IN THE SUPREME COURT OF MISSOURI

No. 83830

State of Missouri *ex rel.*

RONDA A. BOST and
BRIAN GLEN BOST,

Petitioners-Relators,

vs.

HONORABLE JUSTINE E. DEL MURO,

Respondent.

RELATORS' BRIEF

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JURISDICTIONAL STATEMENT

This is an action for a remedial writ, seeking an order requiring Respondent, the Honorable Justine E. Del Muro, Judge of Division Four of the Circuit Court of Jackson County, to sustain the Motion to Compel filed by Relators in the underlying case, so as to compel Defendants Health Midwest Development Group d/b/a Lafayette Regional Medical Center and Health Midwest (collectively, "Health Midwest") to produce the information sought by Relators, and to require that Relators be given at least thirty days from the date of receipt of the information to file their response to the Motion for Summary Judgment filed by Health Midwest. On June 19, 2001, Respondent granted Relators' request for an extension of time to respond to the Health Midwest Motion for Summary Judgment, a request based on the need for the information sought in Relators' request for production to Health Midwest, and in the same Order, Respondent denied Relators' motion to compel the production of that information. On July 13, 2001, Respondent denied Relators' Motion to Reconsider. Relators filed an application for a remedial writ in the Western District of the Court of Appeals on June 20, 2001, which was denied the same day. On July 26, 2001, Relators filed their application for a writ in this Court, which issued its preliminary writ on August 6, 2001. This Court has jurisdiction under Mo. Const., Art. 5, §4(1) to issue remedial writs.

STATEMENT OF FACTS

On July 23, 1999, Relators Ronda and Brian Bost ("Mr. and Mrs. Bost") filed a wrongful death/personal injury suit against various defendants, three of whom were Health Midwest Development Group d/b/a Lafayette Regional Medical Center, Health Midwest (collectively, "Health Midwest") and Gordon B. Clark, M.D. ("Dr. Clark"). [Rel. Writ Ex. 1, Rel. Pet. at 25.] The case was ultimately assigned to Respondent, the Honorable Justine E. Del Muro ("Judge Del Muro"), sitting in Division 4 of the Circuit Court of Jackson County.

Count I of the Petition was a wrongful death claim against Dr. Clark and Health Midwest (allegations as to other defendants will be omitted), with an allegation in ¶ 7 of Count I that Dr. Clark was an employee, agent or servant of Health Midwest and therefore Health Midwest was vicariously liable for Dr. Clark's negligent conduct [Rel. Pet. at 27]; an allegation that Dr. Clark and Mrs. Bost established a physician-patient relationship in June of 1997 [Count I, ¶ 13, Rel. Pet. at 28], and that Dr. Clark breached his duty of care to Mrs. Bost, thereby causing or contributing to cause the death of the baby Steven Tyler Bost on October 19, 1997. [Count I, ¶ 16-17, Rel. Pet. at 28-30.]

Count II contained an alternate wrongful death theory against Dr. Clark and Health Midwest, *i.e.*, that Dr. Clark was the ostensible or apparent agent of Health Midwest at the time of the events giving rise to the underlying litigation. The Bosts alleged that Dr. Clark told them in writing that he was an employee of Health Mid-

west. [Count II, ¶¶ 2-3, Rel. Pet. at 35.] The Petition alleged that perhaps as early as July 31, 1997, Dr. Clark ceased to be an employee of Health Midwest [Count II, ¶¶ 4-5, Rel. Pet. at 35-36]; that neither Dr. Clark nor Health Midwest informed Mrs. Bost of Dr. Clark's change of status [Count II, ¶¶ 7-11, Rel. Pet. at 36-37]; that Mrs. Bost reasonably believed Dr. Clark was an employee of Health Midwest in continuing to use his services [Count II, ¶¶ 12-13, Rel. Pet. at 37] and that Health Midwest knew or should have known that Dr. Clark was continuing to hold himself out as an employee of Health Midwest and Health Midwest acquiesced in and consented to that representation [Count II, ¶ 14, Rel. Pet. at 37-38].

Count III was a wrongful death claim which alleged that Health Midwest negligently hired and retained Dr. Clark, and then with knowledge of his incompetence did nothing to protect Health Midwest's patients, including but not limited to Mrs. Bost, for whom Dr. Clark had been providing health care services as an employee of and on behalf of Health Midwest. [Count III, Rel. Pet. at 39-42.]

Count IV involved a wrongful death claim of fraud by silence against Dr. Clark, alleging that considering his written representation that he was a Health Midwest employee, and considering his fiduciary duty to Mrs. Bost, and considering his superior knowledge of his business relationship to Health Midwest, and considering implicitly that Mrs. Bost had no reason to inquire about a change in that relationship, much less any independent method of acquiring facts about the relation-

ship, Dr. Clark owed a duty to Mrs. Bost to speak, and that he breached that duty. [Rel. Pet. at 44-48.]

Count V was a wrongful death informed consent claim against Dr. Clark. [Rel. Pet. at 48-51.]

Counts VI through X were personal injury claims by Mrs. Bost that mirrored the allegations against Dr. Clark and Health Midwest for wrongful death, *i.e.*, Counts I and VI [Rel. Pet. at 51-058] corresponded; Counts II and VII [Rel. Pet. at 58-62] corresponded; Counts III and VIII [Rel. Pet. at 62-65] corresponded; Counts IV and IX [Rel. Pet. at 65-69] corresponded and Counts V and X [Rel. Pet. at 69-71]corresponded.

Count XI [Rel. Pet. at 71-72] was Mr. Bost's claim for loss of consortium, arising out of Mrs. Bost's claims of personal injury in Counts VI through X.

On March 5, 2001, Health Midwest filed a motion for summary judgment [Rel. Writ Ex. 2, Rel. Pet. at 73], which was accompanied by Suggestions in Support [Rel. Writ Ex. 3, Rel. Pet. at 166]. The motion was granted when no response was filed on behalf of Mr. and Mrs. Bost [¶ 3, Rel. Pet. at 2], and Mr. and Mrs. Bost subsequently filed a motion to set aside the judgment, on the ground that the motion had never been received by counsel for Mr. and Mrs. Bost, although there was no question that counsel for Health Midwest had in fact properly served the motion by mail [¶ 4, Rel. Pet. at 2-3]. Health Midwest did not oppose the motion,

and Judge Del Muro reinstated Mr. and Mrs. Bost's claims against Health Midwest. *Id.*

On April 5, 2001, the Bosts served a request for production on Health Midwest. [Rel. Writ Ex. 5, Rel. Pet. at 193.] On May 5, 2001, Health Midwest served its objections to the request for production. [Rel. Writ Ex. 5, Rel. Pet. at 196.]

For the convenience of the Court, these are the requests for production made by the Bosts [Rel. Pet. at 193-195]:

1. The credentialing file of Gordon Clark, M.D.

2. The personnel file of Gordon Clark, M.D.

3. The contract between Gordon Clark, M.D. and Health Midwest Development Group, d/b/a Lafayette Regional Health Center, Health Midwest, or associated or subsidiary entities.

4. All documents and/or communications labeled in whatever fashion, in the custody of Health Midwest Development Group, d/b/a Lafayette Regional Health Center, Health Midwest that mentions Gordon Clark, M.D., in any way, and his ability to perform, be credentialed for, and/or documents his experience with of [sic] obstetrics and deliveries.

5. The medical staff by-laws of defendant Health Midwest Development Group, d/b/a Lafayette Regional Health Center, and

Health Midwest medical staff in effect during the calendar year 1997, including all additions, modifications, and deletions during that period.

6. The minutes of meetings of defendant Health Midwest Development Group, d/b/a Lafayette Regional Health Center, and Health Midwest medical staff during the calendar year of 1997.

7. The minutes of meetings of defendant Health Midwest Development Group, d/b/a Lafayette Regional Health Center, and Health Midwest medical executive committee during the calendar year of 1997.

8. Rules, regulations, policies, procedures, guidelines or suggestions which existed in defendant Health Midwest Development Group, d/b/a Lafayette Regional Health Center, and Health Midwest ob-gyn department during the calendar year 1997.

9. Rules, regulations, policies, procedures, guidelines or suggestions relating to business associates or partners credentialing one another.

10. The bound notebook or other document kept by defendant Health Midwest's operating room personnel to inform them of what credentials a physician may have to perform certain operations.

Health Midwest made a total of six different objections to these requests,

using identical language to apply the individual objections to some or all of the requests. The following is Health Midwest's objection to the Bosts' first request [Rel. Pet. at 196], with the bracketed numbers being added in the text to identify the five primary objections to be discussed in this brief:

> Defendants Lafayette Regional Health Center and Health Midwest object to this request on the grounds that it is [1] over broad and seeks information and documentation which is [2] not relevant [3] nor reasonably calculated to lead to the discovery of admissible evidence. [4] Dr. Clark was not employed by these defendants after July 30, 1997; he therefore had no relationship with either Lafayette Regional Health Center or Health Midwest at the time of the care and treatment which is at issue in this litigation nor was he employed by these defendants at the time of Ms. Bost's delivery on October 19, 1997. [5] Defendants further object to the extent that the file may contain information protected by the Missouri peer review statute.

The sixth objection was "vagueness."

Health Midwest made objections [1] through [4] to all ten requests. [Rel. Pet. at 196-200.] Objection [5] ("peer review") was made to requests 1, 2, 4, 6 and 7. [Rel. Pet. at 196-199.] Health Midwest made the vagueness objection with reference to requests 9 and 10. [Rel. Pet. at 200.]

On May 19, 2001, the Bosts filed a motion with Judge Del Muro, seeking an extension of time to respond to the Health Midwest motion for summary judgment. [Rel. Writ Ex. 4, Rel. Pet. at 181.] The motion was based on an affidavit from the Bosts' lead counsel stating that the information sought in the request for production was necessary in order to respond to the Health Midwest motion. [Rel. Writ Ex. 5, Rel. Pet. at 185.]

On May 29, 2001, the Bosts filed a Motion to Compel, seeking an order requiring Health Midwest to produce the requested information, after an unsuccessful attempt to resolve the objections, pursuant to the Local Rule. [Rel. Writ Ex. 5, Rel. Pet. at 190.] Suggestions in Support accompanied the Motion to Compel, arguing that based on the claims asserted in the Petition against Dr. Clark and Health Midwest, the data sought was not only discoverable, but also needed in order to respond to the Health Midwest motion for summary judgment. [Rel. Writ Ex. 6, Rel. Pet. at 203-206.] On June 7, 2001, Health Midwest filed Suggestions in Opposition to the Motion to Compel. [Rel. Writ Ex. 7, Rel. Pet. at 208.] On June 14, 2001, the Bosts filed Reply Suggestions in support of their motion. [Rel. Writ Ex. 8, Rel. Pet. at 244.]

On June 19, 2001, Judge Del Muro issued an Order that simultaneously granted the Bosts' motion to extend the deadline for responding to the Health Midwest motion for summary judgment, and denied the Bosts' motion to compel

Health Midwest to produce the information sought in the request for production. [Rel. Writ Ex. 9, Rel. Pet. at 251.]

On June 29, 2001, the Bosts filed a Motion to Reconsider, asking the trial court to vacate its order denying the Motion to Compel and instead compel Health Midwest to produce the information. [Rel. Writ Ex. 10, Rel. Pet. at 252.] Health Midwest filed its Suggestions in Opposition on July 6, 2001. [Rel. Writ Ex. 11, Rel. Pet. at 256.] Judge Del Muro denied the Motion to Reconsider on July 13, 2001. [Rel. Writ Ex. 12, Rel. Pet. at 259.] The Bosts filed an application for a remedial writ in the Western District of the Court of Appeals on June 20, 2001, and the application was denied that same day. [Rel. Writ Ex. 15, Rel. Pet. at 264.] As of the time these events were occurring in the trial court and in the Court of Appeals, Judge Del Muro had not set any deadline for the close of discovery or the designation of experts. [Rel. Writ Ex. 13, 14; Rel. Pet. at 260-263.]

On July 26, 2001, Relators filed their application for a remedial writ in this Court, and the Court issued its preliminary writ on August 6, 2001.

POINTS RELIED ON

POINT I.

Relators are entitled to an order prohibiting Respondent from enforcing her Order denying Relators' Motion to Compel, or al-

ternatively compelling Respondent to set aside the Order denying Relators' Motion to Compel and to enter an Order requiring Health Midwest to produce the requested information because Respondent has abused her discretion in denying discovery in that the information requested by Relators, including but not limited to the credentialing and personnel files of Dr. Clark; any contract between Dr. Clark and Health Midwest; documents reflecting Dr. Clark's ability to perform, be credentialed for or his experience with obstetrics and deliveries; the minutes of various Health Midwest departmental or divisional staff meetings for calendar year 1997, is directly relevant to the claims asserted by Relators in their Petition, or is likely to lead to the discovery of admissible evidence, and Health Midwest's objections to the request for production and its opposition to the Motion to Compel did not provide any factual basis, nor any legal authority, for precluding the discovery.

Carlyle v. Lai, 783 S.W.2d 925 (W.D. Mo. App. 1989)

State ex rel. Dixon v. Darnold, 939 S.W.2d 66 (S.D. Mo. App. 1997)

State ex rel. Justice v. O'Malley, 36 S.W.3d 9 (W.D. Mo. App. 2000)

Turner Engineering, Inc. v. 149/155 Weldon Parkway, L.L.C.,

40 S.W.3d 406 (E.D. Mo. App. 2001)

POINT II

Relators are entitled to an order prohibiting Respondent from ruling on Health Midwest's Motion for Summary Judgment until Relators have had an opportunity to examine the information sought in their Request for Production directed to Health Midwest and until Relators have had at least thirty days after receipt of the information to respond to the motion for summary judgment because the Order by Respondent simultaneously: (a) granting Relators' Motion for Extension of Time to respond to the motion for summary judgment and (b) denying Relators' Motion to Compel the production of the information needed to respond violates the due process rights of the Bosts in that the Bosts have a right under the Fourteenth Amendment to the Constitution of the United States and under Article I, §10 of the Constitution of Missouri to notice and a meaningful opportunity to be heard before their claims against Health Midwest can be dismissed by judgment as a matter of law, and Respondent's Order

granting an extension of time to obtain needed discovery and at the same time precluding that discovery prevents any meaningful opportunity to respond.

Forms World, Inc. v. Labor and Industrial Relations Commission, 935 S.W.2d 680

(W.D. Mo. App. 1996)

Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 70 S. Ct. 652,

94 L. Ed. 865 (1950)

State ex rel. Justice v. O'Malley, 36 S.W.3d 9 (W.D. Mo. App. 2000)

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(E.D. Mo. App. 2001)

Constitution

U.S. Const., Amd. 14

Mo. Const., Art. I, §10

Rules

Mo. R. Civ. P. 74.04(c)(2)

Mo. R. Civ. P. 74.04(f)

ARGUMENT

POINT I.

Relators are entitled to an order prohibiting Respondent from enforcing her Order denying Relators' Motion to Compel, or alternatively compelling Respondent to set aside the Order denying Relators' Motion to Compel and to enter an Order requiring Health Midwest to produce the requested information because Respondent has abused her discretion in denying discovery in that the information requested by Relators, including but not limited to the credentialing and personnel files of Dr. Clark; any contract between Dr. Clark and Health Midwest; documents reflecting Dr. Clark's ability to perform, be credentialed for or his experience with obstetrics and deliveries; the minutes of various Health Midwest departmental or divisional staff meetings for calendar year 1997, is directly relevant to the claims asserted by Relators in their Petition, or is likely to lead to the discovery of admissible evidence, and Health Midwest's objections to the request for production and its opposition to the Motion to Compel did not provide any factual basis, nor any legal authority, for

precluding the discovery.

Section 1. Standard of Review

Prohibition is the proper remedy when a trial court issues an order in discovery proceedings that is an abuse of discretion. *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927-928 (Mo. banc 1992). The standard of appellate review on this issues is stated in *State ex rel. Lichtor v. Clark*, 845 S.W.2d 55 (Mo. App. W.D. 1992):

> The trial court is allowed broad discretion in the control and management of discovery. It is only for an abuse of discretion amounting to an injustice that the appellate courts will interfere. 'A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.'

Id. at 59 (citations omitted).

State ex rel. Justice v. O'Malley, 36 S.W.3d 9, 11 (W.D. Mo. App. 2000).

Section 2. Argument

The purpose of discovery is to facilitate a search for truth through a broad mutual sharing of knowledge, thereby eliminating trial surprises. The broad scope

of discovery authorized by Rule 56.01 is circumscribed by three standards: (1) relevance; (2) whether the discovery request is reasonably calculated to lead to the discovery of admissible evidence, and (3) whether some privilege bars disclosure of otherwise discoverable information.

As the Eastern District of the Court of Appeals has pointed out:

> The purpose of pretrial discovery is to aid the ascertainment of the truth, eliminate surprise, narrow issues, facilitate trial preparation, and obtain relevant information. [Citation omitted.] Fulfillment of these purposes is the fulcrum upon which the need for discovery is to be balanced against the burden and intrusiveness involved in furnishing the information. [Citation omitted.]

State ex rel. Upjohn Company v. Dalton, 829 S.W.2d 83, 84-85 (E.D. Mo. App. 1992). And in *State ex rel. Kawasaki Motors Corporation, U.S.A. v. Ryan*, 777 S.W.2d 247, 251 (E.D. Mo. App. 1989), the Eastern District said:

> Missouri courts have recognized that the rules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits, [citation omitted], and to provide a party with access to anything "relevant" to the proceedings and subject matter of the case which are not protected by privilege. [Citation omitted.]

Judge Del Muro did not specify the reason for the denial of the Motion to Compel. When a trial court does not specify its reasons for dismissing a petition, the appellate court reviewing the dismissal will assume "that the trial court acted for one of the reasons stated in the motion to dismiss." *Turner Engineering, Inc. v. 149/155 Weldon Parkway, L.L.C.*, 40 S.W.3d 406, 409 (E.D. Mo. App. 2001). Logic suggests the same principle applies to a ruling which denies a motion, *i.e.*, the presumption is that the motion was denied for one or more of the reasons given by the party opposing the motion. In this factual setting, those reasons are Health Midwest's six objections to the request for production and its supplemental argument in opposing the Motion to Compel relating to its pending summary judgment motion.

Not one reason offered by Health Midwest as a basis for precluding disclosure of the information sought in the request for production rises to a level which would warrant denial of the Motion to Compel, particularly since Health Midwest provided no factual, much less any legal basis to support the purported reasons.

Health Midwest alleged that all ten requests for production were overly-broad, but did not support that charge with any explanation, and when the objection is compared to the subject-matter of the requests, at a minimum there is an appearance that the objection was not made in good faith. For example, how is a request for Dr. Clark's credentialing file and his personnel file—inferentially one or two file

folders—too broad? How is a request for the production of Dr. Clark's contract with Health Midwest "too broad" when logic suggests that there is only one document to produce? How could a request for the minutes of various departmental or divisional staff or committee meetings, confined to one calendar year, be "too broad?" Health Midwest had an opportunity to explain to the trial court and to the Bosts the manner in which every request for production was overly broad, so that the Bosts could respond and perhaps alleviate any concerns of Health Midwest through compromise. Instead, Health Midwest chose to use the "buzz word" and do nothing more. The Bosts and their counsel are, of course, under no obligation to speculate on what Health Midwest meant by "overly broad" and then try to "answer" that speculation. With no factual support for an over-breadth allegation and no citation to authority, there was no basis for the trial court to use this objection to deny the Motion to Compel.

The focus of the request for production, when considered in relation to the allegations of the Petition against Dr. Clark and Health Midwest, is on the terms, conditions, nature and extent of Dr. Clark's business relationship with Health Midwest, and implicitly, what Health Midwest knew and when Health Midwest knew it. The mere fact that there was supposedly a formal termination of any business relationship between Dr. Clark and Health Midwest at the end of July, 1997, does not automatically foreclose the possibility of a *de facto* or *de jure* relationship between

Dr. Clark and Health Midwest lasting through October 19, 1997.

In *Carlyle v. Lai*, 783 S.W.2d 925, 928 (W.D. Mo. App. 1989), the Western District said:

> The test for relevancy applied in Missouri is whether an offered fact tends to prove or disprove a fact in issue or corroborates other relevant evidence. *Lawson v. Schumacher & Blum Chevrolet, Inc.*, 687 S.W.2d 947, 951 (Mo. App. 1985). The amount of proof required to meet the relevancy threshold is attained when the truth of the offered fact makes probable the existence of the fact in issue.

Application of the *Carlyle* standard to the request for production necessarily results in a conclusion that despite Health Midwest's objection of lack of relevance, each and every request *is* relevant. The documents described all ten requests are directly related to the Bosts' claims against Dr. Clark and Health Midwest, and thus the content of those documents—considering the matter logically, since neither the Bosts, their counsel nor the trial court have seen the documents—would tend to prove or disprove the Bosts' allegations about the terms, conditions, nature, extent and duration of the relationship between Dr. Clark and Health Midwest. As with the first objection, Health Midwest made no effort to provide the trial court with an explanation of why the requests were irrelevant, nor any citation of authority to support the claim. The claim of lack of relevance therefore provides no basis for denial

of the Motion to Compel.

Health Midwest alleged that all ten requests for production were not reasonably calculated to lead to the discovery of admissible evidence, but as with its first two objections, it offered only the buzz words of the phrase quoted from the Rule, and did not support its argument with factual explanation or citations. There is, of course, no way to know what information the requested files might reveal, since there has been no disclosure and only Health Midwest and its counsel have access to or knowledge of the contents of those files. But since the request for production is patently tied to the Petition allegations of the existence of a relationship between Dr. Clark and Health Midwest that extended through the death of the baby on October 19, 1997—a relationship that would make Health Midwest vicariously liable for the negligence of Dr. Clark—each request is in fact reasonably calculated to lead to the discovery of admissible evidence, and thus this objection can not legitimately serve as a basis for denial of the Motion to Compel.

Health Midwest's fourth blanket objection, *i.e.*, as to all ten requests for production, was an assertion that Dr. Clark was not employed by Health Midwest after July 30, 1997, and therefore there was no relationship between Health Midwest and Dr. Clark through October 18-19, 1997. The problem with that assertion is that in order to use it as a basis for denying the Motion to Compel, Judge Del Muro had to accept as true an unsworn statement by an attorney, particularly when the statement

combines purported fact (Dr. Clark was not employed by Health Midwest after July 30, 1997) with a legal conclusion (there was no relationship between Dr. Clark and Health Midwest on October 19, 1997).

"Unsworn statements of trial attorneys do not prove themselves or constitute evidence. [Citations omitted.]" *Kettler v. Hampton*, 365 S.W.2d 518, 523 (Mo. 1963). In an appeal, an attorney's statement cannot be accepted as a substitute for proof in the record, even when the appellate court has no reason to disbelieve the statement. *Landers v. Smith*, 379 S.W.2d 884, 887 (S.D. Mo. App. 1964). The facts in *Kettler* and *Landers* are not relevant to this writ proceeding, and the cases are cited only for the principles quoted. MAI 2.01, the explanatory instruction given in all trials, says in pertinent part:

> The trial may begin with opening statements by the lawyers as to what they expect the evidence to be. At the close of the evidence, the lawyers may make arguments on behalf of their clients. Neither what is said in opening statements or in closing arguments is to be considered as proof of a fact.

Even though the trial court's file contained a "general release and settlement" agreement dated July 30, 1997, between Dr. Clark and Health Midwest (or more specifically, Lafayette Regional Health Center) [Rel. Pet. at 160-165], the mere existence of that document, standing alone, does not absolutely foreclose the possi-

bility of a factual or legal relationship between Dr. Clark and Health Midwest beyond July 30, 1997, under which Health Midwest could be held vicariously liable for the negligence of Dr. Clark. For example, a comparison of the original of that document with the photocopy might disclose notes or comments revealing the existence of some relationship after the date of the agreement—and the Bosts are certainly entitled to inspection of the originals of the requested documents, as well as being afforded an opportunity to copy them if they so choose. The assertion by Health Midwest that there was no relationship between it and Dr. Clark after July 30, 1997, is nothing more than a conclusion offered in a statement by an attorney, and as *Kettler*, *Landers* and MAI 2.01 clearly demonstrate, such a statement is evidence of nothing. Health Midwest's self-serving statement/conclusion that there was no relationship between Dr. Clark and Health Midwest therefore can not serve as a basis for denying the Motion to Compel.

The fifth objection used by Health Midwest was applicable to only Requests 1, 2, 4, 6 and 7. As to each of those requests, Health Midwest said that the requested files "*may* contain information protected by the Missouri peer review statute." [Emphasis added.] [Rel. Pet. at 196-199.] Health Midwest has never provided authority for the proposition that because a file "might" contain data for which an argument of privilege "might" be made, therefore the entire file is non-discoverable. Either a file contains information about which an attorney might in

good faith assert a claim of privilege, peer review-based or otherwise, or it does not. There is no "gray" area about claims of privilege when those claims are being made to preclude discovery. The use of the word "may" suggests that neither Health Midwest personnel nor their attorneys actually reviewed any of the requested information in order to make a determination as to whether the requested files *did* contain information about which a good faith claim of peer review privilege could be asserted, and an appropriate peer review/privilege log could be prepared and presented to the trial court for a ruling on the assertions of privilege. An assertion that a file "might" or "could" or "possibly does" or "may" contain peer review data is insufficient to raise the privilege as a defense against the production of the file.

As this Court held in *State ex rel. Health Midwest Development Group, Inc. v. Daugherty*, 965 S.W.2d 841, 843 (Mo. 1998) (en banc):

> Statutes creating privileges are strictly construed. [Citation omitted.] Claims of privilege are "impediments to discovery of truth," "present an exception to the usual rules of evidence," and "are carefully scrutinized." [Citation omitted.] Statutes creating privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" [Citations omitted.]

It is thus the duty of the party claiming privilege to demonstrate the validity of the privilege as it applies to specific documents. In *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66 (S.D. Mo. App. 1997) the Southern District held that it was an abuse of discretion for the trial court to uphold a claim of "peer review" privilege where the claim was based solely on the written and oral arguments of counsel. *Id.* at 69.

Health Midwest and its counsel—the same law firm that represented Health Midwest in *Health Midwest, supra*— have been directly on notice from this Court since at least 1998 that claims of privilege as a mechanism for defeating discovery will be strictly construed, and that it is the burden of the party asserting the privilege to demonstrate the applicability of the privilege to particular documents. They have also been on notice from this Court that a "party must specify why a discovery request is overbroad, oppressive, burdensome or intrusive." *Health Midwest, supra*, at 844. As Health Midwest did in *Health Midwest*, it has here made only general objections—and general objections are clearly insufficient to form a basis for denial of a motion to compel.

With reference to the peer review privilege assertion, in *Dixon*, the attorney apparently made an affirmative representation of the peer review status of certain information, and the Southern District found that to be insufficient to assert the privilege. What Health Midwest did in the underlying case was one step further re-

moved from *Dixon* because Health Midwest and its counsel did not make an affirmative representation that *any* of the files contained anything subject to the peer review privilege. The lack of a factual basis for asserting the peer review privilege and the lack of any citation to authority to support the application of that privilege to any specific documents in this case necessarily means that that objection can not serve as a basis for denying the Motion to Compel.

The last objection by Health Midwest (used as to requests 9 and 10) is that the requests are vague. Health Midwest provided no clue before the trial court about what it was in the two requests that neither Health Midwest personnel nor Health Midwest's attorneys could understand. In the context of a criminal statute, the Supreme Court of the United States has said:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. General Construction Company, 269 U.S. 385, 391, 46 S. Ct. 126,

127 (1926). Applying the definition from *Connally* to the present circumstances, to avoid a charge of vagueness, a request for production "must be sufficiently explicit to inform those subject to it [what information is sought]." The request must also be in terms sufficiently clear so that "men of common intelligence [do not have to] guess at its meaning and differ as to its application."

No guesswork is needed for requests 9 and 10.

Request #9 asks: Does Health Midwest have any policies relating to situations in which business partners or business associates "credential" one another, *i.e.*, a situation in which one business partner gives authorization to another to perform certain surgical procedures at the hospital, or otherwise certifies that the second business partner is qualified and competent to perform certain surgical procedures at the hospital.

Request #10 asks: Does Health Midwest have any written record which is or can be used to notify operating room personnel whether a particular surgeon has the "credentials" (authorization from the hospital administration) to perform a particular surgical procedure, or otherwise lists the surgical procedures for which a physician is credentialed/authorized.

Surely, if Health Midwest or its attorney in fact did not understand what requests #9 and #10 meant, the proper course of action would have been to ask for an explanation at some point in order to determine what the Bosts "really" meant by

the requests. It is, after all, a *joint* responsibility of the parties to attempt to reach an understanding of the nature of a discovery request and then make a joint effort to resolve any differences. Clearly, Health Midwest made no such effort. The "vagueness" charge cannot serve as a basis for denying the Motion to Compel.

Last, but not least, Health Midwest argued in opposing the Motion to Compel that in order to decide what information is discoverable the trial court has to go outside the pleadings, which in the underlying suit meant, according to Health Midwest, that the trial court should determine the discoverability of the documents requested by the Bosts based on the contents of Health Midwest's motion for summary judgment, and as "support" for their opposition to the Motion to Compel, attached a copy of the Health Midwest motion for summary judgment.

In the underlying case, Health Midwest did not cite any appellate decision of this, or any state, which holds that the content of a pending motion for summary judgment governs what is or is not relevant in relation to discovery in the case, or governs a determination of whether a particular document or class of documents is likely to lead to the discovery of admissible evidence. Health Midwest did not cite any case which holds that *any* pleading or motion filed by a single defendant can *ipso facto* limit the scope of discovery. Health Midwest did not cite any case which holds that unilateral action by a defendant may automatically narrow the issues in a case. Health Midwest did not cite any case which holds that a trial court must, or

even may, go outside the petition to determine what the issues are in order to rule on a motion to compel discovery, especially in the absence of any agreement by the parties narrowing the issues, and in the absence of any court order narrowing the issues after the parties have been afforded their due process rights of notice and a meaningful opportunity to be heard on the question of narrowing the issues.

The issues in any case are necessarily and logically the issues raised by a plaintiff in the original petition, or in an amended petition. It is the plaintiff who has to decide what theories of recovery will be pled against each defendant, and what factual allegations need to be made to support those theories. It is those allegations, absent stipulation or court order, which frame the issues against which the question of data discoverability is resolved.

For example, in a medical malpractice case such as this, it is the plaintiff's allegations in the petition which govern the medical issues and thus set the extent of the plaintiff's waiver of the health care provider-patient privilege. In *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 807 (Mo. 1997) (en banc), this Court said:

> If plaintiff has alleged an injury, defendant is entitled to "those medical records that relate to the physical conditions at issue under the pleadings." [Citation omitted.] Unless special circumstances can be shown, the language of defendant's requested authorization should track plaintiff's allegation of injury in the petition. As with other dis-

> covery, the narrowness or breadth of the medical authorization is directly controlled by the narrowness of breadth of the allegations in plaintiff's petition.

And in *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. 1996) (en banc), this Court said:

> [D]efendants are not entitled to any and all medical records, but only those medical records that relate to the physical conditions *at issue under the pleadings.* It follows that medical authorizations must be tailored to the pleadings, and this can only be achieved on a case-by-case basis. [Emphasis added.]

In *Herrera v. DiMayuga*, 904 S.W.2d 490 (S.D. Mo. App. 1995), the plaintiffs alleged on appeal that the trial court improperly excluded excerpts from minutes of the defendant hospital's medical and nursing staff meetings, and a hospital committee meeting, which were relevant to or would have been used to show "notice." The Southern District pointed out at 493 that "[n]either *the petition on which the case was tried*, nor the evidence indicates that notice was an element of the malpractice charged." [Emphasis added.]

Mo. R. Civ. P. 55.33(b) states in pertinent part: "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

Whether in terms of medical authorizations or the evidence to be presented at trial, it is the petition which sets the issues, and it is only if evidence is offered at trial outside the petition (or sometimes outside of the answer) that the appropriate pleadings may be amended to conform to the evidence actually adduced. What these cases and the Rule teach in combination is that when ruling on a question of discoverability, where no stipulation or court order has narrowed or reduced the issues, the threshold issue of whether document "X" is discoverable is based on a comparison between the allegations of the petition and the document or information sought. If document "X" is reasonably related to the issues raised by the petition, and would either be admissible itself or be reasonably likely to lead to the discovery of admissible evidence, then document "X" is discoverable, unless discovery is foreclosed by some privilege. Since Health Midwest did not properly raise the defense of privilege through its failure to not only affirmatively state that the alleged peer review privilege was applicable, but identify the documents or portions thereof to which the privilege supposedly applied, the privilege "exception" to discoverability is not applicable here.

As discussed above, the relationship between the information sought in the request for production and the issues framed by the Petition is clear. The Health Midwest objections to the request for production were not supported by facts or law. The information sought in the request for production was discoverable at the

time of the request and is discoverable now.

Yet Health Midwest also argued (despite the lack of case authority supporting the use of one party's pending motion for summary judgment as the basis for allowing that party to evade disclosure of requested information) that because the Bosts did not at the time of the filing of the Health Midwest motion for summary judgment have an expert ready to testify against Health Midwest, the information sought in the request for production was not discoverable.

As is at least inferentially clear from the allegations of the Petition, there were initially other nursing defendants in the case, and the underlying case is now down to Dr. Clark and Health Midwest. The so-called "lack" of present expert testimony is irrelevant in the context of the discoverability of the requested information, since the record is clear that at the time of the events giving rise to this writ proceeding, discovery had not closed and Judge Del Muro had set no deadline for designation of expert witnesses, although a trial date had been set. The evidence sought by Plaintiffs is clearly of a type which would need to be submitted to experts in order for them to formulate an opinion on primary liability, or alternatively the evidence sought may be admissible on its face, or may be such as to eliminate the need for direct expert testimony against Health Midwest in the case of a claim of vicarious liability for the negligence of Dr. Clark.

The Petition in the underlying case forms the basis for determining whether

the information requested is discoverable. A comparison of the Petition with the request for production discloses that all the documents requested are in fact and in law discoverable.

As the Western District of the Court of Appeals said in *State ex rel. Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171, 175 (W.D. Mo. App. 2000):

> As we noted in *State ex rel. Stolfa v. Ely*, 875 S.W.2d 579, 581 (Mo. App. W.D. 1994), there is a tendency toward liberality in discovery and the trial court's discretion to deny discovery is commensurately more limited.

The use of a remedial writ to correct a trial court's error in denying discovery is well-established. And the Western District also said in *Ferrellgas, supra* at 175:

> Interlocutory review of a trial court ruling by writ of prohibition should occur only extraordinary circumstances. [Citation omitted.] Our Supreme Court has recognized three situations in which writs of prohibition will issue. [Citations omitted.] First, where there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction. Second, to remedy a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated. Third:
>
> prohibition will issue in those very limited situations

> when an "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," *State ex rel. Richardson v. Randall*, 660 S.W.2d 699, 701 (Mo. banc 1983), or where there is an important question of law decided erroneously that would otherwise escape review on appeal *and* the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision.

State ex rel. Riverside Joint Venture v. Missouri Gaming Comm'n, 969 S.W.2d 218, 221 (Mo. banc 1998) (emphasis in original).

> ... The denial of discovery matters has thus been held to fall within the third category of reviewability under a writ of prohibition because, although a party may in fact be prejudiced by the court's denial, it is nearly impossible to show on appeal how the denied information could have affected and prejudiced the result of the trial. [Citations omitted.]

Without question, it would be impossible for the Bosts, after a trial, to demonstrate on appeal that documents which they and their counsel were never able to examine would have altered the outcome of the summary judgment proceeding initi-

ated below by Health Midwest. Judge Del Muro erroneously decided that the Bosts are not entitled to the production and inspection of the documents they requested from Health Midwest. That decision should be reversed by this Court, so that discovery of all the information sought in the request for production is permitted.

POINT II.

Relators are entitled to an order prohibiting Respondent from ruling on Health Midwest's Motion for Summary Judgment until Relators have had an opportunity to examine the information sought in their Request for Production directed to Health Midwest and until Relators have had at least thirty days after receipt of the information to respond to the motion for summary judgment because the Order by Respondent simultaneously: (a) granting Relators' Motion for Extension of Time to respond to the motion for summary judgment and (b) denying Relators' Motion to Compel the production of the information needed to respond violates the due process rights of the Bosts in that the Bosts have a right under the Fourteenth Amendment to the Constitution of the United States and under Article I, §10 of the Constitution of Missouri to notice and a meaningful opportunity to be

heard before their claims against Health Midwest can be dismissed by judgment as a matter of law, and Respondent's Order granting an extension of time to obtain needed discovery and at the same time precluding that discovery prevents any meaningful opportunity to respond.

Section 1. Standard of Review

Prohibition is the proper remedy when a trial court issues an order in discovery proceedings that is an abuse of discretion. *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927-928 (Mo. banc 1992). The standard of appellate review on this issues is stated in *State ex rel. Lichtor v. Clark*, 845 S.W.2d 55 (Mo. App. W.D. 1992):

> The trial court is allowed broad discretion in the control and management of discovery. It is only for an abuse of discretion amounting to an injustice that the appellate courts will interfere. 'A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.'

Id. at 59 (citations omitted).

State ex rel. Justice v. O'Malley, 36 S.W.3d 9, 11 (W.D. Mo. App. 2000).

Section 2. Argument

Seventy-five years ago, the Supreme Court of the United States described due process in part as being "consonant...with ordinary notions of fair play." *Connally*, *supra*. And that is all the Bosts seek here: fair play.

Whether Health Midwest can be held primarily or vicariously liable for the negligence of Dr. Clark depends on two things: (1) the existence of a relationship between Dr. Clark and Health Midwest at the time of the events for which Health Midwest is sought to be held accountable through the doctrine of *respondeat superior*, and (2) whether such a relationship, if it existed, is of a nature so as to make Health Midwest primarily or vicariously liable for Dr. Clark's negligence, in the event of proof at trial of such negligence.

A summary judgment proceeding is unquestionably a vital and proper tool for use by a trial court, since it serves the function of eliminating trials which are legally and factually unnecessary, thereby conserving and enhancing the judicial resources of the state. But before summary judgment can be granted to a movant, the opposing party *has* to have an opportunity to be heard in opposition to the motion. Mo. R. Civ. P. 74.04 is designed to accomplish that result.

Rule 74.04(b) allows a defending party, *e.g.*, Health Midwest, to file a motion

for summary judgment at any time. Rule 74.04(c)(1) sets out the standards for the content of the motion and accompanying memorandum in support. Rule 74.04(c)(2) gives the adverse party thirty days to respond, and sets the standards for the content of the response, and a legal memorandum giving the reasons for denying a motion for summary judgment. Rule 74.04(c)(2) also says in pertinent part:

> If the party opposing a motion for summary judgment has not had sufficient time to conduct discovery on the issues to be decided in the motion for summary judgment, such party shall file an affidavit describing the additional discovery needed in order to respond to the motion for summary judgment and the efforts previously made to obtain such discovery. For good cause shown, the court may continue the motion for summary judgment for a reasonable time to allow the party to complete such discovery.

In addition, Rule 74.04(f) also provides a mechanism to afford the party opposing summary judgment additional time in which to respond:

> Should it appear from the affidavits of a party opposing the motion that for reasons stated in the affidavits facts essential to justify opposition to the motion cannot be presented in the affidavits, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or

discovery to be had or may make such other order as is just.

On May 19, 2001, the Bosts filed a motion for an extension of time in which to respond to Health Midwest's Motion for Summary Judgment. [Rel. Writ Ex. 4, Rel. Pet. 181-186.] Accompanying that motion, and made a part of it, was an affidavit from William H. Pickett, the Bosts' lead counsel, stating that without the information sought in the request for production no response could be made to the Health Midwest application for summary judgment. [Rel. Pet. at 185-186.]

As with the portion of the Order denying the Bosts' Motion to Compel, Judge Del Muro gave no reason for granting the extension of time. It is therefore presumed that she did so for the reason given in the application for the extension. *Turner*, *supra*. The sole reason given was the necessity for obtaining the information sought in the request for production directed to Health Midwest, plus the possible necessity for depositions of Health Midwest personnel following examination of the documents.

On the one hand, Judge Del Muro gave the Bosts extra time to respond to the motion for summary judgment so that the Bosts could do further discovery through the request for production and possible depositions, and on the other hand, Judge Del Muro denied the Bosts access to the information contained in the files subject to the request for production, and thereby foreclosed the possibility of depositions of any Health Midwest personnel on the issues raised by the motion for summary

judgment. It is "the trial court giveth and the trial court taketh away" dichotomy which has deprived the Bosts of their constitutional right to due process.

Where the net effect of a trial court's denial of discovery is to prevent a party from being able to respond to a motion for summary judgment—a ruling that for all practical purposes grants or guarantees the grant of a pending motion for summary judgment—there has been a significant abuse of discretion.

Under both the Fourteenth Amendment to the Constitution of the United States and Article I, §10 of the Constitution of Missouri, the Bosts are entitled to procedural due process in the underlying case, *i.e.*, to notice and a meaningful opportunity to be heard with reference to the pending Health Midwest motion for summary judgment. While the motion for summary judgment, with its exhibits and supporting legal arguments, clearly provides the "notice" portion of the constitutional right, the denial of the motion to compel wipes out any meaningful opportunity to respond to that motion. The Bosts' lead counsel has already sworn under oath that the information identified in the Request for Production is needed in order to respond to the motion for summary judgment, and Judge Del Muro granted an extension of time based on that affidavit (nothing in the record appearing to the contrary), yet Judge Del Muro has also denied the Bosts the chance to review those documents in order to make their response to the summary judgment motion.

In *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 314,

70 S. Ct. 652, 657, 94 L. Ed. 865 (1950), the Supreme Court of the United States said:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations omitted.]

Citing *Mullane*, albeit in a factually distinct context, the Western District of the Missouri Court of Appeals has said:

> Notice is "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality." *Division of Employment Sec. v. Smith*, 615 S.W.2d 66, 68 (Mo. banc 1981) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950)). The notice must be "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Id.*

Forms World, Inc. v. Labor and Industrial Relations Commission, 935 S.W.2d 680, 684 (W.D. Mo. App. 1996).

As noted above, Health Midwest's motion provides the "notice" element of

due process, while Judge Del Muro's denial of the motion to compel is tantamount to ruling in favor of Health Midwest on the motion, since the denial effectively precludes the Bosts from making any substantive response to the motion. Under such circumstances there is no opportunity to be heard at all, much less a meaningful one, and Plaintiffs' due process rights have been violated.

Because of the intended liberality of the discovery rules, Judge Del Muro's discretion to deny discovery is far more limited than other exercises of a trial court's various discretionary powers. *Ferrellgas, supra*, at 175. A remedial writ is an appropriate mechanism to compel a trial court to permit discovery which the trial court has denied. *Id.*

There has been a clear abuse of discretion on the part of the trial court in this set of circumstances, which should be rectified by this Court allowing the discovery sought by the Bosts and requiring that the Bosts have at least thirty days from the date they receive the documents sought in the request for production in which to respond to the Health Midwest Motion for Summary Judgment.

CONCLUSION

Based on the issues framed by the Petition, Plaintiffs-Relators are entitled to discovery of the original documents they have requested, particularly where there has been no demonstration of the factual or legal validity of any of the objections to discovery raised by Health Midwest Refusing to sustain Relators' Motion to Com-

pel under all the facts and circumstances constitutes an abuse of discretion for which issuance of a remedial writ, requiring disclosure of the original documents, is appropriate. The denial of Relators' Motion to Compel, simultaneously with granting additional time to respond to the Health Midwest Motion for Summary Judgment so that Relators could obtain the information which was the subject of the Motion to Compel, constitutes an abuse of discretion by Respondent and a denial of Relators' constitutional rights of due process. A remedial writ should be granted requiring disclosure of the information sought in Relators' Request for Production and requiring that Relators be provided with at least thirty days from the date of receipt of that information in which to respond to the pending Health Midwest Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

One spiral-bound copy of the above and foregoing brief, and one copy on 3.5" diskette, have been mailed, postage prepaid, this 4th day of October, 2001, to:

PARTY	PARTY'S ATTORNEY
Hon. Justine E. Del Muro Respondent here Trial judge below	Honorable Justine E. Del Muro Circuit Court of Jackson County Jackson County Courthouse 415 East Twelfth Street Kansas City, Missouri 64106 816-881-3604
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David T. Greis

CERTIFICATE OF COMPLIANCE

I hereby certify the following:

1. This brief is in compliance with the requirements of Mo. R. Civ. P. 55.03.

2. This brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b).

3. This brief contains 9,531 words, exclusive of the cover, signature block, certificate of service, and certificate of compliance. This brief was prepared using Microsoft Word 97, and the word count was calculated by Word 97.

4. The file containing this brief, and the respective diskettes filed with the Court and/or served on the parties were scanned for viruses on 4 October 2001, using McAfee VirusScan 4, with virus definitions updated through 3 October 2001, at 1:40 p.m., the most recent date for which virus definitions were available, and the file and diskettes have been found to be virus-free.

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