**No. SC97476**

In The

# Supreme Court of Missouri

State of Missouri ex. rel.
State of Kansas, Department
for Children and Families,
And Gina Meier-Hummel,

*Relators,*

v.

The Honorable
Charles H. McKenzie,
Judge of the Circuit Court
of Jackson County,
Missouri,

*Respondent.*

**On Petition For Writ of Prohibition**
**or, Alternatively, Writ of Mandamus**

## RESPONDENT'S BRIEF IN OPPOSITION

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## Jurisdictional Statement

On September 6, 2018, Respondent denied Relators' *Motion to Dismiss* filed December 13, 2017. Rel. Ex. H at 205. On October 8, 2018, Relators filed a *Writ of Prohibition or, Alternatively, Writ of Mandamus*, in the Missouri Court of Appeals, Western District, which was denied by Order of the Presiding Judge, Edward R. Ardini, Jr. Rel. Ex. H at 209. Mark Pfeiffer, Judge of the Missouri Court of Appeals, concurred with the order. Rel. Ex. H at 209.

This Court has jurisdiction to hear and decide Relators' *Petition for Writ of Mandamus or, Alternatively, Writ of Prohibition*, pursuant to Article V, § 4 of the Missouri Constitution.

## Statement of Facts[1]

On October 11, 2017, an *Amended Petition* was filed by the estate and heirs of a deceased child, A.J., alleging a survival and wrongful-death action against Kansas Department for Children and Families (DCF), ten Missouri social workers individually named, two mental health facilities and two of their employees. Rel. Ex. B, 57-114[2]. Plaintiffs also sued Jane Does and John Does. Rel. Ex. B at 57.

The *Amended Petition* replaced the original petition filed August 27, 2017. The original petition was amended to simply include language directed toward the Missouri social worker defendants (who are represented by the Missouri attorney general's office), stating the Missouri social workers were being sued in their individual capacity, not their official capacity.[3]

Assuming as true all facts alleged by Plaintiffs and the reasonable inferences which can be deduced from those facts,[4] the *First Amended Petition* contained the following facts and reasonable inferences:

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[1]In their statement of facts, Relators downplay some of the facts in Plaintiffs' *First Amended Petition*, which is contrary to the rule in this pre-discovery stage of the litigation. Relators are entitled to have all facts alleged in their pleadings considered as true, and all reasonable inferences that may be drawn from those facts. Accordingly, Respondent provides a statement of facts drawn more in Respondent's favor.

[2]Zeros preceding Relators' page numbers are omitted in Respondent's statement of facts.

[3]Plaintiffs' unopposed motion to amend filed November 15, 2017, may be accessed through Missouri's case.net.

[4]Relators do not dispute the filter from which to view Plaintiffs' allegations of fact. Rel. Pet. at 4, ¶2.

A.J. was a child born in 2008. Rel. Ex. B at 61, ¶2. A.J. was only 2 ½ years old when he became involved with child protective services in Kansas. Rel. Ex. B at 66, ¶¶43-44.

In August 2011, a hotline call was made to Relators reporting A.J.'s mother left A.J. unsupervised. Rel. Ex. B at 10, ¶44. Relators removed A.J. from his natural mother and placed A.J. with his father who lived in Kansas at the time. Rel. Ex. B at 66, ¶¶43-44. A.J.'s father retained custody until A.J.'s untimely death in 2015. Rel. Ex. B at 66, ¶¶43-44.

Shortly after Relators gave custody of A.J. to his father, in December 2011, Relators received two more hotline calls reporting serious physical abuse against A.J. and his siblings, who were still residing in Kansas with A.J.'s father and stepmother. Rel. Ex. B at 66-67, ¶¶50-51. The reports described black eyes, choking, extensive head bruising, and internal injuries. Rel. Ex. B at 66, ¶51. One child reported thinking A.J. was dead because of the choking sounds heard coming from A.J. through the bathroom door. Rel. Ex. B at 67, ¶56. Relators determined the children's injuries were inconsistent with the explanation by A.J.'s stepmother that the injuries were the result of a fall down the stairs. Rel. Ex. B at 66, ¶51.

Relators could have removed A.J. from his father, like they did in 2011 with A.J.'s mother. Rel. Ex. B at 66, ¶¶44-47. After all, Relators removed A.J. from his mother for a mere lack of supervision, compared to reports of severe child abuse occurring in A.J.'s father's home.

Or, Relators could also have made a recommendation to the county or district attorney to file a petition removing A.J. from his father's custody, which is, as Relators point out in their brief, part of Relators statutory duties. Rel. Br. at 46, ¶1.

Instead, Relators required A.J.'s father to sign a safety plan promising not to use physical punishment on A.J. or allow A.J.'s stepmother in the presence of A.J., as a condition of keeping custody of A.J. Rel. Ex. B at 67, ¶57.

The written safety plan signed by A.J.'s father was never revoked or modified.

As the years passed, an extensive history with the child protective services developed in both states concerning the safety of A.J. and other children who were in A.J.'s father's and stepmother's custody. Between December 2011, and 2015, when A.J. died, Relators and the state of Missouri received more than ten (10) hotline calls reporting severe abuse and neglect of A.J. by his father and stepmother. Rel. Ex. B at 66-, ¶¶44-153. Relators received six (6) out of the ten (10) detailed calls. Rel. Ex. B at 66, ¶¶44, 50, 60; p. 68, ¶62; p. 97, ¶95; p. 81-82, ¶¶136-138.

As early as 2013, Relators began sharing its electronic information with Missouri by phone, facsimile, and likely cellular phone text messages. When the hotline reports were made, Relators and Missouri social workers generally made contact during each of these investigations and exchanged extensive confidential history about A.J. and his family. Rel. Ex. B at 70, ¶71; p. 71 ¶73h; p.71, ¶75; p. 75, ¶ 95; p. 75, ¶96;75, ¶97; p. 77, ¶ 108.

The communication did not happen like the old-fashioned way of mailing a copy of a paper file. Rather, the exchanges of electronic information and paper was made through

phone calls, facsimile, and likely cell phone texting and emails. Rel. Ex. B at 70, ¶71; p. 71 ¶73h; p.71, ¶75; p. 75, ¶ 95; p. 75, ¶96;75, ¶97; p. 77, ¶ 108. The information shared between each state's social workers concerned the nature of the hotline calls, the history of the family with child protective services, previous removal of children from the family due to abuse, the physical location of the children, and other facts important to an understanding of the family and their history with child protective services. Rel. Ex. B at 70, ¶71; p. 71 ¶73h; p.71, ¶75; p. 75, ¶ 95; p. 75, ¶96;75, ¶97; p. 77, ¶ 108.

The information shared between the states was extensive. One Missouri social worker commented Relators' records showed "quite a list of prior history with a lack of supervision concerns." Rel. Ex. B at 92-93, ¶203 ii & iii.

Each state agency maintains computer servers that electronically store history of the a family's involvement with social services. In each state, when a hotline call comes in, the social worker assigned to the case is required to review the information in the electronic file. Rel. Ex. 5 at 30-35. The electronically stored information in this case would have included a detailed history of A.J.'s involvement with Relators, the safety plan signed by A.J.'s father, the hotline calls and investigations, the reports of A.J's life-threatening abuse inflicted by his father (choking and bruising on head), among other things.

Sharing of the electronically stored information between the states was not confined to the physical borders of either state. A.J. and his family lived in counties and cities that bordered each other, and in bordering states. Social workers from each state lived, worked, ate in restaurants, met with people, and conducted numerous other activities in the same

cities and counties that border the Missouri and Kansas state line where A.J. and his family lived. Considering the short distance between these areas in the bordering states, the nature of electronically stored information, the modern use of highways and roads crossing state borders, the metropolitan nature of the Kansas City area, the use of cell phone texting in our modern society, and the emergency nature of hotline calls, Kansas social workers could have been physically located in Missouri when they exchanged information with Missouri about A.J.'s case; likewise, the Missouri social workers could have been physically located in Kansas when they exchanged information with Kansas social workers.[5]

When each hotline call came in, child protective services in both states took certain steps to attempt to control the threat to A.J.'s safety. Generally, the steps included reviewing the history of agency involvement with the family, preparing a written safety assessment identifying the threat of danger to A.J., determining whether the threat of danger to A.J. could be controlled, and what intervention was necessary to control the threat of danger including the implementation of a safety plan. Rel. Ex. B at 90-91, ¶189-195.

The same procedures are followed by Relators even though the report is from out-of-state. Rel. Ex. B at 90, ¶191.

Each time A.J.'s father fled to Kansas to evade the Missouri child protective services, Missouri alerted Relators that A.J. was coming their way. In each instance,

[5]It is not reasonable to infer these employees *never* stepped foot in the other state while they were living, working, and traveling around cities and counties that border the Missouri and Kansas state line.

Relators could have initiated the process for A.J. to be removed from his father, like they did in 2011 with A.J.'s mother, but they did not, even though A.J.'s father was in clear violation of the safety plan, and A.J. was in danger.

Child protective services efforts were often frustrated by A.J.'s parents who refused to cooperate. In A.J.'s case, if a hotline call was made to Kansas, A.J.'s family would move from Kansas to Missouri, prompting Kansas to forward confidential information to Missouri about A.J.'s abuse. Rel. Ex. B at 69, ¶67; p. 74-75, ¶¶92, 93; p. 82, ¶143.

Likewise, when A.J.'s family was under investigation in Missouri, A.J.'s father moved back to Kansas with A.J., prompting hotline calls back and forth between Missouri and Kansas. Rel. Ex. B at 69, ¶67; 70, ¶71; p. 71 ¶73h; p.71, ¶75; p. 74-75, ¶¶92; p. 75, ¶ 95; p. 75, ¶96;75, ¶97; p. 77, ¶ 108; p. 82, ¶143.

For example, in early 2012, A.J.'s father admitted to Relators that A.J.'s stepmother was living in his home in violation of the safety plan (Rel Ex. at 68, ¶60); by December 2012, a hotline report was made to Relators that the children in the home were bleeding from abuse, A.J.'s father spanked the children until they bled, pigs were living in the home, and a restraining order was filed against A.J.'s father by A.J.'s stepmother, all of which further violated Relators' safety plan. Rel. Ex. B at 68-69, ¶¶62-63.

A.J. was also exhibiting signs that he was a victim of child abuse: he was wetting the bed, hoarding food, and lighting fires. Rel. Ex. B at 69, ¶¶66-67.

However, during Relators' investigation, A.J.'s father moved to Missouri with A.J., prompting a hotline call to Missouri in 2013. Rel. Ex. B at 69, ¶¶68-69.

The 2013 hotline call to Missouri reported A.J. was forced to stand in a corner for over an hour, A.J. was locked in his bedroom, there were dead animals in the home, and A.J. had bruises on his right cheek and forehead. Rel. Ex. B at 69-71, ¶¶69-74.

Later, in July 2013, a forensic interview of A.J. in Missouri determined A.J.'s father kicked A.J. in the head until a "bone" came out, punched A.J. in the stomach, pulled his ear until it hurt, threw him on the floor, and locked A.J. in his bedroom alone. Rel. Ex. B at 72, ¶82.

However, in August 2013, during Missouri's investigation, A.J.'s father once again fled across the border to Kansas. Rel. Ex. B at 74-75, ¶¶92-93. Relators were alerted of the move to Kansas after A.J.'s family refused to cooperate with Missouri social workers' plan for intensive in-home services. Rel. Ex. B at 74-75, ¶¶92-93. Relators received this information through a hotline call from Missouri that A.J. was in danger and could be found in Kansas' jurisdiction. Rel. Ex. B at 75, ¶95.

When Missouri alerted Relators about A.J.'s whereabouts, Relators exchanged information with Missouri and became involved with the family again. Rel. Ex. B at 75, ¶¶95-97.

During the 2013 hotline call, Relators initiated contact with A.J.'s father, who purportedly advised Relators that he lived in Missouri with A.J. Rel. Ex. B at 75, ¶¶95-97.

However, at some point, a Missouri social worker called a Kansas caseworker, Kaitlyn White, and explained the circumstances of the latest hotline call. She told Relators A.J. was in danger and located in Kansas. Rel. Ex. B at 77, ¶108. After this call in 2014,

however, A.J.'s family purportedly relocated back to Missouri, and a hotline call was made by Relators to Missouri, again reporting A.J. was in danger. Rel. Ex. B at 77, ¶¶104.

In 2014, in response to Relators' call, Missouri social workers met with A.J. in Missouri, and found A.J. had marks on his chin and forehead, including a two-inch vertical line on his wrists where A.J. said his father taped his arms and legs for punishment. Rel. Ex. B at 77-78, ¶¶109-110. A.J. also reported that he was forced to stand in the corner and do jumping jacks and pushups all day. Rel. Ex. B at 77-78, ¶¶109-110.

Additionally, during the 2014 investigation, A.J.'s father told a Missouri social worker that he wanted to abandon A.J. Rel. Ex. B at 77, ¶107. A.J.'s father repeated this statement later to A.J.'s mental health providers at Spofford. Rel. Ex. B at 78, ¶119.

At that point, in March 2014, A.J. was placed in Missouri facility, Spofford, where he received treatment for about six months under the Missouri social services "voluntary placement agreement" program. Rel. Ex. B at 78-79, ¶¶111-118.

In early September 2014, A.J. was released from Spofford to A.J.'s father, who told Spofford that he would be living in Kansas and he intended to neglect A.J. Rel. Ex. B at 81, ¶136. This prompted a hotline report to Relators about the danger to A.J. and information was again exchanged between Relators and Missouri about the most recent abuse and neglect of A.J. Rel. Ex. B at 81-82, ¶¶136-137. Once more, Relators knew A.J. was coming their way, A.J.'s father was in violation of the safety plan, and A.J. was in critical danger.

Relators continued to receive hotline calls in 2014 and 2015, after A.J.'s stepmother's Facebook posts contained graphic pictures depicting A.J. beaten and tortured. Rel. Ex. B at 84, ¶153. It was obvious from these pictures and the hotline reports that were generated from these social media posts that A.J.'s father continued to be in clear violation of Relators' safety plan.[6]

Throughout these hotline calls and investigations, A.J. remained in the custody of his father (Rel. Ex. B at 66, ¶49), despite having violated the condition for keeping custody in Relators' safety plan.

Nonetheless, despite the ongoing hotline calls and involvement by Relators with A.J.'s family over concerns of child abuse, in 2015, Relators opened a child support case on behalf of A.J.'s father and attempted to collect child support from A.J.'s mother. Rel. Ex. B at 83, ¶¶150-151. This provided Relators with A.J.'s whereabouts, from the address A.J.'s father provided to Relators' child support division, which is all part of the same state agency. Rel. Ex. B at 83, ¶150, p. 90, ¶195.

Sometime in 2015, A.J. died a horrific death after being beaten, tortured and starved to death by his father and stepmother, who were convicted of his murder. Rel. Ex. B at 84,

[6]Discovery in this case has stalled. Case-net reflects Plaintiffs' *Amended Motion to Compel* discovery from DCF (initially filed March 26, 2018) was finally granted after a November 30, 2018, hearing, and a proposed order was filed on December 4, 2018, memorializing Respondent's order. However, on that same day, an Order was entered by this Court prohibiting Respondent from doing anything about discovery on this case. Until DCF produces discovery responses, Plaintiffs are forced to rely on heavily redacted records obtained from DCF through an open records request in support of the allegations contained in the pleadings.

¶157. In October 2015, A.J.'s remains were found in Kansas City, Kansas. Rel. Ex. B at 84, ¶156.

It is unknown exactly where A.J. took his last breath, however, at the time of his death, A.J.'s addresses were listed as Kansas City, Kansas, St. Joseph, Missouri, and Plattsburg, Missouri. Rel. Ex. B at 61, ¶4.000061 at 5, ¶3.

On August 27, 2017, Plaintiffs filed their petition against Relators (and other defendants including the Missouri social workers) in the Circuit Court of Jackson County, Missouri. Rel. Ex. B. On December 13, 2017, Relators filed their motion to dismiss in the present case, and a 34-page memorandum in support. Rel. Ex. C & D.

On August 30, 2017, Plaintiffs filed their petition against Relators and the same defendants, in the District Court of Wyandotte County. On December 18, 2017, in the Kansas case, Relators also filed a 102-page motion (including 78 pages of attachments) seeking to be dismissed as a party. To date, this motion has not yet been ruled on.

(The Missouri social workers also filed motions to dismiss in the Missouri and Kansas cases, seeking to be dismissed from both cases. To date, the motion filed in the Kansas case filed by the Missouri social workers has not yet been ruled on.)

In the Missouri case, on June 6, 2018, Relators argued their motion to dismiss in oral argument before the trial court. Rel. Ex. G at 205, ¶1. Judge McKenzie contemplated legal issues for almost nine months from December 13, 2017 until September 6, 2018, when he issued his order granting in part, and denying in part Relators' motion. Rel. Ex. G at 205.

The part of the Respondent's order denying Relators' motion was appealed in a writ by Relators to the Missouri Court of Appeals, Western District, which was denied October 9, 2018. Rel. Ex. H at 209.

Relators now bring the same legal arguments before this Court as in their motion to dismiss, seeking to dismiss Plaintiffs' claims (against Relators) in their *Petition for Writ of Prohibition, or in the alternative, Writ of Mandamus*, filed in the Missouri Supreme Court on October 11, 2018, against Respondent, the Honorable Judge Charles McKenzie, Judge of the 16th Judicial Circuit of Jackson County, Missouri.

Relators, the state of Kansas, Department for Children and Families, desire Plaintiffs' claim against them to be dismissed, whether by writ of mandamus or writ of prohibition.

Respondent moves this Court to deny Relators' petition in its entirety.

## ARGUMENT

This case involves the authority of a Missouri court to entertain a state-law claim brought by the heirs of a deceased Missouri child who died of horrific abuse, against a sister state based on tortious acts committed by social workers in Kansas and Missouri, occurring inside and outside the sister state. For the reasons stated in this brief, Relators have not met their burden and are not entitled to an order prohibiting Respondent from exercising jurisdiction over Kansas.

### Standard of Review

A writ of prohibition is an "extraordinary remedy" and not a "writ of right." State *ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. Banc 1999). The writ of prohibition is to be used "with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991). "In Missouri, prohibition will not lie to control administrative or ministerial functions, discretionary actions, or legislative powers." *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d at 169.

Because prohibition is a writ "divesting the body against whom it is directed to cease further activities," the use of prohibition has been limited to three unusual circumstances. *State ex rel. Riverside Joint Venture, et al. v. Mo. Gaming Comm'n*, 969 S.W.2d 218, 221(Mo. banc 1998). The first type of case where prohibition is appropriate is where the court exceeds its subject-matter jurisdiction or its personal jurisdiction. *Id.* Second, prohibition is proper where the court lacked the authority to act as the court did. *Id.* The

third case pertains to 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). The third type of case may include situations where a trial court erroneously decides an important question of law and the decision would otherwise escape review on appeal, causing the party to suffer expense and hardship as a consequence of the error. *State ex rel. Noranda Aluminum v. Rains*, 706 S.W.2d 861, 862–3 (Mo. banc 1986); *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994).

The burden is on Relators to show that the case is within one of these rare situations and that the Respondent exceeded its jurisdiction. *State ex rel. Mississippi Lime Co. v. Mo. Air Conservation Comm'n*, 159 S.W.3d 376, 383 (Mo. App. W.D. 2004). Relators must also show that no adequate remedy is available through appeal. *Id.*

Review of a trial court's ruling on a motion to dismiss is a de novo review. *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010). A motion to dismiss under Rule 55.27(a)(6) is appropriate only when there are no facts pled that meet a recognizable cause of action under Missouri law. *Id.*(citing *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993)). The review of the pleadings is simply an academic exercise to test the sufficiency of the pleadings. *Id.*(citing *Reynolds v. Diamond Food & Poultry*, 79 S.W.3d 907, 909 (Mo. banc 2002)). The averments of the plaintiff will be accepted as true and inferences from the pleadings will be liberally granted and must be taken in favor of the plaintiff. *Id*. The issue is not whether the plaintiff will ultimately

prevail, but whether the plaintiff is entitled to present evidence in support of his claim. *Bell v. Twombly*, 550 U.S. 544, 556 (2007). A viable complaint must include "enough facts to state a claim for relief that it is plausible on its face." *Id.* A motion to dismiss is not an opportunity to weigh the credibility or persuasiveness of the facts alleged. *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010)(citing *Nazeri v. Missouri Valley Colleg*e, 860 S.W.2d 303, 306 (Mo. banc 1993)).

**RESPONSE TO POINT I: Relators failed to establish a clear right to an order dismissing Plaintiffs' claims (against Relators) as a matter of comity because Kansas does not confer immunity on itself in tort actions thus, there is no Kansas law to bar this suit, but more importantly, assuming arguendo, if Kansas insulated itself from tort liability (which it has not) Missouri should exercise jurisdiction over a sister state in favor of Missouri's strong interest in prioritizing the welfare of children and preventing and deterring child abuse**

Under Point 1, Relators immediately exaggerate Respondent's denial of their motion to dismiss under the doctrine of comity as "a clear abuse of discretion." Rel. Br. at 13, ¶2. A matter of comity, however, is about as clear as mud.

In that vein, Relators are patently incorrect when they assert a dismissal of Plaintiffs' claims (against Relators) is necessary as a matter of comity. Rel. Br. at 13, ¶16. Deference to Kansas law as a matter of comity does not require a dismissal because Kansas law waives sovereign immunity in tort actions. Further, even if Kansas maintained sovereign immunity laws in tort actions, which they don't, a blanket dismissal of Plaintiffs' claims against Relators would violate Missouri's public policy of prioritizing and protecting the safety and wellbeing of children, providing compensation to bereaved plaintiffs for loss, and ensuring tortfeasors pay the consequences for their actions in cases involving child abuse. Thus, Missouri public policy in a case like this should always be

favored over a sister state's sovereign immunity laws if they exist—which they don't in this case.

Relators assert Missouri is free to close (or not close) its courts to suits against a sister state as a matter of comity. Rel. Br. at 13, ¶1. This is a correct statement of the law. In other words, as a matter of comity, deference to the law of a sister state is in the discretion of this Court, compared to the Full Faith and Credit Clause of the United States Constitution, which imposes an obligation to honor the sister state's law. *State ex rel. Dykhouse v. Edwards*, 908 S.W.2d 686, 689-90 (Mo.1995).

However, as one federal court noted in 2016, "There is very little Missouri law on the comity issue." *Babbs v. Block*, 167 F. Supp.3d 1025, 1027 (W.D. Mo. 2016).

The starting point is the Missouri legislative's unambiguous declaration of comity for persons whose injuries occurred in this state over nonresidents is contained in § 507.020 RSMo, which provides:

> Whenever a claim exists under the law of another state, action thereon may be brought in this state by
> (1) The person or persons entitled to the proceeds of such claim if he or they are authorized to bring such action by the laws of said other state;
> (2) The executor, administrator, guardian, guardian ad litem or other person empowered by the laws of said other state to sue in a representative capacity if the person or persons entitled to the proceeds of such claim are not authorized to sue in such cases under the law of said other state.
> 2. In the cases mentioned in subdivision (2), the proceeds of the action, resulting either from judgment or settlement, shall be paid to the person bringing such suit and such person is authorized to satisfy the judgment and execute release. Such person to whom the proceeds are paid shall have authority to distribute and pay same to the person or persons entitled thereto, according to their respective interests therein, under the laws of said other state.

§ 507.020 RSMO.

Thus, under § 507.020, any part of A.J.'s claim for injuries suffered in this state that may exist under Kansas law, may be brought in a Missouri court. Notably, Relators concede under Point I, the claim against Kansas "calls for application of Kansas law." Rel. Br. at 15, ¶2.

The sparse Missouri decisions on the issue of comity demonstrate Missouri will not decline jurisdiction over a sister state, *unless* the law of the sister state expressly limits the action in the forum state. Although these opinions do not discuss § 507.020, the result reached was not inconsistent with this statute.

This doctrine has been aptly referred to by Texas courts as "mandatory venue" statutes which are treated as a conditional waiver of sovereign immunity to a particular venue where the lawsuit is brought. See *Hawsey v. Louisiana Dept. of Social Services*, 934 S.W.2d 723, 727(Tex. App. Houston [1 Dist.],1996); and see *K.D.F. v. Rex*, 878 S.W.2d 589, 594 (Tex..1994).

In this case, the Kansas Tort Claims Act (KTCA) does not expressly limit claims brought against Kansas in another state court. K.S.A. 75-6103. The exceptions listed in the KTCA to governmental liability are based on the factual circumstances of each case, not on the location of the lawsuit. K.S.A. 75-6104.

Relators do not claim (at this time) the KTCA enumerated exceptions bar this lawsuit.

The other limitation under Kansas law only applies to claims brought against the Kansas Public Retirement System (KPERS), which must only be brought in Shawnee County, Kansas. K.S.A. 74-4904. For obvious reasons, this does not apply to the Kansas Department for Children and Families.

Relators, however, confusingly assert, "Missouri courts will enforce other states sovereign immunity statutes." Rel. Br. at 14, ¶3. In Kansas, liability is the rule and immunity is the exception for negligent or wrongful acts or omissions of any of its employees acting within the scope of their employment. *Soto v. City of Bonner Springs*, 238 P.3d 278, 282–83, 291 Kan. 73, 78 (Kan.2010). There is nothing for Missouri to enforce concerning Kansas' "sovereign immunity statutes."

Yet, the scant Missouri cases dealing with comity with a sister state as a defendant are of little help. None of the sister states in those cases involved a waiver of sovereign immunity for tort claims, and, interestingly, none of the opinions mention § 507.020.

Relators are mistaken when they contend the *Ramsden* case supports a dismissal of Plaintiffs claims against Relators. *Ramsden* was a contract dispute against the sister state of Illinois, not Kansas. Illinois law requires contract claims against the state of Illinois to be brought only in the Illinois Claim Courts—another "mandatory venue" statute; Kansas does not have "mandatory venue" laws for tort actions. Thus, the reasoning or conclusions drawn in *Ramsden v. State*, 695 S.W.2d 45 (Mo. banc 1985) and a similar case, *Fruin-Colnon Corp. v. Missouri Highway and Transp. Com'n*, 736 S.W.2d 41, 44 (Mo.1987) do not apply to this case.

> Claims against the State of Illinois arising from contracts with the state must be litigated in the Illinois Court of Claims. Ill.Rev.Stat. ch. 37, par. 439.8 (1981). Establishment of the claims court constitutes a limited waiver of Illinois' sovereign immunity. *See* Ill.Rev.Stat. ch. 127, par. 801 (1981); Art. XIII, § 4, Ill. Const. (1970). This waiver in no way extends to litigation before the courts of this state. Furthermore, the contract appellants entered does not suggest such acquiescence. Comity constrains us to conclude, therefore, that IDOT cannot be joined to this action. *See Ramsden v. State*, 69 S.W.2d 45 (Mo.banc1985).

*Fruin-Colnon Corp. v. Missouri Highway and Transp. Com'n*, 736 S.W.2d 41, 44 (Mo.1987). This is not a contract claim, and Kansas law did not establish a "tort" court for the exclusive litigation of these types of claims. Thus, *Ramsden* is not on point.

Similarly, in *Townsend*, the Missouri Supreme Court looked to the law of the sister state on whether plaintiffs' tort claim was barred, rather than simply dismissing the claim outright as Relators seem to suggest. In *Townsend*, a Missouri state trooper and his wife filed a tort action against a chemical waste company and the District of Columbia (DC), after the trooper was poisoned from chemicals spilled by a van operated by the chemical company on behalf of DC. *Townsend v. Eastern Chemical Waste Systems*, 234 S.W.3d 452 (Mo. App. W.D.2007)(*Application for Transfer denied*). The court in *Townsend* deferred to DC's "sovereign immunity" notice requirement as a matter of comity:

> However, while Missouri is not required to close its courts to suits against other states, this court has previously held that in the interest of comity, Missouri courts will enforce other states' sovereign immunity statutes. *Ramsden*, 695 S.W.2d at 459; see also *Fruin–Colnon Corp. v. Mo. Highway & Transp. Comm'n*, 736 S.W.2d 41, 44 n. 7 (Mo. banc 1987). Hence, to succeed on their claims against DC, the respondents had to have given the notice required by § 12–309.

*Townsend v. Eastern Chemical Waste Systems*, 234 S.W.3d 452, 469–70 (Mo. App. W.D.2007).

In *Townsend*, Plaintiffs were barred from recovery because DC law required prompt notice of the claim within six months, which Plaintiffs failed to accomplish in that case. Relators do not argue a lack of notice here—and there is no such requirement.

Again, the pattern of Missouri caselaw demonstrates deference to the law of the sister state as a matter of comity—and a dismissal of the claim only where the law of the sister state would also result in a dismissal. This meets the intent of § 507.020, which allows a claim to be brought in a Missouri court, where the claim exists under the sister state's law.

Kansas has been sued in other states, although rarely. In *K.D.F. v. Rex*, a tort action was brought against the KPERS alleging a wrongful refusal to release a security interest. *K.D.F. v. Rex*, 878 S.W.2d 589, 595 (Tex.1994). Although the KTCA was not found to prohibit the tort action, the Texas Supreme Court declined jurisdiction out of deference to Kansas' express "mandatory venue" law requiring all lawsuits *against* KPRS be brought in Shawnee County, Kansas. *Id.*

These cases demonstrate Missouri, in its discretion, may extend comity to the law of a cooperative jurisdiction (so long as that law does not violate Missouri public policy). Unless the law of the sister state prohibits the lawsuit, jurisdiction in Missouri should not be declined.

Here, the KTCA does not bar suit against Relators.[7] Nor does Kansas law require a tort claim *against DCF* be brought in Kansas court, or a Kansas county, as demonstrated in the *K.D.F. v. Rex* case. Thus, as a matter of comity, deference to Kansas law does not require a dismissal of Plaintiffs' claims against Relators.

Yet, as previously noted, the comity doctrine does not give us a bright-line test. Section 507.020 allows a claim to be brought in a Missouri court, where the claim exists under the law of the sister state. Where the law of the sister state bars the lawsuit, Missouri declines jurisdiction over a sister state as reflected in the opinions in *Townsend*, *Ramsden*, and *Fruien-Colnon Corp*. In each of these cases, the Missouri courts found a reason to decline jurisdiction under the law of the sister state as a matter of comity. None of those reasons are present in this case, and none of those cases implicated Missouri public policy.

This case is vastly different from those cases. The *Amended Petition* details the horrific facts of severe child abuse suffered by A.J—possibly one of the worst cases of child abuse in this state's history. Plaintiffs assert the only hope of survival for A.J. was held by the social workers in adjoining counties and bordering states who breached their duty to keep A.J. safe.[8] Indeed, important interests are at stake in this controversy.

According to a 2015 study, at least 1 in 7 children have experienced child abuse or neglect in the last year, justifying a high level of monitoring and prevention efforts.

[7]Relators do not argue an exception to the KTCA should be considered under this or any other point.

[8]The issue relating to Relators duty to keep A.J. safe is argued under Point IV.

Finkelhor, D., Turner, H. A., Shattuck, A., & Hamby, S. L. (2015). Prevalence of childhood exposure to violence, crime, and abuse: Results from the National Survey of Children's Exposure to Violence. JAMA Pediatrics, 169(8), 746-754. To that point, Missouri's public policy in prioritizing and protecting the safety and wellbeing of children, and ensuring tortfeasors pay the consequences for their actions in cases where the injured party is a child, should be favored over a sister state's sovereign immunity laws, if they exist.

Accordingly, it is even more appropriate for Missouri to exercise jurisdiction over a sister state as a matter of public policy to ensure nonresident social workers act in a non-negligent manner when investigating reports of child abuse in bordering states.

The Missouri Supreme Court recognized the importance of tort actions as a deterrent to child abuse. In *State ex rel. D.M. v. Hoester,* an action by an adopted daughter against her adoptive father for sexual molestation, the Missouri Supreme Court noted "the number of reports of child abuse cases appearing in a multitude of publications indicate the problem has reached epidemic proportions and apparently the legislature has determined the deterrent value of tort judgments as well as other available sanctions are necessary to stem the rising tide." 681 S.W.2d 449, 452 (Mo. banc 1984). This doctrine was repeated in *Bradley v. Ray* case, where the Missouri Court of Appeals stated the public policy of this State to recognize tort liability where doing so will further the State's interest in protecting children from future abuse is an important consideration. *Bradley v. Ray*, 904 S.W.2d 302, 310 (Mo. App. W.D. 1995). A victim of child abuse who may be found in this state is

entitled to the maximum protections of a Missouri court, even where the defendant is a nonresident governmental employee.

Thus, this Court should make clear: As a matter of Missouri public policy, where an injured party is a child of abuse, injured in this state and sues in the courts of Missouri, there should be no immunity afforded as a matter of comity covering a sister state's negligent conduct. The greater weight is to Missouri's interest in protecting its children from the negligence of employees of sister states rather than a policy favoring governmental immunity. To do so otherwise would be contrary to the policies of this state.

This case is analogous to *Mianecki v. Second Judicial Dist. Court, In and For Washoe County*, 658 P.2d 422, 422, 99 Nev. 93, 94 (Nev.1983). In *Mianecki*, a convicted sex offender, Barney Blake, was placed on probation for first degree sexual assault of a young boy in Wisconsin. Blake was under the supervision of the Wisconsin Division of Corrections while he was on probation. Blake received approval to move to Nevada, where he moved in a home where he sexually assaulted a child. The family was not informed about Blake's background, and sued under theories of negligent failure to warn and failure to investigate where Blake would be living, among other theories.

Wisconsin moved to dismiss the case under doctrines of sovereign immunity, full faith and credit, and comity. Nevada rejected Wisconsin's arguments, opining on the issue of comity:

> The final issue for our consideration is whether Nevada should decline to exercise jurisdiction as a matter of comity. In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial

> decisions of another jurisdiction out of deference and respect. . . . The principle is appropriately invoked according to the sound discretion of the court acting without obligation. . . . [I]n considering comity, there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction. . . . With this in mind, we believe greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore, we hold that the law of Wisconsin should not be granted comity where to do so would be contrary to the policies of this state.

*Mianecki v. Second Judicial Dist. Court, In and For Washoe County*, 658 P.2d 422, 424–25, 99 Nev. 93, 97–98 (Nev.1983)(citations omitted).

Like *Mianacki*, a nonresident governmental employee was engaged in activities outside the forum state that resulted in injuries to a Missouri child who was within the protection of Missouri's jurisdiction. Further, like the state of Nevada, Missouri has a paramount interest in protecting children like A.J. who are injured by the negligent acts and omissions of social workers charged with the responsibility of assessing the safety of children who have the misfortune of living with abusive adults.

Further, this issue doesn't affect this one case. Missouri has a strong interest in deterring sister states from negligently sending their Barney Blakes into this state placing Missouri children at risk. Accordingly, this Court should follow the model provided by *Mianacki*, with the greater weight accorded to Missouri's interests in protecting children rather than a policy favoring immunity to a sister state.

*Mianacki* is not the only case favoring the protection of children injured in the forum state over a sister state's immunity. In *Peterson v. State of Tex.*, 635 P.2d 241, 242 (Colo.

App. 1981), a juvenile filed suit in Colorado against the state of Texas, for injuries suffered while in a juvenile rehabilitation program in Colorado sponsored by the Texas Youth Counsel. The juvenile alleged Texas was negligent in its supervision of the persons who were in charge of the program. The Colorado court held "where the injured party is a citizen of this state, injured in this state and sues in the courts of this state, there is no immunity, by law or as a matter of comity, covering a sister state's activity in this state." *Peterson v. State of Tex*., 635 P.2d 241, 243 (Colo. App. 1981).

Likewise, in Missouri, as a matter of public policy, there should be no immunity as a matter of comity covering a sister state's negligent activity causing injuries in this state, where the injured party is a Missouri child, injured in this state and sues in this state. A nonresident should not be off the hook, simply because the nonresident is a neighboring sister state.

Although Relators would like to think Missouri's policy is also "applicable" in a Kansas court, in reality, the Kansas Supreme Court tends not to honor Missouri public policy on substantive issues. Rel. Br. at 15 ¶ 3, 16 ¶ 1. *See Head v. Platte County, Mo*., 749 P.2d 6, 8–10, 242 Kan. 442, 445–48 (Kan.1988)("A sister state Missouri has no right to exercise its sovereign immunity within the borders of this state.")

Additionally, it is important to consider the combined negligence of two states contributed to Plaintiffs' injuries. This circumstance is similar to a case in Iowa where plaintiffs brought a tort action in an Iowa court, against the state of Iowa and the state of Illinois, for damages suffered when a jeep hit a railing on a bridge maintained by both Iowa

and Illinois. *Struebin v. State, 322 N.W.2d 84* (Iowa 1982)*cert. denied*, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed. 2d 988 (1982).[9] The Iowa court recognized the importance of permitting compensation against a nonresident for negligence, where Iowa was a co-defendant with the sister state. The Iowa Supreme Court stated:

> *The comity question.* Iowa is nevertheless free to close its courts to suits against a sister state as a matter of comity rather than constitutional command. *See Hall*, 440 U.S. at 426-27, 99 S.Ct. at 1190-91, 59 L.Ed.2d at 429. Comity is a doctrine under which courts will give effect to the law of another state as a matter of deference and respect rather than of duty. *Jacobsen v. Saner*, 247 Iowa 191, 193, 72 N.W.2d 900, 901 (1955).
>
> Illinois alleges that Iowa and Illinois have a similar view toward sovereign immunity which should encourage Iowa to respect its desire to have litigation against it brought only in the Illinois Court of Claims, as provided in its statute. Assuming the states do have a common view of the doctrine, no basis appears for believing Illinois' sovereignty will not be sufficiently protected in Iowa courts. *See* Comment, *Nevada v. Hall: Sovereign Immunity, Federalism and Compromising Relations Between Sister States*, 1980 Utah L.Rev. 395, 410. Illinois acknowledges its statute permits an action against the state for negligence in road maintenance.
>
> The only material difference asserted by Illinois is its statutory limitation on recovery. The Illinois policy limiting the amount of recovery against the state for torts in Illinois contrasts with the Iowa policy permitting full compensation to those injured on its highways by the negligence of nonresidents as well as residents. We believe Iowa's interest in full compensation outweighs Illinois' interest in extending its statutory limitation on recovery to its Iowa torts. Iowa's policy is a legitimate attribute of its own sovereignty. Therefore we conclude that the trial court was also correct in overruling the special appearance on the comity ground.

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[9]The *Struebin* case was cited in a footnote by the Missouri Supreme Court in the *Ramsden* case, which suggests *Struebin* might present a factual circumstance under which this Court should exercise jurisdiction over a sister state. *Ramsden v. State of Ill.*, 695 S.W.2d 457, 460 (Mo.1985)(fn2).

*Struebin v. State*, 322 N.W.2d 84, 87 (Iowa 1982).

Like in *Strueben*, the only material difference between Kansas and Missouri law is the Kansas statutory limit on recovery of $500,000 in tort actions (against Kansas), and the Missouri statutory limitation on recovery to $300,000 for any one person in tort actions.[10] K.S.A. 75-6105(a) 537.610.1 RSMo. Neither state allows punitive or exemplary damages against the state. § 537.610(3) RSMo; K.S.A. 75-6105(c). There is no reason to believe Kansas' wavier of sovereignty up to the limit on recovery will not be adequately protected considering Missouri's cap is less than Kansas' cap. For the same reasons delineated in *Streuben* and considering the contributing negligence by two border states that gave rise to the lawsuit, Missouri should exercise jurisdiction over Kansas.

Finally, it would be improper to dismiss this action due to a nearly identical action pending in another state, as Relators suggest, particularly considering Relators seek all claims in both states to be dismissed against them.

> The doctrine of abatement. . . holds that where a claim involves the same subject matter and parties as a previously filed action so that the same facts and issues are presented, resolution should occur through the prior action and the second suit should be dismissed. Exclusive jurisdiction over the matter lies in the court in which the claim is first filed. However, § 509.290(8) and Rule 55.27(9), which codify the common law doctrine of abatement, state abatement is proper only when "there is another action pending between the same parties for the same cause *in this state*.". . . . Abatement applies only to

[10]Plaintiffs did not name the Kansas social workers as defendants, who are immune in their individual capacity under Kansas law in a tort action. K.S.A 75-6109. (Otherwise, Relators would be claiming—correctly—each social worker is immune under Kansas law as individuals.) Missouri law provides the opposite, where the state of Missouri is immune (with exceptions that don't apply here), but Missouri government employees are not insulated from liability in tort actions in their individual capacity.

> intrastate litigation "and has not been extended by the Missouri courts to include pending actions in foreign jurisdiction.

*Shelter Mut. Ins. Co. v. Marquis*, 110 S.W.3d 839, 841 (Mo. App. E.D.2003)(citations omitted). Thus, even if the issues in both the Missouri and Kansas lawsuits were nearly identical, the fact that the actions were brought in different states bars application of the abatement doctrine. Abatement only applies to intrastate litigation and has not been extended by the Missouri courts to include the same actions filed in different states.

A plaintiff has the right to choose any forum where there is proper jurisdiction and venue in which to file. *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 219–20 (Mo.2008).

Section 507.020 provides an action may be brought in a Missouri court, if the action could also be brought in a sister state's court. Here, nothing in Kansas law prohibits this tort action against the state of Kansas, although the Kansas social workers are immune in their individual capaicty. Moreover, Missouri's strong interest in protecting its children from the negligence of employees of sister states should be favored over a sister state's sovereign immunity, even if it did exist.

For these reasons, Missouri should exercise jurisdiction over Relators, as a matter of law and public policy.

**RESPONSE TO POINT II: Relators failed to establish a clear right to an order dismissing Plaintiffs' claims (against Relators) because, under *Hall v. Nevada* (still good law) Kansas does not have the right to exercise sovereign immunity within the borders of Missouri, Kansas law *imposes* liability rather than immunity on Kansas governmental entities in tort actions, and Missouri courts will adequately protect Kansas' fiscal interest considering both Kansas and Missouri law severely limit recovery in tort case against governmental entities.**

a. Relators' Underlying Premise that the Language of the Kansas Tort Claims Act Bars a Tort lawsuit in a Missouri Court is Quite a Stretch of the Imagination

Relators contend the Full Faith and Credit Clause of the United States Constitution requires Missouri to give deference to Kansas procedural law. This is not the problem. It is Relators' incorrect claim that Kansas law prohibits all tort lawsuits against Kansas, except those filed in the Kansas district court, which is a misstatement of Kansas law.

Basically, Relators' try to import meaning into the *absence* of language in Kansas law as consent by Kansas only to be sued in a Kansas court, to the exclusion of all other courts. This point appears to be an extension of Relators argument under Point I, where Relators ignore the KTCA's waiver of sovereign immunity as a matter of comity.

The full faith and credit clause should not be confused with the rule of comity. The full faith and credit clause imposes an obligation on the courts of a sister state compared to the rule of comity, which is a matter of courtesy, complaisance, and respect, not of right. *State ex rel. Dykhouse v. Edwards*, 908 S.W.2d 686, 689 (Mo.1995).

The full faith and credit clause is directed to the relationship of the states to each other.

> The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. The full faith and credit clause prescribes a rule by which courts, Federal and state, are to be guided" and "has nothing to do with the conduct of individuals or corporations. . . . Further, a state "may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject- matter and the parties. . . . A fair reading of these cases would indicate that the full faith and credit clause is a direct Constitutional limitation on the courts, not a personal right or defense that can be waived by the parties.

*Thompson v. Thompson*, 645 S.W.2d 79, 82–83 (Mo. App. W.D. 1982)(citations omitted).

The gravamen of Relators' argument is the flawed premise that the KTCA bars tort suits against the state of Kansas "except in Kansas state court" which is a made-up phrase by Relators to support their theory. Rel. Br. at 18, ¶ 3. To create this made-up phrase "except in Kansas state court," Relators take the KTCA language out of context and misapply Kansas legislative intent and construction.

KTCA provides liability for the negligence of governmental employees as the rule, not the exception. *Carpenter v. Johnson*, 649 P.2d 400, 402, 231 Kan. 783, 784 (Kan. 1982); *Patterson v. Cowley County*, 388 P.3d 923, 929, 53 Kan.App.2d 442, 449 (Kan. App. 2017). There is no language in the KTCA to suggest by any stretch of the imagination a conditional waiver of liability to a particular county or venue.

However, Relators, zealously conflate the meaning of the KTCA when they state a tort lawsuit may only be brought "under the laws of this state," which are "'governed by the Kansas code of civil procedure. . . which applies to all civil actions and proceedings in the district courts of Kansas. . . nothing in this section or in the [KTCA] shall be construed as a waiver by the state of immunity from suit under the 11th amendment to the constitution of the United States." Rel. Br. 19, ¶ 1-2. Relators' theory, it seems, is that liability under the KTCA is the *exception*, not the rule, in support of their made-up phrase that Relators are immune to liability "except in a Kansas state court." At risk of overstating the obvious, Kansas public policy on the liability of Relators in a tort action is just the opposite.

At best, Relators can only point to the *absence* of an express provision in Kansas law that a lawsuit against Relators (or even a tort action generally) must be brought in a Kansas district court. Relators would like this Court to determine what the KTCA *should* be, rather than to give effect to the plain language of the statute under a standard of logic and common sense. In short, Relators' legal theory does not pass muster against the backdrop of the legislative intent and clear language of the KTCA, with no Kansas law to the contrary.

Relators contend the Kansas code of civil procedure applies to all civil actions in the district courts of Kansas, but that does not matter.This is not a civil action filed in the district court of Kansas. This case was filed in a Missouri court. The Kansas code of civil procedure, as Relators admit, only "applies to all civil actions and proceedings in

the district courts of Kansas." Rel. Br. 19, ¶ 1-2. Kansas civil procedure does not apply to a case filed in Missouri.

More importantly, Relators cannot point to any provision in the Kansas code of civil procedure indicating a tort claim may only be brought in the district court of Kansas.

Relators also draw attention to the provision in the KTCA expressly stating that the KTCA is not a waiver of the state's immunity under the Eleventh Amendment. Rel. Br. at 19, ¶ 2. Again, Relators' focus is misplaced. Eleventh Amendment immunity is applicable only to federal claims in federal court. This case is a state-law claim filed in a state court. It makes Relators' made-up phrase, "except in Kansas state court" appear even sillier when applied to the express language of the KTCA. "Nothing in this section or in the Kansas Tort Claims Act shall be construed as a waiver by the state of Kansas of immunity from suit under the 11th amendment to the constitution of the United States. . . . [except in Kansas state court]." K.S.A. 75-6116(g)(made-up phrase added.)

Although Relators boldly assert "courts have repeatedly interpreted the KTCA operates only as a consent to be sued in Kansas state court," they only refer this Court to one single case that has no legal or precedential value to this case, whatsoever. *Ndefru v. Kansas State University, 814 F.Supp. 54, 55* (D.Kan1993). In *Ndefru*, the trial judge granted a defendant's motion to dismiss plaintiff's pro se complaint for failure to state a claim, finding the Kansas State University was entitled to Eleventh Amendment immunity in a 1983 claim brought in federal court. For obvious reasons, *Ndefru* provides no guidance in this case—this is a state law tort claim not a 1983 claim; this case is filed in state court

not federal court; and Eleventh Amendment immunity does not apply to state-law claims filed in state court.

Again, the Kansas legislature intended the KTCA be an open-ended act making governmental liability the rule and immunity the exception. *Bolyard By and Through Bolyard v. Kansas Dept. of Social and Rehabilitation Services*, 912 P.2d 729, 732, 259 Kan. 447, 451 (Kan.1996). The plain and unambiguous legislative intent of the KTCA was to waive sovereign immunity to the extent a private person would be liable. The Kansas legislature did not condition this waiver to claims brought against Kansas in a Kansas court. The only condition on Kansas' waiver of sovereign immunity appears later in the KTCA, where the Kansas legislature expressly stated the KTCA was not to be construed as a waiver of immunity from suit under the Eleventh Amendment. K.S.A. 75-6116(g). Obviously, the Kansas legislature did not intend to enlarge the Eleventh Amendment limitation to include suits brought in non-Kansas courts, or it would have included language to that effect.

> The fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme. Ordinary words are given their ordinary meanings. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be.

*Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007).

The bottom line is there is no language in the KTCA restricting the venue or the filing of a tort action against the State of Kansas to a Kansas district court. The ordinary

words with their ordinary meanings are plain and unambiguous. Even the Texas Supreme Court was unable to find support in the KTCA to dismiss Plaintiffs' claims in *K.D.F. v. Rex*. 878 S.W.2d 589, 595 (Tex.1994).

Accordingly, Kansas has waived consent to be sued in a tort action in any venue that otherwise supports jurisdiction over the claim. Relators' contention that KTCA "plain language makes clear" the opposite conclusion makes no sense unless this Court decides to adopt Relators' made-up phrase into its interpretation of Kansas law.

Relators take another half-hearted stab at a dismissal of Plaintiffs' claim when they argue Missouri may "fail to give the KTCA full faith and credit only if granting Kansas immunity would conflict with Missouri public policy." Rel. Br. 20, ¶ 2. This is an improper, backward application of the full faith and credit clause.

The full faith and credit clause requires Missouri to give effect to Kansas law, unless Kansas law conflicts with Missouri public policy. However, this is not to be confused with Kansas' sovereign entity. Only Kansas may determine its own sovereignty.

The idea of state sovereign immunity is to "afford States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002). Missouri does not have authority to give Kansas greater or less protection than it gives itself. Otherwise, the concept of sovereignty is utterly defeated. For that reason, it would be improper to use the full faith and credit clause to defeat Kansas' sovereignty.

Although it may be tempting to give Kansas the same immunity Missouri provides itself, the result would defeat the notion of Kansas sovereign immunity and violate the full faith and credit clause requiring this Court to honor Kansas' law on Kansas' waiver of sovereign immunity. The KTCA clearly provides liability in tort for the conduct of governmental employees who are indemnified by the state of Kansas, hence why the state of Kansas is a party instead of the individual social workers.

To that point, *Nevada v. Hall,* stands for the opposite proposition suggested by Relators in their brief: That while Kansas may not be sued in its own courts without its consent, Kansas may not claim immunity in Missouri court:

> [N]o sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.

*Nevada v. Hall*, 99 S.Ct. 1182, 1186, 440 U.S. 410, 416 (U.S.Cal.1979).

The KTCA waives liability for tort claims brought against the state of Kansas. The full faith and credit clause requires Missouri to give effect to the KTCA, which does not conflict with Missouri public policy. Both states provide for liability for the conduct of governmental employees in tort actions; in Kansas, the state of Kansas is sued, and the individual social workers are indemnified, whereas in Missouri, the individual social workers are sued because the state of Missouri is insulated. Moreover, the KTCA places monetary limits on Kansas liability, which protects the public treasury, which is the

underlying key purpose in legislative sovereign immunity for Missouri and Kansas governmental units.

Accordingly, the full faith and credit clause does not prohibit a lawsuit against Relators, and Relators' made-up phrase "except in Kansas state court" carries no weight in this case.

b. Kansas Consents to Be Sued, which is Kansas' Prerogative, and This Waiver of Immunity Does Not Stop at the Kansas Border

After a tedious and confusing recitation of several Supreme Court decisions, Relators concede *Hall* (which is still good law) did not address whether a state court *should* refuse to extend immunity as a matter of comity, only whether it *could* do so. Rel. Br. at 28, ¶ 1. However, Relators dramatically warn "permitting Missouri to exercise jurisdiction over Kansas in a claim asserting Kansas has negligently administered its child welfare system absolutely poses a substantial threat to the constitutional system of cooperative federalism." Rel. Br. at 28, ¶ 2. Relators note Kansas joined in a joint *amici curiae* brief in support of a petition for certiorari granted by the United States Supreme Court, seeking *Hall* to be overruled.[11]

The idea of comity between courts is apparently not an easy or trifling concept. Comity is defined as the practice among political entities (as nations, states, or courts of different jurisdictions), involving especially mutual recognition of legislative, executive, and judicial acts. Black's Law Dictionary 303–04 (9th ed. 2009). Cooperative federalism is defined as the distribution of power between the federal government and the states in which each recognizes the powers of the other while jointly engaging in certain governmental functions. Black's Law Dictionary 687 (9th ed. 2009). Respondent describes the concept of comity under Point I as clear as mud.

[11]Missouri did not join the club of Amici States seeking to overturn *Hall*.

In *Nevada v. Hall*, the United States Supreme Court held a state could be forced to defend itself in a sister state, by a vote of 6-3. The Court did not find any provision in the Constitution limiting the state's exercise of jurisdiction over a sister state, although Justice Stevens commented that it may be a wise policy for States to "accord each other immunity or respect any established limits on liability."

In 2003, in *Franchise Tax Board of California*, the United States Supreme Court affirmed *Nevada v. Hall*'s ruling that Nevada court, as a matter of comity, would immunize California to the same extent that Nevada would immunize itself. When the case was remanded for trial, the plaintiff was awarded around $500 million dollars in damages. On appeal, California argued the full faith and credit clause required Nevada to limit damages to the maximum Nevada would permit in a similar suit, or $50,000. The Nevada Supreme Court disagreed and ruled the Nevada limit of $50,000 did not apply. As Relators point out, certiorari was granted June 28, 2018, and the question presented is whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's court without its consent, should be overruled.

The gripe by the losing party in *Franchise Tax Board of California* centers around the opinion in *Hall* authorizing a State's jurisdiction over a sister state who did not consent to be sued, to the tune of California paying out of its state treasury considerably more than what would be allowed under the law of Nevada. In short, although cooperative federalism was encouraged by Judge Stevens in the *Hall* opinion, these cases demonstrate the inability of sister states to get along with each other, not unlike squabbling siblings.

However, this case is not a tax case like *Franchise Tax Board of California*, and there is not an underlying aura of unfairness about being forced to pay $450,000 more than allowed under the sister state's law. This is a tort action, and Kansas waived sovereign immunity to be sued in tort actions, which is Kansas' prerogative. Further, the KTCA and Missouri law severely limit monetary recovery in tort actions against the government, demonstrating the Kansas treasury will be protected in a Missouri court.

Unless the United States Supreme Court sets aside principles of stare decisis and completely overrules *Hall v. Nevada*, the decision in the pending *Franchise Tax Board of California* (which has been litigated now for over a quarter of a century) will not likely affect this case because both Kansas and Missouri place similar limits on damages against governmental entities.

Accordingly, Kansas' sovereign immunity, which is waived under the KTCA, does not bar Plaintiffs' claims against Relators in this case.

**RESPONSE TO POINT III: Relators failed to establish a clear right to an order dismissing Plaintiffs' claims (against Relators) because the pleadings alleged a plethora of facts supporting personal and subject matter jurisdiction in this case, as reflected by the numerous contacts and confidential information exchanged between Kansas and Missouri social workers over the years directed toward the delivery of services to A.J., although negligently delivered.**

a. Relators' Claim that Respondent Lacked Authority to Determine Plaintiffs'Negligence Claim as a Matter of Jurisdiction is Without merit

Relators make a very short argument under subsection "a" that Plaintiffs failed to make a viable claim for negligence. Relators refer to their detailed arguments under Point IV, for the claim that Relators did not owe a duty to A.J.

Relators contend this deficiency defeats Plaintiffs' claim for negligence. Rel. Br. at 30, ¶2. Relators assert this is a "personal jurisdiction" defect. Rel. Br. at 30, ¶3.

Relators misunderstand Respondent's authority as a circuit court judge. The circuit court where Plaintiffs' personal injury claim is filed has the authority to determine the merits of a negligence claim. Nothing in Missouri law supports Relators conclusion that a determination whether the facts support a negligence claim divests the circuit court of personal or subject matter jurisdiction over negligence claims. Article V, § 14 of the Missouri Constitution gives the circuit court original jurisdiction over personal injury claims. Jurisdiction over a nonresident is based on long-

arm jurisdiction and minimum contacts, not on the viability of the underlying negligence claim.

Relators may properly attack the sufficiency of the *facts* in support of a duty giving rise to the negligence claim, but this is not an issue of jurisdictional competence, as Relators suggest. In other words, there is no question Respondent had the *authority* to decide whether Plaintiffs submitted sufficient facts to support a negligence claim.

As this Court opined:

> Because the authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction, there is no constitutional basis for this third jurisdictional concept for statutes that would bar litigants from relief. Elevating statutory restrictions to matters of "jurisdictional competence" erodes the constitutional boundary established by article V of the Missouri Constitution, as well as the separation of powers doctrine, and robs the concept of subject matter jurisdiction of the clarity that the constitution provides. If "jurisdictional competence" is recognized as a distinct concept under which a statute can restrict subject matter jurisdiction, the term creates a temptation for litigants to label every statutory restriction on claims for relief as a matter of jurisdictional competence. Accordingly, having fully considered the potential ill effects of recognizing a separate jurisdictional basis called jurisdictional competence, the courts of this state should confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction; there is no third category of jurisdiction called "jurisdictional competence.

*J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo.2009).

To the extent Relators attempt to re-argue the issue of personal jurisdiction over a nonresident in a negligence action, Respondent's arguments in rebuttal are fully briefed under the other points.

b. & c. (Combined) Taking All Facts as True Together with All Inferences, Plaintiffs Established Long-Arm Jurisdiction and Minimum Contacts Sufficient to Meet Due Process Requirements

Under Point III, Relators basically regurgitate the same arguments presented to the trial court claiming a lack of personal jurisdiction under an extremely narrow view of the facts. Relators claim Missouri's long-arm statute has not been satisfied, and insufficient minimum contacts are present to exercise personal jurisdiction.

Relators do not contest that Plaintiffs' claims falls under Missouri's long-arm statute § 506.500.3 RSMo. Rel. Br. at 31, p. 2. The thrust of Relators' argument attacks the quantity and quality of contacts between the social workers of each state as the basis for dismissing Plaintiffs' claims against them.

Taking the plethora of facts alleged in the *Amended Petition* as true, and all reasonable inferences, Relators' arguments are not ripe for a dismissal at this stage of the litigation. These facts amply support personal jurisdiction over Relators under the long-arm statute, and minimum contacts test, and are consistent with Missouri public policy of insuring protection to its residents from the unlawful acts of nonresidents whose conduct has foreseeable consequences in Missouri.

Missouri courts employ a two-prong test to evaluate personal jurisdiction over nonresident defendants. First, the defendant's conduct must fall within Missouri's long-arm statute, § 506.500 RSMo; *Bryant*, 310 S.W.3d at 231. Second, the defendant must have sufficient minimum contacts with Missouri to satisfy due process. *Andra v. Left Gate*

*Property Holding, Inc.*, 453 S.W.3d 216, 225 (Mo. 2015). § 506.500 RSMo "is construed to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process clause." *Id.* Due process requires that, absent a traditional territorial basis such as a defendant's physical presence in the forum state, a defendant must have sufficient minimum contacts with the forum state so as not to " 'offend traditional notions of fair play and substantial justice.' " (quoting *Int'l Shoe*, 326 U.S. at 316, 66 S.Ct. 154).

Minimum contacts are evaluated on a case-by-case basis. *Id.* The "exercise of personal jurisdiction over a defendant with minimum contact also must be reasonable in light of the surrounding circumstances of the case." *Andra v. Left Gate Property Holding, Inc*., 453 S.W.3d 216, 226 (Mo., 2015). The Missouri legislature intended to confer jurisdiction in all cases that the constitution would permit, but that the specific *categories* of cases over which the legislature did extend jurisdiction should be construed to include all the cases those categories rationally could be understood to include to the extent that due process would permit . . . . A contrary interpretation would effectively ignore the language of the long-arm statute. *Noble v. Shawnee Gun Shop, Inc*., 316 S.W.3d 364, 370 (Mo. App. W.D.2010).

Missouri's long-arm statute provides, in relevant part:

> Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this §, thereby submits such person, firm, or corporation, and, if any individual, his personal representative, to the jurisdiction of the courts

> of this state as to any cause of action arising from the doing of any of such acts:
>
> (3) The commission of a tortious act within this state

§ 506.500 RSMo.

For the statute to apply, the tortious act may occur outside of Missouri, so long as it "produces actionable consequences" in Missouri. *Noble v. Shawnee Gun Shop, Inc.*, 316 S.W.3d 364, 371 (Mo.App. W.D.2010).

Relators concede Missouri has long-arm jurisdiction under the third section of § 506.500 RSMo over "extraterritorial acts that produce consequences in Missouri." Rel. Br. at 31, p. 2.

Again, Relators argument is directed toward the second prong of the test—whether minimum contacts were satisfied under the due process to support personal jurisdiction. Relators contend the *Noble* case involves a product placed in the stream of commerce, compared to this case where a service was rendered, requiring a "more stringent" standard of minimum contacts.

Not surprisingly, Relators narrow their role in A.J.'s demise and their connection with Missouri, and do not explain the "more stringent" standard. Instead, Relators focus on the lack of their "authority to provide services in Missouri" and that they "provided no such services to A.J. in Missouri." Rel. Br. at 32, p. 2. Relators' position ignores the well settled law that the long-arm statute applies to tortious conduct outside the state that produced actionable consequences in Missouri.

Further, Relators' argument that a more stringent standard should be used to analyze whether minimum contacts support personal jurisdiction does not change the result under the circumstances of this case.

A.J.'s father was a person who Relators recognized as a known danger as early as 2011, when Relators required A.J.'s father sign a written promise not to harm A.J. Relators received at least six out of ten hotline calls between 2012 and 2015, and clearly observed A.J. on different occasion with black eyes and bruising consistent with the children's reports of abuse and neglect. There is no doubt A.J.'s father violated Relators' written safety plan, and that Relators knew about it.

For that reason, when A.J.'s parents moved back and forth between Kansas and Missouri, Relators purposely directed their actions toward Missouri in exchanging information and reports about A.J. and his parents, in connection with the numerous horrific observations by social workers about the neglect and abuse. Undisputedly, A.J.'s claim arises out of and relates to those activities.

Notably, Relators take three pages to describe the so-called minimum contact between Kansas and Missouri, which begin in 2013 when Missouri received the first of several hotline calls reporting abuse of A.J. This began a relationship between Kansas and Missouri social services agencies that spanned several years. During 2013 through 2015, social workers in both states attempted to deliver social services across state line for A.J., who was identified as a child who was the subject of the abuse. The social workers of both states reached across state line again and again. This contact included exchanging

confidential information between Relators and Missouri on numerous occasions, by telephone, email, and fax, and likely text.

The confidential information exchanged between Relators and Missouri was not slight, attenuated, or remote. It contained detailed confidential electronically stored information describing A.J.'s history, the child's parents, and contact with each agency, the child's medical records, and other similar information. Relators also initiated contact across state line to A.J.'s father and Missouri social workers by telephone and likely text, on numerous occasions when A.J.'s father claimed to be residing in Missouri. Likewise, Missouri reached out to Kansas when A.J.'s father purportedly returned to Kansas with A.J., and Relators was required to follow the same procedures when the call came from out-of-state.

The quantity of the contact between Relators and Missouri at this "pre-discovery" phase of the case is also significant.[12] During the March 2013 Missouri hotline investigation, Relators and Missouri made contact and communicated on numerous occasions to discuss A.J. and exchange information, and Relators faxed several pages of confidential information to Missouri. In August 2013, Relators and Missouri again contacted each other about A.J., abuse by his father, A.J.'s whereabouts, prompting a seventh (7th) and eighth (8th) hotline call by Missouri to Kansas reporting the updated

[12]As previously mentioned, under an open records request, Relators produced over 1800 pages of records. Relators, however, redacted a significant part of its records concerning its contact with Missouri. Relators have refused to produce additional discovery in this case until this writ is lifted or they are served with a subpoena.

severity of A.J.'s circumstances. Relators, in response to Missouri's concerns, called A.J.'s father and stepmother, who claimed to then live in Missouri. In February 2014, Relators and Missouri caseworkers contacted each other and discussed the ninth (9th) hotline call, and exchanged information about A.J.'s whereabouts, believed to be in Kansas at that time. A.J. returned to Missouri in March 2014, where he underwent in-patient treatment at Spofford. By October 2014, after release from Spofford, A.J. returned to Kansas with his father who applied for welfare with Relators, while more hotline calls were received by Relators about A.J.'s abuse.

Relators are incorrect when it states that it did not provide services to A.J. outside Kansas. Relators' act of exchanging information with phone calls and faxes served A.J. outside of Kansas, in furtherance of the Kansas' policy to keep children safe from abuse. Indeed, Relators' services for A.J. reached well beyond the boundaries of the state line due to the activity of A.J.'s parents who ran back and forth across state line to avoid child protective agencies.

Relators' three cases cited in their brief do not support their position.

In *Krug v. Abel,* Wisconsin residents made one call to a Missouri state prison to obtain an affidavit to assist in their defense against pro se plaintiff, an inmate at the Missouri State Penitentiary. 716 S.W.2d 17, 19 (Mo. App. W.D. 1986). Not surprisingly, the court found the Wisconsin residents did not purposely avail themselves of the privilege of conducting activities in Missouri and thus did not establish minimum contacts. *Id.* Obviously, the one-call *Krug* case is not similar to the present case, where Relators

exchanged significant information over several years on numerous occasions by phone, text, and facsimile with Missouri social workers.

In *Garrity v. A.I. Processors*, there was no connection with Missouri where the plaintiff's contract for a $30,000 dryer was not made in Missouri, plaintiff suffered no damage in Missouri by the breach of the contract, and it was not clear that payment for the dryer was due in Missouri under the contract. 850 S.W.2d 413, 418 (Mo. App. S.D. 1993). Unlike this case, where A.J. lived in Missouri, A.J. was injured in Missouri, and A.J. was a resident of Missouri (and Kansas) at the time of this death.

Likewise, in *Hollinger v. Sifers*, there was only unilateral activity by plaintiff who claimed some relationship with the nonresident defendant by watching his ad on television in Missouri and contacting the doctor from her Missouri home to set an appointment; the contract, surgery, and fraudulent statements were made in Kansas. *Hollinger v. Sifers*, 122 S.W.3d 112, 114 (Mo. App. W.D.2003).

Here, it is nearly impossible to untangle the contributions by Relators to the injuries and death suffered by A.J. Relators mutually exchanged confidential information with Missouri social workers, Relators' actions were intended to be relied on by the Missouri social workers, and A.J. felt the consequences of Relators' acts and omissions. Further, A.J. suffered injury in Missouri as a result of the acts and omissions of the negligence of Relators.

Accordingly, Respondent properly determined defendants' contacts with the state of Missouri were more than sufficient to satisfy due process requirements.

It is important to consider that Relators do not dispute information was exchanged between Kansas and Missouri social workers. At this stage of the litigation, it is not unreasonable to infer that some calls were made and received from cell phones belonging to the social workers assigned to A.J.'s cases. To that point, Kansas and Missouri are border states. In the Kansas City area, it is common for persons living in a Missouri to work in Kansas, and persons living in Kansas to work in Missouri. Accordingly, it is reasonable to infer between 2011, and 2015, a Kansas government employee may have traveled across state line to Missouri to reside, eat, work on a computer, or take and receive phone calls about A.J.'s cases while physically located in Missouri.

Further, Relators could have foreseen A.J.'s parents would go to Missouri and evade Kansas social workers after A.J.'s father violated the written safety plan and continued to abuse A.J.--because he did just that several times between 2011 and 2014 when A.J. was the subject of hotline calls to Kansas. Likewise, when A.J. was the subject of a hotline call to Missouri, A.J.'s father would suddenly relocate to Kansas, generally prompting Relators to be on the receiving end of a hotline call from Missouri. The *First Amended Petition* clearly alleges (in detail) how both Kansas and Missouri social workers dropped the ball on numerous occasions, and simply forwarded information to the other state and closed their respective file as the parents moved back and forth, until the next hotline call came in, and the file was re-opened.

Both Kansas and Missouri social workers missed numerous opportunities to act in a non-negligent manner to keep A.J. safe from harm. Undisputedly, Relators' acts and

omissions were felt in Missouri, and jurisdiction is authorized under Missouri's long-arm statute. Thus, Plaintiffs amply provide a compelling basis for jurisdiction that meets the "more stringent" requirements, if a more stringent standard is determined to be required.

Although this Court is not required to, it may consider five factors in determining sufficient minimum contacts with Missouri: (1) the nature and quality of the defendant's contacts with Missouri; (2) the quantity of the contacts with Missouri; (3) the relation of the cause of action to the contacts; (4) Missouri's interest in providing a forum for its residents; and (5) the convenience of the parties. *Noble v. Shawnee Gun Shop, Inc.*, 316 S.W.3d 364, 373 (Mo. App. W.D.2010).

Overall, the record shows that between 2012, and 2014, a great many contacts were made and received between Kansas and Missouri. Relators initiated communication to Missouri social workers and A.J.'s father who was present in Missouri for the purpose of eliciting information, information was exchanged between Kansas and Missouri about A.J.'s welfare, hotline calls were made by social workers in Missouri to Kansas, and from Kansas to Missouri, and papers were transmitted from Kansas social workers to Missouri concerning the history of child abuse relating to A.J. It is not unreasonable to subject Relators to bring suit in Missouri on a claim that Relators' conduct was the source of the injury in Missouri.

A single phone call can establish personal jurisdiction over a nonresident. See *Strobehn v. Mason*, 397 S.W.3d 487 (Mo. App. W.D.2013)(Exercise of jurisdiction over New York attorney was consistent with Missouri's long-arm statute in action by Missouri

law firm to recover personally against New York attorney under attorney's fee lien, where Missouri law firm accepted New York attorney's offer of a co-counsel agreement in Missouri, during a phone call which New York attorney initiated.).

The reality is that both Kansas and Missouri social workers missed numerous opportunities to act in a non-negligent manner to keep A.J. safe from harm, taking the facts as true with all reasonable inferences thereof. Undisputedly, Relators' acts and omissions were felt in Missouri, and jurisdiction is authorized under Missouri's long-arm statute. Relators purposely engaged themselves with Missouri through phone calls, faxes, and likely text and emails. Thus, Plaintiffs amply provides a compelling basis for jurisdiction that meets the "more stringent" requirements, if a more stringent standard is truly required.

Relators all but made a physical presence in Missouri concerning the management of A.J.'s welfare. (It is reasonable to infer the social workers may have physically been in Missouri when they communicated with Missouri social workers, considering the proximity of the bordering states and cities.) It would be closing our eyes to the realities of modern communication and collaboration between social workers in border states if this Court were to only confer jurisdiction over a nonresident by proof the nonresident was physically sent into this state, as Relators suggest, but not when it follows the more ordinary course of using electronic communication as their messenger. It would also ignore established precedent that extraterritorial acts that produce consequences in the state fall under the long-arm statute.

Logic dictates when Relator continued to exchange confidential information over a period of years on numerous occasions necessary for the safety of a child located in Missouri, Relator purposely availed itself of the privilege of conducting activities within Missouri. Accordingly, in this case, because Relators worked with social workers in Missouri, and sent information to Missouri intending it should be relied on, all of which ultimately resulted in injury to a Missouri resident, Relator has, for jurisdictional purposes, acted within this state and is subject to personal jurisdiction in Missouri.

**<u>POINT IV</u>: Relators failed to establish a clear right to an order dismissing Plaintiffs' claims (against Relators) because the facts in Plaintiffs' pleadings, taken as true with all inferences, clearly demonstrate Relators, by their own undertaking, created a special relationship with A.J. giving rise to Relators' duty to keep A.J. safe, well beyond a statutory duty to the public at large, under a view of either Missouri or Kansas law.**

Under Point IV, Relators continue to make the same error of compressing Plaintiffs' factual allegations to fit their version of the legal issues. Relators tend to ignore the standard on a motion to dismiss, where all facts are construed as true together with all reasonable inferences. The issue is not whether Plaintiffs will ultimately prevail, but whether Plaintiffs simply pled sufficient facts, taken as true, to support their claims. In accord with this standard and in light of the ample facts pleaded in the *Amended Complaint*, Relators' conclusion that they did not have a legal duty toward A.J. is without merit.

With this in mind, it is important to emphasize the following facts and inferences alleged the *Amended Petition*:

- A.J.'s severe abuse began after Relators placed A.J. with his father, who never before had custody.
- Child protective service in both states received numerous hotline calls each year between 2012 and 2015 reporting severe abuse and neglect of A.J.
- Child protective services in both states shared and exchanged information with each other about A.J.'s severe abuse and neglect with each hotline call. This

included the history of the child abuse and the involvement with child protective services over the years.

- The involvement by child protective services in both states spanned several years.
- The severe abuse and neglect of A.J. reported to child protective services in both states included potential life-threatening abuse such as choking, and bruising on the head. A.J. also confirmed his injuries were inflicted by his father and stepmother, and child protective services observed bruising and marks on A.J. consistent with reported child abuse and inconsistent with the explanation provided by the adults.
- A.J.'s father and his stepmother were named as the perpetrator of A.J.'s abuse in these hotline calls, and this was known to child protective services in both states.
- When each hotline call came in, child protective services in both states took affirmative steps to attempt to control the threat to A.J.'s safety and welfare.
- The affirmative steps included preparing a written risk assessment identifying the threat of danger to A.J., whether the threat of danger to A.J. could be controlled, and what intervention was necessary to control the threat of danger including the implementation of a safety plan.
- Child protective services in both states implemented safety plans to control (or attempt to control) the threat of danger to A.J. from his father and stepmother

- Relators' safety plan required A.J.'s father to sign a written promise not to physically abuse A.J. and not to allow A.J.'s stepmother around A.J.
- Relators required A.J.'s father to agree to a safety plan for A.J.'s safety as a condition of keeping custody of A.J.
- Missouri's safety plan was to place A.J. at Spofford for several months under a voluntary placement agreement
- Relators knew A.J.'s father violated the safety plan because Relators received numerous reports detailing A.J.'s severe abuse and neglect, and from these reports Relators knew that A.J.'s stepmother was living with the family and the perpetrator of some of the abuse
- Relators had the authority to initiate A.J.'s removal from his father's custody.
- Relators did not control the danger to A.J. after learning A.J.'s father violated the safety plan.
- Between 2011 and 2015 A.J. was a resident of Kansas and Missouri.
- At the time of A.J.'s death sometime in September/October 2015, he was a resident of Kansas and Missouri.
- A.J.'s remains were found in Kansas in a pig pen.
- A.J. was severely abused and tortured by his father and stepmother from 2012 through 2015, and A.J. died from these injuries.

Even under this set of abbreviated facts, Relators' argument that they had no legal duty to A.J. is not well grounded.[13] This case is not about one simple, innocuous hotline report or a failure to investigate one report.

Rather, when each hotline report came in, Relators investigated, prepared reports, did safety assessments, and undertook the responsibility of controlling the danger to A.J. while in his father's care. During the early hotline calls, Relators required A.J.'s father sign a safety plan to keep custody of A.J. The safety plan provided A.J.'s father would not physically abuse A.J. and not allow A.J.'s stepmother around A.J.

Without a doubt, Relators remained involved with A.J.'s family for years, as A.J. was moved back and forth between Kansas and Missouri by his father while the hotline calls rolled in.

By removing A.J. from his mother and placing him with his father and requiring his father to promise not to abuse A.J. to retain custody, Relators undertook gratuitously to render services to A.J. which Relators knew was necessary for A.J.'s protection, creating a special relationship recognized in both states, the breach of which is the subject of this lawsuit. In other words, when Relators did nothing after learning A.J.'s father was severely abusing and neglecting A.J., Relators breached its duty to keep A.J. safe from the condition Relators created.

[13]Relators do not challenge any other element of Plaintiffs' negligence claim.

For that reason, Relators' affirmative acts in attempting to control the danger to A.J. (and failing) subjected Relators to liability under the Restatement (Second) of Torts § 324A and § 323 under Kansas and Missouri law.[14] Accordingly, Plaintiffs have plead sufficient facts to support a claim of negligence at this state, that Relators owed a duty under § 324A and § 323.

Section 323 of the Restatement (Second) of Torts provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking

The Restatement (Second) of Torts, 324A, Liability to Third Person for Negligent Performance of Undertaking, provides as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or

[14] Relators admit both Kansas and Missouri have adopted the Restatement (Second) of Torts Sections 323 and 324A. Rel. Br. at 45, ¶2.

> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Although Relators contend this Court must "determine which State's law applies to this claim," Relators do not show how Respondent made the wrong "choice" of law, or how a choice of law is material to the legal question whether Relators had a duty under either state's law, since Relators admit both states have adopted Restatement (Second) of Torts § 324A and § 323. Rel. Br. at 45, ¶2.

Interestingly, however, Relators claim Plaintiffs' claim is "controlled by Kansas law" Rel. Br. at 45, ¶1. Kansas law wholly supports Respondent's position.

Kansas has applied these common law principles specifically to create a duty owed by Relators to the specific child in Relators' purview under Restatements (Second) of Torts § 323 and §324A. In these circumstances, Relators are required to provide non-negligent services.

> As we've noted, it's possible that the Department took some affirmative actions that could have created a duty-the Department had previously taken a child from Mother's custody and knew that child was born with drugs in her system, yet allowed Mother to retain custody of the child only under certain circumstances but then did nothing even though it knew that Mother wasn't abiding by those conditions; Plaintiff has plead sufficient facts to support his claim, at this stage, that the Department owed a duty under § 323 or § 324A.).

*Watters v. Kansas Dept. for Children and Families*, 2015 WL 9456744, at *8 (Kan. App. 2015). Relators admit this case, still good law in Kansas, supports Respondent's position. Rel. Br. at 49, ¶2.

Like the *Watters* case, in this instance, Relators owed a duty to A.J. once they went beyond the preliminary investigation of the first hotline call. Here, Relators removed A.J. from his mother (rather than make a recommendation to the county or district attorney), and placed A.J. with his father, who never before had custody. When Relators learned A.J. was severely abused by his father and stepmother, Relators controlled (or attempted to control) the risk by implementing a safety plan. When Relators learned A.J.'s father violated the safety plan, Relators did nothing to protect A.J.

Relators created the danger by placing A.J. with his father, and Relators compounded the danger by allowing A.J.'s father to retain custody after Relators knew A.J.'s father was not following the safety plan which created an unjustifiable risk that A.J. would be harmed. At a minimum, a duty arose for Relators to prevent harm to A.J.

The same result would be reached under Missouri law, as Missouri follows the same principles of law under § 324A and § 323 of the Restatement (Second) of Torts.

The public-duty doctrine does not apply to this case. The social workers in each state went well beyond the investigation stage by identifying the danger to A.J., preparing written risk assessments identifying the threat of danger to A.J. (of his father and stepmother), whether the threat of danger to A.J. could be controlled, and what intervention was necessary to control the threat of danger including the implementation of a safety plan. And, undisputedly, child protective services in both states implemented safety plans to control (or attempt to control) the threat of danger to A.J. from his father and stepmother.

In Missouri, the "public duty" rule denies a civil action against a public employee for tort damages arising out of duties owed to the public at large. *Jamierson v. Dale*, 670 S.W.2d 195, 196 (Mo. App. W.D. 1984). This is not blanket immunity from all liability. *See Southers v. City of Farmington*, 263 S.W.3d 603, 611–12 (Mo.2008)("The public-duty doctrine does not insulate a public employee from all liability, as he could still be found liable for breach of ministerial duties in which an injured party had a special, direct, and distinctive interest.").

In the context of a hotline call about child abuse, this means once a hotline report is made to child protective services, a duty to the general public at large arises to investigate, but not a specific duty to the child who is the subject of the investigation.

Under Kansas law, Relators owe no special duty to allegedly abused children or alleged child abusers to avoid negligence in the *preliminary* investigation stage involving allegations of child abuse. *Kirk v. City of Shawnee*, 10 P.3d 27, 31, 27 Kan.App.2d 946, 951 (Kan.App.2000).

However, a special duty to an individual can be created when the governmental entity performs an affirmative act that causes injury, or where it made a specific promise or representation that under the circumstances, creates a justifiable reliance on the part of the person injured. *Id. Kirk v. City of Shawnee*, 10 P.3d at 31, 27 Kan.App.2d at 952.

Relators incorrectly define the scope of Relators' statutory duties[15] under K.S.A. 38-2230, as the same duty owing to the public at large. Rel. Br. at 45, ¶3. There is no authority to support blurring these concepts together; nor does the §§ 323 or 324A support this conclusion.

> Whenever any person furnishes information to the secretary that a child appears to be a child in need of care, the department shall make a preliminary inquiry to determine whether the interests of the child require further action be taken. Whenever practicable, the inquiry shall include a preliminary investigation of the circumstances which were the subject of the information, including the home and environmental situation and the previous history of the child. If reasonable grounds to believe abuse or neglect exist, immediate steps shall be taken to protect the health and welfare of the abused or neglected child as well as that of any other child under the same care who may be harmed by abuse or neglect. After the inquiry, if the secretary determines it is not otherwise possible to provide those services necessary to protect the interests of the child, the secretary shall recommend to the county or district attorney that a petition be filed.

K.S.A. 38-2230.

This statute simply defines Relators' statutory duties. It does not address whether a special relationship is created by Relators' affirmative acts toward a specific child who is the subject of a hotline investigation, which depends on the facts of each case. In both Missouri and Kansas, Restatements (Second) of Torts § 323 and §324A control the analysis of the legal issue, which is—when does the public duty end, and the special relationship begin, giving rise to a duty?

[15] Again, Relators do <u>not</u> claim (in this proceeding) that an exception to the KTCA protects DCF from liability. Rather, DCF argues its statutory duties are simply part of DCF's duty to the public at large. Rel. Br. at 47.

The cases cited by Relators demonstrate the circumstances that limit the duty of Relators to the public at large when performing an initial investigation of a hotline report. The *Watters* case, on the other hand, demonstrates the circumstances that create a special relationship between Relators and the child who is the subject of a hotline investigation.

For example, this is not a case about a failure to revoke a daycare license where Kansas social workers negligently investigated reports of children being abused. *P.W. v. Kansas Dept. of Social and Rehabilitation Services***,** 255 Kan. 827 (Kan.1994) (Absence of evidence that state Department of Social and Rehabilitation Services and Department of Health and Environment performed affirmative acts or entered into any agreement with parents of children who were abused while in day-care precluded negligence liability for violation of duty to act reasonably by one who has undertaken to render services necessary for protection of another. Restatement (Second) of Torts § 324A.).

Nor is this a case about an oral promise by Relators to help monitor services provided by the Bureau of Indian Affairs and a county mental health provider. *Roe ex rel. v. Kan. Dept. of SRS*, 102 P.3d 396 (Kan. 2004). Or a promise to investigate an abuse complaint. *Beebe v. Fraktman*. 921 P.2d 216 (Kan. Ct. App. 1996).

And, this is not about Relators' duty toward a "discrete class of children attending daycare centers" *Jamierson v. Dale*, 670 S.W.2d 195 (Mo. App. W.D. 1984)(Statutes and regulations placing duty of enforcement upon Division of Family Services employee concerning inspection of licensed day-care centers for compliance with licensing regulations prescribe duty to public at large within purview of public duty rule, and do not

give rise to duty only to discrete class of children attending day-care centers.) Relators do not explain the dissimilarities between *Jamierson* and the facts of this case. Rather, the only common fact with this case is, perhaps, that each inspection began with a hotline call about child abuse.

Likewise, this is also not about a negligent investigation of a mere hotline call for the benefit of a named victim of abuse. See *Nelson v. Freeman*, 537 F. Supp. 602, 611 (D.C. Mo. 1982)(The public duty to investigate imposed by the child abuse hotline statute does not suffice to establish a specific duty to an individual.)

The approach reflected by the caselaw from both jurisdictions on this issue treats the simple investigation of a hotline call, *without more*, as duty owing to the public at large. "Without more," for example, would not encompass oral promises by Relators to monitor the situation, Relators' promises to investigate, Relators' inspections of daycare facilities, or even a negligent preliminary investigation by Relators in response to the hotline report.

Instead, "more," giving rise to a duty by child protective services, would clearly include agreements with parents (a/k/a safety plans), or other similar affirmative acts necessary for the protection of the child.

In this vein, this case is quite similar to the facts in *Watters v. Kansas Dept. for Children and Families*, 2015 WL 9456744, at *8 (Kan. App. 2015). In the *Watters* case, Relators investigated, performed a risk assessment, and took steps to control (or attempt to control) the danger to the child who was the subject of the investigation by creating a safety plan for the parent. *Id.* When the parent in *Watters* failed to abide by the conditions of the

safety plan, Relators did nothing even though it knew the parent was not abiding by those conditions. The *Watters* court found Plaintiff pleaded sufficient facts to support his claim to survive a motion to dismiss, that the Department owed a duty under § 323 or § 324A. *Id.*

Likewise, in this case, Plaintiffs had plead facts sufficient to state a claim—and, taking language from Relators' brief, "from which it was plausible KsDCF [Relators] had undertaken action beyond its statutory duty and thus created a special duty." Rel. Br. at 50, ¶1.

In this case, it is not a stretch to find Relators' acts went well beyond the investigation stage into the "special relationship" arena. Relators clearly went outside its statutory duties (and authority) when Relators removed A.J. from his mother and placed him with his father, instead of making a recommendation to the county or district attorney to file a petition for removal. This was an affirmative act creating a special relation between Relators and A.J. giving rise to Relators' duty to protect A.J. while he was in father's custody.

Further, when Relators receive additional reports that A.J. and other children were being severely abused while in his father's custody, Relators took additional affirmative steps by allowing A.J.'s father to conditionally retain custody of A.J. under the safety plan, firmly establishing Relators' specific duty owed to A.J. while he was in his father's custody.

And, Relators did nothing when Relators learned A.J.'s father was not abiding by those conditions, breaching Relators' duty owed to A.J. to keep him safe while in his father's care. This created the peril the ultimately led to A.J.'s demise. This is, at a minimum, a prima facie showing of a claim of negligence against Relators under both Kansas and Missouri law at this stage of the litigation. At the risk of repeating this argument ad nauseum, Plaintiffs have pled sufficient facts showing Relators had a duty to A.J. under Section 323 or 342A.

With these affirmative acts, Relators undertook a duty to protect A.J., creating a special relationship recognized in both states, the breach of which is the subject of this lawsuit.

## CONCLUSION

This Court should deny the *Petition for Writ of Prohibition or Alternatively, Writ of Mandamus*. Relators are not entitled to walk out of this case scot-free after conducting themselves in a negligent manner toward a Missouri citizen even if they are a sister state.

*As a matter of law*, Relators are wrong in its assertion that Kansas is entitled to immunity in a Missouri court as a matter of comity. Kansas law does not confer immunity on itself in a tort action. It is Kansas' prerogative to define the limits of its own sovereign immunity. Nothing in Kansas law declares Kansas immune from suit in this case, regardless of venue.

Further, preventing a Missouri court from hearing suits against sister states in a case involving child abuse would violate Missouri's strong interests in prioritizing the welfare of children and preventing and deterring child abuse.

If both Kansas and Missouri believe expanded immunity is appropriate, the two states are free to enter an agreement to provide immunity in each other's courts, or to join a broader agreement with all states sharing the same views. Otherwise, Missouri is free to exercise jurisdiction over a sister state.

This does not mean Kansas is not without protection in a Missouri court under a choice of either Kansas or Missouri law, due to the caps on damages. A Missouri court can defer to Kansas law that provides caps and prevents punitive damages as a matter of comity. This is consistent with Missouri public policy, and it makes sense.

Moving on, *as a matter of fact*, Plaintiffs' pleadings alleged ample facts to support

personal jurisdiction over Relators to survive a motion to dismiss. Relators' services were important to A.J.'s safety, and Relators' negligent conduct in providing these services contributed to A.J.'s injuries and death, which were foreseeable, especially considering nature and reason for Relators' safety plan put in place by Relators at the beginning of A.J.'s custody with his father—which was also orchestrated by Relators.

Relators maintained a significant relationship and connection with Missouri social workers over several years, exchanging confidential information back and forth as A.J.'s father fled back and forth between Kansas and Missouri trying to evade child protective services. Relators' conduct and connection with Missouri are such that Relators should reasonably have anticipated they would be made to answer in a Missouri court on whether their part of the services provided on A.J.'s behalf was conducted in a non-negligent manner.

Finally, this is not a case about conducting a preliminary investigation of a hotline call in a non-negligent manner. A.J's abuse and neglect was the repeated subject of an endless series of reports and hotline calls to social workers in both states, who investigated and documented every kick, punch, slap and injury inflicted upon A.J. by his father. Relators, by their own undertaking, created a special relationship with A.J., when they removed A.J. from his mother and placed him with his father; afterwards implementing a safety plan as a condition of custody. The affirmative acts, along with the other toothless measures implemented by Relators directed toward keeping A.J. safe, gave rise to a duty to protect A.J. well beyond a statutory duty at large to the public.

For these reasons, Respondent did not wrongly decide Relators' motion to dismiss and the *Petition for Writ of Prohibition or Alternatively, Writ of Mandamus* should be denied.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I HEREBY CERTIFY:

1. This brief complies with the limitations contained in Supreme Court Rule 84.06. The brief was completed using Microsoft Word, in Times New Roman size 13-point font. Excluding the cover page, signature block, this certificate of service, this brief contains 18,839 words, which does not exceed the 27,900 words allowed for Respondent's brief.

2. On this 28th day of January, 2019, I filed a true and accurate Adobe PDF copy of the Respondent's Brief and Certificate of Compliance and Service, and Respondent's Appendix via the Court's electronic filing system, which notified the following person of that filing:

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