

IN THE
SUPREME COURT OF MISSOURI

<i>STATE OF MISSOURI ex rel.</i>)	
<i>CH ALLIED SERVICES, INC., d/b/a</i>)	
<i>BOONE HOSPITAL CENTER,</i>)	
)	
Relator,)	
)	
v.)	
)	Circuit Court No. 042-08454
<i>HON. DONALD L. McCULLIN,</i>)	
<i>Circuit Court Judge,</i>)	
<i>22nd Judicial Circuit, Missouri,</i>)	
)	
Respondent.)	

Original Proceeding in Mandamus and/or Prohibition from
The Circuit Court of the City of St. Louis, State of Missouri
The Honorable Donald L. McCullin, Judge Presiding, Division I

BRIEF OF RELATOR
CH ALLIED SERVICES, INC. d/b/a BOONE HOSPITAL CENTER

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JURISDICTIONAL STATEMENT

This is an original proceeding in mandamus and/or prohibition seeking to compel Respondent, the Honorable Donald L. McCullin, to transfer this entire action, pursuant to §476.410 RSMo and §355.176.4 RSMo, to the Circuit Court of Boone County, where venue is proper as to nonprofit defendant CH Allied Services, Inc. d/b/a Boone Hospital Center and individual defendant Dr. James Pitt. This Court is authorized to issue such extraordinary original writs pursuant to Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS/PROCEDURAL HISTORY

I. Factual Background

On April 30, 2004, plaintiff Sadaf Qamar, a resident of Boone County, Missouri, entered Boone Hospital Center (“Boone Hospital”), 1600 East Broadway, Columbia, MO 65201, for a Caesarian section scheduled by her Obstetrician/Gynecologist Kimberly Karol Morse. (Exhibit 10, ¶¶ 1, 14).¹ Dr. Morse was and is employed by Women’s Health Associates, Inc., in Boone County. (Exhibit 10 ¶ 8). Following delivery, Ms. Qamar remained in Boone Hospital until discharge on May 3, 2004. (Exhibit 10, ¶ 17). On May 6, 2004, she presented to Dr. Morse’s office with complaints of abdominal pain, and Dr. Morse instructed her to proceed to the Boone Hospital emergency department. (Exhibit 10, ¶ 18). Ms. Qamar was treated in the emergency department and discharged home. (Exhibit 10, ¶ 19).

On May 8, 2004, Ms. Qamar returned to the Boone Hospital emergency department with similar complaints and was admitted to the hospital by Dr. Mark Loeb. (Exhibit 10, ¶ 20). Dr. Loeb consulted with Dr. Christopher Martin and Dr. James Pitt, and the decision was made to perform an exploratory surgical procedure on May 14, 2004. (Exhibit 10, ¶ 23). Plaintiffs’ allege that during the surgery, Dr. Pitt punctured

¹ All citations to exhibits reference the previously filed four volumes of exhibits to Relator’s Petition for Writ of Mandamus and/or Prohibition, with the exception of Exhibits 42 and 43, which are attached hereto.

Ms Qamar's liver with a trocar, introducing carbon dioxide into her circulatory system and causing a gas embolism that resulted in brain damage. (Exhibit 10, ¶ 24).

II. Parties

On or about October 12, 2004, Sadaf Qamar and Syed Haider, as Jane and John Doe, filed their Petition against Dr. James Pitt, Columbia Surgical Associates, Inc., Dr. Kimberly Morse, Women's Health Associates, Inc., CH Allied Services, Inc. d/b/a Boone Hospital Center and BJC Health System, Cause No. 042-08454 in the Circuit Court of the City of St. Louis. (Exhibit 1). A First Amended Petition added Dr. J. Christopher Martin and his employer, Columbia Nephrology and Internal Medicine, P.C., as defendants. (Exhibit 10).

At all pertinent times, plaintiffs Sadaf Qamar and Syed Haider resided at 1505 Longwell Drive, Columbia, MO, 65203. As described below, all medical treatment Ms. Qamar received related to this action was in Boone County, Missouri.

Dr. James Pitt is, and was at all times relevant herein, a resident of Boone County, Missouri. (Exhibit 2, p. 32). All medical care he rendered to plaintiff was in Boone County. (Exhibit 8). At all relevant times he was employed by Columbia Surgical Associates, Inc. ("CSA"). (Exhibit 10, ¶ 4). CSA's primary place of business is Boone County, Missouri. (Exhibit 1, Caption). Dr. Pitt had no health care relationship with plaintiff outside of Boone County. (Exhibit 2, p. 33).

Dr. J. Christopher Martin is, and was at all relevant times herein, a resident of Boone County, Missouri. (Exhibit 17, p. 322). All care he rendered to the plaintiff was in Boone County. (Exhibit 17, p. 323).

Dr. Kimberly Morse, is, and was at all relevant times herein, a resident of Boone County, Missouri. (Exhibit 10, Caption). All care she rendered to the plaintiff occurred in Boone County. (Exhibit 10, ¶¶ 7, 16, and 18). Women’s Health Associates, Inc. (“WHA”), employed Dr. Morse. (Exhibit 10, ¶ 8). WHA’s registered agent and primary place of business is Boone County, Missouri. (Exhibit 10, Caption, ¶¶ 8, 14, and 16). WHA had no health care relationship with plaintiff outside of Boone County.

CH Allied Services, Inc., d/b/a Boone Hospital Center is a non-profit Missouri corporation in good standing located in Boone County, Missouri. (Exhibit 10, ¶5). Its registered office, registered agent, and principal place of business are all in Boone County, Missouri. (Exhibit 1, Caption; Exhibit 29 reflecting Summons, p. 1298; Exhibit 4, pp. 67-70). Boone had no health care relationship with plaintiff outside of Boone County. (*See generally*, Exhibit 10 and Exhibit 4). Boone Hospital is party to an affiliation agreement with the BJC Health System, a Missouri non-profit corporation with its primary place of business in St. Louis, Missouri. (Exhibit 1, ¶12). BJC Health System and Boone Hospital are separately incorporated, distinct entities. (Exhibit 1, Caption; Exhibit 10, ¶¶ 5 and 6; Exhibit 4, pp. 67-74).

III. Procedural History

In response to plaintiffs’ original Petition, Defendant Boone Hospital timely filed a Motion to Dismiss, or in the Alternative to Transfer Venue. (Exhibit 4). Similar motions were timely filed by defendant BJC Health System (“BJC”), Dr. James Pitt, and his surgical group, CSA). (Exhibit 6; Exhibit 2).

On May 3, 2006, Sadaf Qamar and Syed Haider filed their First Amended Petition adding defendants Dr. J. Christopher Martin and Columbia Nephrology & Internal Medicine, P.C. (Exhibit 10).²

Boone Hospital again timely filed a Motion to Dismiss, or in the Alternative, to Transfer Venue. (Exhibit 13). The motion and subsequent Memorandum of Law argued that the inclusion of BJC, the sole St. Louis defendant, was pretensive and plaintiffs' bare legal conclusions that BJC controlled the health care at issue were insufficient to defeat defendants' challenge. (Exhibit 20). Similar motions and memoranda were filed by BJC, (Exhibit 15) and Dr. James Pitt and CSA (Exhibit 11; Exhibit 21).

In response to the Defense venue motions, plaintiffs filed an amended supplemental response with 42 exhibits in support. (Exhibit 18). Plaintiffs argued the 42 exhibits established a good faith basis that BJC controlled the health care rendered to Ms. Qamar at Boone Hospital. Plaintiffs subsequently produced for deposition two retained liability experts, Dr. Kenneth Janes and Dr. Jeffrey Drebin, neither of whom had criticisms of Boone Hospital personnel or BJC personnel. (Exhibit 42, p. 1317, attached

² The children of Ms. Qamar and Dr. Haider were also named as plaintiffs under a loss of parental consortium claim, but that Count has been dismissed by the Trial Court. (Exhibit 26). Plaintiffs voluntarily dismissed Dr. Chris Martin, Columbia Nephrology & Internal Medicine, P.C., Dr. Kimberly Morse and Women's Health Associates, Inc., as defendants, so that only Dr. Pitt, CSA, Boone Hospital, and BJC currently remain. (Exhibits 23 and 24).

hereto; Exhibit 43, pp. 1321-1322, attached hereto). Further, neither of plaintiffs' experts opined that Boone Hospital or BJC had the right to control Dr. Pitt or the health care rendered to Ms. Qamar in this case. (Exhibit 42, pp. 1317, 1318, attached hereto; Exhibit 43, pp. 1322-1324, attached hereto).

On February 27, 2008, Judge Robert McCullin denied the motion of BJC Health System to dismiss, or in the alternative, to transfer venue. (Exhibit 26). On March 12, 2008, Judge Robert McCullin denied the venue motions of Boone, Dr. Pitt and CSA. (Exhibits 27 and 28).

On March 20, 2008, Boone Hospital, Dr. Pitt, CSA and BJC filed in the Court of Appeals, Eastern District, Petitions for Writ of Mandamus and/or Prohibition. (ED91081, ED91082 and ED91083). 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 answered and filed Suggestions in Opposition to the three Petitions. (Exhibits 32-37). On April 7, 2008, the Eastern District quashed the Preliminary Orders in Prohibition and denied the Writs of Prohibition. (Exhibit 38-40).

On May 2, 2008, Boone Hospital, Dr. Pitt, CSA, and BJC filed their respective Petitions for Writ of Prohibition, or in the Alternative, Petition for Writ of Mandamus with suggestions in support in this Court. On May 20, 2008, this Court issued a Preliminary Writ. Respondent timely filed Answers on June 17, 2008.

POINTS RELIED ON AND AUTHORITIES

- I. RELATOR IS ENTITLED TO AN ORDER REQUIRING RESPONDENT TO DISMISS THIS ACTION OR TRANSFER THE CASE TO A PROPER VENUE, BECAUSE PLAINTIFFS' JOINDER OF DEFENDANT BJC HEALTH SYSTEM WAS PRETENSIVE, IN THAT 1) PLAINTIFFS' PETITION FAILED TO STATE A CLAIM AGAINST BJC, AND ALTERNATIVELY, 2) THE RECORD BEFORE RELATOR ESTABLISHED THERE WAS NO CAUSE OF ACTION AGAINST BJC AND THE INFORMATION AVAILABLE TO PLAINTIFFS AT THE TIME SUIT WAS FILED WOULD NOT HAVE SUPPORTED A REASONABLE LEGAL OPINION THAT A CASE COULD BE MADE AGAINST BJC.**

Ritter v. BJC Barnes Jewish Christian Health Sys., 987 S.W.2d 377, 384

(Mo. App. E.D. 1999)

State ex rel. Malone v. Mummert, 889 S.W.2d 822, 824-825 (Mo. banc 1994)

State ex rel. BJC Health System v. Neill, 86 S.W.3d 138, 141 (Mo. App. E.D. 2002)

State ex rel. BJC Health System v. Neill, 121 S.W.3d 528, 531 (Mo. banc 2003)

- II. RELATOR IS ENTITLED TO AN ORDER REQUIRING RESPONDENT TO DISMISS THIS ACTION OR TRANSFER THE CASE TO A PROPER VENUE, BECAUSE RSMO §508.010.4, AS MODIFIED BY HOUSE BILL 393, IS DETERMINATIVE OF THE VENUE ISSUE IN THAT PLAINTIFFS "RE-BROUGHT" THEIR CAUSE OF ACTION BY FILING A FIRST AMENDED PETITION ON MAY 3, 2006, TRIGGERING A *DE***

***NOVO VENUE ANALYSIS PER STATE EX REL. LINTHICUM ET AL. V.
CALVIN, 57 S.W.3D 855, 858 (MO. 2001).***

State ex rel. DePaul Health Ctr. v. Mummert, 870 S.W.2d 820, 823 (Mo. Banc 1994)

State ex rel. Linthicum et al. v. Calvin, 57 S.W.3d 855, 858 (Mo. 2001)

STANDARD OF REVIEW FOR ALL POINTS

Where the trial court retains an improperly venued case, it acts in excess of its jurisdiction, creating error that 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 19885). Prohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation. *State ex rel. Linthicum et al. v. Calvin*, 57 S.W.3d 855 (Mo. 2001), citing *State ex rel. Police Ret. Sys. Of St. Louis v. Mummert*, 875 S.W.2d 553, 555 (Mo. banc 1994). It is reversible error to allow a matter to proceed in an improper venue. *Igoe v. Department of Labor and Industrial Relations*, 152 S.W.3d 284, 289 (Mo. banc 2005).

ARGUMENT

Boone Hospital is a Missouri non-profit corporation with its principal and only place of business located in Boone County, Missouri. When this suit was originally filed, the applicable venue statute was RSMo. §355.176.4, which provided that 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.; *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 141 (Mo. banc 2002).

Plaintiffs' Petition admits the location of defendant Boone Hospital's registered office and registered agent is in Boone County and the allegedly negligent events all occurred at Boone Hospital located in Columbia, Boone County, Missouri. (*See* Exhibit 1, Caption and ¶¶14-23; *see also* the Docket Sheet reflecting Summons, Exhibit 29). Further, Boone Hospital's principal place of business is in Boone County, located at 1600 East Broadway, Columbia, Missouri, 65201 (Exhibit 4, pp. 16-18). Thus, any analysis under RSMo §355.176.4 leads to the same result. The Petitions establish that venue is improper in the Circuit Court of the City of St. Louis against defendant Boone Hospital.

Plaintiffs' sole foundation for filing suit in the City of St. Louis was inclusion of BJC as a defendant. By describing BJC as a joint tortfeasor, plaintiffs at various times

hauled seven Boone County defendants into the City of St. Louis. This attempt to secure City venue, apparently for the reasons outlined by Judge Wolff in his concurring opinion in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. 2001), was undertaken with no recognizable cause of action pled against the sole City defendant. The pleadings and discovery in this case have established that BJC was pretensively joined and should have been ignored for purposes of the venue analysis. *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 824-825 (Mo. banc 1994). Compelling Boone Hospital to defend in a foreign county halfway across the state from its residence, a suit with no relation to the chosen forum, creates a fundamental jurisdictional defect and unfairly prejudices Relator. The St. Louis City Circuit Court should take no other action but to transfer this case to Boone County.

I. RELATOR IS ENTITLED TO AN ORDER REQUIRING RESPONDENT TO DISMISS THIS ACTION OR TRANSFER THE CASE TO A PROPER VENUE, BECAUSE PLAINTIFFS' JOINDER OF DEFENDANT BJC HEALTH SYSTEM WAS PRETENSIVE, IN THAT 1) PLAINTIFFS' PETITION FAILED TO STATE A CLAIM AGAINST BJC, AND ALTERNATIVELY, 2) THE RECORD BEFORE RELATOR ESTABLISHED THERE WAS NO CAUSE OF ACTION AGAINST BJC AND THE INFORMATION AVAILABLE TO PLAINTIFFS AT THE TIME SUIT WAS FILED WOULD NOT HAVE SUPPORTED A REASONABLE LEGAL OPINION THAT A CASE COULD BE MADE AGAINST BJC.

Venue is pretensive if (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)). Plaintiffs have the burden of showing that venue is proper. *Igoe v. Dep't. of Labor and Indus. Relations*, 152 S.W.3d 284, 288 (Mo. banc 2005). *See also, Raskas Foods, Inc. v. Sw. Whey, Inc.*, 978 S.W.2d 46, 49 (Mo. App. E.D. 1998).

The pretensive joinder analysis is a two-prong, disjunctive test. If a plaintiff fails to satisfy either prong, venue is improper and the case must be transferred. *State ex rel. Malone*, 889 S.W.2d at 824-825. The first prong assesses the pleading of the case; the second prong analyzes the proof and whether there was an objective belief of merit at the time of filing.

A. Plaintiffs failed to meet the first prong of the pretensive joinder test because the allegations in plaintiffs' First Amended Petition fail to state a claim against defendant BJC.

All allegations of negligence in plaintiffs' First Amended Petition are concerned with medical judgment exercised by health care providers at Boone Hospital on May 6, 8, and 14th. (Exhibit 10, ¶¶ 35, 45). A petition must contain allegations of fact to support each essential element of the cause pleaded. *Berkowski v. St. Louis County Bd. of*

Election Comm'r, 854 S.W.2d 819, 823 (Mo. App. E.D. 1993). The first element of a claim for medical malpractice is an act or omission by the defendant. *Lashmet v. McQueary*, 954 S.W.2d 546, 551 (Mo. App. S.D. 1997). Because BJC is a corporation and artificial being, it must act through its employees or agents. *Ritter v. BJC Barnes Jewish Christian Health Sys.*, 987 S.W.2d 377, 384 (Mo. App. E.D. 1999) (citing *Standard of Beaverdale, Inc. v. Hemphill*, 746 S.W.2d 662, 663 (Mo. App. 1988)).

Plaintiffs have pled no specific allegation of negligence by a BJC employee. No individual in plaintiffs' pleadings is identified as an employee of BJC. With no direct claim against BJC, plaintiffs were required to plead facts evidencing BJC's control over the actions of (a) the individual physician defendants, or (b) Boone Hospital or Boone Hospital employees. The First Amended Petition does neither.

1. Plaintiffs failed to plead factual allegations of control by BJC over the individual physician defendants.

Plaintiffs' petitions do not demonstrate that Drs. Pitt, Martin, or Morse were agents, servants, or employees, actual, ostensible, or apparent of BJC, though that bare conclusion is stated. (Exhibit 10, ¶ 12). Each physician is, in fact, alleged to be employed by separate corporations apart from BJC, with no hint or suggestion of how BJC controlled the doctors or their respective employers. (Ex. 10, ¶ 4, 8, and 10). 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. *Berkowski*, 854 S.W.2d at 823.

Lacking proof of employment, plaintiffs might have pled agency. Agency is a legal status conferred by a factual analysis. Plaintiffs pled no factors supporting an

agency relationship between BJC and the doctors. *See generally, Ritter*, 987 S.W.2d at 386 (enumerating the factors necessary for finding apparent agency); *see also Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 567 (Mo. 2002) (enumerating the factors necessary for finding actual agency). None of the factors for actual or apparent agency are pled. No allegations of how BJC might have controlled the doctors or otherwise affected Ms. Qamar's health care are pled. None of the three individual physicians named in the First Amended Petition can be linked to BJC through any factual allegation. (Exhibit 10, ¶¶ 3, 7 and 9). Plaintiffs' legal conclusion that "all corporate defendants were acting by and through ... the named individual defendants" is a self-serving fabrication. (Ex. 10, ¶ 12).

Plaintiffs should have pled factual allegations, which if true, would establish that the physicians in Boone County were acting as employees, agents, or servants of defendant BJC. *See Downey v. Mitchell*, 835 S.W.2d 554, 556 (Mo. App. E.D. 1992); *see also Eyberg v. Shah*, 773 S.W.2d 887, 890 (Mo. App. S.D. 1989). More specifically, plaintiffs should have pled factual allegations demonstrating that Dr. Pitt was acting as an employee, agent, or servant of BJC because his is the only care for which plaintiffs developed expert criticisms. Such allegations of employment or agency are absent because there was no basis on which to plead them. No legal link exists between BJC and any of the physicians caring for Ms. Qamar. BJC should be, and should have been, dismissed and disregarded in the court's venue analysis.

2. Plaintiffs failed to plead factual allegations of control by BJC over defendant Boone Hospital Center.

Just as BJC is an artificial being, so too Boone Hospital can only act through its employees and agents. *Ritter*, 987 S.W.2d at 384. Plaintiffs' allegations against Boone Hospital are just as deficient as those against BJC, with only the bare conclusion that an agency relationship existed between the hospital and the doctors caring for Ms. Qamar. The physicians are not employees of Boone Hospital, (Exhibits 8 and 17), and there are no acts or representations described which would support a theory of agency. *See generally Ritter*, 987 S.W.2d at 386 (enumerating the factors necessary for a finding apparent agency); see also *Scott*, 70 S.W.3d at 567 (enumerating the factors necessary for finding actual agency). Even plaintiffs' retained experts drew no link of control between Boone Hospital and the physicians, and refused to support any independent claim of negligence against Boone. (Exhibits 42 and 43, attached hereto.).

Plaintiffs' theory of liability against Boone Hospital is built on the following single paragraph:

At all pertinent times, all corporate defendants were acting by and through their agents, servants, and employees, actual ostensible, or apparent, including but not limited to, the named individual defendants; and, all defendants were acting as agents, servants and employees of all other defendants. (Exhibit 10, ¶ 12).

Venue analysis aside, this language is insufficient to support a cause of action against Boone Hospital. *Downey*, 835 S.W. 2d at 556 (holding that plaintiff's bare conclusion of an agency relationship between a hospital and surgeon was insufficient to support a cause of action against the hospital.) But the language also shows how plaintiffs

have compounded their mischief by pleading that BJC is liable for Boone's negligence when Boone's alleged negligence is likewise premised on nothing more than the conclusion that the physicians whose care is at issue were "agents, servants, and employees, whether actual, ostensible, or apparent" of Boone. Plaintiffs' experts did not criticize Boone Hospital, and plaintiffs pleaded no facts suggesting that Boone Hospital, much less BJC, controlled Dr. Pitt's conduct during surgery. Plaintiffs have only a double layer of conclusory statements linking BJC to Ms. Qamar's care with no factual allegations in the chain.

Assuming for the sake of argument plaintiffs had pled the necessary factual allegations to link the physician defendants to Boone, either through an agency analysis or with facts of employment, BJC and Boone remain indisputably separate Missouri corporations. (Exhibit 10, ¶¶ 5-6; Venue Motion Exhibit 6; and Venue Motion Exhibit 4). Linking BJC to the tortious conduct of a separate corporation requires an exception to the general principal that separate corporations are treated as distinct individuals. In order for BJC to be sued along with a separate corporate entity, even an affiliated hospital, plaintiffs must plead facts evidencing (a) "control sufficient to pierce the corporate veil," and/or (b) "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 neither.

- a. Plaintiffs' First Amended Petition does not contain allegations of control by defendant BJC over the separately incorporated defendant Boone Hospital Center sufficient to pierce the so-called corporate veil.**

Under Missouri law, a parent corporation is not liable for the conduct of a subsidiary corporation unless an exception to intercorporate liability is met. *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 644 (Mo. banc 2002). In order to pierce the corporate veil, plaintiffs must not only demonstrate control by the parent, there must be evidence that the corporate cloak was used as a subterfuge to defeat public convenience, to justify a wrong, or to perpetuate a fraud. *Ritter*, 987 S.W.2d at 384 (citing *Thomas Berkeley Consulting Eng'r, Inc. v. Zerman*, 911 S.W.2d 692, 695-696 (Mo. App. E.D. 1995)). This is also true where two corporations are affiliated unless the affiliation agreement was conceived or used for fraudulent purposes. *Id.* (citing *Camelot Carpets v. Metro Distrib. Co.*, 607 S.W.2d 746, 749 (Mo. App. 1980)). If the purpose to be served by the affiliation is fair and lawful, legal forms are respected and corporate liability is evaluated separately. *Id.*

Missouri Courts have reviewed the BJC affiliation agreement on multiple occasions, and consistently found nothing unfair or unlawful in its purpose. *Ritter*, 987 S.W.d at 384. The agreement is intended for business reasons and is not an effort to control health care. *State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138, 141 (Mo. App. E.D. 2002). Plaintiffs here cannot simply plead conclusions against this precedent, particularly when no factual allegations of fraud, subterfuge, or even control are offered

in their petitions. A corporate veil analysis cannot save plaintiffs' venue. Plaintiffs acknowledge this in their Answer to Relator's Petition before this Court, disclaiming a veil-piercing argument and any applicability of *Ritter*. (See, Answer to Relator CH Allied Services, Inc. d/b/a Boone Hospital Center's Writ of Mandamus and/or Prohibition, ¶34).

Plaintiffs also disclaimed the veil-piercing approach at the trial level, stating that such an analysis would be irrelevant because "plaintiffs are alleging the (sic) BJC was the direct employer of those who cared for Sadaf Qamar and that BJC is vicariously liable." (Exhibit 18, p. 346). Yet in response to the Petitions for Writ filed in the Eastern District Court of Appeals, plaintiffs embarked on a veil piercing/alter ego argument, describing the evidence as "abundant" that the affiliation agreement has been used as a subterfuge. (Exhibit 33, p. 1245). Significantly, there were no citations to the First Amended Petition.

Ritter, 987 S.W.2d at 384 is, in fact, virtually dispositive of this matter. The *Ritter* suit was filed by the same firm that is prosecuting this claim. The *Ritter* court rejected the same arguments being advanced here when it held that BJC did not control the surgery performed by a private physician at Christian Hospital, another BJC affiliated hospital. The *Ritter* court also outlined the elements necessary to establish the control of one corporation over another in order to justify piercing the corporate veil. These elements are not alleged in plaintiffs' First Amended Petition.

Again, the first prong of the pretensive joinder analysis is an examination of the pleadings. Regardless of plaintiffs' next position with regard to veil-piercing, their petitions will not support a veil piercing argument. Further, the entire veil-piercing issue

is a distraction because plaintiffs' allegations center on Dr. Pitt's surgical care, so the affiliation agreement between BJC and Boone Hospital is irrelevant.

b. Plaintiffs' First Amended Petition does not contain any factual allegations that BJC affected the health care rendered to Sadaf Qamar at Boone and caused her injury.

Having failed to plead or justify a piercing of the corporate veil, in order to prevail on venue plaintiffs must demonstrate that "the alleged control by defendant BJC Health System affected the health care at issue and caused the alleged injury." *BJC Health System*, 121 S.W.3d at 531. Plaintiffs were required to plead facts demonstrating how BJC controlled Dr. Pitt's performance of Ms. Qamar's surgery. Again, the conclusion of control is pled but there are no factual allegations. Plaintiffs only effort to plead control is the vague conclusion that "BJC exercises control over Boone Hospital Center in many areas, including areas that affect medical care provided to plaintiff Sadaf Qamar in 2004, and the other aforementioned hospitals and health care centers." (Exhibit 10, ¶ 6). This is particularly lame given the lack of detail establishing how Boone, in turn, controlled Dr. Pitt. Plaintiffs' two experts denied such control. Even if plaintiffs' conclusion regarding control was accepted, BJC would remain at least one step removed from the health care at issue because of its separate corporate status.

Plaintiffs describe their theory thus:

On or about May 14, 2004, defendants Pitt and Columbia Surgical Associates, Inc. negligently, as more fully set forth hereinafter, performed a laparoscopy upon plaintiff Sadaf Qamar at which time defendant Pitt

punctured plaintiff's liver with a blind trocar insertion, introduced carbon dioxide through this puncture, and caused and allowed this gas into plaintiff's circulatory system. (Exhibit 10, ¶ 24).

Plaintiffs do not describe how Boone Hospital or BJC controlled the trocar insertion, the introduction of CO₂, or any other aspect of surgery. Nowhere are those elements addressed. In *State ex rel. BJC Health System v. Neill, supra*, this Court found that plaintiffs stated a claim against BJC by specifically alleging control over the affiliate hospital in specific ways, including “control and oversight of the adoption, promulgation, and use of standards, protocols, and procedural guidelines,” directly affecting the health care of the patient. *BJC Health System*, 121 S.W.3d at 531. Even that broad language is absent in plaintiffs' petition, and its absence is understandable given the indisputable fact that Dr. Pitt, an independent physician, controlled all aspects of his surgery, not Boone Hospital, and certainly not BJC. (Exhibit 8).

Plaintiffs failed to meet the first prong of the pretensive joinder test because the First Amended Petition does not state a claim against BJC. No BJC employee was negligent in the care and treatment of Ms. Qamar. BJC did not employ or control Dr. Pitt or the other individual physicians involved in Ms. Qamar's care. There is no direct claim of negligence against Boone Hospital, and even if one existed, there are no factual allegations of control linking BJC to Boone's theoretical liability. Although plaintiffs have repeatedly insisted they pled control and agency, they have in fact only concluded there was control and agency. With no explanation from plaintiffs as to what control BJC exercised or how that control could have affected Dr. Pitt's surgical decisions, the

pretensive joinder analysis need go no further. Having failed to meet the first prong of the disjunctive test, plaintiffs' joinder of BJC is revealed as pretensive. BJC should have been disregarded by Respondent in the venue analysis.

B. Plaintiffs failed to meet the second prong of the pretensive joinder test because discovery has established that no viable claim against BJC exists, and plaintiffs had no objective evidence to the contrary when suit was filed.

At the time of filing, plaintiffs did not have an objective, realistic belief under the law and facts that a valid claim could be made against defendant BJC. This provides alternate grounds to hold that BJC's joinder was pretensive. The second prong of the disjunctive pretensive joinder test examines the evidence available to support the resident's joinder and requires plaintiffs to prove 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*, 996 S.W.2d at 663 (Mo. App. S.D. 1999) (citing *Breckenridge*, 920 S.W.2d at 902). Per plaintiffs' own experts, only the surgical conduct of co-defendant Dr. Pitt is at issue in this case. (Exhibit 42, p. 1317; Exhibit 43 p. 1322). Plaintiffs have never had information that BJC employed Dr. Pitt or controlled his surgical decisions. Plaintiffs therefore never had a reasonable legal belief that a case could be made against BJC for Dr. Pitt's surgical conduct, so they fail under the second prong of the disjunctive test as well.

1. The information available to plaintiffs at the time of filing would not have supported an objective legal opinion of control by BJC over Dr. Pitt.

In an effort to retrospectively justify suing BJC, plaintiffs filed a 28-page, Amended Supplemental Response to the defendants' venue motions, with 42 supporting documents, offering a litany of general arguments that fall short of explaining their legal basis for concluding BJC could have liability for the conduct of Dr. Pitt. Ignoring the lack of control by Boone Hospital over Dr. Pitt, plaintiffs focused on BJC's business arrangement with Boone. Plaintiffs argued BJC has the power to set guidelines for the delivery of health care through the system affiliate agreement (Exhibit 18, pp. 329-331), that it has system-wide policies (*Id.* at 331-332), has a BJC compliance program (*Id.* at 332-334), a BJC Center for Quality Management (*Id.* at 334), a BJC News Forum and corporate compliance programs (*Id.* At 334-335), exercises approval power over affiliate hospitals' budgets (*Id.* at 337-338), exercises control over the board of directors of affiliate hospitals (*Id.* at 338), has "integrated" and assumed many services of affiliate hospitals (*Id.* at 339-340), and that defendant BJC has the ability to negotiate and contract on behalf of affiliate hospitals (*Id.* at 340).

None of these nine arguments advance plaintiffs' position because they speak only to the alleged relationship between BJC and Boone Hospital, while plaintiffs' case is solely concerned with the surgical actions of Dr. Pitt, a non-party to the agreement. Plaintiffs' retrospective justification for joining BJC lacks the key element also absent in the First Amended Petition: *control over Dr. Pitt's surgical skills and care.*

Respondent denied defendants' venue motions by finding that plaintiffs pled "that BJC had control over Boone Hospital Center." (Exhibit 26, p. 5). Finding generic "control" is insufficient under Missouri law. The control must affect the health care at issue and cause the alleged injury. *Neill*, 121 S.W.3d at 531. That requires proof of control over Dr. Pitt, not Boone Hospital.

The only relevant inquiry for this Court is whether plaintiffs had any reasonable belief that BJC controlled Dr. Pitt's placement of the trocar or insufflation with CO2 during the May 14, 2004 operation. Nothing in this business agreement between Boone Hospital and BJC could or would have controlled Dr. Pitt's surgical decisions.

Lower courts have acknowledged this truth after examining the impact of this affiliation agreement on care rendered at other BJC affiliate hospitals. *BJC Health System*, 86 S.W.3d at 141 (holding "the affiliation agreement is intended for business reasons and not to assert control or right to control over medical care" at Missouri Baptist Medical Center.); *See also Ritter*, 987 SW2d at 384 (holding that BJC did not control a surgeon's actions at Christian Hospital.). The Courts have repeatedly evaluated the nature of the BJC system and rejected the notion of control plaintiffs here used to justify venue.

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.

The Court of Appeals further stated while the Affiliation Agreement between BJC and its affiliate hospitals allowed BJC to exert some control, “the evidence also makes clear that it did so for business reasons, while observing autonomy in the individual entities.” *Ritter*, 987 S.W.2d at 385. Although BJC has control over some of the member hospital's affairs, “it does not have control or right to control over the medical care of patients” at the affiliate hospital. *Id.* (citations omitted).

The *Ritter* case bears more than a passing resemblance to this case. In *Ritter*, the plaintiff, represented by the same attorneys who filed this suit, sought venue in the City of St. Louis by joining BJC in a suit related to surgery in St. Louis County. *Ritter* resulted in a statement of law that, when applied to this case, hinges BJC’s liability on control or

right to control Ms. Qamar's allegedly tortious care, i.e., the surgeon's surgical conduct. *Ritter*, 987 S.W.2d at 385 (citing *J.M. v. Shell Oil Co.*, 922 S.W.2d 759, 764 (Mo. banc 1996)). Clearly, none of plaintiffs' documents grant BJC the right to usurp the surgical judgment of Dr. Pitt, a non-party to the affiliation agreement.

Significantly, plaintiffs channel their efforts into establishing control by BJC over Boone Hospital without explanation for how that grants BJC control over Dr. Pitt. Both links in the chain require an agency analysis, but rather than relying on the tests for agency set down by Missouri Courts, plaintiffs advocate a test for agency based upon public perception. Statements such as "[t]o the general public, Boone Hospital appears to be owned and controlled by BJC" (Exhibit 18, p. 346) have no citation, no foundation, and no relevance for an agency analysis under Missouri law for Dr. Pitt's conduct. The numerous exhibits attached to Plaintiffs' Amended Supplemental Response to Defendants Motion to Dismiss or Transfer for Improper Venue were offered in support of this public perception theory of agency, but did not advance a legally recognized theory of liability against BJC. Nor did these documents make the more significant leap to show how BJC could have controlled the surgical decisions of Dr. Pitt.

Further, most of the plaintiffs' documents and arguments meant to support venue are over ten years old. (Exhibit 18). The *Ritter* decision is almost as old, meaning that counsel knew as far back as 1999 that these documents were not sufficient objective evidence of BJC's alleged control to justify this venue choice. Plaintiffs did not have an objective, reasonable legal opinion at the time of filing that BJC controlled Dr. Pitt's

surgical care of Ms. Qamar. Having no legal foundation for BJC's joinder, it must be considered pretensive.

2. Discovery in this case offers further proof of BJC's pretensive joinder.

The discovery that followed plaintiffs' filings further confirm that plaintiffs did not have an objective, good faith belief that a claim could be made against BJC when suit was filed. The testimony of defendant Dr. Pitt and plaintiffs Sadaf Qamar and Syed Haider provide uncontroverted evidence that defendant BJC was pretensively joined.

a. Affidavits of defendant Dr. Pitt are uncontroverted and show that Dr. Pitt is not an employee or agent of defendants BJC and Boone Hospital Center.

Dr. Pitt has submitted two affidavits in support of the various motions to transfer venue. Both establish that all of Dr. Pitt's care and treatment to plaintiff Sadaf Qamar in May 2004 occurred only in Columbia, Boone County, Missouri. (Exhibits 2 and 8). Dr. Pitt's testimony stands as uncontroverted evidence that his medical decisions were based on his own education, training, and clinical experience. (Exhibit 8, ¶ 3). He further stated "neither [Boone] nor BJC Health System controlled or had the right to control my said independent medical decisions described above." (Id., ¶ 4). Plaintiffs neither have nor had evidence to the contrary.

b. Deposition Testimony of Plaintiff Sadaf Qamar supports that plaintiffs pretensively joined defendant BJC.

The September 21, 2007, deposition testimony of plaintiff Sadaf Qamar further undermined the legitimacy of joining BJC. Sadaf Qamar testified in her deposition that she had no idea what defendant BJC Health System was or what the relationship between defendants BJC and Boone was at the time of the events at issue. (Exhibit 20, p. 1178). She certainly had no expectation that BJC controlled her health care.

**c. Deposition Testimony of Plaintiff Syed Haider supports
that plaintiffs pretensively joined defendant BJC**

Plaintiff Syed Haider's September 21, 2007, deposition testimony does not provide a good faith basis for the belief that a claim could be made against defendant BJC, either. Dr. Haider testified in his deposition only that he was aware that BJC and Boone Hospital had a relationship of some type and that Boone was an affiliate hospital. (Exhibit 20, p. 1180). He had no information regarding the relationship that would support a conclusion that BJC controlled Dr. Pitt's surgical choices.

Dr. Haider had no information tending to show that any of the health care providers in Boone County were actually employed by BJC. (*Id.* at 1181). Dr. Haider did not believe that BJC directed Dr. Pitt in providing care to his wife. (*Id.* at 1181-1182). Furthermore, he did not have any information that BJC controlled any of the health care providers at Boone. (*Id.* at 1182).

Neither plaintiffs nor their attorneys had any objective reason or legal basis to name BJC as a defendant. Their failure to plead a cause of action means that BJC's joinder was pretensive under the first prong of the analysis. Their failure to support the

filing with evidence during the discovery phase proves that joinder was pretensive under the second prong as well.

d. Deposition testimony of plaintiffs' retained liability experts supports that plaintiffs pretensively joined defendant BJC.

Plaintiffs produced two retained liability experts for deposition, Dr. Kenneth Janes and Dr. Jeffrey Drebin. Neither was critical of BJC or Boone Hospital. (Exhibit 42, p. 1317 attached hereto; Exhibit 43, pp. 1321-1322, attached hereto). Their only criticisms related to the surgical judgment of Dr. Pitt. (Exhibit 42, p. 1317; Exhibit 43, p. 1322). Most significantly for this Court's analysis of the second prong of the pretensive joinder test, the experts confirmed that neither BJC nor Boone Hospital controlled or had the right to control Dr. Pitt's actions in caring for Ms. Qamar. (Exhibit 42, p. 1318; Exhibit 43, pp. 1323-1324).

The testimony of plaintiffs' experts demonstrates that plaintiffs' case is, and always has been, solely concerned with the propriety of Dr. Pitt's actions during the May 14, 2004 surgery. This Court's inquiry must therefore focus on plaintiffs' ability to demonstrate BJC's control over those actions. Plaintiffs failed to carry that burden either through pleadings or discovery, and therefore fail both prongs of the disjunctive test for pretensive joinder.

II. RELATOR IS ENTITLED TO AN ORDER REQUIRING RESPONDENT TO DISMISS THIS ACTION OR TRANSFER THE CASE TO A PROPER VENUE, BECAUSE RSMO §508.010.4, AS MODIFIED BY HOUSE BILL

393, IS DETERMINATIVE OF THE VENUE ISSUE IN THAT PLAINTIFFS “RE-BROUGHT” THEIR CAUSE OF ACTION BY FILING A FIRST AMENDED PETITION ON MAY 3, 2006, TRIGGERING A *DE NOVO* VENUE ANALYSIS PER *STATE EX REL. LINTHICUM ET AL. V. CALVIN*, 57 S.W.3D 855, 858 (MO. 2001).

Relator contends that the pretensive joinder of BJC, described in Point I, is wholly dispositive of the venue issue before this Court. But the procedural history of the case provides an alternate ground to transfer the case to Boone County. Because plaintiffs filed an amended petition on May 3, 2006 and added new Boone County defendants, the Trial Court was obligated to examine venue anew, and because of the impact of House Bill 393, transfer the case out of St. Louis City.

Venue in Missouri is determined by statute. *Igoe*, 152 S.W.3d at 289. Venue is determined as the case stands when brought. *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 823 (Mo. Banc 1994). “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.” *Linthicum*, 57 S.W.3d at 858. As this Court recognized in *State ex rel. Burns v. Whittington*, 219 S.W.3d 224 (Mo. 2007), amending the allegations in a lawsuit does not create a new and separate cause of action. The amendment in *Burns*, however, did not include an addition of parties, the key consideration in the *Linthicum* opinion. *Burns*, 219 S.W.3d at 225. The *Burns* case was not “re-brought” post tort reform; the case at bar was.

This distinction is necessary to afford new defendants the venue protections to which they are entitled. It is fundamentally unfair to drag Boone County defendants into the Circuit Court of the City of St. Louis to defend an action centered entirely on care rendered in Boone County. It is particularly egregious to do so when the defendants are fresh and have the right to expect the statutory protections of RSMo §508.010 as amended prior to their being added to the suit. Failing to re-examine venue when the case was re-brought rendered *Linthicum* moot and dispensed with notions of fairness in favor of an ephemeral legal loophole.

Plaintiffs “brought” this lawsuit on May 3, 2006, at which time RSMo §508.010(4) required that in all tort actions in which plaintiff was injured within the state, “venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.” Clearly, the statute fixes venue in Boone County. Respondent should have transferred the case to Boone County upon defendants’ respective motions filed after suit was brought on May 3, 2006. RSMo. §476.410 .

CONCLUSION

Plaintiffs’ City venue hinges on the joinder of BJC to the suit. The test for pretensive joinder is disjunctive, meaning plaintiffs’ failure to meet either prong of the analysis is fatal to their venue choice. Plaintiffs failed to meet the first prong by filing inadequate petitions devoid of any factual basis for concluding BJC controlled Dr. Pitt’s surgical care. Plaintiffs failed to meet the second prong by demonstrating no legitimate foundation for BJC’s joinder, despite extensive discovery. Alternatively, §508.010 RSMo., as amended by HB 393, requires that the case be transferred to Boone County,

Missouri because all care at issue occurred in that venue. This Court should, therefore, issue an order instructing Respondent to dismiss BJC from the litigation and transfer the matter to Boone County where venue is proper.

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Certificate of Service

The undersigned certifies that a copy of the foregoing was sent by US mail, postage pre-paid, this 24th day of July, 2008, to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Rule of Civil Procedure 84.06(c), the undersigned attorney certifies that:

1. This brief includes the information required by Missouri Rule of Civil Procedure 55.03.
2. This brief complies with Missouri Rule of Civil Procedure 84.06(b).
3. This brief contains approximately **8,019** words according to the Word Count feature of Microsoft Word.
4. The submitted disk has been scanned for viruses and is virus-free.