
IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel. BJC Health)	
System,)	
)	
Relator,)	
)	
vs.)	
)	
The Honorable Donald L. McCullin,)	Circuit Court No.
Judge of The Missouri Circuit Court,)	042-08454
Twenty-Second Judicial Circuit (St.)	
Louis City),)	
)	Subject to protective order and
Respondent.)	filed under seal.

Original Proceeding in Mandamus and/or Prohibition from the
Twenty-Second Judicial Circuit, St. Louis City, Division 20
The Honorable Donald L. McCullin, Presiding

BRIEF OF RELATOR BJC HEALTH SYSTEM

WILLIAMS VENKER & SANDERS LLC

Paul N. Venker, # 28768

Lisa A. Larkin, #46796

100 N. Broadway, 21st Floor

St. Louis, Missouri 63102

(314) 345-5000

(314) 345-5055 FAX

pvenker@wvslaw.com

llarkin@wvslaw.com

ATTORNEYS FOR RELATOR BJC HEALTH SYSTEM

TABLE OF CONTENTS

TABLE OF AUTHORITIES	5
JURISDICTIONAL STATEMENT	8
STATEMENT OF FACTS	9
POINTS RELIED ON.....	22
ARGUMENT	25

- I. Relator is entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County because Plaintiffs pretensively joined BJC as a defendant and Respondent should have dismissed BJC and/or disregarded its presence in his venue analysis in this case in that: 1) there is absolutely no evidence or information in this record to support that defendant BJC participated in conduct that affected the health care at issue and caused the claimed injuries in this medical malpractice case, which is based on the alleged negligence of a private surgeon, Dr. James Pitt, in performing surgery on Sadaf Qamar at separately incorporated Boone Hospital Center in Columbia, Missouri; and, 2) Plaintiffs have not shown that they or their counsel had any information or evidence at the time of filing this action to support that

they had a colorable claim against defendant BJC for the injuries claimed herein	25
A. Standard of Review	25
B. Plaintiffs pretensively joined BJC as a defendant and it should have been dismissed and/or its presence disregarded in Respondent’s venue analysis	26
II. Relator is entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County because venue is proper as to all defendants in Boone County in that, after disregarding the presence of the pretensively joined BJC, venue is improper pursuant to § 355.176.4, RSMo. because non-profit corporation Boone Hospital Center is located in Boone County, maintains its registered agent in Boone County, and the cause of action accrued in Boone County; or alternatively, the 2005 amended venue statute, § 508.010.4, RSMo. (Supp. 2005), applies to this action and venue is only proper in Boone County under that statute as the location where plaintiff Qamar was first allegedly injured....	54
A. Standard of Review	54
B. After disregarding the presence of the pretensively joined BJC, venue in the City of St. Louis is improper pursuant to	

§ 355.176.4, RSMo. (1994), because non-profit corporation Boone Hospital Center has its principal place of business in Boone County, Missouri, maintains its registered agent there, and the cause of action accrued in Boone County **55**

C. The 2005 amended venue statute, § 508.010.4 RSMo. (Supp. 2005), applies to this action and venue is only proper in Boone County under that statute **57**

III. Relator is entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County because pursuant to § 355.176.4, RSMo. (1994), the exclusive venue for the claims against nonprofit corporation Boone Hospital Center is in Boone County in that: (1) it is undisputed that the cause of action accrued there, Boone Hospital Center's principal place of business is located there, and the office of its registered agent is located there. This Court should revisit its holding in *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528 (Mo. banc 2003), and hold that pursuant to §355.176.4, even if defendant BJC was not pretensively joined, the entire case must be transferred to the Circuit Court of Boone County as the *only* proper venue for Plaintiffs' claims against all defendants, including those against nonprofit corporate

defendant Boone Hospital Center	59
A. Standard of Review	59
B. This Court should hold that pursuant to § 355.176.4, regardless whether defendant BJC was pretensively joined, the entire case must be transferred to Boone County as the only proper venue for plaintiffs’ claims against nonprofit corporate defendant Boone Hospital Center.	60
CONCLUSION	64
RULE 84.06(c) CERTIFICATE OF COMPLIANCE.....	65
PROOF OF SERVICE.....	66

TABLE OF AUTHORITIES

Cases

<i>Berkowski v. St. Louis County Bd. of Election Com'rs</i> , 854 S.W.2d 819 (Mo.App. E.D. 1993)	38
<i>Brickner v. Normandy Osteopathic Hospital, Inc.</i> , 746 S.W.2d 108 (Mo.App. 1988).....	38
<i>Downey v. Mitchell</i> , 835 S.W.2d 554 (Mo.App. E.D. 1992).....	22, 37, 38
<i>Eads v. Kinstler Agency, Inc.</i> , 929 S.W.2d 289 (Mo.App. E.D. 1996)	53
<i>Eyberg v. Shah</i> , 773 S.W.2d 887 (Mo.App. S.D. 1989).....	38
<i>Halmick v. SBC Corporate Services, Inc.</i> , 832 S.W.2d 925 (Mo.App. E.D. 1992)	31, 32, 35, 36
<i>Hefner v. Dausmann</i> , 996 S.W.2d 660 (Mo.App. S.D. 1999)..	22, 29, 39, 44
<i>Green v. Penn-America Ins. Co.</i> , 242 S.W.3d 374 (Mo.App. W.D. 2007).....	32
<i>Igoe v. Department of Labor and Indus. Relations</i> , 152 S.W.3d 284 (Mo. banc 2005).....	26, 29, 39, 54, 55, 60
<i>Jeff-Cole Quarries, Inc. v. Bell</i> , 454 S.W.2d 5 (Mo. 1970).....	53
<i>J.M. v. Shell Oil Co.</i> , 922 S.W.2d 759 (Mo. banc 1996).....	47
<i>Keltner v. Keltner</i> , 950 S.W.2d 690 (Mo.App. S.D. 1997)	26, 39, 55, 60

<i>Matteuzzi v. Columbus Partnership, L.P.</i> , 866 S.W.2d 128	
(Mo. banc 1993).....	31, 34-36
<i>Raskas Foods, Inc. v. Southwest Whey, Inc.</i> , 978 S.W.2d 46	
(Mo.App. E.D. 1998)	29
<i>Ritter v. BJC Barnes Jewish Christian Health Systems</i> , 987 S.W.2d	
377 (Mo.App. E.D. 1999)	12, 22, 27, 34, 35, 40-43, 45-50, 52, 53
<i>Sedalia Mercantile Bank and Trust Co. v. Loges Farms, Inc.</i> ,	
740 S.W.2d 188 (Mo.App. W.D. 1987).....	34
<i>State ex rel. Bibbs v. Director of Revenue</i> , 237 S.W.3d 252	
(Mo.App. W.D. 2007)	32
<i>State ex rel. BJC Health System v. Neill</i> , 121 S.W.3d 528	
(Mo. banc 2003).....	12, 19, 22, 24, 27, 31, 32, 33, 34, 59, 60, 63
<i>State ex rel. BJC Health System v. Neill</i> , 86 S.W.3d 138 (Mo.App.	
E.D. 2002)	12, 24, 34, 43
<i>State ex rel. Breckenridge v. Sweeney</i> , 920 S.W.2d 901 (Mo.	
banc 1996).....	29, 44
<i>State ex rel. City of St. Louis v. Kinder</i> , 698 S.W.2d 4 (Mo. banc	
1985)	25, 54, 59
<i>State ex rel. Etter, Inc. v. Neill</i> , 70 S.W.3d 28 (Mo.App.	
E.D. 2002)	26, 54, 59

<i>State ex rel. Ford Motor Co. v. Bacon</i> , 63 S.W.3d 641 (Mo. banc 2002)	33, 49
<i>State ex rel. Linthicum v. Calvin</i> , 57 S.W.3d 855 (Mo. banc 2001).....	23, 58
<i>State ex rel. Malone v. Mummert</i> , 889 S.W.2d 822 (Mo. banc 1994) ..	28, 40
<i>State ex rel. SSM Health Care St. Louis v. Neill</i> , 78 S.W.3d 140 (Mo. banc 2002)	23, 55, 56, 61, 62, 63
<i>State ex rel. SSM Health Care St. Louis v. Neill</i> , 78 S.W.3d 145 (Mo. banc 2002)	23, 56

Statutes and Other Authorities

Article V, Section 4, Missouri Constitution	8
§355.176.4, RSMo. (1994)	8, 13, 23, 24, 28, 54-56, 59-63, 64
§476.410, RSMo. (2004)	8, 23, 56, 67, 64
§508.010, RSMo. (Supp. 2005)	16, 23, 54, 57, 58
§508.040, RSMo. (1991)	61, 63
§538.232, RSMo. (Supp. 2005)	23, 57, 58
§508.305, RSMo. (Supp. 2005)	23, 57, 58
Rule 51.045, Mo.R.Civ.Pro.	24, 29, 56, 64

JURISDICTIONAL STATEMENT

This is an original proceeding in prohibition seeking to compel Respondent, the Honorable Donald L. McCullin, to transfer this entire action, pursuant to §476.410, RSMo. (2004), and §355.176.4, RSMo. (1994), to the Circuit Court of Boone County, wherein venue is proper as to all properly joined nonprofit corporate defendants and individual defendant Dr. Pitt.

Pursuant to Article V, Section 4, of the Missouri Constitution, the Missouri Supreme Court is authorized to issue extraordinary original remedial writs.

STATEMENT OF FACTS

This case involves abdominal surgery that defendant James Pitt, D.O. performed on plaintiff Sadaf Qamar on May 14, 2004, at defendant Boone Hospital Center in Colombia, Missouri. Plaintiffs claim the surgery was negligently performed and caused plaintiff Qamar to suffer serious injury. It is undisputed that Dr. James Pitt is not an employee of defendant BJC Health System (herein also “BJC”).

A. The Petition

On October 7, 2004, plaintiff Qamar, Individually and by and through her husband, Syed Haider¹, as Durable Power of Attorney, and Syed Haider and their two minor children brought this medical negligence suit against James Bruce Pitt, D.O., Columbia Surgical Associates, Inc., CH Allied Services, Inc., d/b/a Boone Hospital Center, BJC Health System, Kimberly Karol Morse, M.D., and Women’s Health Associates, Inc.² (Petition, Exhibit 1, pp. 1-2)³.

¹ Plaintiffs were originally identified as Jane and John Doe.

² On May 10, 2005, Plaintiffs voluntarily dismissed without prejudice their cause of action against defendants Kimberly Morse, M.D. and Women’s Health Associates, Inc. (Exhibit 22).

Plaintiffs allege that on or about April 30, 2004, plaintiff Qamar had a cesarean section at Boone Hospital Center in Columbia, Missouri. (Petition, Exhibit 1, ¶¶ 14-21). Plaintiffs further allege that on or about May 14, 2004, plaintiff Qamar returned to Boone Hospital Center and defendants Pitt and Columbia Surgical Associates, Inc. performed a laparoscopy upon her, at which time defendant Pitt punctured plaintiff's liver and introduced carbon dioxide gas, which entered plaintiff's circulatory system. (Petition, Exhibit 1, ¶¶ 14-21). As a result of the alleged negligence, plaintiff Qamar allegedly suffered severe brain injury and damage. (Petition, Exhibit 1, ¶ 23).

All the allegedly negligent care and treatment of plaintiff Qamar occurred in Boone County, Missouri; none occurred within the City of St. Louis. (Petition, Exhibit 1, generally). The registered agents for all defendants, except defendant BJC Health System, are located in Columbia, Boone County, Missouri. (Petition, Exhibit 1, caption). The registered agent of defendant BJC Health System is located in St. Louis County, Missouri at 3015 North Ballas Road, St. Louis Missouri 63131. (Petition, Exhibit 1, caption).

³ All exhibit references are to the joint exhibits of all Relators filed contemporaneously with the filing of BJC Health System's Petition for Writ of Mandamus and/or Prohibition.

Plaintiffs’ sole allegations of defendant BJC’s role in this case are that BJC “holds itself out to the public as an ‘integrated delivery system’ employing more than 25,000 people who work to provide health care services at its member institutions, which include Boone Hospital Center, and that BJC provides health care and health care facilities for consideration to the general public through its employees, servants, agents, actual, ostensible, or apparent, and member institutions and hospitals, including Boone Hospital Center, and that BJC is the parent corporation presently overseeing the operations of ... Boone Hospital Center ... and that BJC exercises control over Boone Hospital Center in many areas including areas that affect the medical care provided to plaintiff [Sadaf Qamar] in 2004...” (Petition, Exhibit 1, ¶ 6)(emphasis added). The Petition admits BJC and Boone Hospital Center are separately incorporated. (Petition, Exhibit 1, ¶¶ 5-6).

On November 24, 2004, BJC Health System timely filed a Motion to Dismiss or in the Alternative to Transfer Venue, which asserted as grounds for dismissal that:

(1) plaintiffs failed to state a claim against defendant BJC for the actions of separately incorporated defendant Boone Hospital Center and Dr. Pitt because, under Missouri law, a parent corporation is not liable for the conduct of one of its subsidiary corporations unless one of the two exceptions to the general rule of the corporate entity doctrine is met. (BJC’s Motion to Dismiss or Transfer

Venue, Exhibit 6, ¶¶ 5-6). One exception is the so-called piercing of the “corporate veil,” and to come within this exception, plaintiffs herein would have to plead facts and prove defendant Boone Hospital Center was a mere sham corporation of defendant BJC and that its existence was designed to perpetuate a fraud upon the public, including plaintiffs. *See State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528, 531 (Mo. banc 2003); *State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138, 140-41 (Mo.App. E.D. 2002); *Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d 377, 384-87 (Mo.App. E.D. 1999). The Petition contains no *alter ego* allegations;

(2) Missouri law states that no liability can pass to defendant BJC based on its relationship with defendant Boone Hospital Center for the health care at issue unless “the alleged control by BJC Health System affected the health care at issue and caused the alleged injury.” *State ex rel. BJC Health System v. Neill*, 121 S.W.3d at 531; Plaintiffs bare and unsupported allegations that defendant BJC somehow “owned, managed, controlled, or had the right to control” the separately incorporated defendant Boone Hospital Center and the individual health care providers are insufficient to state a claim under Missouri law. Plaintiffs’ Petition fails to contain any allegations, beyond mere legal conclusions, specifically stating how defendant BJC had actual control over the health care at issue, and how said control actually affected the outcome and

caused plaintiffs' claimed injuries. As such, plaintiffs failed to plead sufficient allegations of control that, if true, state a claim upon which relief can be granted against defendant BJC as a parent corporation; and

(3) plaintiffs' vague and conclusory allegations that the other corporate defendants (i.e. Columbia Surgical Associates, Inc., and Women's Health Associates, Inc.) are defendant BJC's employees or agents, and furthermore, that all the individual defendants and health care providers were somehow agents, servants, and employees of defendant BJC Health System are insufficient to state a claim against defendant BJC. (Exhibit 6).

For its alternative Motion to Transfer Venue, BJC asserted venue is improper in the Circuit Court of the City of St. Louis pursuant to §355.176.4, RSMo, because venue as to non-profit defendant Boone Hospital Center is only proper in Boone County. (Exhibit 6). Defendant Boone Hospital Center is a Missouri nonprofit corporation. (See printout from the Missouri Secretary of State's Office regarding Boone Hospital Center, which is attached to the Motion to Dismiss or Transfer Venue (Exhibit 6) as Exhibit A, p. 110). Plaintiffs' Petition admitted many of the crucial venue facts, namely: (1) that the location of defendant Boone Hospital Center's registered office and registered agent is in Boone County, Missouri; and (2) that the allegedly negligent events occurred only at Boone Hospital Center. (See Petition, Exhibit 1, Caption, summons, and ¶¶13-22).

Defendant BJC further asserted that plaintiffs pretensively joined it in an improper attempt to establish venue in the Circuit Court of the City of St. Louis and to deny defendant Boone Hospital Center its statutory venue right to be sued only in Boone County. Defendant BJC was pretensively joined because: (1) the petition on its face fails to state a claim against BJC, and (2) based upon the allegations in plaintiffs' Petition and the information available at the time this Petition was filed, it is clear that plaintiffs could not have had a reasonable basis, in law or in fact, to believe that they had a colorable claim against defendant BJC. (Exhibit 6).

Plaintiffs filed a Response to BJC's Motion to Dismiss, or in the Alternative, to Transfer Venue, asserting that plaintiffs sufficiently stated a cause of action against defendant BJC and that venue is proper in the Circuit Court of the City of St. Louis because defendant BJC has its principal place of business in the City of St. Louis. (Plaintiffs' Response, Exhibit 7).

The other defendants filed similar Motions to Dismiss or to Transfer venue. (Exhibits 2 and 4). Defendant James Pitt, D.O., in support of his own Motion to Dismiss or to Transfer Venue, submitted an affidavit in which he attests that defendant BJC did not manage or control the manner, method or means by which he rendered care and treated plaintiff Qamar, and that defendant BJC did not have the right to control, nor did it control the manner, method or means by which he

rendered care and treated plaintiff Qamar. (Affidavit of James Bruce Pitt, D.O., Exhibit C to Exhibit 2, ¶ 5, pp. 32-33).

Thereafter, Dr. Pitt submitted a supplemental affidavit in support of his Motion to Transfer Venue, attesting he exercised his own independent skill and judgment in making all decisions relating to the medical care and treatment he provided to plaintiff Qamar. (First Supplemental Affidavit of James Bruce Pitt, D.O. in Support of Motion to Transfer Venue, Exhibit 8, ¶2). Dr. Pitt further attested that neither defendant BJC nor Boone Hospital Center controlled or had the right to control his independent medical decisions with respect to plaintiff Qamar, and he is not and never has been an employee or agent of Boone Hospital Center or BJC, and was not acting as an employee or agent of either in his capacity as a physician rendering medical care and treatment to plaintiff Qamar as mentioned in the Petition. (Exhibit 8, ¶¶ 4-6).

On or about May 3, 2006, plaintiffs filed their First Amended Petition adding previously dismissed defendants Kimberly Karol Morse, M.D. and Women's Health Associates, Inc., and adding never-before named defendants Chris J. Martin, M.D., and Columbia Nephrology & Internal Medicine, P.C., all from Boone County, Missouri. (First Amended Petition, Exhibit 10). All substantive allegations against the other defendants remained unchanged. (*See* First Amended Petition, Exhibit 10, generally).

In response to the First Amended Petition, defendant BJC filed a second Motion to Dismiss, or in the Alternative, Motion to Transfer Venue, essentially reasserting the arguments made in its previously filed Motion to Dismiss or to Transfer Venue. (Motion of Defendant BJC Health System to Dismiss, or in the Alternative, Motion to Transfer Venue, Exhibit 15).

Plaintiffs filed a Response to BJC's second Motion to Dismiss or Transfer, which was substantively identical to that previously filed, with an added response to the defendants' arguments that Sec. 508.010 as amended by Missouri's 2005 tort reform should determine the proper venue for the case. (Plaintiffs' Response to Defendant BJC Health System's Motion to Dismiss, or in the Alternative, to Transfer Venue, Exhibit 16).

In support of their own Motion for Change of Venue, defendants Chris Martin, M.D. and Columbia Nephrology & Internal Medicine, P.C. submitted an affidavit of Dr. Martin. In that affidavit, Dr. Martin attested: (1) that he exercised his own independent skill and judgment in making all medical care and treatment decisions regarding plaintiff Qamar, and that neither Boone Hospital Center, CH Allied Services, Inc. nor defendant BJC controlled or had the right to control his independent medical decisions; and (2) that he was not an employee or agent, servant, whether actual or ostensible, of Boone Hospital Center, CH Allied Services, Inc., or BJC and was not acting as an employee or agent of BJC in his

capacity as a physician rendering medical care and treatment to plaintiff Qamar. (Affidavit and Supplemental Pleading of Chris Martin, M.D. and Columbia Nephrology & Internal Medicine, P.C. in Support of Motion for Change of Venue, Exhibit 17, ¶¶ 3-5).

On November 22, 2006, plaintiffs filed an Amended Supplemental Response to all Defendants' Motions to Dismiss or Transfer for Improper Venue. (Plaintiffs' Amended Supplemental Response to Defendants Motion to Dismiss or Transfer for Improper Venue, Exhibit 18). Included with that filing were numerous exhibits submitted in opposition to the various motions to dismiss or transfer venue. (Exhibits included with Exhibit 18, pp. 357-980)(It should be noted that although Plaintiffs' Amended Supplemental Response stated they were submitting 42 exhibits with the Amended Supplemental Response, no documents were submitted with exhibit numbers 6, 30-33, 36, or 38-40).

On October 30, 2007, defendant BJC filed its Memorandum of Law in Support of its Motion to Dismiss or Transfer. (Memorandum of Law of Defendant BJC Health System in Support of its Motion to Dismiss, or in the Alternative, Motion to Transfer Venue, Exhibit 20, including venue exhibits). Also on October 30, 2007, all defendants' Motions to Dismiss or to Transfer Venue were called, heard and taken under submission. (10/30/07 Order, Exhibit 25).

Almost four months later, on February 27, 2008, Respondent McCullin entered an order denying in part BJC's Motion to Dismiss⁴ and denying its Motion to Transfer Venue. (2/27/08 Order, Exhibit 26). In denying the bulk of BJC's Motion to Dismiss, Respondent noted plaintiffs filed 42 exhibits⁵ with their responses to the Motion intended to establish BJC exercises control over its system and affiliates. (Exhibit 26, p. 2). According to Respondent, the 42 exhibits show:

that BJC sets standards and guidelines for the delivery of health care at its subsidiaries, that BJC holds itself out to the public as the employer of healthcare providers in Boone Hospital Center, the BJC exercises approval power over its subsidiaries' budgets and has authority over all items which affect the bottom line, that BJC exercises control over its subsidiaries' boards of directors, that BJC has integrated and assumed many services of its members (sic) institutions, and that BJC has the power to contract and negotiate with third parties on behalf of the member institutions.

⁴ The only claim Respondent dismissed was Count VII, plaintiffs' claim for loss of parental consortium. (2/27/08 Order, Exhibit 26, p. 5).

⁵ Again, although plaintiff stated they were submitting 42 exhibits, no documents were submitted with exhibit numbers 6, 30-33, 36, or 38-40).

(Exhibit 26, p. 4). Respondent then noted, relying on *State ex rel BJC Health System v. Neill*, 121 S.W.3d 528, 531 (Mo. banc 2003), that the Missouri Supreme Court has found plaintiffs in an underlying medical malpractice case can state a claim against BJC by alleging that BJC maintained control over the adoption, promulgation, and use of standards, protocols and procedural guidelines at its affiliate hospitals. (Exhibit 26, p. 5). Respondent then held plaintiffs herein had similarly pleaded BJC had control over Boone Hospital Center. (*Id.*). Given his holding that plaintiffs had stated a claim as to defendant BJC, Respondent then denied BJC's venue transfer motion, stating that since venue is proper as to defendant BJC in the City of St. Louis, venue is therefore proper as to all jointly liable defendants in the City of St. Louis. (Exhibit 26, p. 6).

As to defendant BJC's argument that it had been pretensively joined to manipulate venue, Respondent simply held plaintiffs have provided "sufficient evidence of their belief that BJC controls Boone Hospital Center," and that there is "ample case law" in Missouri finding defendant BJC may be jointly liable for acts at its affiliate hospitals. (Exhibit 26, p. 7).

On March 12, 2008, Respondent also denied co-defendants' Motions to Dismiss or to Transfer Venue.⁶ (Exhibits 27 and 28, Orders).

⁶ Plaintiffs voluntarily dismissed without prejudice defendants Kimberly Morse, M.D. and Women's Health Associates, Inc. on October 11, 2006 (Exhibit 23), and

On March 20, 2008, BJC filed in the Missouri Court of Appeals, Eastern District, a Petition for Writ of Mandamus and/or Prohibition. (ED91081). Also on March 20, 2008, co-defendants Dr. Pitt and Boone Hospital Center each filed similar Petitions for Writ of Mandamus and/or Prohibition. (ED91082 and ED91083, respectively). On March 24, 2008, the Eastern District issued three Preliminary Orders in Prohibition, ordering Respondent to file an answer to the Petitions on or before April 4, 2008, and to refrain from all action in the premises until further order of the court. (Exhibits 29-31).

On April 4, 2008, Respondent filed both Answers to each of the three Petitions and Suggestions in Opposition to each of the Petitions. (Exhibit 32, Answer to Relator BJC Health System's Petition for Writ of Mandamus and/or Prohibition; Exhibit 33, Suggestions in Opposition to Relator BJC Health System's Petition for Writ of Mandamus and/or Prohibition; Exhibit 34, Answer to Relators James Bruce Pitt, D.O., and Columbia Surgical Associates, Inc.'s Petition for Writ of Prohibition; Exhibit 35, Memorandum of Plaintiffs on Behalf of Respondent Adopting Suggestions in Opposition to Relator BJC Health System's Petition for Writ of Mandamus and/or Prohibition; Exhibit 36, Answer to Relator CH Allied Services, Inc. D/B/A Boone Hospital Center's Petition for Writ of Prohibition, or

Chris Martin, M.D. and Columbia Nephrology & Internal Medicine, P.C. on September 20, 2007 (Exhibit 24).

in the Alternative, Petition for Writ of Mandamus; Exhibit 37, Memorandum of Plaintiffs on Behalf of Respondent Adopting Suggestions in Opposition to Relator BJC Health System's Petition for Writ of Mandamus and/or Prohibition).

On April 7, 2008, the Eastern District ordered the Preliminary Orders in Prohibition quashed and the Writs of Prohibition denied. (Exhibit 38-40).

On May 2, 2008, BJC filed in this Court a Petition for Writ of Mandamus and/or Prohibition. Also on May 2, 2008, co-defendants Dr. Pitt and Boone Hospital Center each filed similar Petitions for Writ of Mandamus and/or Prohibition. (SC89284 and SC89283, respectively).

On May 20, 2008, this Court entered three Preliminary Orders in Prohibition, ordering Respondent to file an answer to the Petitions on or before June 19, 2008, and to refrain from all action in the premises until further order of the Court. On June 18, 2008, Respondent filed his Writ Answer/Return. This briefing follows.

POINTS RELIED ON

I. Relator is entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County because Plaintiffs pretensively joined BJC as a defendant and Respondent should have dismissed BJC and/or disregarded its presence in his venue analysis in this case in that: 1) there is absolutely no evidence or information in this record to support that defendant BJC participated in conduct that affected the health care at issue and caused the claimed injuries in this medical malpractice case, which is based on the alleged negligence of a private surgeon, Dr. James Pitt, in performing surgery on Sadaf Qamar at separately incorporated Boone Hospital Center in Columbia, Missouri; and, 2) Plaintiffs have not shown that they or their counsel had any information or evidence at the time of filing this action to support that they had a colorable claim against defendant BJC for the injuries claimed herein.

State ex rel. BJC Health System v. Neill, 121 S.W.3d 528 (Mo. banc 2003)

Ritter v. BJC Barnes Jewish Christian Health Systems, 987 S.W.2d 377

(Mo.App. E.D. 1999)

Hefner v. Dausmann, 996 S.W.2d 660 (Mo.App. S.D. 1999)

Downey v. Mitchell, 835 S.W.2d 554 (Mo.App. E.D. 1992)

II. Relator is entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County because venue is proper as to all defendants in Boone County in that, after disregarding the presence of the pretensively joined BJC, venue is improper pursuant to § 355.176.4, RSMo. because non-profit corporation Boone Hospital Center is located in Boone County, maintains its registered agent in Boone County, and the cause of action accrued in Boone County; or alternatively, the 2005 amended venue statute, § 508.010.4, RSMo. (Supp. 2005), applies to this action and venue is only proper in Boone County under that statute as the location where plaintiff Qamar was first allegedly injured.

State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 140 (Mo. banc 2002)

State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 145 (Mo. banc 2002)

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)

§355.176.4, RSMo. (1994)

§476.410, RSMo. (2004)

§508.010, RSMo. (Supp. 2005)

§508.305, RSMo. (Supp. 2005)

§538.232, RSMo. (Supp. 2005)

III. Relator is entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County because pursuant to § 355.176.4, RSMo. (1994), the exclusive venue for the claims against nonprofit corporation Boone Hospital Center is in Boone County in that: (1) it is undisputed that the pertinent venue facts are that the cause of action accrued there, its principal place of business is located there and the office of its registered agent is located there. This Court should revisit its holding in *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528 (Mo. banc 2003), and hold that pursuant to § 355.176.4, even if defendant BJC was not pretensively joined, the entire case must be transferred to the Circuit Court of Boone County as the *only* proper venue for Plaintiffs' claims against all defendants, including those against nonprofit corporate defendant Boone Hospital Center.

State ex rel. BJC Health System v. Neill, 86 S.W.3d 138 (Mo.App. E.D. 2002)

§355.176.4, RSMo. (1994)

ARGUMENT

I. Relator is entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County because Plaintiffs pretensively joined BJC as a defendant and Respondent should have dismissed BJC and/or disregarded its presence in his venue analysis in this case in that: 1) there is absolutely no evidence or information in this record to support that defendant BJC participated in conduct that affected the health care at issue and caused the claimed injuries in this medical malpractice case, which is based on the alleged negligence of a private surgeon, Dr. James Pitt, in performing surgery on Sadaf Qamar at separately incorporated Boone Hospital Center in Columbia, Missouri; and, 2) Plaintiffs have not shown that they or their counsel had any information or evidence at the time of filing this action to support that they had a colorable claim against defendant BJC for the injuries claimed herein.

A. Standard of Review

Where the trial court retains an improperly venued case, it acts in excess of its jurisdiction, and the error is so fundamental that it provides the basis for a writ of prohibition. *State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. banc 1985). “Prohibition lies to bar the trial court from taking any further action, except

to transfer the case to a proper venue.” *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28, 32 (Mo.App. E.D. 2002).

Once a proper objection to the propriety of venue is raised, it is reversible error to allow a matter to proceed in the improper venue. *See Iggoe v. Department of Labor and Indus. Relations*, 152 S.W.3d 284, 289 (Mo. banc 2005)(plaintiff’s verdict set aside and case remanded for transfer to proper venue); *Keltner v. Keltner*, 950 S.W.2d 690, 691 (Mo.App. S.D. 1997)(defendant’s participation in trial on merits after her objection to venue did not constitute waiver; judgment for plaintiff reversed and case remanded for transfer to proper venue).

B. Plaintiffs pretensively joined BJC as a defendant and it should have been dismissed and/or its presence disregarded in Respondent’s venue analysis.

This Court should make permanent its preliminary writ of prohibition permanent because Respondent erred in denying BJC’s Motion to Dismiss or, in the Alternative, to Transfer Venue because: 1) there is absolutely no evidence or information in this record to support plaintiffs’ required element that defendant BJC participated in conduct that affected the health care at issue and caused the claimed injuries in this medical malpractice case, which is based exclusively on the alleged negligence of a private surgeon, Dr. James Pitt, in performing surgery on Sadaf Qamar at separately incorporated Boone Hospital Center in Columbia,

Missouri; and 2) plaintiffs have not shown that they or their counsel had any information or evidence at the time of filing this action to support their belief that they had a colorable claim against defendant BJC for the injuries claimed herein.

In denying defendant BJC's Motion to Transfer Venue, Respondent failed to follow Missouri precedent as articulated in *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528 (Mo. banc 2003) and *Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d 377 (Mo.App. E.D. 1999). The main issue here falls squarely within this Court's 2003 holding in *State ex rel. BJC Health System v. Neill*, *supra*, that defendant BJC is not liable for the acts of an affiliate hospital unless defendant BJC's conduct affected the health care at issue and caused the alleged injury. *Id.* at 531.

Further, the issues raised in this case were previously addressed by the Court of Appeals, Eastern District, in *Ritter v. BJC Barnes Jewish Christian Health Systems*, *supra*, where the court addressed the BJC parent's potential liability for actions of an affiliate hospital and analyzed many documents that were substantially similar to those submitted by plaintiffs herein. In that case, the court concluded plaintiff Ritter did not show defendant BJC exercised sufficient control or had the contractual right to control the affiliate hospital's performance of the surgery at issue in that case. The facts of this case are strikingly similar to the facts of the now almost one decade-old *Ritter*, *supra*, which held that the BJC parent

corporation could not be held liable for the gallbladder surgery performed by a private physician at an affiliate hospital because plaintiff had no evidence of the BJC parent corporation's actual control of or right to control the health care at issue, i.e., the surgery performed.

Here, Respondent ignored plaintiffs' failure to allege defendant BJC's conduct affected the health care at issue and caused the alleged injury and erroneously denied BJC's Motion to Dismiss for failure to state a claim. Respondent then relied on the City of St. Louis location of the pretensively joined BJC to deny the statutory venue rights of Boone Hospital Center under § 355.176.4, RSMo. (1994), to be sued only in Boone County.

1. Missouri law does not allow a party to be joined to a lawsuit solely for the purpose of manipulating venue; the pretensively joined defendant should be disregarded for purposes of determining venue.

The pretensive joinder analysis is two-pronged: the first prong involves an assessment of the pleading of the case; the second prong analyzes the veracity of the allegations and whether they can be proven. The pretensive joinder test is disjunctive, such that a plaintiff losing on either prong means the case is improperly venued and must be transferred to a proper venue. *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 824-825 (Mo. banc 1994).

Venue is pretensive if either: (1) the petition fails to state a claim for which relief can be granted against the resident defendant; or (2) the record in support of a Motion asserting pretensive joinder establishes there is no cause of action against the resident defendant and the information available at the time the Petition was filed would not support a reasonable legal opinion that a case could be made against that defendant. *Hefner v. Dausmann*, 996 S.W.2d 660, 663 (Mo.App. S.D. 1999) (citing *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. banc 1996)).

The pretensive joinder maxim is often incompletely stated. The starting point in the analysis is that the plaintiff has the burden of showing venue is proper. “The procedure for challenging venue is now expressed in Rule 51.045, *but the burden of showing that venue is proper always has been with the plaintiff when venue is challenged.*” *Igoe v. Department of Labor and Industrial Relations*, 152 S.W.3d 284, 288 (Mo. banc 2005)(emphasis added). Thus, “[w]here venue is an issue, the plaintiff carries the burden of proof to show an honest belief that there is a justiciable claim against a resident party.” *Id.* (citing *Raskas Foods, Inc. v. Southwest Whey, Inc.*, 978 S.W.2d 46, 49 (Mo.App. E.D. 1998)).

In this case, plaintiffs are currently claiming that defendant BJC is liable because : (1) it had employees or agents who provided health care to plaintiff Qamar at Boone Hospital Center; and (2) it controlled or had the right to control

the health care at issue in this case (whether under an alter ego theory or through participatory conduct). As will be seen below, plaintiffs have failed, both on the pleadings level and on an evidentiary level, to carry their burden of showing that they had – at the time of filing this case – sufficient information or evidence to support a good faith belief defendant BJC participated in conduct which affected the health care at issue and caused plaintiff Qamar’s alleged injuries.

a. The allegations of plaintiffs’ First Amended Petition fail to state a claim against defendant BJC.

Respondent should have dismissed the claims against defendant BJC because plaintiffs’ First Amended Petition fails to state a claim against it. Again, the first prong of the pretensive joinder analysis is whether plaintiffs have validly pled a claim against defendant BJC.

i. As a matter of law, Plaintiffs’ allegations of “control” by defendant BJC over the health care at issue fail to state a claim.

Plaintiffs are attempting to hold the separately incorporated defendant BJC liable for the actions of the separately incorporated Boone Hospital Center. This is the only pleaded basis for any liability of defendant BJC. There are no specific allegations, however, of how defendant BJC’s conduct affected the health care to plaintiff Sadaf Qamar at Boone Hospital Center and caused the alleged injuries, as

required by *State ex rel. BJC Health System v. Neill* 121 S.W.3d 528, 531 (Mo. banc 2003). The conclusory allegations of the Petition, therefore, are simply inadequate to state a claim against BJC under Missouri law.

More than one Missouri appellate court has upheld a trial court's dismissing a petition for a plaintiff's failure to adequately plead the required degree of control. In *Matteuzzi v. Columbus Partnership L.P.*, 866 S.W.2d 128, 132 (Mo. banc 1993), this Court affirmed a dismissal for failure to state a claim where the assertion by an employee on an independent contractor that property owners retained control of the proper in question did not show the owners exercised "substantial control." *Id.* at 132. The employee's sole allegation of "control" was that "[t]he subject property was owned and/or controlled by [the owner]..." *Id.* This Court held such a "bare assertion" of control fails to allege sufficient landowner control to state a cause of action and, therefore, the trial court correctly dismissed the petition. *Id.*

In *Halmick v. SBC Corporate Services, Inc.*, 832 S.W.2d 925, 929 (Mo.App. E.D. 1992), the court also affirmed a trial court's dismissal of a petition for plaintiff's failure to plead control with the requisite degree of specificity. There, the court noted the plaintiff employee of an independent contractor alleged the property owner maintained some control over the property, but held the degree of control alleged was insufficient to state a claim as a matter of law. *Id.* at 929. To state a claim, a plaintiff must allege "control [] beyond securing compliance with

the contracts; the owner must be controlling the physical activities of the employees of the independent contractor or the details of the manner in which the work is done.” *Id.*

This Court has held that defendant BJC may only be sued along with its affiliate hospitals if plaintiffs allege: (1) control by the BJC parent corporation sufficient to pierce the corporate veil, and/or (2) that “the alleged control by BJC Health System affected the health care at issue and caused the alleged injury.” *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528, 531 (Mo. banc 2003). Plaintiffs’ First Amended Petition does not contain sufficient factual allegations to hold defendant BJC liable under either of these theories of recovery. *See Green v. Penn-America Ins. Co.*, 242 S.W.3d 374, 379 (Mo.App. W.D. 2007)(noting that fact pleading demands a relatively rigorous level of factual detail and a valid petition states ultimate facts in support of *each* essential element of the cause pleaded); *State ex rel. Bibbs v. Director of Revenue*, 237 S.W.3d 252, 257, FN2 (Mo.App. W.D. 2007)(noting a valid petition must invoke substantive principles of law entitling the plaintiff to relief and allege ultimate facts informing the defendant of what the plaintiff will attempt to establish at trial).

Turning to the allegations in this case, it is important that plaintiffs admit in the First Amended Petition that both defendants BJC and Boone Hospital Center are separate Missouri corporations. (*See* First Amended Petition, Exh. 10, Caption,

¶¶ 5-6). With exhibits earlier in the these proceedings, Defendants confirmed this with information from the Missouri Secretary of State's Office. (See Motions of Defendant BJC Health System to Dismiss, or in the Alternative, Motion to Transfer Venue, Exhs. 6 and 15). Further, although some of plaintiffs' allegations are directed to care in Boone Hospital Center's emergency department and also to Dr. Pitt, the First Amended Petition contains no specific counts or allegations that the emergency department physicians or defendant Dr. Pitt were employees or agents of defendant BJC. (See Exhibit 10, generally).

As to the corporate veil piercing theory, plaintiffs' First Amended Petition does not contain any allegations of domination by defendant BJC over the separately incorporated defendant Boone Hospital Center that might support such a theory. Under Missouri law, a parent corporation is not liable for the conduct of one of its subsidiary corporations unless an exception to their corporate separateness is pled and proven. *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 644 (Mo. banc 2002). For an exception to apply, plaintiffs would have to plead and prove defendant Boone Hospital Center was a mere sham corporation of defendant BJC and designed to perpetuate a fraud upon the plaintiffs. Such pleading and proof is required even if one corporation totally owns the other and even if one corporation exercises some degree of control over the corporation whose conduct is the basis of the claim. See *State ex rel. BJC Health System v.*

Neill, 121 S.W.3d at 531; *State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138, 140-41 (Mo.App. E.D. 2002); *Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d 377, 384-87 (Mo.App. E.D. 1999). “[T]here must be such domination and control ‘that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a conduit for its principal.’” *Sedalia Mercantile Bank and Trust Co. v. Loges Farms, Inc.*, 740 S.W.2d 188, 202 (Mo.App. W.D. 1987); *see also Matteuzzi*, 866 S.W.2d at 132 (holding allegations of one corporation owning and/or controlling the property at issue did not show that the defendant exercised the “substantial” control the law requires for liability to be imposed). Once again, plaintiffs’ First Amended Petition contains no *alter ego* allegations.

As to the “control” theory, no liability can attach to defendant BJC based upon its relationship with Boone Hospital Center for the health care at issue unless “the alleged control by defendant BJC Health System affected the health care at issue and caused the alleged injury.” 121 S.W.3d at 531. In Respondent’s order denying BJC’s Motion to Dismiss, he applied an incorrect standard to find plaintiffs had stated a claim against BJC. Respondent simply held plaintiffs have pled “that BJC had control over Boone Hospital Center.” (Exh. 26, p. 5). The correct standard, however, is not simply one of some control over the hospital, but rather one of control *affecting the health care at issue and causing the alleged*

injury. Failing to plead the requisite degree of control should result in the dismissal of that claim. *Matteuzzi, supra*, at 132; *Halmick, supra*, at 929.

The Answer and briefing filed by Plaintiffs on behalf of Respondent in the Court of Appeals below (ED91081) and the Answer they filed in this Court contain numerous unfounded statements of law or fact, which serve to underscore the weakness of plaintiffs' position both in the Circuit Court and here. For example, in plaintiffs' Suggestions in Opposition, they argue on behalf of Respondent that they have pled "alter ego" and joint venture theories in the First Amended Petition, and also wildly assert that the evidence is "abundant" that the affiliation agreement between BJC and the affiliated hospitals has been used as a subterfuge on the public. (Exh. 33, Suggestions in Opposition, p. 12). In fact, there are no alter ego or joint venture allegations in any petitions in this case. Further, the Court of Appeals in *Ritter* (almost 10 years ago) held, as a matter of law, that the BJC system affiliation agreement serves legitimate business purposes, is not a subterfuge, and does not create an agency relationship between the BJC parent corporation and its affiliate hospitals. *Ritter*, 987 S.W.2d at 384-385.

Plaintiffs claim that they have a good faith basis for a claim against Relator BJC because, they say, Boone Hospital Center "appears to the general public to be owned and controlled by Defendant BJC". (Exh. 33, Respondent's Suggestions in Opposition at p. 17). This phrase, however, has no significance under Missouri

law. There is no claim or remedy that has this concept at its core, or even as an element. Yet, this is what plaintiffs have turned to as supporting their good faith belief under Missouri law that they had a viable claim against the BJC parent corporation when they filed this lawsuit, while at the same time admitting the proper legal standard is that, “BJC may be sued along with its affiliates or agents as long as plaintiffs validly claim . . . that the alleged control by BJC Health System affected the health care at issue and caused the alleged injury.” (Answer of Respondent filed herein, pages 9-10).

Nowhere in plaintiffs’ original or First Amended Petition are there any allegations, beyond mere conclusions, that any alleged control by defendant BJC affected the health care to Sadaf Qamar at Boone Hospital Center **and** caused her alleged injuries. As a matter of law, Plaintiffs unsupported conclusions that BJC “exercises control” over Boone Hospital Center (*See* Exhs. 1 and 10, ¶ 6) is insufficient to state a claim against it under Missouri law in the context of this case. Plaintiffs fail to plead what the alleged “control” consisted of and how it specifically affected health care to Qamar and caused her alleged injuries. This failure by plaintiffs is fatal to their stating a claim against defendant BJC. *See Matteuzzi, supra*, at 132; *Halmick, supra*, at 929.

Plaintiffs, therefore, fail to state a claim against defendant BJC and Respondent should have dismissed BJC as a defendant and/or disregarded its presence in the venue analysis.

ii. As a matter of law, Plaintiffs fail to allege BJC's employment or agency of the individually named defendants.

Plaintiff's allegations of defendant BJC's alleged employment or agency relationship with the individually named defendants are legally insufficient to state a claim. As discussed above, plaintiffs First Amended Petition does not contain any specific allegations that the emergency department physicians on May 6 and 8, 2004, or that defendant Dr. Pitt on May 14, 2004, were employees or agents of defendant BJC such that it is liable for their alleged actions or inactions. (*See* Exh. 10, generally).

In *Downey v. Mitchell*, 835 S.W.2d 554, 556 (Mo.App. E.D. 1992), the Court of Appeals held the plaintiff patient did not state a vicarious liability claim against the defendant hospital for negligence of a non-employee surgeon. The court noted that the allegations of the petition failed to allege facts showing the existence of a duty on the part of the hospital-employed nurses and anesthetist to intervene in the non-employee surgeon's performance of surgery upon the plaintiff. *Id.* at 555-56. "A hospital which has no control or right to control over a non-

employee physician who performs surgery in the hospital incurs no vicarious liability because of the negligence of such physician.” *Id.* citing *Brickner v. Normandy Osteopathic Hospital, Inc.*, 746 S.W.2d 108, 115 (Mo.App. 1988).

Here, Plaintiffs’ attempts to plead employment or agency fall short, as a matter of law, because they are mere conclusions and do not contain any factual allegations, which if true, would establish there were health care providers at Boone Hospital Center who were employees/agents/servants of defendant BJC. An agency relationship will not be inferred merely because a third person assumed it existed. *Eyberg v. Shah*, 773 S.W.2d 887, 890 (Mo.App. S.D. 1989). Missouri law is clear that the failure to include factual allegations, which if true, would establish an employment or agency relationship means dismissal of a petition is warranted. *See Berkowski v. St. Louis County Bd. of Election Com’rs*, 854 S.W.2d 819, 823 (Mo.App. E.D. 1993)(affirming dismissal of petition for failure to state a claim where facts alleged did not support each essential element of plaintiff’s cause of action); *Downey*, 835 S.W.2d at 556 (holding plaintiff patient did not state a claim for vicarious liability claim of defendant hospital for negligence of a non-employee surgeon). Respondent, therefore, erred in not granting defendant BJC’s Motion to Dismiss on the grounds that plaintiffs’ agency allegations were fatally defective.

b. Plaintiffs have failed to show they had as of the time of filing the Petition an objective, realistic belief under the law and facts that they had a valid claim against defendant BJC.

The second prong of the disjunctive pretensive joinder analysis is whether the record establishes there is no action against the resident defendant and the information available at the time the action was commenced⁷ would not support a reasonable legal opinion that a case could be made against that defendant. *Hefner*, 996 S.W.2d at 663. Plaintiffs must have had at the time of filing an objective,

⁷ There is no valid rationale to allow plaintiffs' efforts to manipulate venue to deny defendants their statutory right to be sued in Boone County, Missouri. This should be true regardless of whether the pretensive joinder test is applied as of commencement of this action, or at any time prior to trial. Improper venue – as defendants timely and properly asserted in this case – means the court is without jurisdiction over the defendants and must transfer the case to a proper venue. No party's conduct can impose jurisdiction on the court or take it away, and it is reversible error to allow a matter to proceed in an improper venue. *See Igoe, supra*, at 289; *Keltner, supra*, at 691. There seems to be no logical reason, therefore, to limit the applicability of the pretensive joinder test to as of “the time the action was commenced.”

realistic belief that under the law, they have stated a viable claim and cannot rely on an assertion that they “honestly” believed their allegations do so. *Malone v. Mummert*, *supra*, at 824.

i. The striking similarities between the case at bar and the *Ritter* case underscore that Plaintiffs here cannot state a claim against BJC.

Almost ten years ago, the Court of Appeals, Eastern District, decided the case of *Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d 377 (Mo.App. E.D. 1999), which involved a claim that the BJC parent corporation was legally responsible for alleged medical negligence that occurred during gallbladder surgery performed by a private physician at Christian Hospital. The fact pattern of the *Ritter* case and the core argument of alleged control by the BJC parent in that case is the functional mirror image of the issues and facts in the case at bar. After a thorough analysis of the pleadings, the evidence and the law, the *Ritter* court held that plaintiffs Ritter had failed to carry their burden to show that the BJC parent corporation had the right to control, or in fact, did control the health care delivered to plaintiff Robert Ritter at Christian Hospital.⁸ *Id.* at 388.

⁸ This Court denied an Application for Transfer filed by Plaintiffs in *Ritter*. 987 S.W.2d 377 (see procedural history).

The core facts in the *Ritter* case relative to the claimed liability of the BJC parent corporation are nearly identical to the core facts in this case. For example, both cases involved surgery performed at an affiliate hospital of the BJC parent corporation; the physicians in each case were neither employees of the hospitals involved, nor employees of defendant BJC; the claimed negligence had to do with how the private physicians performed the surgery and did not involve any claims that hospital employees, such as nurses, were at fault. *Id.* at 381 and 386.

In holding that Missouri law would not impose liability on the BJC parent corporation for the gallbladder surgery performed at Christian Hospital, the *Ritter* court recited the corporate entity doctrine and its exceptions (alter ego and direct participatory control) and then stated in pertinent part in its opinion:

Here, the Affiliation Agreement and witness testimony would support a finding that BJC exerts some control over Christian Hospital. However, the evidence also makes clear that it did so for business reasons, while observing autonomy in the individual entities. Although BJC has control over some of Christian Hospital's affairs and it participates in many of Christian Hospital's activities, **it does not have control or right to control over medical care of patients at Christian Hospital.** [citations omitted]. In particular, BJC did not have control or participate directly in Mr. Ritter's surgery. The evidence would not support a finding that BJC

has actual, participatory or the right to control over Christian Hospital with respect to patient care including Mr. Ritter's surgery. **Thus, there is no evidence to support finding an agency relationship between BJC and Christian Hospital.**

Id. at 385 (emphasis added). The court also stated:

Ritter must establish that BJC and Christian Hospital have equal right to control health care delivery, the business venture or undertaking in which Christian Hospital is engaged. **She must show that BJC participated in making decisions regarding delivery of health care and, in particular, Mr. Ritter's surgery.** [citation omitted]. There has been no such showing. Ritter merely argues that a right of control over budget matters and the board of directors is sufficient. Indirectly, these matters may have an effect on health care delivery, but **they will not support a finding that BJC has the right to control the way in which Christian Hospital delivers health care.**

Id. at 388 (emphasis added). The court affirmed the trial court's granting of summary judgment to defendant BJC. *Id.* at 388.

The *Ritter* case is now almost a decade old and no case has overturned its holdings as to the BJC parent corporation's potential liability for health care provided at one of its affiliate hospitals. Of course, the *Ritter* court was not

breaking new ground with its decision, but was skillfully applying traditional Missouri law in a health care context. In any event, for almost ten years, Missouri lawyers⁹ have been aware of what a plaintiff must do to be able to have even a colorable claim against the BJC parent corporation for health care at one of its affiliate hospitals. *See State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138, 141 (Mo.App. E.D. 2002)(citing *Ritter* and stating “Unless Plaintiffs allege control sufficient to pierce the corporate veil or show the alleged control by BJC Health System affected the health care at issue and caused the alleged injury, the allegations are insufficient to establish an agency relationship in connection with the malpractice suit.”).

ii. Plaintiffs could not have an objective, realistic believe under the law and facts that a valid claim could be made against defendant BJC.

Plaintiff pretensively joined defendant BJC and Respondent should have dismissed it or ignored its presence in the venue analysis because plaintiffs could not have an objective, realistic belief under the law and facts that a valid claim could be made against defendant BJC. Under the second prong of the pretensive joinder analysis, the question is whether the pleadings, discovery, affidavits and

⁹ Notably, the same plaintiffs’ law firm was involved in both *Ritter* and is counsel in this case.

other evidence in the case support the allegations, such that they can be proven at trial, and that the information available at the time the petition was filed would support a reasonable legal opinion that a case could be made against the resident defendant. *Hefner v. Dausmann*, 996 S.W.2d 660, 663 (Mo.App. S.D. 1999) (citing *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. banc 1996)).

In plaintiffs' Amended Supplemental Response to the various Motions to Transfer Venue, they argued BJC could be held liable for three reasons: a) it had agents, servants or employees who were involved in the health care at issue at Boone Hospital Center [Exh. 18, pp. 335-337; 343-346]; b) its control over Boone Hospital was "apparent" on some level, such that it is responsible for whatever occurred at Boone Hospital Center [Exh. 18, pp. 329-335; 337-340; 346-348]; and c) defendant BJC and defendant Boone Hospital Center were in a joint venture [Exh. 18, pp. 348-351].

None of plaintiffs' arguments, however, satisfy the legal standard for imposing liability on one corporation for the conduct of an affiliated corporation. This includes their allegations that: (a) defendant BJC has the power to set guidelines for the delivery of health care through the system affiliate agreement [Exh. 18, pp. 329-331]; (b) has system-wide policies [Exh. 18, pp. 331-332]; (c) has a BJC compliance program [Exh. 18, pp. 332-334]; (d) has a BJC Center for

Quality Management [Exh. 18, p. 334]; (e) has a BJC News Forum and corporate compliance programs [Exh. 18, pp. 334-335]; (f) exercises approval power over affiliate hospitals' budgets [Exh. 18, pp. 337-338]; (g) exercises control over the board of directors of affiliate hospitals [Exh. 18, p. 338]; (h) has “integrated” and assumed many services of affiliate hospitals [Exh. 18, pp. 339-340]; and (i) has the ability to negotiate and contract on behalf of affiliate hospitals [Exh. 18, p. 340]. These attempted attacks do not satisfy the legal standard for imposing liability on the BJC parent for the conduct of an affiliate hospital. As seen above, Missouri precedent is clear that such liability can occur only under either an alter ego theory or under a *proper* vicarious liability theory.

Here, plaintiffs' have not even tried to allege an *alter ego* theory of recovery in the First Amended Petition. (Exh. 10, generally). As to the more common vicarious liability theory, plaintiffs still fall short for a number of reasons. First and foremost, none of these attacks deals with defendant BJC controlling or affecting the health care at issue – plaintiff Qamar's health care at Boone Hospital Center in May 2004. Rather, the attacks involve activity the BJC parent is purportedly involved in due to its relationship with system affiliate hospitals. In *Ritter*, however, the court well explained the legitimate rationale for the formation of BJC Health System:

The BJC System was created in response to the rapidly changing health care field. The objective of the BJC System was to form an integrated regional health care delivery system capable of providing high quality, cost effective health services "that can successfully operate in a managed care marketplace." Additionally, the System was created to improve patient access to primary care medical services and specialized medical services. The parties sought to coordinate "clinical services, medical, nursing and other health professional education, research, fund raising, and centralized strategic planning, capital finance, marketing and such other administrative and management activities as [BJC] shall identify in order to enhance quality, reduce duplication of resources, increase efficiencies, maintain and improve the Institutions' financial posture, and decrease costs to health care consumers." Although the Affiliation Agreement addresses activities to connect the institutions under the BJC System, the Agreement specifically provides that the Institutions and Affiliates retain their identities as separate institutions with unique traditions, constituencies and philanthropic support.

Ritter, 987 S.W.2d at 381.

It is clear from *Ritter*, and the cases upon which it relied, that in order to hold defendant BJC vicariously liable for the acts of Boone Hospital, the control or right to control must relate to the physical activities of Boone Hospital or to the

details of the manner in which the work was done by Boone Hospital. *Ritter*, 987 S.W.2d at 385(citing *J.M. v. Shell Oil Company*, 922 S.W.2d 759, 764 (Mo. banc 1996)). Utilizing this legal principle, the court in *Ritter* held that for plaintiff's claim there to survive, she would have to produce evidence sufficient to support a finding that the BJC parent exercised sufficient control or had the right to control the performance of the surgery at issue there. *Ritter, supra, at 386.*

**iii. The BJC Health System Affiliation Agreement
proves defendant BJC does not control health care at
Boone Hospital Center.**

The BJC Health System Amended and Restated System Affiliation Agreement (hereafter also called “ARSAA,” submitted herewith as Exh. A to Exh. 20, pp. 1015-1172) makes clear the affiliate hospitals to the agreement have granted only certain powers and authority to the BJC parent, but have retained all other powers. In the ARSAA, Section 4.3, entitled “Powers Reserved to the Institutions”, it is clear “[e]ach Institution shall retain all powers not granted to the Parent Corporation...” (See Exh. A to Exh. 20, p. 1038). There is no mention in the ARSAA about oversight or control of health care at the system hospitals being granted to the BJC parent corporation. (See Exh. A to Exh. 20, pp. 1015-1172).

This issue was also analyzed in *Ritter*, where the court listed the powers allocated between the BJC parent and the affiliates and institutions. *Ritter*, 987

S.W.2d at 382. The *Ritter* court specifically found that the right to control the medical care of patients at the affiliate hospitals is among the powers retained by the hospitals and not granted to the system parent corporation. *Ritter, supra*, at 385. In reviewing the same affiliation agreement as involved here, the court stated: “Although BJC has control over some of Christian Hospital’s affairs and participates in many of Christian Hospital’s activities, it does not have control or right to control over medical care of patients at Christian Hospital”. *Id.* (emphasis added).

iv. The items pointed to by plaintiffs to show the purported control exercised by defendant BJC have already been addressed by the *Ritter* court and were held not to create liability for the BJC parent corporation in a medical malpractice claim.

The types of documents Plaintiffs submitted with Exh. 18 as support for their good faith belief that a claim can be stated against defendant BJC under the circumstances of this case were already examined and analyzed by the *Ritter* court’s decision. The system-wide policies plaintiffs claim show control of defendant BJC over Boone Hospital Center do not help their case. (Exh. 18, pp. 331-332). First of all, it is clear that plaintiffs are not claiming any of these policies are involved in the health care that is the subject of this lawsuit – i.e. the

surgery which private physician Dr. Pitt performed. Second, the court in *Ritter* specifically addressed the existence of system-wide policies and found they did not lead to the imposition of liability for the BJC parent corporation. *Ritter*, 987 S.W.2d at 383.

The *Ritter* court also addressed BJC's authority to review budgets of affiliate hospitals and found it was not the kind of control that could result in liability being imputed from an affiliate hospital to the parent corporation in a medical malpractice claim. *See Ritter*, 987 S.W. 2d at 382 and at 388 [35]. Also, the court found that uniform human resource policies as being within the powers of the BJC parent corporation did not create liability for the parent corporation in a medical malpractice case. *Id.* Further, the fact that the CEO of the BJC parent corporation can remove and appoint a senior executive officer of a system Institution (*see* Exh. A to Exh. 20, ARSAA, section 4.2.4.2 entitled "Senior Executive Officer", p. 1034), likewise does not create liability for the parent corporation. *Id.* Although one corporation may have the same officers as another, Missouri law will not presume them to be controlled by one another. It must be proven that corporate formalities have been ignored. *See Ford Motor Co.*, 63 S.W.3d at 644.

There is nothing about the BJC parent corporation providing services to the system affiliates that somehow makes the parent corporation liable for the conduct of the affiliate hospitals in providing health care. Again, the *Ritter* court was well

aware how the system was formed and how it operated. It found that the parent corporation's providing centralized services, such as human resources, fund raising, strategic planning, capital finance and other such administrative activity would not operate to impose liability upon the parent corporation. *Ritter*, 987 S.W.2d at 381.

Similarly, that defendant BJC is authorized to negotiate for system affiliates with third parties cannot be used to make the BJC parent liable for the conduct of Boone Hospital Center in this case. The *Ritter* opinion recited this power and held such a role for the BJC parent corporation did not result in imposing liability on the parent corporation there. *Ritter*, 987 S.W.2d at 382.

v. The venue documents and the discovery and depositions taken dispel any notion of plaintiffs' good faith belief.

Additionally, the written discovery and deposition testimony in the case further confirm plaintiffs could not have had at the time of filing the petition an objective, good faith belief that a claim could be made against defendant BJC. Dr. Pitt has submitted two affidavits in support of the various Motions to Transfer Venue. (Exhs. 2 and 8). Both affidavits establish all of Dr. Pitt's care and treatment to plaintiff Sadaf Qamar in May 2004 at Boone Hospital Center occurred only in Boone County, Missouri. (See Exhs. 2 and 8). Dr. Pitt clearly states

defendants BJC and Boone Hospital Center did not control or have the right to control his actions during his surgery on Sadaf Qamar. (*See* Exh. 8, ¶4). The affidavits also establish Dr. Pitt was not an employee or agent of defendants BJC or Boone Hospital Center while rendering health care to plaintiff Sadaf Qamar. (See Exh. 8, ¶ 5).

Plaintiffs' only response to the affidavit of private surgeon Dr. James Pitt stating that no one controlled the health care he provided to plaintiff Sadaf Qamar, is simply to deny it. (Exh. 32, Respondent's Answer, ¶¶ 13-16; Answer of Plaintiffs filed herein, ¶¶ 13-15). They do not offer any facts or evidence to support their claim of his having been an employee or agent of Relator BJC. The only thing approaching agency allegations in the First Amended Petition consists of a circular, legally defective and conclusory statement that all defendants were "acting as agents, servants and employees of all other defendants." (Exh. 10, ¶12). No Missouri case recognizes such language as properly pleading agency.

Further, the September 21, 2007, deposition testimony of plaintiff Sadaf Qamar does not provide a good faith basis for the belief that a claim could be made against defendant BJC. Sadaf Qamar testified she had no idea what defendant BJC Health System was or the relationship between defendants BJC and Boone Hospital Center at the time of the events at issue. (*See* Deposition of Sadaf Qamar, p. 62, taken on September 21, 2007, attached as Exh. D to Exh. 20, p. 1178).

Neither does plaintiff Syed Haider's September 21, 2007, deposition testimony provide a good faith basis for the belief that a claim could be made against defendant BJC. Dr. Haider does not have any information that any of the health care providers who cared for his wife at Boone Hospital Center were actually employees of defendant BJC. (*See* Deposition of Syed Haider, pp. 199-200, Exh. E to Exh. 20, p.1181). Dr. Haider testified that he does not believe anyone from defendant BJC directed Dr. Pitt in providing care to his wife at Boone Hospital Center. (*See* Exh. E to Exh. 20, p. 201). Furthermore, he testified that he does not have any information that defendant BJC controlled any of the health care providers at Boone Hospital Center. (*See* Exh. E to Exh. 20, p. 202).

vi. Plaintiffs' assertion of defendant BJC being liable under a joint venture theory was already defeated in *Ritter v. BJC* when asserted by the same plaintiffs' counsel.

Plaintiffs erroneously claim defendant BJC and Boone Hospital were in a joint venture. (Suggestions in Opposition, Exh. 18, pp. 348-351). Plaintiffs, however, have not pled a joint venture theory in the First Amended Petition, making that theory beyond the scope of the pleadings and should not even be discussed. Further, the elements of a joint venture require plaintiffs to plead and prove the following: (1) an express or implied agreement among members of the

association; (2) a common purpose to be carried out by the members; (3) a community of pecuniary interest in that purpose; and (4) that each member has an equal voice or an equal right in determining the direction of the enterprise. *Eads v. Kinstler Agency, Inc.*, 929 S.W.2d 289, 292 (Mo.App. E. D. 1996). The parties must intend to, and in fact do, create a contract of joint venture. *Jeff-Cole Quarries, Inc. v. Bell*, 454 S.W.2d 5, 16 (Mo. 1970).

Plaintiffs have not pled any of the elements of joint venture, nor is there any basis that they exist in this case. As held by the *Ritter* court, the system affiliation agreement does not support a joint venture relationship between the BJC parent corporation and its affiliate hospitals. *Ritter*, 987 S.W.2d at 387(holding the mere participation in an affiliation agreement by two corporations did not equate with a joint venture).

Thus, it is clear – at least insofar as a joint venture theory is concerned – plaintiffs cannot use this theory to refute they pretensively joined BJC as a defendant.

In this case, there simply can be no question that defendant BJC was pretensively joined to manipulate venue. As a result, Respondent erred in not either dismissing defendant BJC as pretensively joined or disregarding BJC's presence in the venue analysis.

II. Relator is entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County because venue is proper as to all defendants in Boone County in that, after disregarding the presence of the pretensively joined BJC, venue is improper pursuant to § 355.176.4, RSMo. because non-profit corporation Boone Hospital Center is located in Boone County, maintains its registered agent in Boone County, and the cause of action accrued in Boone County; or alternatively, the 2005 amended venue statute, § 508.010.4, RSMo. (Supp. 2005), applies to this action and venue is only proper in Boone County under that statute as the location where plaintiff Qamar was first allegedly injured.

A. Standard of Review

Where the trial court retains an improperly venued case, it acts in excess of its jurisdiction, and the error is so fundamental that it provides the basis for a writ of prohibition. *State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. banc 1985). “Prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue.” *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28, 32 (Mo.App. E.D. 2002).

Once a proper objection to the propriety of venue is raised, it is reversible error to allow a matter to proceed in the improper venue. *See Igoe v. Department of Labor and Indus. Relations*, 152 S.W.3d 284, 289 (Mo. banc 2005)(plaintiff’s

verdict set aside and case remanded for transfer to proper venue); *Keltner v. Keltner*, 950 S.W.2d 690, 691 (Mo.App. S.D. 1997)(defendant’s participation in trial on merits after her objection to venue did not constitute waiver; judgment for plaintiff reversed and case remanded for transfer to proper venue).

B. After disregarding the presence of the pretensively joined BJC, venue in the City of St. Louis is improper pursuant to § 355.176.4, RSMo. (1994), because non-profit corporation Boone Hospital Center has its principal place of business in Boone County, Missouri, maintains its registered agent there, and the cause of action accrued in Boone County.

As set forth above, plaintiffs pretensively joined defendant BJC. Respondent, therefore, should have disregarded the pretensively joined defendant BJC for purposes of the venue analysis in this case. Once defendant BJC’s presence is disregarded, for purposes of venue, the only Missouri non-profit corporate defendant remaining is defendant Boone Hospital Center.

“Venue in Missouri is determined by statute.” *Igoe*, 152 S.W.3d at 289. Venue in this case is governed by the nonprofit corporation venue statute, §355.176.4, RSMo. (1994). This Court has held that § 355.176.4, RSMo., is a special venue statute that governs when a nonprofit corporation is sued alone as well as when it is sued with other corporations or individuals. *State ex rel. SSM*

Health Care St. Louis v. Neill, 78 S.W.3d 140, 145 (Mo. banc 2002); *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 145, 146 (Mo. banc 2002).

Pursuant to § 355.176.4, RSMo., suits against a nonprofit corporation *shall* be commenced *only* in one of the following locations:

1. The county in which the nonprofit corporation maintains its principal place of business;
2. The county where the cause of action accrued; or
3. The county in which the office of the registered agent for the nonprofit corporation is maintained.

§ 355.176.4, RSMo. (1994); *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d at 141.

Defendant Boone Hospital Center is a Missouri nonprofit corporation. (*See* Exh. A to Exh. 6, p. 110). Venue, therefore, is only proper in the Circuit Court of Boone County because: (1) the location of Boone Hospital Center's registered office and registered agent is in Boone County; (2) the allegedly negligent events at issue occurred only at Boone Hospital Center in Boone County; and (3) Boone Hospital Center has its principal place of business located in Boone County. (*See Id.*; Exh. 10). Plaintiffs do not dispute any of these pertinent venue facts.

Therefore, Respondent should have transferred the case to the Circuit Court of Boone County pursuant to Rule 51.045 and §§ 355.176.4 and 476.410, RSMo.

C. The 2005 amended venue statute, § 508.010.4 RSMo. (Supp. 2005), applies to this action and venue is only proper in Boone County under that statute.

Venue is improper in this Court pursuant to the amended venue statute, §508.010.4, RSMo. (Supp. 2005), which applies with the filing of plaintiffs' First Amended Petition on May 3, 2006, adding "causes of action" against newly added defendants Chris Martin, M.D., and Columbia Nephrology & Internal Medicine, P.C. (Exhibit 10). The Missouri General Assembly passed House Bill 393 in 2005 (popularly known as "Tort Reform"), which, among other things, amended the venue statutes applicable to "all causes of action filed after August 28, 2005." *See* §§ 508.010.4 and 538.305, RSMo. (Supp. 2005).

The amended venue law, § 508.010.4, RSMo. (Supp. 2005), provides that "[n]otwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the State of Missouri, *venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.*" § 508.010.4, RSMo. (Supp. 2005) (emphasis added). The other applicable provision of law is §538.232, RSMo. (Supp. 2005), which provides, "[i]n any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, for purposes of determining venue

under section 508.010, RSMo., *the plaintiff shall be considered injured by the health care provider only in the county where the plaintiff first received treatment by the defendant for a medical condition at issue in the case.*” § 538.232, RSMo. (Supp. 2005) (emphasis added).

The newly enacted venue statutes, §§ 508.010.4 and 538.232, RSMo. (Supp. 2005), “shall apply to all *causes of action* filed after August 28, 2005.” § 538.305 RSMo. (Supp. 2005) (emphasis added). Plaintiffs’ filing of their First Amended Petition on May 3, 2006, that added two new defendants and new claims against them, operates as the bringing of new “causes of action” that require the re-determination of venue, such that the amended venue laws apply. *See also State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 858 (Mo. banc 2001).

The first health care by a defendant at issue, and all health care in this case, occurred only in Boone County, Missouri. (*See* First Amended Petition, Exhibit 10). Thus, pursuant to §§ 508.010 and 538.232, RSMo. (Supp. 2005), the only proper venue for this case is Boone County as the location where plaintiff Qamar was allegedly injured.

III. Relator is entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County because pursuant to §355.176.4, RSMo. (1994), the exclusive venue for the claims against nonprofit corporation Boone Hospital Center is in Boone County in that: (1) it is undisputed that the pertinent venue facts are that the cause of action accrued there, its principal place of business is located there and the office of its registered agent is located there. This Court should revisit its holding in *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528 (Mo. banc 2003), and hold that pursuant to § 355.176.4, even if defendant BJC was not pretensively joined, the entire case must be transferred to the Circuit Court of Boone County as the *only* proper venue for Plaintiffs' claims against all defendants, including those against nonprofit corporate defendant Boone Hospital Center.

A. Standard of Review

Where the trial court retains an improperly venued case, it acts in excess of its jurisdiction, and the error is so fundamental that it provides the basis for a writ of prohibition. *State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. banc 1985). “Prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue.” *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28, 32 (Mo.App. E.D. 2002).

Once a proper objection to the propriety of venue is raised, it is reversible error to allow a matter to proceed in the improper venue. *See Igou v. Department of Labor and Indus. Relations*, 152 S.W.3d 284, 289 (Mo. banc 2005)(plaintiff's verdict set aside and case remanded for transfer to proper venue); *Keltner v. Keltner*, 950 S.W.2d 690, 691 (Mo.App. S.D. 1997)(defendant's participation in trial on merits after her objection to venue did not constitute waiver; judgment for plaintiff reversed and case remanded for transfer to proper venue).

B. This Court should hold that pursuant to § 355.176.4, regardless whether defendant BJC was pretensively joined, the entire case must be transferred to Boone County as the only proper venue for plaintiffs' claims against nonprofit corporate defendant Boone Hospital Center.

This defendant is aware of and recognizes this Court's decision in *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528, 530-531 (Mo. banc 2003), that where defendants share common or joint liability, several nonprofit corporations may be sued in any county where one nonprofit may be sued. Defendant BJC, however, believes that said decision was incorrectly decided and that the facts of the present case offer an ideal opportunity to address the continued validity of that holding. Accommodating the statutory venue rights of all defendants is at the core of the correct analysis. The proper venue in this case for all defendants is Boone County, Missouri.

As a nonprofit corporation, and pursuant to § 355.176.4, RSMo (1994), Boone Hospital Center can be sued *only* in one of the following three locations: (1) the county in which the nonprofit corporation maintains its principal place of business; (2) the county where the cause of action accrued; and (3) the county where the office of the registered agent for the nonprofit corporation is located. As outlined above, under the facts of this case, Boone Hospital Center can be sued *only* in the Circuit Court of Boone County in that there is no dispute that the alleged cause of action against Boone Hospital Center accrued in Boone County, the office of its registered agent is located in Boone County, and its principal place of business is located in Boone County. (*See* Exh. A to Exh. 6, p. 110; Exhibit 10).

In holding that venue was improper in the City of St. Louis, this Court in *State ex rel. SSM Health Care v. Neill*, 78 S.W.3d 140, 143 (Mo. banc 2002), closely analyzed the language of § 355.176.4 when compared to other venue statutes, including §508.040, RSMo. (1991). *Id.* at 143-44. This Court concluded that § 355.176.4, RSMo, provided the “exclusive venues” in which a nonprofit corporation can be sued. *Id.* at 144-45 (emphasis added). Therefore, § 355.176.4 acts as a venue trump card over all other venue statutes and all other venues that might be proper to other defendants, whether individual or corporate. Thus, all other venue rights yield to it. *Id.*

In the case at bar, the *only* venue proper for all defendants and improper as for none is Boone County. This is because, pursuant to § 355.176.4, the Circuit Court of Boone County is the exclusive venue within which Boone Hospital Center can be sued and is also a proper venue for all other defendants. (See Exhs. 1 and 10, caption and ¶¶14-21). Defendant BJC’s presence in the City of St. Louis as an allegedly jointly liable defendant should not be allowed to thwart or infringe Boone Hospital Center’s statutory venue rights under that statute. Section 355.176.4, expressly states that “[s]uits against a nonprofit corporation ***shall be commenced only*** in one of” three locations. Section 355.176.4 (emphasis added).

In *SSM Health Care v. Neill*, this Court made two important holdings that are directly applicable to the facts of this matter. First, this Court noted that §355.176.4 governs venue in suits in which a nonprofit corporation is sued alone or with other nonprofit corporate defendants. 78 S.W.3d at 143. Second, this Court held that “the legislature’s use and placement of *both* the words ‘shall’ and ‘only’ in §355.176.4 signifies on its face that the legislature intended to designate **exclusively** those locations set out in §355.176.4 as permissible venues for suit against nonprofit corporations, and **restrict** venue to them...” 78 S.W.3d at 143 (emphasis to “both” in original, remaining emphasis added). What is clear from the *SSM Health Care* holdings, therefore, is that § 355.176.4, is a restricting or

limiting venue statute, designed to specifically identify the only three permissible venues for suits against a nonprofit corporation.

In *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528 (Mo. banc 2003), this Court held venue is proper in any county where at least one of the non-profit corporate defendants can be sued, but did so based on cases which analyzed § 508.040, RSMo. (1991). 121 S.W.3d at 530. Section 508.040 is substantively different from §355.176.4 in that it specifically states suit may be brought “in any county” where such corporations keep an office or agent for the transaction of their usual and customary business. In contrast, §355.176.4 does not contain the “in any county” language, instead mandating suit be brought “only in one” of the locations listed in the statute. *See* §355.176.4. Therefore, Relator respectfully maintains that the 2003 *Neill* case was erroneously decided.

Here, there is no dispute that Boone Hospital Center, a nonprofit corporation, maintains its principal place of business in Boone County, that the cause of action accrued in Boone County, and that Boone Hospital Center’s registered agent’s office is in Boone County. Thus, under §355.176.4 and *State ex rel. SSM Health Care v. Neill* the “exclusive venue” within which Boone Hospital Center can be sued under the facts of this case is Boone County, which is also a proper venue under § 355.176.4 for BJC Health System (the only other nonprofit corporation named in the suit) and a proper venue for all other defendants.

CONCLUSION

Relator BJC Health System prays this Court make permanent its preliminary writ in prohibition and order Respondent to transfer the entire action, pursuant to Missouri law, including § 476.410 RSMo., 51.045 Mo.R.Civ.Pro. and §355.176.4 RSMo., to the Circuit Court of Boone County, Missouri, wherein venue is proper as to all defendants, and to refrain from proceeding further with this matter. Further, Relator prays that it be granted its costs expended herein.

WILLIAMS VENKER & SANDERS LLC

By:_____

Paul N. Venker, # 28768
Lisa A. Larkin, #46796
100 N. Broadway, 21st Floor
St. Louis, Missouri 63102
(314) 345-5000
(314) 345-5055 (FAX)
pvenker@wvslaw.com
llarkin@wvslaw.com

ATTORNEYS FOR RELATOR
BJC HEALTH SYSTEM

RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Supreme Court Rule 84.06(c), that the foregoing Relator's Brief complies with the limitations contained in Rule 84.06(b) and contains 14,258 words (exclusive of the appendix) and that counsel relied on the word count of the word-processing system used to prepare the brief (Microsoft Word for Windows). Counsel further certifies that the disks containing electronic copies of the Relator's Brief have been scanned for viruses and are virus free.

WILLIAMS VENKER & SANDERS LLC

By:_____

Paul N. Venker, # 28768
Lisa A. Larkin, #46796
100 N. Broadway, 21st Floor
St. Louis, Missouri 63102
(314) 345-5000
(314) 345-5055 (FAX)
pvenker@wvslaw.com
llarkin@wvslaw.com

ATTORNEYS FOR RELATOR
BJC HEALTH SYSTEM

PROOF OF SERVICE

One copy of the foregoing Relator's Brief, along with one 3 ½ inch diskette containing a true and accurate electronic copy of the Brief, and one copy of Relator's Separately Bound Appendix were mailed, postage pre-paid, this 24th day of July 2008, to:

Honorable Donald L. McCullin
Circuit Court of the City of St. Louis, Division 20
10 N. Tucker
St. Louis, MO 63101
314-622-4503
314-622-4519 (fax)
Respondent

Stephen R. Woodley
Joan M. Lockwood
Gray, Ritter & Graham, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101
314-241-5620
314-241-4140 (fax)
Attorneys for Plaintiffs

Kenneth W. Bean
Russell Makepeace
Sandberg, Phoenix & von Gontard, P.C.
One City Centre, 15th Floor
St. Louis, MO 63101-1880
314-231-3332
314-241-7604 (fax)
Attorneys for Defendant
CH Allied Services, Inc. d/b/a Boone Hospital Center

Brent W. Baldwin
Lathrop & Gage, L.C.
10 S. Broadway, Suite 1300
St. Louis, MO 63102-1708
314-613-2500
314-613-2550 (fax)
Attorneys for Defendants
Dr. Pitt and Columbia Surgical Associates
