

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel. )  
Chul Kim, M.D., Angela )  
Patterson, M.D. and Westwood )  
Medical Clinic, Inc., )  
 )  
Relators, )  
 )  
vs. )  
 )  
Honorable William C. Seay, )  
 )  
Respondent. )

No. SC88473

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Writ of Prohibition from Order of the Circuit Court of Cape Girardeau  
County

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Relators' Opening Brief

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OSBURN, HINE, KUNTZE,  
YATES & MURPHY, L.L.C.

Ted R. Osburn, #33224  
Mark J. Lanzotti, #51405  
Michael E. Gardner, #56786  
3266 Lexington Ave.  
Cape Girardeau, MO 63701  
Telephone: 573-651-9000  
Fax: 573-651-9090  
tosburn@ohkylaw.com  
mlanzotti@ohkylaw.com  
mgardner@ohkylaw.com

*Attorneys for Relators Chul Kim,  
M.D., Angela Patterson, M.D. and  
Westwood Medical Clinic, Inc.*

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<sup>1</sup> All statutory references are to RSMo 2000.

## STATEMENT OF FACTS

In addition to containing impermissible argument, the statement of facts in Plaintiffs' brief includes several misstatements of the record that warrant correction.

### **1. The Manor was not a “John Doe defendant” in the original petition.**

Plaintiffs state that The Manor was named as a “John Doe defendant” in the original petition. *Plaintiffs' Brief, at p. 5.* The record, however, reveals that although Plaintiffs' original petition named several John Doe defendants, The Manor was not one of them. Specifically, Plaintiffs' original petition named 10 John Doe defendants, and the petition described each of those John Does. *Plaintiffs' Appx., at A-157.* For example, John Doe #4 was described as “Medical Director of Current River Nursing Center.” *Plaintiffs' Appx., at A-157.* None of the descriptions of the John Doe defendants in the original petition refer to The Manor.<sup>2</sup>

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<sup>2</sup> In their Answer and Return, Plaintiffs used the John Doe argument to claim that The Manor was an “original defendant” so that The Manor's answer due date could be used to determine the due date of Plaintiffs' application for change of venue. Plaintiffs have apparently realized that The Manor was not one of the original John Doe defendants, as they have abandoned this argument in their brief.

**2. The trial court did not give The Manor an extension to file its answer to Plaintiffs' 7th Amended Petition.**

Plaintiffs misstate facts pertaining to the due date of The Manor's answer to the 7th Amended Petition. While Plaintiffs accurately state that The Manor was first named in the 7th Amended Petition on March 27, 2006, and was served on April 17, 2006, they incorrectly state that The Manor was given an extension to file its answer to the 7th Amended Petition. *Plaintiffs' Brief, at p. 5.* Specifically, Plaintiffs' brief states, "The Manor was served with the seventh amended petition on April 17, 2006, and due to [Plaintiffs'] pending motion for leave [to file their 8th Amended Petition], was given an extension of the due date to file any answer until June 7, 2006." *Plaintiffs' Brief, at pp. 5-6.*

The record, however, shows that the court did not give The Manor an extension to file its answer to the 7th Amended Petition. *Ex. 1, A-12 to A-20.* In fact, The Manor never filed an answer to the 7th Amended Petition. *Ex. 1, A-12 to A-20.* The first answer The Manor filed was in response to the 8th Amended Petition. *Ex. 1, A-20.*

**3. Cape Girardeau County is not within the same circuit as Crawford County.**

Plaintiffs erroneously state that Respondent remained over the case because "Cape Girardeau County is within the same circuit as Crawford County." *Plaintiffs' Brief, at p. 7.* To the contrary, Cape Girardeau County is within the

32nd Judicial Circuit, while Crawford County is within the 42nd Judicial Circuit. *See sections 478.715 and 478.710.*

After the circuit judges in Cape Girardeau County were disqualified, this Court appointed Respondent to the case. *Ex. 13, A-132.* Crawford County is within Respondent's circuit, and even though none of the parties have any connection to Crawford County, that is where Respondent transferred this case. *Ex. 15, A-152.*

**4. The Manor is not the same entity as Bluff Manor.**

Later in their brief, Plaintiffs mistakenly refer to The Manor as "Bluff Manor." For purposes of clarity, Relators wish to point out that The Manor and Bluff Manor were separate defendants in this case and were represented by different counsel. Specifically, The Manor is the d/b/a of Poplar Bluff No. 1, Inc. *Plaintiffs' Appx., at A-187.* Bluff Manor is the d/b/a of Beverly Enterprises-Missouri, Inc. *Plaintiffs' Appx., at A-187.*

**POINTS RELIED ON**

**I. Relators are entitled to an order prohibiting Respondent from granting Plaintiffs' application for change of venue and transferring this case from Cape Girardeau County to Crawford County because Plaintiffs were barred by Rule 51.02 from seeking a change of venue in that they had stipulated to a previous change of venue from Butler County to Cape Girardeau County.**

*State ex rel. Conners v. Miller*, 194 S.W.3d 911 (Mo. App. W.D. 2006).

*State ex rel. Terry v. Holtkamp*, 51 S.W.2d 13 (Mo. banc 1932).

*Rule 51.02.*

*Rule 51.03.*

**II. Relators are entitled to an order prohibiting Respondent from granting Plaintiffs' application for change of venue and transferring this case from Cape Girardeau County to Crawford County because Plaintiffs' application for change of venue was untimely in that (1) it was filed later than 10 days after the original defendants' original answers were due to be filed; (2) it could not be timely based on the answer due date of the most-recently added defendant, The Manor, since Plaintiffs dismissed The Manor before they filed their application; and (3) even if The Manor's due date was relevant, Plaintiffs filed their application more than 10 days after that due date.**

*Jones v. Chrysler Corp.*, 731 S.W.2d 422 (Mo. App. S.D. 1987).

*State ex rel. Conners v. Miller*, 194 S.W.3d 911 (Mo. App. W.D. 2006).

*State ex rel. Terry v. Holtkamp*, 51 S.W.2d 13 (Mo. banc 1932).

*Rule 44.01.*

*Rule 51.03.*

*Rule 55.25.*

*Rule 55.33.*

## ARGUMENT

**I. Relators are entitled to an order prohibiting Respondent from granting Plaintiffs’ application for change of venue and transferring this case from Cape Girardeau County to Crawford County because Plaintiffs were barred by Rule 51.02 from seeking a change of venue in that they had stipulated to a previous change of venue from Butler County to Cape Girardeau County.**

**A. Rule 51.02 does not require “all parties” to stipulate to the change of venue.**

Plaintiffs erroneously state that “[a] court may only order a change of venue based on stipulation if *all parties* file a signed written agreement for change of venue.” *Plaintiffs’ Brief, at p. 12.* (emphasis added). To the contrary, Rule 51.02, which governs this case, does not require all parties to join in the stipulation. Rule 51.02 provides that if “the parties” file a stipulation for change of venue, then no change of venue shall later “be granted to any party stipulating to the change.” If the rule required *all parties* to stipulate, then the “any party stipulating to the change” language would be unnecessary. In fact, that language implicitly recognizes that some parties may not stipulate to the change. All that is required is that at least one plaintiff and one defendant stipulate to the change of venue. That is what happened in this case. *Ex. 4, A-78.*

**B. The fact that the proposed order referenced Rule 51.03 does not mean that Plaintiffs did not stipulate to the change of venue.**

Plaintiffs rely heavily on the fact that the proposed order that transferred the case from Butler County to Cape Girardeau County referenced Rule 51.03, which allows a party to seek a change of venue as a matter of right. But that is a red herring. The proposed order referenced that rule only because of the way the change of venue issue was initiated.

As discussed in Relators' opening brief, one of the other defendants, Poplar Bluff Regional Medical Center, filed a motion for change of venue as a matter of right under Rule 51.03. *Ex. 3, A-77.* After that motion was filed, Plaintiffs stipulated to have the case transferred to Cape Girardeau County. They memorialized their stipulation by having their attorney sign the proposed order, which expressly stated that the case would be transferred to Cape Girardeau County. *Ex. 4, A-78.* Importantly, Plaintiffs' attorney signed the proposed order before it was submitted to Judge Richardson. *Ex. 4, A-78.*

The proposed order mentioned Rule 51.03 merely because that is how the issue was initially raised. But when Plaintiffs' attorney signed the proposed order, it became a stipulation to transfer the case to Cape Girardeau County. Plaintiffs claim that they were merely "suggesting" that the case be sent to Cape Girardeau County, and that such a suggestion "does not convert a Rule 51.03 motion into a stipulation under Rule 51.02. If it did, all Rule 51.03 motions would be a Rule 51.02 stipulation." *Plaintiffs' Brief, at pp.14-15* (citation omitted).

But Plaintiffs lose sight of the fact that they did not merely *suggest* where the case should be sent. Instead, they signed a proposed order that sent the case to a specific county. If Plaintiffs were merely *suggesting* where the case should be sent, then Plaintiffs' counsel would have made such a suggestion in person at the hearing, by correspondence or by conference call. Those are the commonly used methods of "suggestion" that are contemplated by Rule 51.03(c). A party does not make a suggestion by having their attorney sign a proposed order that transfers a case to a specific county. That is a stipulation.

**a. Plaintiffs rely on matters that are not in the record.**

In a desperate attempt to avoid the consequences of their stipulation, Plaintiffs include in their brief several unsupported allegations about telephone conversations with counsel for the various defendants.

Missouri courts hold that review in prohibition actions is limited to the record made in the trial court. *See, e.g., State ex rel. Terry v. Holtkamp*, 51 S.W.2d 13, 15 (Mo. banc 1932); *State ex rel. Conners v. Miller*, 194 S.W.3d 911, 913 (Mo. App. W.D. 2006). In addition to being completely false, Plaintiffs' allegations regarding the telephone conversations are not supported by the record and cannot be considered in this case.

**II. Relators are entitled to an order prohibiting Respondent from granting Plaintiffs’ application for change of venue and transferring this case from Cape Girardeau County to Crawford County because Plaintiffs’ application for change of venue was untimely in that (1) it was filed later than 10 days after the original defendants’ original answers were due to be filed; (2) it could not be timely based on the answer due date of the most-recently added defendant, The Manor, since Plaintiffs dismissed The Manor before they filed their application; and (3) even if The Manor’s due date was relevant, Plaintiffs filed their application more than 10 days after that due date.**

**A. The deadline for Plaintiffs’ application for change of venue is measured by the due dates of the original defendants’ original answers.**

Rule 51.03 requires a motion for change of venue to be filed “not later than ten days after answer is due to be filed.” As Relators explained in their opening brief, it is clear that Rule 51.03 contemplates that a plaintiff must file an application for change of venue within 10 days of when the original defendants’ original answers were due. Otherwise, plaintiffs could easily manipulate the system by simply adding a new defendant, seeking a change of venue within 10 days of the new defendant’s answer due date, and then dismissing that defendant.

Plaintiffs argue that Rule 51.03 instead refers to *any* defendant’s original answer. Plaintiffs criticize Relators’ argument on the basis that “defendants

identified in the original petition may all receive service of summons on different dates, resulting in different answer dates for each defendant.” *Plaintiffs’ Brief*, at p. 17. Plaintiffs fail to recognize, however, that the same thing could happen under their own theory. New defendants added in an amended petition could just as easily be served at different times and therefore have different due dates for their answers.

Although Missouri courts have not addressed this issue, the rationale behind this Court’s venue rules suggests that Rule 51.03 requires a plaintiff to file a motion for change of venue within 10 days of the *earliest* answer due date of the original defendants. Rule 51.03 includes the short 10 day time limit in an effort to limit changes of venue as a matter of right to the early stages of the case. Since it is the plaintiff who selects where a case is filed, it makes sense to require the plaintiff to seek a change of venue at the earliest possible time. Otherwise, the system would be subject to the abuses that occurred in this case.

It must be emphasized that under Plaintiffs’ theory, there would essentially be no time limit for a plaintiff to seek a change of venue. A plaintiff could re-start the deadline for seeking a change of venue *at any time* by simply adding a new defendant.

**a. *Linthicum* is inapposite.**

Plaintiffs mistakenly rely on *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). They cite *Linthicum* for the proposition that venue can be determined with each new defendant that is added in an amended petition.

Although the *Linthicum* Court held that, under section 508.010, the determination of whether venue is *proper* must be made with each new defendant, the Court said nothing about the time frame for seeking changes of venue as a matter of right under Rule 51.03. The *Linthicum* Court's reasoning was based on both the meaning of the word "brought" in section 508.010 and the legislature's desire that defendants not be subject to improper venue merely because of when they are added to the case. Nothing in that reasoning can be said to apply to the deadline for seeking a change of venue as a matter of right. *Linthicum* is simply inapposite.

**B. The due date of The Manor's answer does not save Plaintiffs' application for change of venue.**

Plaintiffs argue that their application for change of venue was timely because it was filed within 10 days of when The Manor filed its answer to Plaintiffs' 8th Amended Petition. Under Plaintiffs' theory, since they added The Manor as a defendant in 2006, they could use the due date of The Manor's answer to re-start the time period for the filing of Plaintiffs' application for change of venue.

As fully discussed in Relators' opening brief, this argument fails because The Manor's due date cannot be used as the measure since Plaintiffs dismissed The Manor before they filed their application for change of venue. *Ex. 1, A-21; Ex. 7, A-94; Ex. 9, A-99*. But even if the due date of The Manor's answer is used as the measure, Plaintiffs' application is still untimely because it was filed more than 10 days after that due date.

**a. Plaintiffs cannot rely on the due date of The Manor’s answer since they dismissed The Manor before they filed their application for change of venue.**

As fully discussed in Relators’ opening brief, Plaintiffs cannot rely on the due date of The Manor’s answer since they dismissed The Manor before they filed their application for change of venue. *Ex. 1, A-21; Ex. 7, A-94; Ex. 9, A-99*. Once Plaintiffs dismissed The Manor, it obviously was no longer a party to the case, and its deadlines could not be used to calculate further deadlines.

In response, Plaintiffs rely on another irrelevant case. They cite *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994) for the proposition that “Venue is determined because of the petition adding the defendant. This is so even when the defendant was added by an amended petition and dismissed prior to a hearing on venue.” *Plaintiffs’ Brief, at 23* (citation omitted).

But as with *Linthicum*, the *Mummert* case is inapposite because it involved application of section 508.010, not Rule 51.03. *Mummert* simply held that if venue is *proper* at the time the suit is brought, then later dismissing a defendant does not make venue *improper*. *Mummert*, 870 S.W.2d at 823. That is an entirely different issue from whether a party may seek a change of venue as a matter of right based on the answer due date of a defendant that has already been dismissed.

**b. Under Plaintiffs’ own theory, their application for change of venue was untimely.**

Plaintiffs make a devastating admission in their brief. All along, Plaintiffs’ position has been dependent on their application being due within 10 days of when The Manor filed its answer to the 8th Amended Petition. And they have previously argued that a plaintiff may seek a change of venue within 10 days of when *any* answer is due to be filed by any defendant. *Ex. 11, A-110*. Relators explained in their opening brief that, even under this scenario, Plaintiffs’ application was untimely since they did not file their application within 10 days of the most-recent answer due date—specifically, the due date for The Manor to file its answer to the 8th Amended Petition. *Relators’ Opening Brief, at pp. 19-20*.

But now Plaintiffs argue that a motion for change of venue must be filed within 10 days of the due date of *any defendant’s original answer*. *Plaintiffs’ Brief, at pp. 18, 21-22*. By arguing that the time frame is limited to a defendant’s original answer, Plaintiffs have proven that their application was untimely since The Manor’s *original* answer was due in response to the 7th Amended Petition, not the 8th Amended Petition.

Specifically, Plaintiffs argue that “when a defendant is named in an amended petition, there are ten days from its answer due date in which to seek a transfer of venue.” *Plaintiffs’ Brief, at p. 18*. In other words, as Plaintiffs state later in their brief, “The deadline to file a motion to change venue pursuant to Rule

51.03 was no later than ten days after any defendant's original answer was due to be filed." *Plaintiffs' Brief, at pp. 21-22.*

The record clearly shows that Plaintiffs failed to file their application for change of venue within 10 days of The Manor's original answer due date. It is undisputed that The Manor was first named in Plaintiffs' 7th Amended Petition, and was served with that petition on April 17, 2006. *Ex. 1, A-16; Plaintiffs' Appx., at A-187; Plaintiffs' Brief, at p. 5.* Therefore, The Manor's original answer would have been due 30 days later on May 17, 2006. *See Rule 55.25(a).*

The Manor, however, did not file an answer to the 7th Amended Petition. *Ex. 1, A-12 to A-20.* Nevertheless, under Plaintiffs' own theory, since The Manor's original answer was *due* on May 17, 2006, Plaintiffs' application for change of venue would have been due 10 days later. *See Rule 51.03.* But Plaintiffs did not file their application for change of venue until nearly a month later on June 15, 2006. *Ex. 9, A-99.* Therefore, under Plaintiffs' own theory, their application for change of venue was untimely.

**c. The fact that Plaintiffs allegedly gave The Manor an informal extension of time to file its answer did not change the due date for Plaintiffs' application for change of venue.**

Plaintiffs mistakenly claim that The Manor's original answer was due in response to the *8th Amended Petition*, not the *7th Amended Petition*. According to Plaintiffs, The Manor "was given an extension of the due date to file any answer until June 7, 2006." *Plaintiffs' Brief, at 22.* But the trial court did not grant The

Manor an extension of the due date for its answer to the 7th Amended Petition. *Ex. 1, A-12 to A-20*. And nowhere in the record is there anything indicating that the court relieved The Manor of its obligation to file an answer to the 7th Amended Petition.

**i. Informal agreements between parties do not push back “due dates”; they waive enforcement of them.**

Plaintiffs are apparently again referencing an informal agreement they allegedly had with The Manor. As fully explained in Relators’ opening brief, informal agreements between parties do not change due dates, they merely waive enforcement of them. *See Rule 44.01(b); Rule 55.25(c); Rule 55.33(a)*.

In arguing that parties can actually change due dates, Plaintiffs cite *Jones v. Chrysler Corp.*, 731 S.W.2d 422 (Mo. App. S.D. 1987). But that case is distinguishable on its facts. In *Jones*, after the defendant failed to file an answer, the trial court entered a default judgment. *Id.* at 424. The defendant then filed a motion to set aside the default judgment. *Id.* At the hearing on the motion, the trial court heard oral testimony regarding whether the parties had agreed to extend the time for filing an answer. *Id.* at 425. Apparently finding that there was no such agreement, the trial court denied the defendant’s motion to set aside, and the Southern District affirmed. *Id.* at 431. Notably, the Southern District did not hold that informal agreements between the parties actually change due dates.

Plaintiffs argue that the *Jones* court implied that the parties’ agreement could have been a basis for setting aside the default judgment. But *Jones* involved

equitable considerations that are unique to cases involving default judgments. The standard for setting aside a default judgment includes a determination of whether the defendant “had a good excuse for being in default.” *Id.* at 426. If the plaintiff in *Jones* had informally agreed to waive enforcement of the answer due date, the defendant may well have had a good excuse for not filing an answer.

That logic does not extend to the present case. Here, although Plaintiffs allege they informally agreed to extend The Manor’s due date, it does not follow that any such waiver would then extend Plaintiffs’ own due dates. Consider the fallacy of Plaintiffs’ argument: Their theory would allow a party to indirectly change its *own* due dates. To prevent this kind of manipulation, the Missouri Rules of Civil Procedure wisely permit only trial courts to extend due dates. *See Rule 44.01(b); Rule 55.25(c); Rule 55.33(a).*

**ii. There is nothing in the record showing that Plaintiffs and The Manor informally agreed to waive enforcement of the due date.**

*Jones* is also distinguishable because the trial court in that case heard oral testimony on the issue of whether there was an agreement to extend the due date. *Jones*, 731 S.W.2d at 425. Here, there is simply *nothing* in the record showing an informal agreement between Plaintiffs and The Manor. All we have are self-serving statements in Plaintiffs’ brief. As noted, this Court’s review is limited to the record made in the trial court. *See, e.g., Terry*, 51 S.W.2d at 15; *Connors*, 194 S.W.3d at 913. Therefore, Plaintiffs’ claim that they had an informal agreement

with The Manor cannot be used in determining whether their application for change of venue was timely.

In sum, even under Plaintiffs' own theory, since they failed to file their application for change of venue within 10 days of the due date of The Manor's original answer, their application was untimely.

**d. The fact that The Manor may not have been entitled to a change of judge does not make Plaintiffs' application for change of venue timely.**

Plaintiffs make an irrelevant argument regarding The Manor's motion for change of judge. Plaintiffs essentially ask the Court to forgive the untimeliness of their application for change of venue since the trial court erroneously granted The Manor's motion for change of judge. Plaintiffs state, "If Defendants were really concerned about judicial economy, and not manipulating the system, they would not have filed the improper motion to change judge." *Plaintiffs' Brief, at p. 21.*

Relators raise this issue to clarify that it was The Manor, not Relators, that sought the change of judge. *Ex. 1, A-20.* Plaintiffs' repeated allegations that "the Defendants" collectively sought a change of judge are simply misleading and inaccurate. Moreover, whether The Manor was entitled to a change of judge is not an issue that is relevant to this case.

**Conclusion**

Respondent exceeded his jurisdiction in granting Plaintiffs' application for change of venue because (1) Plaintiffs were barred by Rule 51.02 from seeking a

change of venue since they had stipulated to the previous change of venue; and (2) even if this Court concludes that Plaintiffs were not barred by Rule 51.02 from seeking a change of venue, Plaintiffs' application was untimely. Accordingly, Relators respectfully request the Court to make its preliminary writ of prohibition absolute.

Respectfully submitted,

OSBURN, HINE, KUNTZE,  
YATES & MURPHY, L.L.C.

By: \_\_\_\_\_

Ted R. Osburn, #33224  
Mark J. Lanzotti, #51405  
Michael E. Gardner, #56786  
3266 Lexington Ave.  
Cape Girardeau, MO 63701  
Telephone: 573-651-9000  
Fax: 573-651-9090  
tosburn@ohkylaw.com  
mlanzotti@ohkylaw.com  
mgardner@ohkylaw.com  
*Attorneys for Relators Chul Kim,  
M.D., Angela Patterson, M.D. and  
Westwood Medical Clinic, Inc.*

## **CERTIFICATE OF COMPLIANCE**

The undersigned counsel for Relators, pursuant to Rule 84.06(c), hereby certifies to this Court that:

1. The brief filed herein on behalf of Relators contains the information required by Rule 55.03.
2. The brief complies with the format requirements of 84.06(b).
3. The number of words in this brief, according to the word processing system used to prepare this brief, is 4,005 exclusive of the cover, certificate of service, this certificate, and the signature block.
4. In compliance with Rule 84.06(g), a floppy disk is filed with the brief that complies with Rule 84.06(g), and said disk has been scanned for viruses and, according to the program used to scan the disk for viruses, the disk is virus-free.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that two copies of the foregoing, along with a floppy disk as required by Rule 84.06(g), were served on the following attorneys of record via United States mail, postage prepaid, this \_\_\_\_\_ day of August, 2007.

Ms. Gail Friend  
Friend & Associates, L.L.P.  
1001 Fannin St., Ste. 725  
Houston, TX 77002  
888-862-6161

and

Mr. Gary Green  
Mr. John Schillie  
Ms. Rayma Church  
Law Offices of Gary Green  
909 East Republic Rd., Bldg. F  
Ste. 100  
Springfield, MO 65807  
417-886-2229  
*Attorneys for Plaintiffs*

Mr. Kevin O'Malley  
Mr. James L. Smith  
Greensfelder, Hemker and Gale, P.C.  
10 S. Broadway, Ste. 2000  
St. Louis, MO 63102  
314-241-9090  
*Attorneys for Defendants Robert Hall, M.D., and  
Richard E. Musser, M.D.*

Mr. Joseph C. Blanton, Jr.  
Blanton, Rice, Sidwell, Nickell, Cozean & Collins, L.L.C.  
219 South Kingshighway  
P.O. Box 805  
Sikeston, MO 63801  
573-471-1000  
*Attorneys for Defendants Poplar Bluff Regional Medical  
Center, Poplar Bluff Regional Medical Center North,*

*and Pat Hendrick, RN*

Mr. James A. Cochrane, III  
Bradshaw, Steele, Cochrane & Berens, L.C.  
3113 Independence, P.O. Box 1300  
Cape Girardeau, MO 63702  
573-334-0555  
*Attorneys for Defendant Advanced Healthcare  
Management Services, L.L.C.*

Hon. William C. Seay  
Crawford County Circuit Courthouse  
302 East Main St.  
Steelville, MO 65565  
573-729-6816

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