S.C. 83830

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel.

RONDA A. BOST and BRIAN GLEN BOST,

Petitioners,

v.

HON. JUSTINE E. DEL MURO,

Respondent.

Writ from the Circuit Court of Jackson County, Missouri
Case No. 99-CV-214759
The Honorable Justine E. Del Muro, Judge

BRIEF OF RESPONDENT

ANDREW L. McMULLEN **#38002**
RICHARD M. PAUL III **#44233**
THOMAS A. ROTTINGHAUS **#50106**
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1800
Kansas City, MO 64105
(816) 421-3355
(816) 374-0509 Fax
ATTORNEYS FOR DEFENDANT HEALTH MIDWEST DEVELOPMENT GROUP, d/b/a LAFAYETTE REGIONAL HEALTH CENTER and HEALTH MIDWEST

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JURISDICTIONAL STATEMENT

Defendants Health Midwest Development Group, d/b/a Lafayette Regional Health Center and Health Midwest do not contest the Court=s jurisdiction in this case.

STATEMENT OF FACTS

This is a medical malpractice case. On July 23, 1999, plaintiffs Ronda and Brian Bost filed suit against defendants Gordon Clark, MD, Lafayette Regional Health Center (ALRHC@), Health Midwest, Patty A. Runyon, RN, and Shannon K. Pirtle, RN. (Writ Exhibit 1, at p.25). Plaintiffs alleged medical negligence against Dr. Clark, Nurse Runyon and Nurse Pirtle for their medical care and treatment of Mrs. Bost during her labor and delivery on October 19, 1997 at Western Missouri Medical Center, which is not a party to this action. (Writ Exhibit 1, at p.25). Plaintiffs allege that these defendant health care providers failed to diagnose or appropriately manage a uterine rupture at the time of delivery, and that this negligence caused or contributed to cause the death of Mrs. Bost=s newborn son. (Writ Exhibit 1, at pp. 28-33).

Mr. and Mrs. Bost further alleged that LRHC and Health Midwest could be held responsible for the acts of Dr. Clark on three different theories: (1) that Dr. Clark was their agent or employee; (2) that Dr. Clark was their ostensible or apparent agent; and (3) that defendants LRHC and Health Midwest were negligent in the hiring or retention of Dr. Clark as an employee. (Writ Exhibit 1, at p.25).

The material facts at issue in this case have been fleshed out through extensive discovery. Mrs. Bost first sought care and treatment from Dr. Clark, an obstetrician, in

June 1997 for her second pregnancy. (Writ Exhibit 2, at p.130). At that time, Dr. Clark was employed by LRHC/Health Midwest and remained so employed until July 30, 1997. (Writ Exhibit 2, at p.141). On July 30, 1997, approximately 2**2** months before the delivery at issue in this litigation, Dr. Clark terminated his employment relationship with LRHC and Health Midwest and entered into a general release and settlement agreement with LRHC. (Writ Exhibit 2, at p.160).

Plaintiffs have hired two liability expert witnesses, Dr. Emanuel Friedman and Dr. Lynn Frame. Neither doctor has any criticisms of Dr. Clark during his prenatal care or before July 30, 1997 when he was employed by LRHC/Health Midwest. (Writ Exhibit 2, at p.159; Exhibit AA to Defendants= Suggs. in Opp. to Plaintiffs= Petition for Writ, at p.97, 99-100). Both Dr. Friedman and Dr. Frame testified that nothing that transpired before July 30, 1997 had any causal relationship with the events that occurred in conjunction with Mrs. Bost=s labor and delivery on October 19, 1997. (Writ Exhibit 2, at pp.158-59; Exhibit AA to Defendants= Suggs. in Opp. to Plaintiffs= Petition for Writ, at p.85).

After July 30, 1997, Dr. Clark=s employment with defendants LRHC and Health Midwest was terminated and these defendants did not have any further relationship with Dr. Clark or exercise any control over his practice. (Writ Exhibit 2, at pp. 141-48; 160-64; These defendants did not pay any salary, provide any office or equipment, provide insurance, regulate his hours/vacation time or otherwise provide benefits as was done before that time. (Writ Exhibit 2, at pp.143, 147-48, 160-64).

On March 5, 2001, defendants LRHC and Health Midwest filed a Motion for Summary Judgment. (Writ Exhibit 2, at p.73). Plaintiffs failed to respond to that motion and, on April 16, 2001, the trial court granted summary judgment to LRHC and Health Midwest. (Writ Exhibit 4, at p.182). Plaintiffs then asserted that they had never received defendants= summary judgment motion and, without objection from defendants, the trial court set aside its summary judgment order. (*Id.*). The motion has been pending since that time and the trial court has granted plaintiffs at least two extensions of time to respond to the summary judgment motion. (Writ Exhibit 9, at p.251).

After the summary judgment motion was filed, plaintiffs submitted a request for production of documents to LRHC and Health Midwest requesting documents relating to Dr. Clark, including his credentialing file, his personnel file, any documents relating to Dr. Clark=s ability to perform obstetrics and certain by-laws and minutes of meetings that may have discussed Dr. Clark=s performance as a physician at LRHC in 1997. (Writ Exhibit 4, at pp.187-88). Defendants objected to the requests on the grounds that the documents sought by plaintiffs are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. (Writ Exhibit 5, at p.196). Further, plaintiffs= requests are over broad and, if documents were produced to the fullest extent of plaintiffs= request, would likely include information that is privileged by Missouri law. (*Id.*).

On May 29, 2001, plaintiffs filed a motion to compel asking the trial court to rule on LRHC=s and Health Midwest=s objections to their request for production of documents. (Writ Exhibit 5, at p.190). After extensive briefing by the parties, the trial

court denied the motion to compel on June 19, 2001 but granted plaintiffs an additional thirty days to respond to the motion for summary judgment. (Writ Exhibit 9, at p.251). The parties again briefed the issue in conjunction with plaintiffs= motion to reconsider. (Writ Exhibit 10, at p.252). On July 13, 2001, the trial court denied plaintiffs= motion to reconsider. (Writ Exhibit 12, at p.259). The case was set for trial on September 24, 2001. (Writ Exhibit 4, at p.181).

On July 20, 2001, plaintiffs filed their Petition for Writ of Prohibition, or in the Alternative, a Writ of Mandamus in the Missouri Court of Appeals, Western District. The Missouri Court of Appeals denied the extraordinary relief sought by plaintiffs. (Writ Exhibit 15, at p.264). On July 23, 2001, plaintiffs filed their Writ Petition with this Court. This Court entered a preliminary order in prohibition and ordered the trial court not to proceed with the trial of this proceeding. (Preliminary Order in Prohibition).

POINTS RELIED ON

I. Relators Are Not 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 Relators Failed to Show Good Cause Under Rule 74.04 to Justify A Continuance to Obtain Additional Discovery In That the Discovery Sought by Relators Was Irrelevant and Immaterial to the Issues Raised in Defendants= Motion for Summary Judgment

A. Standard of Review

Rule 74.04

State ex rel. St. Louis Housing Auth. v. Gaertner, 695 S.W.2d 460 (Mo. banc 1985)

State ex rel. Baldwin v. Dandurand, 785 S.W.2d 547 (Mo. banc 1990)

State ex rel. Chaney v. Franklin, 941 S.W.2d 790 (Mo. App. 1997)

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Derfelt v. Yocom, 692 S.W.2d 300, 301 (Mo. banc 1985)

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State ex rel. Kroger Co. v. Craig, 329 S.W.2d 804 (Mo. App. 1959)

Wilkerson v. Prelutsky, 943 S.W.2d 643 (Mo. banc 1997)

State ex rel. Conway v. Villa, 847 S.W.2d 881 (Mo. App. 1993)

Tobler's Flowers v. Southwestern Bell Tele. Co., 632 S.W.2d 15 (Mo. App. 1982)

Kemp Constr. Co. v. Landmark Bancshares Corp., 784 S.W.2d 306 (Mo. App. 1990)

Gal v. Bishop, 674 S.W.2d 680 (Mo. App. 1984)

Lewis v. El Torito Restaurants, Inc., 806 S.W.2d 46 (Mo. App. 1991)

Wray v. Samuel U. Rodgers= Community Health Ctr., 901 S.W.2d 167 (Mo. App. 1995)

Ritter v. Barnes Jewish Christian Health Sys., 987 S.W.2d 377 (Mo. App. 1999)

J.H. Cosgrove Contractors, Inc. v. Kaster, 851 S.W.2d 794 (Mo. App. 1993)

II. Relators Are Not Entitled to an Order Prohibiting Respondent from Ruling on Health Midwest=s Motion for Summary Judgment until 30 Days after Relators Receive the Additional Discovery They Seek Because Relators Are

Not Entitled to Additional Discovery In That They Have Failed to Satisfy the Good Cause Requirement of Rule 74.04

Rule 74.04

ARGUMENT

I. Relators Are Not 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 Relators Failed to Show Good Cause Under Rule 74.04 to Justify A Continuance to Obtain Additional Discovery In That the Discovery Sought by Relators Was Irrelevant and Immaterial to the Issues Raised in Defendants= Motion for Summary Judgment

A. Standard of Review

Prohibition is not a writ of right; the issuance of a writ of prohibition is in the sound discretion of the Court. *State ex rel. St. Louis Housing Auth. v. Gaertner*, 695 S.W.2d 460, 462 (Mo. banc 1985); *State ex rel. Baldwin v. Dandurand*, 785 S.W.2d 547, 549 (Mo. banc 1990). In considering a petition for writ of prohibition, there is a presumption that the trial court acted correctly. *State ex rel. Chaney v. Franklin*, 941 S.W.2d 790, 792 (Mo. App. 1997). The burden is on the petitioning party to show that the trial court exceeded its jurisdiction and the burden includes overcoming the presumption of a correct ruling by the trial court. *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997).

A petition for writ of prohibition must Aunequivocally and explicitly@ set forth every fact requisite to the issuance of the writ. *State ex rel. Hartman v. Casteel*, 678 S.W.2d

816, 818 (Mo. App. 1984). Missouri courts have emphasized that a writ of prohibition is an extraordinary remedy to be used with great caution and forbearance, and should only be granted when the facts and circumstances demonstrate unequivocally that there exists an extreme necessity for preventative action. *State ex rel. Lester E. Cox Med. Ctr. v. Wieland*, 985 S.W.2d 924, 926 (Mo. App. 1990); *State ex rel. 401 N. Lindbergh Assoc. v. Ciarleglio*, 807 S.W.2d 100, 103 (Mo. App. 1990). Missouri courts must therefore be reluctant to issue the extraordinary writ of prohibition except where a clear right to it exists. *State ex rel. M.D.K. v. Dolan*, 968 S.W.2d 740, 745 (Mo. App. 1998). In fact, this Court has held that Missouri courts Ashould employ the writ judiciously and with great restraint.@ *Id*. (*quoting Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985)).

B. The Trial Court Did Not Abuse Its Discretion In Refusing Relators= Request for Additional Time to Conduct Discovery

1. The Trial Court Has Broad Discretion in Discovery Matters

Under Missouri law, a trial court has broad discretion to control discovery, and an appellate court should not disturb its rulings absent an abuse of discretion. *Misischia v. St. John=s Mercy Med. Ctr.*, 30 S.W.3d 848, 864 (Mo. App. 2000). The basis for this rule is that the trial court is in the best position to evaluate the proposed discovery requests and evaluate the basis for the documents sought by a party. The rules governing discovery were not designed or intended for Auntrammeled use of a factual dragnet or fishing expedition.@ *State ex rel. Kroger Co. v. Craig*, 329 S.W.2d 804, 806 (Mo. App.

1959). A trial court abuses its discretion when its ruling is Aclearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.@ *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648 (Mo. banc 1997).

2. Relators Failed to Satisfy the AGood Cause@ Requirement of Rule 74.04

Relators=s brief focuses on the general right to discovery, but the heart of this dispute arises out of Rule 74.04(c) and (f) requiring a showing of Agood cause@ before the alleged need for additional discovery can be used to extend the time to respond to a motion for summary judgment. Relators did not show good cause to the trial court, nor have they made such a showing in this writ proceeding.

Rule 74.04(c) states that AIf 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.@ Similarly, Rule 74.04(f) states in relevant part, AShould 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 order a continuance to permit ... discovery to be had ....@

Here, relators filed their affidavit under this rule requesting time for additional discovery but were unable to show good cause for further delay and failed to show by affidavit why the discovery they sought was material to their response to the motion for summary judgment.

AEven if requests for discovery are pending, Rule 74.04(f) contemplates that the opponent to the motion for summary judgment must call the court's attention to the uncompleted discovery and *show by affidavit why it is material and important for the discovery to be completed*.@ *State ex rel. Conway v. Villa*, 847 S.W.2d 881, 886 (Mo. App. 1993) (citing *Tobler's Flowers v. Southwestern Bell Tele. Co.*, 632 S.W.2d 15, 19 (Mo. App. 1982)) (emphasis added). AIt is not sufficient to allege that further discovery >might= enable a party to stumble upon necessary evidence.@ *Kemp Constr. Co. v. Landmark Bancshares Corp.*, 784 S.W.2d 306, 309 (Mo. App. 1990) (citing *Gal v. Bishop*, 674 S.W.2d 680, 683 (Mo. App. 1984)); *see also Lewis v. El Torito Restaurants, Inc.*, 806 S.W.2d 46, 47 (Mo. App. 1991) (same).

Here, relators= affidavit stated that a continuance so that additional discovery could be completed was necessary to learn more about the relationship between Dr. Clark and LRHC/Health Midwest, to learn the reasons for the termination of that relationship, and to learn what steps, if any, LRHC/Health Midwest took to inform Dr. Clark=s patients that Dr. Clark was no longer employed by LRHC. (Writ Exhibit 4, p.185-86). This explanation for additional discovery is a mere fishing expedition based on speculative hopes that something negative about Dr. Clark will appear in his files. And even if their

speculation paid off, nothing in the information requested by relators relates to the material uncontroverted facts set forth by LRHC/Health Midwest, nor does it relate to any legal basis to avoid judgment as a matter of law.

Because relators= affidavit does not make the necessary connection between the discovery sought and the motion for summary judgment, the affidavit fails Rule 74.04=s requirement to show good cause. The affidavit does not show Awhy it is material and important for the discovery to be completed,@ but instead is based on the mere hope of stumbling onto evidence that Amight@ help their case. Relators have not shown which facts they hope to controvert in response to the motion for summary judgment. Nor have they shown that with additional facts the cases cited by LRHC/Health Midwest would not apply. Under Missouri law, relators= showing is inadequate. Accordingly, the trial court=s order was not so Aclearly 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.@ *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648 (Mo. banc 1997). A permanent writ of prohibition is therefore inappropriate.

3. Relators= Discovery Requests Are Irrelevant and Unnecessary to the Issues Raised in Defendants= Motion for Summary Judgment

The discovery at issue here sought the following documents:

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

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

C. The contract between Dr. Clark and these defendants.

D. Any and all documents relating to Dr. Clark=s ability to perform obstetrics and deliveries in 1997.

E. Certain by-laws, rules, regulations and the minutes of meetings relating to the calendar year of 1997 concerning the practice of obstetrics at Lafayette Regional Health Center.

Under Rule 74.04(c) and (f), relators must show (by affidavit) that these requests relate to the issues raised in the motion for summary judgment. Relators have failed to do so; none of these requests relate to the 3 theories on which relators seek to hold LRHC/Health Midwest responsible for the acts of Dr. Clark.

a. Agency or Employment Relationship

Relators= first theory is that LRHC/Health Midwest can be held vicariously liable for the acts of Dr. Clark as an agent or employee of LRHC/Health Midwest. The evidence in this case is uncontroverted that Dr. Clark ceased to be an employee of LRHC/Health Midwest as of July 30, 1997 when Dr. Clark terminated his employment relationship with LRHC/Health Midwest and resigned his staff privileges at LRHC. The labor and delivery that is the focus of the underlying case, and the conduct of Dr. Clark that is at issue in this litigation, occurred on October 18-19, 1997, 2**2** months after Dr. Clark left LRHC. No discovery is needed on this point.

Under Missouri law, to establish that Dr. Clark was the agent of LRHC/Health Midwest, relators must show that (1) LRHC/Health Midwest consented to Dr. Clark

acting on its behalf after July 30, 1997; and (2) Dr. Clark was subject to LRHC/Health Midwest=s control. *Wray v. Samuel U. Rodgers= Community Health Ctr.*, 901 S.W.2d 167, 170 (Mo. App. 1995). The discovery that relators seek is not related to either of these elements**B**both of which must be proved to avoid summary judgment.

LRHC/Health Midwest produced to relators in discovery the parties= employment agreement and the General Release and Settlement Agreement (the **A**Agreement@) between Dr. Clark and LRHC in which: (1) the parties terminated Dr. Clark=s employment agreement; (2) Dr. Clark withdrew and resigned his medical staff privileges at LRHC; (3) LRHC transferred title to Dr. Clark of all assets at Dr. Clark=s clinic and assigned to him the accounts receivable; (4) LRHC assigned to Dr. Clark its lease in another of Dr. Clark=s clinics; (5) the parties mutually forgave all past and future debts between them; and (6) agreed to full mutual releases. Further, the parties agreed that **A**this Agreement represents the entire understanding between them.@ (Writ Exhibit 2, p.160-64). Relators deposed Dr. Clark and his testimony as to the actual practice between the parties was consistent with this Agreement.

Beyond the fact that any consent for Dr. Clark to act as LRHC=s agent or any control over his actions would be inconsistent with the Agreement, relators= discovery requests are not aimed at these issues. Dr. Clark=s credentialing file, his personnel file, his Employment Agreement, his ability to perform obstetrics and deliveries in 1997, and LRHC=s internal rules, regulations and by-laws all may uncover information about Dr. Clark=s abilities, but none of it will show an agency relationship because no document

request seeks documentation of Dr. Clark=s post-termination conduct. The pertinent legal issues thus bear absolutely no relevance to documents created while he was employed by LRHC.

b. Apparent or Ostensible Agency

Nor do any of the documents requested by relators have any relevance to their claim of apparent or ostensible agency. To establish an apparent or ostensible agency relationship, relators must show (1) LRHC/Health Midwest consented or knowingly permitted Dr. Clark to exercise authority; (2) the relators relied on such authority in good faith and had reason to believe and actually believed Dr. Clark possessed authority; and (3) the relators changed their position and will be injured if LRHC/ Health Midwest is not bound by the transaction executed by Dr. Clark. *See Ritter v. Barnes Jewish Christian Health Sys.*, 987 S.W.2d 377, 386 (Mo. App. 1999).

None of the documents requested by plaintiffs in their request for documents can possibly tend to prove or disprove the elements of apparent or ostensible agency. No request seeks information about the post-employment relationship between Dr. Clark and LRHC. Further, Ms. Bost testified that she had no knowledge of who employed Dr. Clark at the time she first sought care from him. After she had seen Dr. Clark for approximately 2 months, she knew he changed employment in July, 1997 and that he became an employee of the hospital in Warrensburg, Missouri. It is clear from her testimony that she did not believe Dr. Clark possessed any authority on behalf of LRHC or Health Midwest following July 30, 1997. Further, there is no evidence that Ms. Bost

in any way relied on any alleged authority by these defendants on behalf of Dr. Clark in her pursuit of care and treatment from him during her pregnancy. Because none of the documents requested by plaintiffs in any way involve Ms. Bost=s knowledge or beliefs, there is no relevancy between the pre-July 30, 1997 documentation sought and relators= claim of apparent or ostensible agency post July 30, 1997.

c. Negligent Hiring/Retention

Plaintiffs= final basis for vicarious liability is that these defendants negligently hired and/or retained Dr. Clark as an employee. This cause of action allows a plaintiff to recover against a defendant if the employee was negligently hired or retained as an employee after the defendant had knowledge of some type of incompetence or wrongdoing. *J.H. Cosgrove Contractors, Inc. v. Kaster*, 851 S.W.2d 794, 798 (Mo. App. 1993). But even if relators could show that these defendants negligently hired Dr. Clark, or otherwise wrongfully retained him as an employee, these issues are completely moot following his termination on July 30, 1997. Relators= own experts have clearly testified that there is no causal relationship between anything that happened before July 30, 1997 and the events on October 18-19, 1997. Again, nothing in their discovery requests seeks information concerning this causal connection.

For example, even if the credential file, personnel file or other documents requested by relators in their request for documents reveal that Dr. Clark was in fact not a physician, or was an incompetent physician, or had some history in which he provided inadequate care to patients, relators have not shown how such a fact would tend to prove

or disprove a causal connection between Dr. Clark=s past practice or abilities when employed by LRHC and his subsequent alleged negligence when employed by another employer. Any evidence contained in the requested documentation cannot tend to prove or disprove any allegation or material issue as it relates to the events of Ms. Bost=s labor and/or the delivery of her son on October 18-19, 1997 when relators= own expert witnesses have conceded that nothing that transpired before July 30, 1997 has any causal relationship to the events that transpired in October, 1997. Further, relators have provided no legal basis for the duties they seek to impose on LRHC/Health Midwest.

4. LRHC/Health Midwest=s Other Objections Also Have Merit

Relators= request for a permanent writ should be denied because relators= have not shown good cause to delay summary judgment proceedings in order to conduct more discovery. This case has been on file for over two years, significant discovery has been conducted, and the relators have yet to show any good faith basis to have joined LRHC/Health Midwest in this suit. The uncontroverted facts are such that LRHC/Health Midwest is entitled to judgment as a matter of law regardless of what other discovery relators= might obtain. But even if relators= fishing expedition were allowed to continue, the other objections posed by LRHC/Health Midwest have merit as well.

These other objections, however, such as the peer review statute privilege, overbreadth, and vagueness, relate more to limiting the scope of any production that would be required if LRHC/Health Midwest were actually forced to go pull the requested documents and produce them. At this point, relators have shown no right to the

discovery requested and thus LRHC/Health Midwest has not pulled the records to know whether there are documents contained in those records protected from disclosure by the peer review statute. Further, even if relators were to show good cause for such discovery, the requests are overbroad because they ask for entire files that likely contain information far removed from the allegations in this case. For example, relators= request for Dr. Clark=s personnel file is overly broad even if it is only one file because it may contain Dr. Clark=s own medical records that have nothing to do with his abilities as a physician.

The issue in this writ proceeding is whether relators have shown good cause for delaying summary judgment proceedings to obtain further discovery. LRHC/Health Midwest contends they have plainly failed to meet their burden. The trial court agreed. Thus relators are not entitled to put LRHC/Health Midwest to additional expenses to engage in additional discovery hoping to find some document to provide the least bit of support for their claims. Obviously if this Court were to hold differently and order discovery to continue, LRHC/Health Midwest would produce all documents that relators would reasonably be entitled to and only withhold those documents to which these other objections applied. If this occurs and the parties cannot resolve a dispute, the trial court could then rule on specific objections in the first instance at that time**B**they are not issues this Court should resolve in a writ proceeding.

II. Relators Are Not Entitled to an Order Prohibiting Respondent from Ruling on Health Midwest=s Motion for Summary Judgment until 30 Days after Relators Receive the Additional Discovery They Seek Because Relators Are Not Entitled to Additional Discovery In That They Have Failed to Satisfy the Good Cause Requirement of Rule 74.04

Relators= Point II is redundant of their Point I. Relators are only entitled to additional discovery if they can show that it relates to the issues in Health Midwest=s motion for summary judgment. For the reasons explained above in Point I, they have failed to make this showing to the satisfaction of the trial court and are therefore not entitled to irrelevant discovery. Relators= failure to show good cause for additional discover in light of a pending dispositive motion does not result in a denial of due process.

If they had made a showing of good cause, they obviously would be entitled to time to review that discovery and use it to prepare their response to the motion. There is no need to argue about due processBthe only issue is whether they have shown Agood cause@ under Rule 74.04(c)(2). Because they have not, relators should be ordered to immediately submit their response to the motion for summary judgment that LRHC/Health Midwest filed back on March 5, 2001.

CONCLUSION

WHEREFORE, defendants Lafayette Regional Health Center and Health Midwest respectfully request this Court to set aside its preliminary writ of prohibition and deny relators' request for a permanent Writ of Prohibition, and for such further relief as this Court deems necessary and appropriate.

ANDREW L. McMULLEN #38002
RICHARD M. PAUL III #44233
THOMAS A. ROTTINGHAUS #50106
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1800
Kansas City, MO 64105
(816) 421-3355
(816) 374-0509 Fax
ATTORNEYS FOR DEFENDANTS HEALTH MIDWEST DEVELOPMENT GROUP, d/b/a LAFAYETTE REGIONAL HEALTH CENTER and HEALTH MIDWEST

CERTIFICATE OF COMPLIANCE

As required by Missouri Rule of Civil Procedure 84.06(b), I certify that this brief is proportionally spaced and contains 4,527 words. I relied on my word processor to obtain the count and it is Microsoft Word 2000.

_____
Attorney for Defendants

CERTIFICATE THAT DISKETTE HAS BEEN SCANNED AND IS VIRUS-FREE

I, Richard M. Paul III, certify that the computer diskette accompanying Brief of Respondents and filed concurrently herewith was scanned for viruses and is virus free.

_____
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that one copy and a diskette of the above and foregoing were mailed, postage prepaid, this 23rd day of October, 2001, to:

Honorable Justine E. Del Muro
Circuit Court of Jackson County
415 E. 12th Street
Division 4, 5th Floor
Kansas City, MO 64106

William H. Pickett
David T. Greis
600 Griffith Bldg.
405 E. 13th Street
Kansas City, MO 64106
Fax: 221-8258
Attorneys for Plaintiffs

Norman I. Reichel, Jr., Esq.
Wallace, Saunders, Austin, Brown & Enochs
10111 W.87th Street
P.O. Box 12290
Overland Park, KS 66282-2290
Fax: (913) 888-1065
Attorneys for Defendant
Dr. Gordon Clark

_____
Attorney for Defendants Health Midwest Development Group, d/b/a Lafayette Regional Health Center and Health Midwest