No. SC89283

IN THE
SUPREME COURT OF MISSOURI

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

POINTS RELIED ON

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.

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.

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.

II. RELATOR IS ENTITLED TO AN ORDER REQUIRING RESPONDENT TO DISMISS THIS ACTION OR TRANSFER THE CASE TO A PROPER VENUE, BECAUSE SECTION 508.010.4 R.S.MO, AS MODIFIED BY HOUSE BILL 393, IS DETERMINATIVE OF THE VENUE ISSUE IN THAT PLAINTIFFS "REBROUGHT" 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. VS. CALVIN*, 57 S.W. 3rd 855, 858 (MO. 2001).

ARGUMENT

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.

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). Here, that means defending the pretensive joinder of BJC. Joinder 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)).

The pretensive joinder analysis is a two-prong, disjunctive test. If plaintiffs have run afoul of *either* prong, venue is improper and the case must be transferred. *State ex rel. Malone*, 889 S.W.2d 822, 824-825 (Mo. 1994).

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.[1]

Based upon the Respondent's Brief, it should now be clear that the answer to the venue debate rests entirely on whether the plaintiffs can establish that BJC, the sole resident defendant, controlled the surgical decisions of defendant Dr. James Pitt. As plaintiffs state in their Brief:

> During the laparoscopy, a trocar was placed into Sadaf's abdomen to visualize her abdominal structures. The trocar was not properly placed and carbon dioxide gas entered Sadaf's circulatory system instead of her abdomen and she sustained permanent neurological injury and brain damage. (Brief of respondent, p. 11)

Counsel well knows Dr. James Pitt placed the trocar, not some nameless, unidentifiable agent of BJC or Boone Hospital. The facts have never been secret. Though plaintiffs now resort to passive verbiage to imply anonymity, they pled in their Petition:

[1] Relator utilizes the same points relied on used in its original Brief. Point IA corresponds to Respondent's Point I. Relator's Point IB corresponds to Respondent's Point II. Relator's Point II corresponds to Respondent's Points III, IV, and V.

> [D]efendants Pitt and Columbia Surgical Associates, Inc. negligently, as more fully set forth hereinafter, performed a laparascopy 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).

That pleading was presumably informed by plaintiffs' compliance with § 538.225 RSMo., which involved consulting medical experts who would have informed counsel, consistent with their deposition testimony, that Dr. Pitt alone controlled the trocar and insufflation of gas during Ms. Qamar's procedure. This is not and never has been a case about Boone Hospital.

How then did plaintiffs plead a link between BJC and Dr. Pitt and thus state a cause of action? Plaintiffs specifically pled that Columbia Surgical Associates was "at all times acting through its agents, servants, and employees, including defendant James Bruce Pitt, D.O." (Exhibit 10, ¶4). Dr. Pitt is nowhere listed as the agent, servant, or employee of BJC. There is no link of employment.

Further the Petition is devoid of factors alleging any agency relationship between BJC and Dr. Pitt. There are tests for establishing agency, but plaintiffs did not plead any relevant facts. The pleaded a perfunctory conclusion that BJC is responsible for all the actions of all the caregivers in all the medical records does not alone describe a cause of action. The Petition on its face supports no legal relationship between BJC and Dr. Pitt

whatsoever, and that is the reason plaintiffs cannot satisfy the first prong of the disjunctive pretensive joinder test.

Rather than address the dispositive issue of control over Dr. Pitt, the bulk of Respondent's Brief focuses on BJC's alleged control of Boone Hospital. But building a cause of action against BJC through Boone Hospital would require pleaded factual allegations that BJC's control not only existed, but also caused plaintiffs' injury. *State ex rel. BJC Health Sys. v. Neill*, 121 S.W.3d 528, 531 (Mo. banc 2003). Plaintiffs would have to plead a double level of agency with factual allegations establishing BJC's control over Boone and Boone's control over Dr. Pitt. Plaintiffs cannot and could not plead that link in their Petition because there is nothing in the Affiliation Agreement, system-wide programs, or other documents they now reference that would have permitted BJC to control Dr. Pitt's placement of the trocar or decision to insufflate. Without that foundation, plaintiffs' pleadings had no hope of satisfying the first prong of the pretensive joinder analysis. That should be the end of the inquiry.

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.

Plaintiffs' ineffective pleadings against BJC forecast their failure under the second prong of the pretensive joinder test. It should be clear based upon Respondent's Brief and the record before this Court that there is no viable cause of action against BJC. It should also be clear that the information available to the plaintiffs at the time they filed

suit would not support a viable claim against BJC. None of the exhibits filed or the materials cited in Respondent's Brief would have supported a reasonable legal opinion that BJC controlled Dr. Pitt's insertion of the trocar or insufflation of gas. Again, generic "control" over health care providers is not enough; control must affect the health care at issue and cause the alleged injury. *Neill*, 121 S.W.3d at 531. So, while counsel might have been aware of the Affiliation Agreement and some system wide policies when they sued, they could not have concluded that BJC controlled any care causing Ms. Qamar's injury. Even now, with the benefit of years' worth of discovery, plaintiffs are unable to cite any document addressing actual practice in the operating room.

Forced to explain the reasonable legal opinion that led to these pleadings, plaintiffs reference the "new [BJC] clinical guidelines to help physicians decide when to perform a Cesarean section" and the BJC "system-wide 'Central Venous Catheter Insertion Policy.'" All readers will realize that these are irrelevant topics, not indicative of control over Dr. Pitt's surgical choices. Likewise, there is no legal context or relevance to other information, such as plaintiffs' revelation that a BJC flag flies in front of Boone County Hospital. (Respondent's Brief at 36). According to plaintiffs, Boone Hospital also flies the Missouri and U.S. flags, though surely that does not mean the Governor controls Boone Hospital or Dr. Pitt. These facts serve only to distract from the test this Court must apply.

Ultimately, plaintiffs must admit there was a lack of proof against BJC when they filed. The argument they were "outsiders" with respect to these issues of control is essentially an admission that their pleadings were insufficient, and it belies the fact that

counsel consulted with medical experts who considered the situation and disputed that BJC could have exercised such control. It also ignores the fact that this same firm represented the plaintiffs in the *Ritter* suit which set forth specific requirements for allegations of control and rejected plaintiffs' theory herein. *Ritter v. BJC Barnes Jewish Christian Health Sys.*, 987 S.W.2d 377, 384 (Mo. App. E.D. 1999). There is no viable legal claim against BJC, and there never was. Plaintiffs' inclusion of the resident defendant was pretensive.

II. RELATOR IS ENTITLED TO AN ORDER REQUIRING RESPONDENT TO DISMISS THIS ACTION OR TRANSFER THE CASE TO A PROPER VENUE, BECAUSE SECTION 508.010.4 R.S.MO, AS MODIFIED BY HOUSE BILL 393, IS DETERMINATIVE OF THE VENUE ISSUE IN THAT PLAINTIFFS "REBROUGHT" 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. VS. CALVIN*, 57 S.W. 3rd 855, 858 (MO. 2001).

The plaintiffs devote three points in their Brief to the position that amending their petition after tort reform did not trigger a new venue analysis. They rely on *State Ex. Rel Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. 2007), which held that the term "cause of action" refers to a negligent act or omission. Clearly, a negligent act needs an actor. Plaintiffs acknowledge this, concluding that "a cause of action is considered a negligent act or omission *by a party* in a tort case." (Relators Brief, p. 56, emphasis added). The party is a necessary element. Regardless of terminology, no "suit," "claim," "civil

action," or "cause of action" can exist without a defendant, and because Dr. Martin was not a defendant prior to May 3, 2006, there was no "suit," "claim," "civil action," or "cause of action" before that date.

Plaintiffs in fact chose the "cause of action" terminology when filing the First Amended Petition, beginning Count III, "COME NOW Plaintiffs and for Count III of their cause of action against defendants Chris Martin, M.D. and Columbia Nephrology & Internal Medicine, P.C., state..." (Exhibit 10, p. 167). There was no actor for Count III before May 3, 2006, and thus no cause of action. Having not previously existed, the cause of action was by definition new, requiring a new venue analysis. *State ex rel. Linthicum et al. v. Calvin*, 57 S.W.3d 855 (Mo. 2001). Because § 538.305 RSMo. requires that the new venue statutes "shall apply to all causes of action filed after August 28, 2005," Respondent should have transferred the case to Boone County upon defendants' motions.

Plaintiffs argue this Court should reverse *Linthicum* outright, but the alternative is to interpret *Burns* and *Linthicum* harmoniously and require an examination of venue as of May 3, 2006 when the new suit was brought against Dr. Martin. The latter approach is entirely consistent with *Burns*, in which this Court took care to specifically note that the *Burns* fact pattern did not include the addition of new defendants at a post tort reform date.

The situation is analogous to statutory interpretation. If statutes are subject to multiple interpretations, the Court should attempt to reconcile the statutes with an interpretation that permits application of both. *State ex rel. Safety Roofing Sys. Inc. v.*

Crawford 86 S.W.3d 488, 492 (Mo.App. S.D., 2002). Similarly, in contract interpretation, two clauses should be interpreted as consistent if possible so that neither is rendered nugatory. *State ex rel. Riverside Pipeline Co. L.P. v. Public Service Commission*, 215 S.W.3d 76, 84 (Mo. banc 2007). Here, *Burns* and *Linthicum* are consistent, and there is no reason to reverse *Linthicum*, except to preserve plaintiffs' chosen venue in the City of St. Louis.

Contrary to plaintiffs' suggestion, applying *Linthicum* and *Burns* in concert does not present a constitutional problem. The 2005 venue statute, § 508.010 RSMo., need not be applied retrospectively. *Linthicum* only requires that it be applied prospectively to the newly brought cause of action against new defendants, which was filed after August 28, 2005. Such an application would satisfy all precedent, § 508.010 RSMo., and the venue rights of all defendants.

CONCLUSION

Venue in Missouri is determined by statute, and those statutes serve to limit the forums in which a defendant may be sued. That limitation is a protection for defendants, not a right granted to plaintiffs. In this case, defendant has a statutory right under § 355.176.4 RSMo. to be sued in one of only three locations, none of which is the City of St. Louis. Plaintiffs' efforts to strip defendant of its statutory rights by pretensively joining BJC should be met with an order of prohibition requiring the trial court below to dismiss this case or transfer it to Boone County where venue would be proper as to all defendants.

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Certificate of Service

The undersigned certifies that a copy of the foregoing was sent by United States mail, postage pre-paid, this ___ day of _____, 2008, to the following counsel of record:

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CERTIFICATION OF COMPLIANCE WITH RULE 84.06(c)

Russell L. Makepeace, attorney of record for [Plaintiff/defendant/appellant/respondent], certifies pursuant to Supreme Court Rule 84.06(c) that:

1. The Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and Local Rule 360;
2. The Brief, excluding the cover page, signature block, Certificate of Service, this Certificate, and the Appendix contains 2,443 words, according to the word count total contained in the MS Word 2000 software with which it was prepared; and
3. The disk accompanying this Brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

_____
Russell L. Makepeace