IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. STATE OF KANSAS, DEPARTMENT FOR CHILDREN AND FAMILIES, and LAURA HOWARD, Relators, vs. THE HONORABLE CHARLES H. MCKENZIE Judge, Division 13, 16th Judicial Circuit, Kansas City, Jackson County, Missouri, Respondent.	)	Case No. SC97476

REPLY BRIEF OF RELATORS STATE OF KANSAS, DEPARTMENT FOR CHILDREN AND FAMILIES, AND LAURA HOWARD

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TABLE OF CONTENTS

Cases

Statutes

POINT RELIED ON

I. Relators are entitled to an order prohibiting Respondent from taking any further action other than to grant Relators' Motion to Dismiss because Respondent's decision not to decline to exercise jurisdiction as a matter of comity constitutes a clear abuse of judicial discretion.

Ramsden v. State of Illinois, 695 S.W.2d 457, 459-60 (Mo. banc 1985)

Townsend v. E. Chem. Waste Sys., 234 S.W.3d 452, 469-70 (Mo. App. 2007)

Missouri Appellate Courts have instructed that comity be applied when considering the immunities employed by other sovereign states. Controlling case law removed this decision from the Circuit Court's judicial discretion.

Plaintiffs argue Kansas has waived sovereign immunity in all state courts. Kansas disagrees.[1] The Kansas Tort Claims Act codified a history of judicial exceptions to common law sovereign immunity. Through the KTCA, Kansas consented to suit in tort in the state of Kansas only to the extent a private person would also be liable and with twenty-four exceptions. Because the KTCA is a consent statute, if the Act does not

[1] Laura Howard is now the Acting Secretary for the Kansas Department for Children and Families. Under Rule 52.13(d), Secretary Howard is automatically substituted for former Secretary Gina Meier-Hummel.

include language that explicitly states Kansas consents to suit in sister states, then that consent cannot be read into the statute by another state. *See, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996) (waiver of sovereign immunity must be expressed unequivocally in statutory text and is strictly construed in favor of the sovereign); s*ee also McNeill Trucking Co., Inc. v. Missouri State Highway & Transp. Comm'n*, 35 S.W.3d 846, 848 (Mo. banc 2001) (any purported statutory waiver of sovereign immunity must be express and is to be strictly construed), *Brown v. State Highway Comm'n*, 476 P.2d 233, 234 (Kan. 1970) (same), and *Maune ex rel. Maune v. City of Rolla*, 203 S.W.3d 802, 805 (Mo. App. 2006) (courts "strictly construe the statutory provisions that waive a public entity's sovereign immunity."). The KTCA does not state that Kansas consents to be sued in tort in Missouri or any other jurisdiction. Kansas' sovereign immunity in sister states remains intact.

Comity is particularly appropriate in this instance where Plaintiffs (Kansas citizens) seek damages from the State of Kansas under Kansas law for acts or omissions in Kansas pertaining to a Kansas child murdered in Kansas by his parents. Plaintiffs are asking Missouri to judge the effectiveness of Kansas policy and implementation of Kansas child protection laws. Missouri courts prohibit such review. *Ramsden v. State of Illinois*, 695 S.W.2d 457, 459-60 (Mo. banc 1985) ("[I]t must be remembered that strong interests are implicated in cases involving a state as a party. One is the interest of a state in governing its own operation … ."). A failure by Missouri to apply comity, and acknowledge that Kansas' sovereign immunity as to torts is absolute outside its own borders, would infringe upon the harmonious relations comity is intended to preserve.

Plaintiffs' response conflates comity and choice of law. Plaintiffs rely heavily on R.S.Mo. § 507.020, which is Missouri's choice of law statute. This statute has no relevance to the application of comity to sovereign entities as there is no question as to which state's law governs the claims. This is why, as Plaintiffs acknowledge, the Missouri opinions on comity do not discuss §507.020. Plaintiffs' references to cases where states are not a party are also irrelevant.

The issue of comity is not up for debate in Missouri. "[W]hile 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***." *Townsend v. E. Chem. Waste Sys.*, 234 S.W.3d 452, 469–70 (Mo. App. 2007) (emphasis added) (referencing *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). The question is not one of discretion. Missouri courts have been instructed to enforce the sovereign immunity statutes of sister states. Kansas does not consent to suit in Missouri. Enforcement of the KTCA requires dismissal and this Court's writ of prohibition should issue.

The facts of this case, as horrific as they are, do not and cannot change the result. Missouri does not allow itself to be sued in tort in its own state. It is illogical and would be hypocritical to assert that, as a matter of public policy, Missouri should hale Kansas into its courts to answer for a tort for which Missouri itself could not be liable.

Plaintiffs argue, "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." Resp. Br. at 29 ¶2. This statement perfectly illustrates how Plaintiffs' argument is flawed—it asserts Missouri should exercise jurisdiction and oversight of the executive departments of neighboring states. The very reason Missouri extends comity to other states is because Missouri does not and should not govern or police the acts of nonresident social workers investigating reports of child abuse in states other than Missouri. To suggest otherwise ignores the fact Kansas and Missouri are separate sovereigns. The public policies of Kansas and Missouri are the same on this issue, both states seek to protect the safety and wellbeing of children. This case, involving the alleged breach (in Kansas) of a legal duty owed by the State of Kansas to a Kansas citizen under Kansas law should be litigated in Kansas as a matter of comity.

The ruling by the Nevada Supreme Court in *Mianecki v. Second Judicial Dist. Court, In and For Washoe County*, 99 Nev. 93 (1983), is not controlling authority and is easily distinguished. In *Mianecki*, the Court found it dispositive that if the claim had been brought against Nevada, Nevada would not be immune and therefore declined to apply Wisconsin's immunity statute in Nevada. The opposite is true here. If the same allegations were brought against Missouri, Missouri would be immune. This is acknowledged by Plaintiffs as they did not sue the State of Missouri.

Mianecki is also distinguishable on the facts. The sex offender, Barney Blake, was on probation when Wisconsin granted him permission to move to Nevada. Plaintiffs argue, "Missouri has a strong interest in deterring sister states from negligently sending their Barney Blakes into this state placing Missouri children at risk." Resp. Br. at 31 ¶3.

This statement may be true but is immaterial. KsDCF had no involvement in Michael Jones' decision to move to Missouri. Nor could KsDCF have taken any action to prevent the move across state lines. *Mianacki* is irrelevant.

Plaintiffs suggest Missouri should decline comity because Kansas did not extend comity to Missouri in *Head v. Platte County, Mo*., 749 P.2d 6 (Kan. 1988). This exact argument was raised in *Babbs v. Block*, 167 F.Supp.3d 1025, 1028-29 (W.D. Mo. 2016) and rejected. *Babbs* was a negligence action against the Unified Government of Wyandotte County and the City of Kansas City, Kansas (the "KCK defendants"), related to an incident in which an off-duty KCKPD police officer inadvertently shot the bouncer at a Missouri nightclub. 167 F.Supp.3d at 1027. Like Plaintiffs here, the plaintiff in *Babbs* argued that because Kansas declined to extend comity to Missouri in *Head*, Missouri courts would now do the same. The Western District Court rejected the argument, pointing out that in *Head*, Missouri authorities had intentionally crossed the state line to cause the allegedly wrongful arrest of a Kansas resident. *Id*. at 1028. Conversely, in *Ramsden*, this Court held that it was appropriate to extend comity where Illinois did not enter Missouri to conduct activity. *Ramsden*, 695 S.W.2d at 459-461. Ultimately, the court held that "[t]he KCK defendants did not intentionally cause conduct in Missouri so [the court was] satisfied that even if the Missouri courts would question the *Head* result, it is not so offensive as to invite retaliation." *Babbs,* 167 F.Supp.3d at 1028. *Babbs* strongly supports the extension of comity in this case.

A writ of prohibition is appropriate as Missouri case law requires jurisdiction be declined as a matter of comity.

POINT RELIED ON

II. Relators are entitled to an order prohibiting Respondent from taking any further action other than to grant Relators' Motion to Dismiss because Respondent lacks subject matter jurisdiction over the claim against Relators by virtue of the State of Kansas' sovereign immunity.

Nevada v. Hall, 440 U.S. 410 (1979)

Franchise Tax Bd. of California v. Hyatt, 538 U.S. 488 (2003)

Franchise Tax Bd. of California v. Hyatt, 136 S.Ct. 1277 (2016)

U.S. Const., Art. IV, § 1

K.S.A. 75-6103

Kansas' sovereign immunity is neither "made-up" nor "silly." Resp. Br. at 37 ¶2, 39 ¶2. Sovereign immunity can only be waived through express consent. *See Keeney v. Missouri Highway & Transp. Comm'n*, 70 S.W.3d 597, 600 (Mo. App. 2002), *quoting Krasney v. Curators of University of Missouri*, 765 S.W.2d 646, 650 (Mo. App. 1989). As detailed above, Kansas has not consented to be sued in Missouri or any other jurisdiction. There is nothing in the KTCA to suggest Kansas waived its sovereign immunity outside of Kansas. Rather, the waiver is specifically limited to situations where "a private person[] would be liable under the laws of this state." K.S.A. 75-6103(a). Not the laws of Missouri or any other state, but the laws of Kansas. Because waiver of sovereign immunity requires specific consent, and there is no specific consent found in KTCA as to any state or laws other than Kansas, the immunity must apply in Missouri courts. *See*, *e.g.*, *State ex rel. Pub. Hous. Agency of City of Bethany v. Krohn*, 98 S.W.3d 911, 914 (Mo. App. 2003) (explaining that statutory provisions waiving sovereign immunity are narrowly construed in favor of the state preserving its rights).

Because Kansas' sovereign immunity in Missouri remains intact, Missouri must give it full faith and credit. The parties agree that the Full Faith and Credit Clause requires Missouri to apply the KTCA unless its application runs afoul of Missouri public policy. Plaintiffs concede that Missouri law does not allow the State of Missouri to be sued in tort. Likewise, Kansas does not consent for the State of Kansas to be sued in Missouri. The policies are in accord.

Plaintiffs write, "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." Resp. Br. at 42 ¶1. This argument flips the concept of sovereign immunity on its head. Plaintiffs suggest extraterritorial enforcement of Kansas' sovereign immunity defeats sovereign immunity. Kansas has not waived its sovereign immunity in Missouri. The arguments are clearly set forth in the Relators' Brief and above and will not be repeated.

The State of Kansas has briefed its position that *Nevada v. Hall* was incorrect and is ripe for reversal and incorporates those arguments into this brief. *Franchise Tax Bd. of California v. Hyatt*, 238 S.Ct. 2710 (cert. granted June 28, 2018)[2] ("*Hyatt III*") currently in front of the United States Supreme Court, seeks a reversal of *Nevada v. Hall*. The case

[2] Though Missouri did not join in the Amicus Brief on the merits briefing, Missouri joined an Amicus Brief with 44 other states in support of the Petition for Writ of Certiorari that argued in favor of overturning *Hall*. *See https://www.supremecourt.gov/DocketPDF/17/17-1299/43345/20180413144538828_Amicus%20Brief%20of%20State%20of%20Indiana%20and%2044%20Other%20States.pdf*.

has been fully briefed and was argued on January 9, 2019. The transcript of the oral argument is available for review.[3]

To the extent this Court is not inclined to issue a writ on the grounds of (a) comity, (b) personal jurisdiction, or (c) lack of duty, the decision of the Supreme Court in *Hyatt III* will directly impact the present action. Kansas would suggest this Court refrain from publishing an opinion based on sovereign immunity in this matter until a decision is made in *Hyatt III*.

POINT RELIED ON

III. Relators are entitled to an order prohibiting Respondent from taking any further action other than to grant Relators' Motion to Dismiss because Respondent lacks personal jurisdiction over Relators.

Andra v. Left Gate Prop. Holding, Inc., 453 S.W.3d 216 (Mo. 2015)

International Shoe Co. v. Washington, 326 U.S. 310 (1945)

M & D Enterprises, Inc. v. Fournie, 600 S.W.2d 64 (Mo. App. 1980)

R.S.Mo. § 506.500

U.S. Const., Amend. XIV, § 1

Plaintiffs' negligence claim is not valid because Kansas owed no duty to A.J. A *prima facie* showing of the validity of a claim is required in order to exercise personal jurisdiction. *Hollinger v. Sifers*, 122 S.W.3d 112, 116 (Mo. App. 2003). Plaintiffs do not provide any additional argument on this point. No further response is required.

[3] The transcript is available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1299_f2bh.pdf.

Kansas does not agree that Plaintiffs have satisfied Missouri's long-arm statute as claimed in their Response in Opposition Brief (p. 51 ¶2) Indeed, this point is contested in Relators' Brief at pages 31-36.

Plaintiffs concede that no Kansas actor committed a tortious act in Missouri (while arguing vigorously they *must* have eaten and texted while in Missouri). Instead, Plaintiffs argue Kansas engaged in acts outside of Missouri that produced actionable consequences in Missouri. However, a close look at the facts actually alleged in the Amended Petition and which are recited in Relators' Brief, reveals that Plaintiffs fail to allege any acts or omissions by KsDCF that occurred, or produced injurious consequences, in Missouri. KsDCF's only contact with Missouri was a *de minimis* cooperative exchange of information with MoDSS. This exchange of information is not alleged to have caused injurious contact in Missouri, nor can such be inferred. A finding that such cooperation subjects Kansas to jurisdiction in Missouri would not only result in a chilling effect on the exchange of information but also create a situation in which virtually any phone call could subject an out-of-state defendant to Missouri's jurisdiction. Neither R.S. Mo §506.500 nor the Fourteenth Amendment tolerate such a result.

Missouri jurisdiction is likewise prohibited by the Fourteenth Amendment. The Amended Petition alleges KsDCF responded to MoDSS's requests for information related to A.J.'s stepmother and a series of phone calls initiated by MoDSS to report that the family was believed to be in Kansas. Plaintiffs' response fails to identify a single case that supports their position that such contact is sufficient to avoid running afoul of the Fourteenth Amendment.

Plaintiffs rely on *Strobehn v. Mason*, 397 S.W.3d 487 (Mo. App. 2013) for the generic proposition that a single phone call can establish personal jurisdiction over a non-resident. Resp. Br., at 57 ¶3. In *Stroben* the "single phone call" formed the basis of a breach of contract claim but was not the only contact. *See Id*. at 502. *Strobehn* does not hold a single phone call establishes personal jurisdiction where that "single phone call" does not form the basis for the cause of action.

Plaintiffs' arguments that these social workers could have crossed state lines and probably texted each other, and might have eaten at restaurants in another state are pure speculation and supposition. This after-the-fact conjecture is not pled in the Amended Petition and cannot be reasonably inferred from the allegations included. *See Berkowski v. St. Louis Cty. Bd. of Election Comm'rs*, 854 S.W.2d 819, 823 (Mo. App. 1993) ("A petition must contain allegations of fact in support of each essential element of the cause sought to be pleaded.") Regardless, it is irrelevant whether a Kansas social worker might have eaten dinner in Missouri. What is relevant is that they did not provide, and are not alleged to have provided, services to A.J. in Missouri or alleged to have taken action that produced injurious consequences to A.J. in Missouri.

A writ of prohibition is appropriate when a trial court erroneously fails to grant a motion to dismiss for lack of jurisdiction. *See e.g., State ex Rel. Brantingham v. Grate*, 205 S.W.3d 317, 319 (Mo. App. 2006); *State ex rel. Specialized Transp., Inc. v. Dowd*, 265 S.W.3d 858, 862 (Mo. App. 2008). Because Plaintiffs' Petition fails to allege facts sufficient to grant Missouri subject matter or personal jurisdiction over Kansas, a writ of prohibition is appropriate.

POINT RELIED ON

IV. Relators are entitled to an order prohibiting Respondent from taking any further action other than to grant Relators' Motion to Dismiss because Relators owed Plaintiffs no legal duty as a matter of law.

Natalini v. Little, 185 S.W.3d 239 (Mo. App. 2006)

P.W. v. Kan. Dep't of Soc. & Rehab. Servs., 877 P.2d 430 (Kan. 1994)

Roe ex rel. v. Kan. Dept. of SRS, 102 P.3d 396 (Kan. 2004)

Jamierson v. Dale, 670 SW.2d 195 (Mo. App. 1984)

Plaintiffs concede their negligence claim is controlled by Kansas law. Regardless, whether Missouri or Kansas law is applied the result is the same. There was no special relationship between KsDCF and A.J. and therefore no duty was owed. Absent a duty there can be no finding of negligence. *Roe ex rel. v. Kan. Dept. of SRS*, 102 P.3d 396 (Kan. 2004). The removal of A.J. from his neglectful mother and placement with his father was squarely within the statutory duty of KsDCF to protect the health and welfare of A.J. under K.S.A. 38-2230. Similarly, KsDCF's instructions to Michael Jones to take steps to keep A.J. safe plainly fall under KsDCF's statutory duty. *See Roe*, *supra* (explaining that the scope of DCF's statutory duties is interpreted broadly).

Plaintiffs argue Kansas recognized §§ 323 and 324A impose a duty upon KsDCF to "provide services to children where DCF undertakes an affirmative action to protect a specific child." The applicable Kansas precedent says otherwise, *P.W. v. Kan. Dep't of Soc. & Rehab. Servs.*, 877 P.2d 430 (Kan. 1994), *Beebe v. Fraktman*, 921 P.2d 216 (Kan. App. 1996), and *Roe*, 102 P.3d 396, each state unequivocally that affirmative actions taken pursuant to statutory duties do not create a special duty.

Plaintiffs cite only an unpublished Court of Appeals opinion. That case, *Watters v. Kan. Dept. of Children and Families*, 2015 WL 9456744 (Kan. App. 2015) (unpublished), does not support the contention that any "affirmative act" by KsDCF triggers a special duty. To the contrary, the court in *Watters* explicitly recognized that "[a]ny actions taken by the [KsDCF] that are part of its statutory responsibility ***cannot, by definition, form the basis for finding an individualized and special duty owed to a particular person***." 2015 WL 9456744, at *8 (emphasis added). The actual holding in *Watters* was that the plaintiffs had pled facts sufficient to state a claim under Kansas' notice pleading standard, from which it was plausible KsDCF had undertaken action *beyond* its statutory duty and thus created a special duty. *See id.* at *5. But, unlike in *Watters*, Missouri's "fact pleading" standard governs Plaintiffs' claims. *See Charron v. Holden*, 111 S.W.3d 553, 555 (Mo. App. 2003). To state a valid claim under §§ 323 or 324A in Missouri, Plaintiffs' First Amended Petition must contain specific allegations that KsDCF performed acts that exceeded the broadly construed scope of its duties under K.S.A. 38-2230. *See Berkowski v. St. Louis Cty. Bd. of Election Comm'rs*, 854 S.W.2d at 823 ("A petition must contain allegations of fact in support of each essential element of the cause sought to be pleaded."); *see also*, *Agnello v. Walker*, 306 S.W.3d 666, 678 (Mo. App. 2010), *as modified* (Apr. 27, 2010) (explaining that unlike the federal notice pleading standard, also followed in Kansas, Missouri's fact pleading standard "demands a relatively rigorous level of factual detail."). Given that Plaintiffs have not alleged any conduct by KsDCF that would fall outside the scope of its statutory responsibilities,

Plaintiffs have not and cannot show that KsDCF owed A.J. a legal duty as a matter of law. Because there is no duty a writ of prohibition is appropriate.

CONCLUSION

For the above-stated reasons, Relators respectfully move the Court for a permanent writ of prohibition or, in the alternative, a writ of mandamus, requiring Respondent to dismiss the claims against Relators.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief includes the information required by rule 55.03 and complies with the limitations contained in Rule 84.06(6); and was prepared in Microsoft Word in Times New Roman with 13-point font, and there are approximately 4,043 words in the brief.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2019, I electronically filed the foregoing with the Clerk of the Court and that a true and correct copy of the foregoing was sent via electronic mail to the following recipients:

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