of cases. Nothing could be farther from the truth. In *Carlson* there was one plaintiff who had sued one defendant. The defendant was K-Mart. While the plaintiff had been shopping at K-Mart, a box fell on her. About six months after that incident, she was involved in a motor vehicle accident. K-Mart argued that Carlson's injuries were caused from the motor vehicle accident and not from the box striking her. Carlson requested that the damage instruction be amended in form consistent with the verdict director so that the damage instruction would be for injury "caused or contributed to be caused". At no point was there a suggestion by Carlson that anyone other than K-Mart was responsible for the injury. At no point was joint and several liability an issue. *Carlson* is so factually different from *Jinkerson* and the issues so different,

it simply can't be read to question *Jinkerson* or be in conflict with it. Moreover, *Carlson* is in complete compliance with the line of cases noted above as it is clear that there is a mechanism in place to handle an injury which occurs in the first accident even after there is a second accident. Instructions may be modified to allow the plaintiff to recover for injuries resulting from a later occurrence if the jury finds that the injuries were caused or contributed to be caused by the earlier negligent conduct of the defendant. *Carlson v. K-Mart Corp., supra*, at 147. A defendant is then free to argue that the plaintiff's injuries were not directly caused or contributed to be caused by its negligence, but rather by the other accident or some other cause. *Carlson v. K-Mart Corp., supra*, at 148.

Each of the other main cases relied upon by the Relators (Relators' Brief, p. 8 – 9) are easily distinguishable. For instance, in *State ex rel. Allen v. Barker*, 581 S.W.2d 818 (Mo.banc 1979), discussed by Relators in conjunction with the overruled case of *Hager v. McGlynn, supra*, there were several defendants who had all been sued for defamation as each had separately published an allegedly slanderous statement about the plaintiff. Just as in *Hager*, there was no contention in *Barker* on the part of the plaintiff that the claims were joint. "It is to be noted that relator's petition did not allege any concert of action between the various defendants but alleged that each published the allegedly defamatory statement and that each should be responsible for independent damage. No joint claim was alleged." *State ex rel. Allen v. Barker, supra*, at 825. Even in finding that joinder was permissible, the court specifically stated that such a decision would lie within the discretion of the trial court as to whether to have separate trials. *State ex rel. Allen v. Barker, supra*, at 827. As such, even if

the *Barker* decision is somehow precedent for that now before this Court, which is not admitted by Respondent, then it is obvious that Respondent had the discretion to do that which he did in severing the actions. When a court is entitled to exercise discretion, a writ of prohibition is not proper to prevent or control the exercise of that discretion. *State ex rel. Kinder v. McShane, supra*, at 260.

The *State ex rel. Farmers Insurance Co., Inc. v. Murphy*, 518 S.W.2d 655 (Mo.banc 1975) decision relied upon by Relators is also easily distinguishable. Plaintiff had sued two individual defendants and his own uninsured motorist insurance carrier. The insurance carrier filed a motion to dismiss on the basis of improper joinder of claims and parties. The facts of the case involved one motor vehicle accident involving three separate vehicles. *State ex rel. Farmers Insurance Co., Inc. v. Murphy, supra*, at 656. The case had more to do with joinder of claims as opposed to parties. There were not two separate and distinct motor vehicle accidents occurring months apart.

The three main cases relied upon by Relators (Relators' Brief, p. 8 – 9) are from the State of Missouri. Only a brief review of each case is required to clearly show that there is no conflict between *Jinkerson* and *Carlson* as argued by Relators. It is probably for that very reason that Relators seek authority from jurisdictions outside of Missouri in support of their argument. Relators cite a case from a United States District Court in Pennsylvania and a case from the 7th Circuit Court of Appeals. Neither is considered precedent in Missouri. Moreover, neither is of assistance to Relators on the merits. The *Diehl v. H.J. Heinz Co.*, 901 F.2d 73 (7th Cir. 1990) case adds nothing to the discussion before this court as the entire

opinion dealt with discovery sanctions. Any mention of the law on joint tortfeasors would be nothing but *dicta* and even then would undoubtedly be discussed with an eye toward Illinois law. The *Poster v. Central Gulf Steamship Corp.*, 25 F.R.D. 18 (E.D.PA 1960) decision is a Federal court decision out of Pennsylvania. It dates back to an injury occurring in 1957 when the plaintiff was on a ship and allegedly contracted a disease and three months later was on a different ship and again showed symptoms from the same disease. The court noted that the second occurrence might result in concurrent liability of both companies. *Id* at 20. The lack of any precedential value from that particular case is clearly seen from a subsequent decision distinguishing it in *Beaulieu v. The Concord Group of Ins. Co.*, 208 F.R.D. 478 (D. NH 2002). In *Beaulieu* a United States District Court in New Hampshire decided a case in which the plaintiff was involved in a motor vehicle accident on September 15, 1998, and another accident on February 9, 2000. As a result of the second accident, the plaintiff alleged that injuries from the first accident were aggravated and plaintiff also alleged additional injuries. Plaintiff filed, in one petition, a contract claim against her own insurance carrier and a claim against one of the tortfeasors. Plaintiff relied, in part, upon the *Poster v. Central Gulf Steamship Corp.*, *supra*, in support of her opposition to a motion to sever. The court believed that the *Poster* decision was inapposite to the issue before it. In part, it was inapposite because there was no contract claim involved in *Poster*, but the New Hampshire court also stated the following, at 480:

“The Court also finds it significant that the two incidents alleged by Plaintiff are separated by a span of nearly fifteen months. Even in cases where the

Plaintiff contends that the Defendants are successive joint tortfeasors, which is not the case here, at some point a lapse in time makes the logical relationship between the acts too attenuated to find that the acts are part of the same transaction or occurrence. *See Gruening*, 89 F.R.D. at 574 (finding that there must be some systematic pattern or logical relation between tortious events before there is a requisite ‘series of transactions or occurrences’). So it is here.”

The court held that the claims could not meet the transactional relationship test for permissive joinder under Federal Rule of Civil Procedure 20(a). The New Hampshire court did not find any precedential value to the *Poster* decision. The New Hampshire court noted law very similar, if not identical, to Missouri law as noted above with *Jinkerson* and the cases both prior and subsequent to it.

The three Missouri Appellate Court districts have had no problem in following *Jinkerson* and applying the appropriate substantive law when separate tortfeasors in different accidents separated by time and place are involved. There is no indication that the Appellate Courts are having any difficulty distinguishing *Jinkerson* from *Carlson*. Moreover, Missouri has recently changed its joint and several liability statute and it now requires that 51% of the fault be assessed to any one defendant before he or she can be jointly and severally liable. Certainly the legislature was contemplating common liability between the defendants. In this case, there is no basis to determine liability between the defendants as they were not involved in the same accident and do not share common liability.

Respondent's decision to sever the cases did not leave Relators without full remedy. Each defendant remains responsible for all damage Relators prove that defendant caused or contributed to cause, assuming Relators prove the negligence of each defendant. Both substantive law and procedural mechanisms are in place allowing Relators a full and complete recovery in a situation where Nixon was involved in two separate and distinct motor vehicle accidents occurring at two separate and distinct times and involving two separate and distinct defendants. There is nothing common about the liability issues. There is absolutely no basis to hold the two separate defendants jointly and severally responsible to Relators. There was no error in the ruling. A Writ of Prohibition should not issue.

CONCLUSION

Respondent did not err when severing Relators' actions against Hayes and Gardner in that Hayes and Gardner are not joint tortfeasors. Relators' attempt to hold Hayes and Gardner jointly and severally liable when they were involved in two separate and distinct accidents with Relators separated by a period of almost eleven (11) months and at two separate and distinct locations is improper especially considering the fact that Relators did not suffer an indivisible injury. Each alleged tortfeasor, if negligent, is responsible for that injury he or she caused or contributed to cause Relators. A Writ of Prohibition should not issue under the circumstances of this case.

Respectfully submitted,

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CERTIFICATE OF VIRUS FREE DISK

I, the undersigned, hereby certify pursuant to Rule 84.06(g) that the accompanying floppy disk has been scanned for viruses using Sophos anti-virus software, this 18th day of January, 2008.

Kevin M. FitzGerald

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

COMES NOW Kevin M. FitzGerald and hereby certifies, pursuant to Rule 84.06(c), as follows:

1. This brief includes the information required by Rule 55.03.
2. This brief complies with the limitations contained in Rule 84.06(b).
3. There are 6,762 words contained in this brief.
4. There are zero lines of mono-spaced type in this brief.

Kevin M. FitzGerald

CERTIFICATE OF SERVICE

I, Kevin M. FitzGerald, hereby certify that two true and accurate copies of Brief of Respondent have been served via first class mail, postage pre-paid, on this ____ day of January, 2008, to the following:

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