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IN THE SUPREME COURT OF MISSOURI

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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),	)	
	)	
Respondent.	)	

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

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REPLY BRIEF OF RELATOR BJC HEALTH SYSTEM

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## ARGUMENT

### Reply to Respondent's Point I

Relator is entitled to a permanent writ in prohibition because plaintiffs have not adequately pled a cause of action against defendant BJC in that: (1) plaintiffs' petition does not sufficiently allege the other defendants were agents, servants, or employees of BJC; (2) there is absolutely no evidence or information in this record to support that defendant BJC had the right to control or exercised control over any other defendant affecting the health care at issue and causing the claimed injuries in this case; and (3) plaintiffs' Petition does not allege any elements of an alter ego theory of recovery against BJC.

A. Although the Petition contains bare allegations of "agency" between BJC and the remaining defendants, the allegations are insufficient under Missouri law to properly state a claim against defendant BJC.

In Respondent's Brief, plaintiffs assert their original Petition and the First Amended Petition were legally sufficient to state a claim against BJC under the theory that BJC was in an agency relationship with the other defendants. (Respondent's Brief, p. 26). As support for this contention, plaintiffs point only to paragraphs 6 and 11 of their original petition (Exhibit 1) and the First Amended Petition (Exhibit 10).<sup>1</sup> Those

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<sup>1</sup> 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.

paragraphs, however, contain nothing more than bare legal conclusions of the existence of an agency relationship.

Paragraph 6 of the First Amended Petition, for example, simply asserts, “Defendant BJC Health System... 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, 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...” Similarly, paragraph 11 of the First Amended Petition simply concludes defendant BJC acted through its agents to provide health care to plaintiff Qamar and that “at all times herein, BJC and Boone and their agents, servants, and employees were acting as the agents, servants, or employees of each other.”

Though plaintiffs correctly assert they are not required to plead the specific evidence by which the facts will be proved, Missouri fact pleading requirements do compel them to plead the ultimate facts in support of each of the essential elements of the cause of action pleaded. *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 must allege ultimate facts informing the defendant of what the plaintiff will attempt to establish at trial).

Here, plaintiffs have not pled any ultimate facts to support their bare allegations of agency. Each individual defendant, in fact, is alleged to be employed by corporations separate and apart from BJC. (Exhibit 10, ¶¶ 4, 8, and 10). Nowhere in the petitions is there a hint or suggestion of how BJC controlled the doctors, nurses and others who provided health care to plaintiff Qamar or their respective employers. (See Exhibit 10, generally). Notably, Respondent's Brief does not address or seek to distinguish the agency cases Relator BJC discussed in its opening brief. (Respondent's Brief, pp. 37-38). Specifically, plaintiff do not address the *Downey v. Mitchell* case, which held allegations similar to those made by plaintiffs herein did not state a vicarious liability claim against the defendant hospital for negligence of a non-employee surgeon. 835 S.W.2d 554, 556 (Mo.App. E.D. 1992).

There simply are no factual allegations that, if true, would establish there were health care providers at Boone Hospital Center who were employees, agents, or servants of defendant BJC. The burden of proof on the existence of an agency relationship rests on its proponent. *Eyberg v. Shah*, 773 S.W.2d 887, 890 (Mo.App. S.D. 1989). An agency relationship will not be inferred merely because a third person assumed it existed. *Id.* Yet, that is exactly what plaintiffs want the court to do in this case: infer the existence of an agency relationship – or at least that one has been properly alleged – by the mere assumption that one existed, with no ultimate facts alleged to support such a relationship. Such an approach is unsupported by Missouri law and cannot lead to a valid claim being stated against defendant BJC. See *Berkowski v. St. Louis County Bd. of Election Com'rs*, 854 S.W.2d 819 (Mo.App. E.D. 1993)(noting a petition that offers only conclusions and

does not contain ultimate facts, or allegations from which to infer those facts, fails to state a cause of action). BJC, therefore, should have been dismissed and disregarded in the trial court's venue analysis.

B. Allegations of “control” by defendant BJC over the health care at issue are non-existent in the Petition and the First Amended Petition.

In maintaining they have sufficiently pleaded that defendant BJC controlled the health care at issue in this case, plaintiffs repeat and perpetuate the error made by the trial court in its original ruling – that is, plaintiffs cite and apply the incorrect legal standard for holding the separately incorporated BJC parent entity liable for the actions of the separately incorporated Boone Hospital Center. This Court has held BJC may be sued along with its affiliates or agents only if plaintiffs validly claim “control sufficient to pierce the corporate veil,” or 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)(emphasis added). Here, there are no specific allegations of how defendant BJC's alleged control affected the health care to plaintiff Sadaf Qamar at Boone Hospital Center **and** caused the alleged injuries.

Plaintiffs contend they have made the required allegations of control in two ways: (1) they assert the facts set forth on pages 15-18 of Respondent's Brief demonstrate that BJC controlled health care at its member institutions; and (2) they assert this Court has previously held that BJC maintains control over health care, citing *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528, 531 (Mo. banc 2003) and that they have similarly pled that BJC had control over Boone Hospital Center. Neither of these



contentions supports a finding that plaintiffs have properly alleged BJC exerted control affecting the health care to plaintiff Qamar and caused her alleged injuries.

The facts set forth at pages 15-18 of Respondent's Brief all deal with the multitude of exhibits plaintiffs submitted in opposition to defendants' Motion to Dismiss, or in the Alternative, to Transfer Venue. (*See* Exhibit 18, including sub-exhibits 1-42). The types of things plaintiffs point to include the existence of the Affiliation Agreement among the member hospitals, BJC's alleged authority to set standards and guidelines, the existence of a BJC Center for Quality Management, the alleged existence of BJC system-wide policies, the existence of a BJC flag at Boone Hospital<sup>2</sup>, and the existence of BJC signs at Boone Hospital. (Respondent's Brief, pp. 15-18, 35).

Plaintiffs assert the exhibits show "that BJC exercises control over its system and its affiliates, including Boone Hospital." Even if this were true, however, the proper standard is not simply one of whether BJC exercises some degree of control over Boone Hospital because "owning and controlling" is not enough under Missouri law to impute

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<sup>2</sup> As support for the proposition that BJC has gone to great lengths to convince the residents of Columbia, Missouri, that BJC Health System "runs" Boone Hospital, plaintiffs state, "In the front of Boone Hospital, there are three flags: a United States flag, a Missouri state flag and a BJC Health System flag." Under this logic, it might have been equally plausible for the public to assume the United States government or the State of Missouri "runs" Boone Hospital.

liability to the controlling corporation. *See Hefner v. Dausmann*, 996 S.W.2d 660, 664 (Mo.App. S.D. 1999).

None of the exhibits submitted in opposition to the Motions to Transfer Venue relate to how BJC's alleged control affected the health care to plaintiff Sadaf Qamar and caused her alleged injuries. What BJC system-wide policy affected Dr. Pitt's provision of health care to plaintiff Qamar and caused her to be injured? How did the BJC Center for Quality Management affect Dr. Pitt's provision of health care to plaintiff Qamar and cause her to be injured? What BJC guideline affected Dr. Pitt's provision of health care to plaintiff Qamar and caused her to be injured? These are all ultimate facts left unanswered by the First Amended Petition. Although the legal conclusion of BJC controlling Boone Hospital is asserted, there are no factual allegations. There are no factual allegations of how, in turn, Boone Hospital controlled Dr. Pitt's provision of health care to plaintiff. Plaintiffs do not describe how BJC (or Boone Hospital, for that matter) controlled the trocar insertion, the introduction of carbon dioxide gas, or any other aspect of Dr. Pitt's surgery. *See Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d 377, 385-86 (Mo.App. E.D. 1999).

Plaintiffs incorrectly assert this Court's opinion in *State ex rel. BJC Health System v. Neill* "previously determined that BJC maintains control over health care." (Respondents' Brief, p. 30). The *State ex rel. BJC Health System v. Neill* opinion makes no such blanket determination. In that opinion, which addressed two consolidated writ proceedings, this Court held BJC had not been pretensively joined because very specific allegations were made in both cases as to control by BJC which allegedly affected the

health care to the plaintiffs in those cases and caused their alleged injuries. 121 S.W.3d at 531. The opinion does not in any way address the merits of the allegations against the parent corporation. This Court noted that in one case plaintiff alleged the medical providers administered substandard care to plaintiff because they had to follow specific cost saving procedures set up by BJC. *Id.* This Court further noted that in the other case the plaintiff alleged 22 specific ways in which BJC's control and oversight of the adoption, promulgation and use of standards, protocols, and procedural guidelines allegedly directly affected the health care rendered to plaintiff and caused the injury. *Id.* Thus, far from making a blanket finding that "BJC maintains control over health care," this Court's opinion in *BJC v. Neill* simply holds that *in those cases*, the plaintiffs had sufficiently pled, "the alleged control by BJC Health System affected the health care at issue and caused the alleged injury."<sup>3</sup> *Id.*

Here, allegations attempting to tie the alleged control by BJC to the health care rendered to plaintiff Qamar such that it caused her alleged injuries are noticeably absent. As such, the First Amended Petition does not state a claim against BJC.

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<sup>3</sup> It should be noted that Relator continues to believe the allegations against the parent corporation in the cases underlying the *BJC v. Neill* opinion were not specific enough to state a claim and that the case was wrongly decided on this basis.

C. Plaintiffs' First Amended Petition does not assert any of the elements or essential facts necessary to plead a "corporate veil" theory against BJC.

Plaintiffs assert they have adequately pled Boone Hospital is the alter ego of BJC. (Respondents' Brief, pp. 33-36). As support, plaintiffs identify eleven factors that courts should take into account to determine whether one corporation exercises control over another sufficient to pierce the corporate veil. *See* Respondent's Brief, p. 34, citing *Real Estate Investors Four, Inc. v. American Design Group, Inc.*, 46 S.W.3d 51, 56 (Mo.App. E.D. 2001).

Instead of then addressing each of the 11 *Real Estate Investors* factors in the context of this case, however, plaintiffs surprisingly argue that two entirely different "facts" justify the "corporate veil" they say exists here to be pierced: (1) that "Plaintiffs have pled that BJC is the parent corporation overseeing operations at Boone Hospital"; and (2) that "BJC exercises control over Boone Hospital." (Respondents' Brief, p. 35). Neither "fact" is among the 11 factors listed in the case plaintiffs cite as controlling the issue. Nowhere do plaintiffs allege BJC owns all or most the capital stock of Boone Hospital, that BJC and Boone have common directors or officers, that BJC finances the subsidiary, nor that Boone had grossly inadequate capital. Plaintiffs do not allege BJC pays the salaries and other expenses or losses of Boone Hospital, nor that Boone Hospital has substantially no business except with BJC or no assets except those conveyed to it by BJC. Plaintiffs do not allege BJC uses Boone Hospital property as its own, that Boone Hospital directors or executives do not act independently in the interest of Boone Hospital, nor that the corporate legal formalities of Boone Hospital have been ignored.

*See Real Estate Investors*, 46 S.W.3d at 56. As plaintiffs surely know, there are simply no facts pled, nor any that exist, to support a claim that Boone Hospital is a mere sham corporation and the alter ego of defendant BJC.

### **Reply to Respondent's Point II**

**Relator is entitled to a permanent writ in prohibition because plaintiffs have failed to show they, as of the time of filing the Petition, had a realistic belief under the law and facts that they had a valid claim against defendant BJC.**

The thrust of plaintiffs' argument in Point II of Respondent's Brief is that it was reasonable for them to ignore the clear precedent established by the Eastern District in *Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d 377 (Mo.App. E.D. 1999), and instead try to base their good faith belief on the bare assertions that Boone Hospital appears to the general public to be owned and controlled by BJC and that BJC's alleged control over Boone Hospital affected the health care to plaintiff Qamar. (Respondents' Brief, p. 39).

The problem with plaintiffs' arguments, however, is that the *Ritter* court already decided this issue more almost a decade ago. Relator thoroughly discussed the details of the *Ritter* case in its opening brief, but a couple of quotes from that case warrant repeating because of the factual similarities with this case:

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.**

\* \* \*

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 385, 388 (emphasis added).

Plaintiffs assert the *Ritter* case is not controlling because it involved a summary judgment proceeding. (Respondents' Brief, pp. 47-48). The fact that *Ritter* was a summary judgment case makes it no less applicable to the pretensive joinder aspect of the present case. The *Ritter* court laid out what a plaintiff therein would need to allege and prove to hold the parent corporation liable for an act or omission of the affiliate hospital and concluded the plaintiff therein would not be able to prove the required elements of

the claim, i.e., 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. *Id.* at 388. Here, the question is not what have plaintiffs proven, but rather what have they sufficiently alleged and did they have a reasonable basis to believe they could state a claim. The common denominator in both instances, however, is that plaintiffs must have sufficiently alleged either control by defendant BJC sufficient to pierce the corporate veil or that the alleged control by defendant BJC affected the health care at issue and caused plaintiff Qamar's injuries. The difference in the procedural posture of the cases, therefore, is irrelevant.

The documents plaintiffs point to as showing defendant BJC allegedly controlled or had the right to control the health care at issue (Respondents' Brief, p. 41) speak only to the alleged relationship between defendant BJC and Boone Hospital in the most general sense and not to the surgical actions of the private physician, Dr. Pitt. These documents, therefore, do nothing to assist plaintiffs in their efforts to retrospectively justify their joinder of defendant BJC as a defendant in this lawsuit. The documents, like the original Petition and the First Amended Petition, lack an essential element: how defendant BJC's control affected the surgery performed by Dr. Pitt, as "the health care at issue" and caused plaintiff Qamar's injury. What is clear from the documents is that, if they were the only basis for plaintiffs' pre-filing belief of the existence of an agency relationship, then the belief was based on speculation and guesswork.

The affidavits filed by Dr. Pitt in support for the Motions to Transfer Venue attest defendant BJC did not manage or control the manner, method or means by which Dr. Pitt

rendered care to plaintiff Qamar, and that BJC did not have the right to control, nor did it allegedly control the manner, method or means by which he rendered care and treatment to plaintiff Qamar. (*See* Affidavits of James Bruce Pitt, D.O., Exhibit C to Exhibit 2, ¶ 5, pp. 32-33 and Exhibit 8). Plaintiffs contend the affidavits do “no more than controvert the facts pleaded in the petition” and do not “shine a helpful light on the analysis of what plaintiff knew at the time the lawsuit was filed.” (Respondent’s Brief, p. 45).

This contention, however, ignores the fact that the Petition and the First Amended Petition contain no pleaded “facts” with regard to agency. Instead, as discussed *supra*, the agency allegations are nothing more than bare assertions that agency exists and that each defendant was an agent of the other. No ultimate facts tending to support the bare agency allegations are pled. The affidavits, therefore, do not “controvert” anything in the pleadings and are useful to show the information available to plaintiffs at the time of filing would not have supported an objective legal opinion of control by defendant BJC over the health care rendered to plaintiff Qamar. Nor do plaintiffs come forward with any information to show they had evidence or information to support their belief that Dr. Pitt was an agent or employee of either Boone Hospital Center or defendant BJC at the time they filed the Petition herein.



### **Reply to Respondent's Points III-V**

**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.**

Respondent's third, fourth and fifth points all relate to newly revised §508.010 RSMo. (Supp. 2005) and its effect on the venue determination in this case. Plaintiffs contend the First Amended Petition does not constitute a "new cause of action" so the new tort venue statutes are not implicated and that application of the new venue statutes would amount to an unconstitutional retroactive application of substantive laws. (Respondent's Brief, pp. 50-64).

Plaintiffs' filing of their First Amended Petition on May 3, 2006, which added two new defendants and new claims against them, operated as the bringing of new "causes of action" that required the re-determination of venue, such that the amended venue laws apply. This Court in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 858 (Mo. banc 2001), made clear that a cause of action is "brought" each time a party is added, and venue must be redetermined at that time. *Id.* ("For purposes of RSMo §508.010, a suit is 'brought' whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition.").

Plaintiffs argue *Linthicum* has no application in light of the new venue laws because the legislature chose in §538.305, RSMo. (Supp. 2005), to speak in terms of when "causes of action" are "filed," not in terms of when a suit is "brought." (Respondent's Brief, p. 60). The new venue statute itself, however, does speak in terms of the word "brought." See § 508.010(2)-(4). Thus, this Court's holding in *Linthicum* is

not at all inconsistent with the new venue laws and, in fact, was codified at § 508.012, RSMo. (Supp. 2005).

Plaintiffs also argue applying the new venue statute to this case would amount to an unconstitutional retroactive application of a substantive law. (Respondent's Brief, pp. 62-64). Venue, however, is procedural, not substantive. *State ex rel. LeNeve v. Moore*, 408 S.W.2d 47, 48 (Mo. banc 1966).

The first health care by a defendant at issue, and all health care in this case, occurred only in Boone County, Missouri. 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.

#### **Reply to Respondent's Point VI**

**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 Boone Hospital Center.**

In Respondent's Brief, plaintiffs contend defendant BJC has asked this Court to negate the doctrine of *stare decisis*. (Respondent's Brief, p. 66). To the contrary, BJC's original brief fully acknowledged this Court's previous holding in *BJC v. Neill* that where defendants share common or joint liability, several nonprofit corporations may be sued in any county where one nonprofit may be sued. 121 S.W.3d at 530-531. Defendant BJC respectfully contends, however, 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. BJC is not asking this Court to ignore its own precedent, but rather to revisit it in light of what should be the overarching goal of any venue analysis: accommodating the statutory venue rights of all defendants.

In the case at bar, the *only* venue proper for all defendants and improper as for none is Boone County, 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. There is no dispute that Boone Hospital Center is a nonprofit corporation that 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. BJC's presence in the City of St. Louis as an allegedly jointly liable nonprofit corporate defendant should not be allowed to thwart or infringe Boone Hospital's statutory venue rights under that statute.

## **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.

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**RULE 84.06(c) CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies, pursuant to Supreme Court Rule 84.06(c), that the foregoing Relator's Reply Brief complies with the limitations contained in Rule 84.06(b) and contains 4,286 words (exclusive of the cover, certificate of service, this certificate, and the signature block) 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 Reply Brief have been scanned for viruses and are virus free.

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## **PROOF OF SERVICE**

One copy of the foregoing Relator's Reply Brief and one 3 ½ inch diskette containing a true and accurate electronic copy of the Reply Brief were mailed, postage pre-paid this 11<sup>th</sup> day of September 2008, to:

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