IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. NEAL W. HOLZUM, M.D.,	)	
	)	Case No. SC91434
Relator,	)	
vs.	)	
THE HONORABLE NANCY L. SCHNEIDER,	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
THE HONORABLE NANCY L. SCHNEIDER, CIRCUIT JUDGE
CASE NO. 0911-CV11523
EASTERN DISTRICT COURT OF APPEALS NO. 95797

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This is an original action in prohibition before this Honorable Court. The Honorable Nancy L. Schneider, in her capacity as a Circuit Judge of the Circuit Court of the County of St. Charles, is the Respondent. Because the Circuit Court is the Respondent, adequate relief in prohibition cannot be afforded application to any other Circuit Court. Supreme Court Rule 84.22(a). Relator previously filed a Petition for Writ of Prohibition before the Missouri Court of Appeals, Eastern District. The Court of Appeals denied Relator's Petition without opinion on November 23, 2010. A denial of a writ of prohibition without opinion is not appealable. Accordingly, Relator filed a new petition for writ of prohibition in this Court to prohibit Judge Schneider's Order of October 5, 2010, denying Relator's motion to dismiss. Relator requested dismissal under Section 537.100, RSMo. 2010 on the allegation that the statute of limitations had expired with regard to Plaintiff's claim against Relator.

On January 25, 2011, this Court entered its preliminary writ of prohibition. Respondent asks this Court to quash its preliminary writ of prohibition. The jurisdiction of this Court is based upon Article V, Section 4, of the Missouri Constitution, and Supreme Court Rules 84.22, 84.23, 84.24 and 97.01.

STATEMENT OF FACTS

On October 2, 2008, Plaintiff filed a Petition in the Circuit Court for St. Louis

County, Missouri, alleging claims of medical malpractice against Defendants Barnes-Jewish Hospital, Washington University, John Doe and Jane Doe. (Appx., p. A1). The original Petition was filed at 5:00 p.m. on the third anniversary of Plaintiff's decedent's death. (Appx., p. A1). Plaintiff's Petition identified the Plaintiff as the son of Alverna Katz, a deceased person, and further identified Defendant as "Barnes-Jewish St. Peters Hospital is a Missouri not-for-profit corporation doing business in this judicial district and which at all times hereinafter mentioned was engaged in the provision of medical care and services to the consuming public, including Decedent for a fee." (Appx., p. A2, paragraph 2). Plaintiff stated that "Defendant The Washington University and/or Washington University Medical Center (hereinafter "The Washington University") was a Missouri not-for-profit corporation operating within the City of St. Louis engaged in the business of providing medical services and was, at all times mentioned herein, acting by and through its agents, servants and employees." (Appx., p. A2, paragraph 3). Plaintiff further stated "That Defendants John Doe and Jane Doe and the above Defendants are providers of medical services, who at all times relevant to this action was (sic) engaged in providing medical services to the consuming public, including Decedent for a fee." (Appx., p. A2, paragraph 7). Plaintiff further stated "That on or about October 1 through October 2, 2005, Decedent presented herself to Defendants and through their negligent treatment died on October 2, 2005." (Appx., p. A2, paragraph 8).

Plaintiff further recited "that Defendants were negligent in their treatment of Decedent and by and through such negligence caused the death of decedent on or about

October 2, 2005." (Appx., p. A2, Count I).

This action was originally filed in Circuit Court of St. Louis County. (Appx., p. A1). On or about the 8th and 10th days of September, 2009, Defendants filed their Motion to Transfer Venue to St. Charles County which motion was unopposed by Plaintiff. (Appx., p. A4-A9). This case only received a file number and became active in St. Charles County on the 3rd day of December, 2009 . (Appx., p.A10).

Plaintiff was not provided with the actual names of the Jane Doe or John Doe Defendant until Interrogatory responses were received after the 13th day of July, 2010. (Appx., p. A11-A24).

On or about August 6, 2010 Plaintiff, with leave of Court, filed his Second Amended Petition. Such Second Amended Petition identified as Defendants Barnes-Jewish St. Peters Hospital, Inc. d/b/a Barnes-Jewish St. Peters Hospital, BC Missouri Physicians, LLC, Scott L. Landry, M.D., David Poggemeier, M.D., and Neal W. Holzum, M.D. (Appx., p. A25). Plaintiff's Second Amended Petition did not list as or name as Defendants either John Doe or Jane Doe. (Appx., p.A25-A33).

In Count II of Plaintiff's Second Amended Petition, Plaintiff states as follows:

> 13. BC Missouri Physicians, LLC and its agents, employees and assigns, including Dr. Landry and Dr. Poggemeier are substituted herein in Plaintiff's Second Amended Petition

> for the "Jane Doe" Defendant in that BC Missouri Physicians, LLC and Drs. Landry and Poggemeier were the entity and its agents, employees and assigns against whom suit was brought in Plaintiff's original Petition under the name "Jane Doe". (Appx., p. A29).

In Count III of Plaintiff's Second Amended Petition, Plaintiff stated as follows:

> 17. Neal W. Holzum, M.D. is substituted herein in Plaintiff's Second Amended Petition for the "John Doe" Defendant in that Dr. Holzum was the treating physician against whom suit was brought in Plaintiff's original Petition under the name of "John Doe". (Appx., p. A31).

Subsequent to the filing of Plaintiff's Second Amended Petition Defendants BC Missouri Emergency Physicians, LLP, Scott L. Landry, M.D., David Poggemeier, M.D., and Neal W. Holzum, M.D., filed motions to dismiss on the basis that the three year statute of limitations for wrongful death had expired. (Appx., p. A34-A42). On or about October 5, 2010, Respondent entered an Order denying the motions to dismiss. (Appx. p. A43). On or about November 10, 2010, Relator filed a Petition for Writ of Prohibition in the Missouri Court of Appeals, Eastern District to prohibit Respondent's Order of October 5, 2010 permitting the case to move forward. (Appx. p. A44-A65). On or about the 22nd day of November, 2010, Respondent filed Suggestions in Opposition to the Writ

of Prohibition (Appx., p. A66-A74). On or about November 23, 2010, the Eastern District Court of Appeals denied Relator's Petition for Writ of Prohibition. (Appx., p. A75). On or about January 6, 2011, Relator filed a Petition for Writ of Prohibition with this Court to prohibit Judge Schneider's Order. (Appx. p. A76-A92). On or about January 14, 2011, Respondent filed Respondent's Suggestions in Opposition to Relator's Petition for Writ of Prohibition and/or Mandamus. (Appx., p. A93-A98). On or about January 25, 2011, this Court issued its Preliminary Writ of Prohibition. (Appx., p. A99). On or about February 22, 2011, Respondent filed his Return to the Preliminary Writ in Prohibition in this Court. (Appx., p. A100-A108).

Respondent now requests that this Court quash the Preliminary Writ which it issued on January 25, 2011.

POINTS RELIED ON

I

I. Relator is not entitled to a permanent writ prohibiting Respondent from allowing the case against Relator to go forward in that Respondent did not exceed her authority as a matter of law in that:

(A) The statute of limitations regarding Plaintiff's underlying claim against Relator did not run in that Plaintiff filed his action within three years of the date of the decedent's death pursuant to Section 537.100; and

(B) Plaintiff's Second Amended Petition substituting Relator for John Doe was a mere correction of a misnomer, and/or change in the name of a party, and therefore, related back to the original filing pursuant to Mo.R.Civ.P. 55.33(c).

Bailey v. Innovative Management & Investment, Inc., 890 S.W.2d 648 (Mo. banc 1995)

Watson v. E.W. Bliss, 704 S.W.2d 667 (Mo. banc 1986)

Maddux v. Gardner, 192 S.W.2d 14 (Mo. App. 1945)

POINTS RELIED ON

II

II. Relator is not entitled to a permanent writ prohibiting Respondent from allowing the case against Relator to go forward, in that Respondent did not exceed her authority as a matter of law in that:

(A) The issue of whether or not Relator had sufficient notice to satisfy the notice requirements of Mo.R.Civ.P. 55.33(c) is a question of fact, and no evidence was before the Court on Relator's Motion to Dismiss regarding whether or not the notice requirements of Rule 55.33(c) had been met.

Windscheffel v. Benoit, 646 S.W.2d 354 (Mo. banc 1983)

Mallek v. First Banc Ins., 220 S.W.3d 324 (Mo. App. E.D. 2007)

ARGUMENT

Standard of Review

In State v. Moorehouse, 267 S.W.2d 717 (Mo. App. W.D. 2008), the Court held:

"A writ of prohibition does not issue as a matter of right." State ex rel. Rosenberg v. Jarrett, 233 S.W.3d 757, 760 (Mo. App. W.D. 2007). "Rather, it is discretionary and

will lie only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." Id. (quote marks and citation omitted). "A writ of prohibition is an extraordinary remedy that is to be used with great caution and forbearance and only in cases of extreme necessity." Id. (quote marks and citation omitted). Writs of prohibition are appropriate in three scenarios: "to prevent the trial court from usurping judicial power when it lacks the requisite jurisdiction, to remedy an excess of jurisdiction or abuse of discretion when the lower court lacks the power to act, and to prevent a party from suffering irreparable harm." State ex rel. Brantingham v. Grate, 205 S.W.3d 317, 319 (Mo. App. W.D. 2006).

POINT I

I. Relator is not entitled to a permanent writ prohibiting Respondent from allowing the case against Relator to go forward in that Respondent did not exceed her authority as a matter of law in that:

(A) The statute of limitations regarding Plaintiff's underlying claim against Relator did not run in that Plaintiff filed his action within three years of the date of the decedent's death pursuant to Section 537.100; and

(B) Plaintiff's Second Amended Petition substituting Relator for John Doe was a mere correction of a misnomer, and/or change in the name of a party, and therefore, related back to the original filing pursuant to Mo.R.Civ.P. 55.33(c).

A writ of prohibition is improper in this action in that the trial judge was acting

within her jurisdiction and discretion to deny Relator's Motion to Dismiss based on the statute of limitations in that this action was properly before the Trial Court, and it was within the Trial Court's discretion to determine that Plaintiff's Second Amended Petition related back to the time and date of the original filing, and therefore, Respondent's denial of Relator's Motion to Dismiss was within the Trial Court's jurisdiction and was not an abuse of its discretion.

The issue in this matter is simply whether or not Plaintiff Eric Katz alleged a sufficient Petition against John Doe in the underlying medical malpractice action such that when the identity of such individual was subsequently discovered, substitution of his name for the John Doe Defendant related back to the filing date.

Respondent would suggest that to the extent that Eric Katz alleged a sufficient cause of action against Barnes-Jewish St. Peters Hospital and the Washington University, he similarly alleged a sufficient cause of action against John Doe, in that the allegations of negligence against all such Defendants were identical in Plaintiff's original Petition.

At the time of the filing of this action for wrongful death, it was not known or knowable to Plaintiff who provided health care services to the decedent, only that she went to Barnes-Jewish St. Peters Hospital (hereinafter "the Hospital") on a certain date and died as a result of negligent health care administered there. Plaintiff filed his action against the identifiable entities and the Doe Defendants within the statute of limitations and therefore, Plaintiff's Petition for wrongful death was timely with regard to all named

Defendants.

Plaintiff stated in his Petition that "on or about October 1 through October 2, 2005, Decedent presented herself to Defendants and through their negligent treatment died on October 2, 2005". Plaintiff further identified John Doe and Jane Doe as "providers of medical services, who at all times relevant to this action were engaged in providing medical services to the consuming public, including Decedent for a fee".

Plaintiff further alleged that all such medial service providers " were negligent in their treatment of Decedent and by and through such negligence caused the death of Decedent on or about October 2, 2005."

Consequently, Plaintiff identified the date, place and acts of negligence (provision of health care) and the job descriptions of the Defendants who caused the death of the decedent.

The universe of possible defendants was therefore very small, and obviously one of the correctly named Defendants, the Hospital, would have precise knowledge of who the John and Jane Does were. Plaintiff, however, had no way of ascertaining such information until discovery was engaged in in this action. In fact, the Plaintiff first contacted Plaintiff's counsel regarding this matter twenty-four minutes before the statute of limitations ran!

As soon as such discovery was obtained, Plaintiff amended his Petition to reflect the names of the Doe Defendants and substitute them for the fictitious names.

What Relator fails to distinguish in his Petition for Writ of Prohibition is that

correction of misnomer and the "relation back" rule, Mo. R. Civ. P. 55.33(c), creates two distinct categories of circumstances under which an amended petition, filed after the running of the statute of limitations, will relate back to the original filing in order to preserve the statute. These two categories are an amendment which (1) corrects an error in pleadings commonly referred to as "misnomer", or (2) changes or adds parties. Bailey v. Innovative Management & Investment, Inc., 890 S.W.2d 648 (Mo. banc 1995).

It is only in the case of amendments which change or add parties where, in order to relate back, there is a requirement that the party to brought in; "(1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Rule 55.33(c). "This is the only portion of the relation back doctrine as set forth in Rule 55.33(c) that requires notice." Bailey v. Innovative Management & Investment, Inc., supra. at 651.

Conversely, where an amendment merely corrects an error in the pleading, for example, by substituting the correct name for a party, there is no notice requirement. Bailey v. Innovative Management & Investment, Inc., supra. at 651-652. As this Court held in Bailey, Respondent fails to distinguish between an amendment which changes a party and a misnomer. As in the Bailey case and as in Watson v. E.W. Bliss, 704 S.W.2d 667 (Mo. banc 1986), the Plaintiff in this case intended to sue the actual tortfeasers (here the health care providers whose negligence caused the death of the decedent), but merely

lacked their correct names. Just as in the Bailey case, there is no doubt that the reference to "John Doe" in the first Petition and to Relator in the Second Amended Petition are both intended to refer to the health care providers that treated the decedent. "This is a classic example of a misnomer case". Bailey v. Innovative Management & Investment, Inc., supra. at 652.

As the Bailey Court explained:

> The present case and Watson should be distinguished from cases in which the petition filed before the statute of limitations names some other party in existence, not because of mistake in the name but but because the pleader attempts to name a different party. Id.

It is obviously the case that Plaintiff, in what is admittedly a timely filed original Petition, did not intend to sue an individual named "John Doe" nor is it argued by any party hereto that Plaintiff believed that an individual named "John Doe" provided negligent medical services causing the death of the decedent. It is apparent from the pleadings and, expressly stated in Plaintiff's Second Amended Petition, that "Neal W. Holzum, M.D. is substituted herein in Plaintiff's Second Amended Petition for the "John Doe" Defendant and that Dr. Holzum was the treating physician against whom suit was brought in Plaintiff's original Petition under the name of "John Doe". (Appx., p. A31). It cannot be legitimately argued that the Plaintiff intended to sue some other, actual,

Defendant and then later made a decision to change to Relator, but always intended to sue Relator and to substitute his name when such name was discovered.

By analogy, this Court has held that the statute of limitations is tolled, essentially indefinitely, when a lawsuit is timely filed even if it is never served and the named defendant has no notice at all. Ostermueller v. Potter, 868 S.W.2d 110 (Mo. banc 1993). In Bailey, the Court stated:

> Ostermueller, therefore, eliminates the requirement that the plaintiff exercise due diligence in serving process on the defendant. Bailey v. Innovative Management & Investment, Inc., supra. at 650.

If filing suit by itself, with no notice to the defendant during the limitations period or even afterwards, indefinitely tolls the statute of limitations, to the extent Plaintiff pled a viable action against any Defendant in his initial petition, he pled a sufficient cause of action against all Defendants, including John Doe. Consequently, the requirements of the statute of limitations regarding John Doe have been satisfied. Missouri law recognized that a correction of misnomer relates back to a time of the original pleading even prior to the enactment of Rule 55.33(c) as stated in Watson v. E.W. Bliss Co., supra at 676, 671. "The misnomer theory existed long before the amendment of Rule 15(c) and our present Rule 55.33(c)." Watson v. E.W. Bliss Co., supra. at 671. To the extent "John Doe" is subsequently replaced by "Neal Holzum, M.D.", in a subsequent pleading, it would

represent the correction of a misnomer, not requiring any notice, and would relate back to the date of the original filing.

Even if this Court holds that naming Relator in the Second Amended Petition constitutes "changing or adding" a party, unlike the plaintiff in Schultz v. Romanace, 906 S.W.2d 393 (Mo. App. 1995), who in his petition merely indicated his desire "to add additional named parties as defendants if he acquired sufficient information to permit him to do so", the Plaintiff here had sufficient information to allege a cause of action against the John Doe and Jane Doe Defendants; he merely lacked their names. Unlike the plaintiff in Schultz, who did not substitute the newly named parties for a prior named "Doe", here plaintiff clearly substituted Relator. Once again, unlike the plaintiffs in Schultz, who, in his amended petition, retained the Doe defendants and added additional defendants, in the case at bar, the Plaintiff expressly eliminated the Doe defendants and expressly replaced them with, in this case, Relator, Dr. Holzum.

This action is analogous to Maddux v. Gardner, 192 S.W.2d 14 (Mo. App. 1945), where the nature of the event, the allegation of negligence and the job descriptions of the fictitious defendants was pleaded. When the plaintiff in Maddux later amended to substitute the names of the individuals filling those job descriptions, the Court held that such amendment related back to the original filing.

In this case, the Plaintiff identified the Jane and John Doe Defendants as "providers of medical services, who at all times relevant to this action was engaged in providing medical services to the consuming public, including decedent for a fee."

(Appx., p. A2). Plaintiff further identified the specific time period "October 1 through October 2, 2005" (Appx., p. A2) when the specifically-named decedent was treated by the Jane and John Doe Defendants and further stated that such Defendants "were negligent in their treatment of the decedent and by and through such negligence caused the death of the decedent on or about October 2, 2005." (Appx., p. A2). Consequently, as in Maddux v. Gardner, the time, place, allegations of negligence, and the name of the patient were disclosed in Plaintiff's original Petition. The hospital wherein she was treated was known and properly served as a Defendant in this action. There has been no allegation of this action that the pleading as alleged against Barnes-Jewish St. Peters Hospital was insufficient as a matter of law to put such hospital on notice of the claims made against it, and therefore, the only thing lacking in Plaintiff's original Petition was the specific name of Relator.

The Courts in Missouri have regularly recognized that "Rule 55.33(c) is a remedy for a mistake in *identity*, and the remedy is a *change* in a party." Windscheffel v. Benoit, 646 S.W.2d 354, 357 (Mo. banc 1983) (emphasis in original). Furthermore, "[s]tatutes of limitation were never intended to be used as swords. Rather, they are shields, primarily designed to assure fairness to defendants by prohibiting stale claims which tend to undermine the truth finding process." Johnson v. Delmar Gardens West, (E.D. 95317) (E. Dist. of Mo., March 8, 2011). As stated in the Johnson v. Delmar Gardens West case:

> In this case, there is no question that Plaintiff is seeking to bring a single action against the

> [health care providers] that committed the acts that allegedly led to Decedent's death. . . .This case involves a mistake in the identification of a defendant and Plaintiff's actions exhibit [his] intent to rectify the misidentification. Because the proper remedy for a mistake in the identity of a defendant is a substitution of the correct party for the incorrect party, the [Relator] should be substituted for [John Doe] as defendant in Plaintiff's action so long as Plaintiff satisfies the notice provisions of Rule 55.33.
>
> Johnson v. Delmar Gardens West, supra. at 9.

Since Eric Katz filed the original Petition within the statute of limitations, Jane Doe and John Doe were timely named Defendants in this medical negligence action. Once such parties were timely joined to this action, the duration of time between then and when their correct names were discovered is not dispositive of whether or not the substitution of the correct names relates back to the original filing. Often it is difficult and time consuming to identify specific individuals that are involved in the medical care and treatment of patients. Often, even when the medical record is obtained, the health care providers are identified only by initials or illegible handwriting. Even after the names are obtained through discovery, it then becomes necessary to discover the identity

of the employers of such care providers.

This is the purpose and intent of bringing actions against defendants by fictitious names so that when the true identities are discovered, substitution can be made.

To grant Relator's relief would work irreparable prejudice against the Plaintiff. Plaintiff would have been incapable of pleading additional facts with regard to Relator even had his name been known on the date of the original filing. If the facts pleaded were sufficient to allege a cause of action against the specifically named Defendants, then they were sufficient to allege a cause of action against this Defendant.

POINT II

II. Relator is not entitled to a permanent writ prohibiting Respondent from allowing the case against Relator to go forward, in that Respondent did not exceed her authority as a matter of law in that:

(A) The issue of whether or not Relator had sufficient notice to satisfy the notice requirements of Mo.R.Civ.P. 55.33(c) is a question of fact, and no evidence was before the Court on Relator's Motion to Dismiss regarding whether or not the notice requirements of Rule 55.33(c) had been met.

If Plaintiff's substitution of Relator for "John Doe" in his Second Amended Petition constitutes a change of party under Rule 55.33(c), then Respondent did not exceed her authority in denying Relator's Motion to Dismiss, in that, whether or not Plaintiff's Amended Petition changing a party relates back to the date of the original

filing depends on whether or not:

> [the] party to be brought in: 1) has received adequate notice so as the parties will not be prejudiced in maintaining the parties' defense on the merits; and 2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
>
> Windscheffel v. Benoit, supra.
>
> Mallek v. First Banc Ins., 220 S.W.3d 324 (Mo. App. E.D. 2007).

It is necessary to reach a factual conclusion on the issue of notice before a determination can be made as to whether or not all of the elements of Rule 55.33(c) have been satisfied:

> Having concluded that [plaintiff] sued the wrong parties, we now must determine whether [parties to be added] received adequate notice so as not to be prejudiced in maintaining their defense and knew or should have known that, but for [plaintiff's] mistake, the action would have been brought against them. Mallek v. First Banc Ins., supra. at 332.

Relator, in his Motion to Dismiss, provided no evidence as to whether or not he received adequate notice. Notice to Relator or the lack thereof has never been briefed by

the parties nor has any evidence been introduced by any party heretofore on the issue of Relator's notice. Respondent would respectfully suggest that there is no evidence before this Court, and none before Respondent, which would establish as a matter of law that there was a failure of adequate notice under Rule 55.33(c).

In that Relator seeks a Writ of Prohibition regarding Respondent's denial of a Motion to Dismiss on the pleadings, in the absence of any evidence outside the pleadings being presented to the Court, Respondent would respectfully suggest that it was within her jurisdiction and discretion to deny such Motion to Dismiss at that time, and that consequently, this Court lacks jurisdiction over Respondent's ruling.

Consequently, Respondent would respectfully suggest that this Court's Preliminary Writ in Prohibition be quashed, and this cause be allowed to proceed.

CONCLUSION

Consequently, this Court should quash its preliminary writ of prohibition and permit the underlying action to proceed, in that Respondent did not exceed her authority in denying Relator's Motion to Dismiss, in that Plaintiff's Second Amended Petition was merely a correction of misnomer, substituting Relator for the previously pled Doe Defendant. In the alternative, to the extent that such Second Amended Petition constitutes a change of parties, such change relates back to the date of the original filing in that Plaintiff's Petition pled sufficient facts and allegations to satisfy the requirements of Missouri Rule of Civil Procedure 55.33(c). In the second alternative, Respondent did not lack jurisdiction to determine that, on a Motion to Dismiss on the pleadings, there was insufficient factual basis on which to sustain Relator's Motion to Dismiss.

WHEREFORE, all things considered, Respondent respectfully prays that this Court quash its preliminary writ of prohibition and permit the underlying action to proceed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed, with postage prepaid, U.S. Mail this 12th day of April, 2011 to: The Honorable Nancy L. Schneider, Judge of the Circuit Court of St. Charles County, Division No. 2, 300 North Second Street, St. Charles, Missouri 63301; Terese A. Drew, Kara L. Kezios, Hinshaw & Culbertson LLP, Gateway One, 701 Market Street, Suite 1300, St. Louis, Missouri 63101-1843, T: 314-241-2600, F: 314-241-7428, tdrew@hinshawlaw.com, kkezios@hinshawlaw.com, Attorneys for Defendants BC Missouri Emergency Physicians, LLP, Scott L. Landry, M.D. and David Poggemeier, M.D.; Peter J. Krane, Jennifer Collins Hansen, Williams Venker & Sanders LLC, Bank of America Tower, 100 North Broadway, 21st Floor, St. Louis, Missouri 63102, T: 314-345-5000, F: 314-345-5055, pkrane@wvslaw.com, jhansen@wvslaw.com, Attorneys for Defendant Barnes-Jewish St. Peters Hospital, Inc. d/b/a Barnes-Jewish St. Peters Hospital; and Michael J. Smith, Tricia J. Mueller, Lashly & Baer, P.C., 714 Locust Street, St. Louis, Missouri 63101, T: 314-621-2939, F: 314-621-6844, msmith@lashlybaer.com, tmueller@lashlybaer.com, Attorneys for Defendant Neal W. Holzum, M.D.

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Mark T. McCloskey #36144

CERTIFICATE OF COMPLIANCE

As required by the Missouri Supreme Court Rule 84.06, I hereby certify that this Brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and states the number of words in the brief, as follows:

This brief is prepared using WordPerfect, is proportionally spaced, and contains 4,864 words. Also, pursuant to Missouri Supreme Court Rule 84.06, accompanying this Brief is a CD containing full text of this Brief. Undersigned counsel further states that a copy of the diskette has been provided to opposing counsel, that the diskette has been scanned for viruses and that the diskette is virus-free.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

_____

Mark T. McCloskey #36144