SC89283

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel. CH ALLIED SERVICES, INC., d/b/a BOONE HOSPITAL CENTER, Relator, vs. THE HONORABLE DONALD L. McCULLIN, Judge of the Missouri Circuit Court, Twenty-Second Judicial Circuit (St. Louis City), Respondent.	Circuit Court No.: 042-08454 Subject to protective order and filed under seal.

Original Proceeding in Mandamus and/or Prohibition from the
Twenty-Second Judicial Circuit, St. Louis City, Division No. 20
The Honorable Donald L. McCullin, Presiding

BRIEF OF RESPONDENT

GRAY, RITTER & GRAHAM, P.C.
Stephen R. Woodley, #36023
Joan M. Lockwood, #42883
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
(314) 241-4140 (Fax)
E-mail: swoodley@grgpc.com
jlockwood@grgpc.com
Attorneys for Plaintiffs
and on behalf of Respondent
The Honorable Donald L. McCullin

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JURISDICTIONAL STATEMENT

The Relator, CH Allied Services, Inc., d/b/a Boone Hospital Center ("Boone Hospital") seeks a Writ of Mandamus and/or Prohibition that would require the Respondent, the Honorable Donald L. McCullin, to transfer this case from the Circuit Court of the City of St. Louis to the Circuit Court of Boone County. The Circuit Court of the City of St. Louis lies within the Eastern District of the State of Missouri, and, as a result, Relator first filed a Petition with the Missouri Court of Appeals, Eastern District, as provided by § 477.050 RSMo (2000). Pursuant to Rule 83.20 and Article V, § 4 of the Missouri Constitution, jurisdiction for this Petition now lies in the Missouri Supreme Court.

STATEMENT OF FACTS

Plaintiffs Sadaf Qamar and Syed Haider filed this cause of action on October 7, 2004. (Petition, Exhibit 1).[1] Plaintiffs alleged that medical care and abdominal surgery performed at Boone Hospital Center in Columbia, Missouri, was done negligently causing severe and permanent personal injuries and brain damage. (Id.) Syed Haider holds the durable power of attorney for his wife and also alleged a loss of consortium. (Exhibit 1 at ¶¶ 43-45).

A. The Pleadings and Procedural History

In the initial Petition, Plaintiffs brought this medical negligence claim against James Pitt, D.O. (Pitt), Columbia Surgical Associates, Inc., CH Allied Services, d/b/a Boone Hospital Center (Boone Hospital), BJC Health System (BJC), Kimberly Morse, M.D. and Women's Health Associates, Inc.[2] (Petition, Exhibit 1). Plaintiffs alleged that

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[1] The Legal File includes all previously filed motions, memorandums, and the "Joint Exhibits" filed by BJC in this matter. All exhibit reference numbers and L.F. references are to the Joint Exhibits filed by BJC and Relators in SC 89282. Respondent filed Exhibit A in their Answer to BJC's writ in SC 89282. All exhibit references beginning with the letter A refer to Respondent's Exhibit A, attached to their Answer to BJC's writ in this Court.

[2] Defendants Morse and Women's Health Associates, Inc., were voluntarily dismissed without prejudice on May 10, 2005. (Exhibit 22).

the defendants acted individually, jointly and concurrently and as agents, servants and employees of the other defendants. (Exhibit 1 at ¶¶ 11 and 12). Among other things, Plaintiffs allege and intend to prove that the relationship of BJC, Boone Hospital and Pitt was one of principle-agent or employer-employee. (Exhibit 1; Exhibit 10; Exhibit A-1 through A-41).

Plaintiffs alleged that on May 6, 2004, Sadaf was admitted through the emergency room to Boone Hospital for continuing abdominal pain following a cesarean section. She was initially seen by two internists. On May 9, 2004, Defendant James Pitt, D.O., a surgeon, was called in to consult on Sadaf's care. Sadaf's complaints did not improve and various physicians continued to treat her conservatively. Dr. Pitt did not return until May 13, 2004. (Exhibit 10 at ¶¶ 15-26). On May 14, 2004, a registered nurse spoke with Sadaf and had her sign a consent form for Pitt to perform an exploratory laparotomy. (Exhibit A16 at ¶ 21-22). The surgery was performed at Boone County Hospital by Pitt and Boone Hospital personnel. (Exhibit 1 at L.F. 5-7; Exhibit A16 at ¶¶ 13-19).

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. (Exhibit 1 at ¶ 21-23, 37-39).

Plaintiffs filed their First Amended Petition on May 3, 2006, adding the previously dismissed defendants Kimberly Morse, M.D. and Women's Health Associates, Inc. and adding Defendants Chris J. Martin, M.D. ("Martin") and Columbia Nephrology &

Internal Medicine, P.C. ("Columbia Nephrology"). All substantive allegations against the defendants remained unchanged and the factual basis for the claims against defendants Martin and Columbia Nephrology were the same – i.e. failing to timely detect, diagnose and treat Plaintiff's developing abdominal pain. (See, Plaintiffs' First Amended Petition, Exhibit 10, subparts g thru l of ¶ 30 and Count III, generally). Defendants Morse and Women's Health Associates were dismissed by Plaintiffs on October 11, 2006 (Exhibit 23) while Defendants Martin and Columbia Nephrology were dismissed without prejudice by Plaintiffs on September 20, 2007. (Exhibit 24).

Plaintiffs alleged that BJC, acting individually, jointly and concurrently and as the agent, servant and employee of the other Defendants, negligently caused the injuries to Plaintiffs. In addition, Plaintiffs alleged that BJC controlled or had the right to control the care and treatment of Sadaf through an agreement with CH Allied Services and Boone Hospital, and that Boone Hospital was acting as the agent (actual or apparent) of BJC in the treatment of Sadaf. (Exhibit 10 at ¶¶ 6, 11, 12, 34-38, 44-45). Plaintiffs further alleged that BJC was liable for the actions of Boone Hospital because BJC and Boone Hospital had entered into a joint venture such that BJC is liable for the acts of negligence at Boone Hospital. (Id. at ¶¶ 6, 11).

Specifically, Plaintiffs alleged, among other things, that "BJC holds itself out ... as an 'integrated delivery system' employing more than 25,000 people who work to provide health care services" at BJC's "member" institutions, including Boone Hospital. (Exhibit

10 at ¶ 6). Plaintiffs also alleged these Defendants are jointly liable for the injuries sustained by Sadaf Qamar (Exhibit 10 at ¶¶ 11-12, 23, 35).

B. The Procedural Posture and the Allegations as to BJC

In response to Plaintiffs' Petition and First Amended Petition, Boone Hospital filed Motions to Dismiss, or in the alternative Motions to Transfer Venue. (Exhibits 4, 13). The other defendants filed similar Motions to Dismiss or to Transfer Venue. (See, Exhibit 2, 6, 15, 17). Plaintiffs filed a Response to each of Defendants' motions. (Exhibits 5, 7, 12, 14, 16, 18).

BJC and Boone Hospital are nonprofit corporations. The nonprofit corporate venue statute, § 355.176.4, RSMo. (1994), states in pertinent part:

> 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;
>
> (3) The county where the office of the registered agent for the nonprofit corporation is maintained.

Plaintiffs have alleged that venue is proper for this action in the City of St. Louis under § 355.176.4 RSMo. (1994), because Defendant BJC has its principal place of business there. Although the cause of action accrued at Boone Hospital's facility, which

is located in Boone County, the principal place of business of BJC is in the City of St. Louis, and this fact has never been disputed.

On October 30, 2007, all defendants' Motions to Dismiss or to Transfer Venue were called, heard and taken under submission. (Exhibit 25, Order dated 10-30-07). Respondent found Plaintiffs' allegations sufficient to state a claim. (Exhibit 26; See also, Exhibit 27 and Exhibit 28). Further, Respondent decided that venue was proper as to Relator BJC and other Defendants in the Circuit Court of the City of St. Louis. (Id.) Respondent denied Boone Hospital's motion to dismiss or, in the alternative, to transfer venue, because BJC's principal place of business is in St. Louis City, and Relator did not persuade the trial court that venue was improper as to BJC. (Exhibit 26; Exhibit 27; Exhibit 28). Relators then filed a Petition for Writ of Prohibition, or in the alternative Petition for Writ of Mandamus in the Eastern District. (ED 91081; ED 91082: ED 91083). Respondent filed answers to each of the three Petitions and Suggestions in Opposition. (Exhibits 32-37). On April 7, 2008, the Missouri Court of Appeals, Eastern District quashed the preliminary order in prohibition and the writs of prohibition were denied. (Exhibit 38-40).

This Court entered three Preliminary Orders in Prohibition on May 20, 2009. This briefing followed.

C. Plaintiffs Introduced a Multitude of Facts in Opposition to Defendants' Motions to Dismiss or Alternatively to Transfer Venue.

Plaintiffs introduced extensive evidence regarding the formation and chronology of BJC. Plaintiffs also introduced extensive evidence regarding the details by which Boone Hospital Center became affiliated with BJC. (Exhibit 18 at L.F. 327-29). Boone Hospital, as a subsidiary of Christian Health Services Development Corporation became a member of the BJC System in 1993. (Exhibit 18, tab 2 at L.F. 378-458).

The member institutions participated in the creation of the BJC System as a vertically and horizontally integrated medical care delivery and medical education system which was created in order to "enhance access to capital markets at lower costs; *provide coordination of the provision of patient care services*, which should reduce duplication of resources, increase efficiencies and decrease costs to health care consumers; provide additional patient access to specialized services . . . and provide other clinical, medical educational, marketing, planning, finance and management services and expertise." (Exhibit 18, tab 2 at L.F. 382)(emphasis added). The goal of the Affiliation Agreement was to provide the BJC System with "sufficient authority over the Institutions and their Affiliates to accomplish effectively the Goals and Objectives." (Id. at L.F. 391).

Plaintiffs introduced evidence that BJC exercises control over its system and its affiliates, including Boone Hospital. According to the Affiliation Agreement, "the key to successful functioning of the System is the ability of (the BJC System) to exert sufficient authority over each institution and Affiliate to accomplish the Goals and Objectives." (Exhibit 18, tab 2 at L.F. 391). A Bond Agreement reiterates this grant of authority: "(the BJC System), as the sole member of each of the Institutions, has been granted a number

of reserved powers over their activities to enable (the BJC System) to operate the System as a vertically and horizontally integrated medical care delivery and medical education system." (See, BJC Health System Bond Prospectus, Exhibit 18, tab 7 at L.F. 538-39).

Plaintiffs introduced evidence that BJC has the power to set standards and guidelines for the delivery of health care. BJC has the power to approve "the creation of new health care services or any new location for the delivery of health care services." (Id. at L.F. 398.) The BJC quality assurance office oversees the delivery of quality health care and oversees reporting with respect to issues of quality. (See, Deposition of William C. Dunagan, M.D., Exhibit 18, tab 8 at L.F. 652).

Plaintiffs introduced evidence that BJC controls the staff at Boone Hospital through the Center for Quality Management of BJC Health System, the BJC Corporate Compliance Program, BJC Codes of Conduct, The BJC News Forum (where employees and physicians and get answers to questions from BJC leadership) and the BJC Corporate Compliance Program (which educates employees about standards, ethical behavior and ensures uniformity across BJC). (Exhibit 18 at L.F. 329-335).

Plaintiffs introduced evidence that BJC controls the health care delivered at Boone Hospital via BJC system wide policies (known as BJC Health System Core Policies[3]) and

[3] BJC has implemented system-wide policies regarding the provision of health care, known as BJC Health System Core Policies. If a core policy is established "no facility can remove requirements from the Core content; however, some may wish to

via the BJC Center for Quality Management which develops uniform health care guidelines, protocols and standing order forms. (Exhibit 18, tab 8 at L.F. 652-69).

Plaintiffs also introduced evidence that BJC consistently and systemically holds itself out to the public as the employer of healthcare providers at Boone County Hospital. (Exhibit 18, tab 23 at L.F. 905-19). Clay Dunagan, M.D., a BJC Vice President does not "contest. . . that the nurses work for BJC Healthcare." (Exhibit 18, tab 8 at L.F. 667). Further, medical records and the billing statement of Boone County Hospital has the BJC service mark on it and the payroll checks of all employees of the various member and affiliate institutions have had the BJC service mark on them since June of 1993. (Exhibit A16 at ¶¶ 21-22, 24; Exhibit 18, tab 4 at L.F. 480; Exhibit 18, tab 12 at L.F. 710). Publications put out by BJC and disseminated to the public state that employees of the member institutions are employees of BJC. (Exhibit 18, tab 14; See, BJC Health System Mission Statement, Exhibit 18, tab 16 at L.F. 802-06; Exhibit 18, tab 15; See, Members of BJC Health/Chronology, Exhibit 18, tab 17 at L.F. 807; See, "Connections" Publication, Exhibit 18, tab 18 at L.F. 808). BJC has a comprehensive patient satisfaction assessment program that is run by or through BJC. (Exhibit 18, tab 8 at L.F. 652).

Plaintiffs also introduced evidence that the manner by which BJC reports information to the public permits external recognition of the system as a whole. Data,

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add an attachment with detailed information pertinent to their institution." (See, Core Policy, Exhibit 18, tab 22 at L.F. 899).

revenue, financials, medical staff, admissions, emergency room visits, surgical procedures, outpatient visits, home health visits, community education events, baby deliveries, are all consolidated so that the numbers include the totals from the various affiliates and members. (Exhibit 18, tab 14 at L.F. 738-61; Exhibit 18, tab 4 at L.F. 475; Exhibit 18, tab 15; Exhibit 18, tab 4 at L.F. 477).

This evidence all supports a finding of the apparent and actual authority that BJC granted to Boone Hospital. BJC has united its member/affiliates into one "integrated" system and represents to the public that BJC is the principal institution. Certainly BJC has benefitted from such a unified design. It would be unjust to allow BJC to enjoy such benefits but to escape the liability that may result.

POINTS RELIED ON

I. A WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE BECAUSE PLAINTIFFS' PETITION ADEQUATELY PLEADED A CAUSE OF ACTION AGAINST DEFENDANT BJC IN THAT PLAINTIFFS PLEADED THAT DEFENDANT BJC AND THE REMAINING DEFENDANTS WERE AGENTS OF ONE ANOTHER, THAT BJC CONTROLLED THE HEALTH CARE AT ISSUE, AND THAT BOONE HOSPITAL WAS THE ALTER EGO OF BJC.

City of Ballwin v. Hardcastle, 765 S.W.2d 324 (Mo. App. E.D. 1989)

Real Estate Investors Four, Inc. v. American Design Group, Inc., 46 S.W.3d 51 (Mo. App. E.D. 2001)

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

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

II. A WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE BECAUSE VENUE IN THE CITY OF ST. LOUIS IS PROPER AND IS NOT PRETENSIVE BECAUSE THE FACTS KNOWN TO PLAINTIFFS AT THE TIME THE CASE WAS FILED SUPPORTED A REASONABLE LEGAL OPINION THAT A CASE COULD BE MADE AGAINST BJC. FURTHER, THE FACTS SET OUT IN DEFENDANTS' AFFIDAVITS ARE THEMSELVES CONTROVERTED AND PROVIDE NO BASIS FOR A JUDICIAL DETERMINATION THAT JOINDER OF BJC WAS PRETENSIVE.

Bottger v. Cheek, 815 S.W.2d 76 (Mo. App. E.D. 1991)

Keller v. Missouri Baptist Hospital of Sullivan, 800 S.W.2d 35 (Mo. App. E.D. 1990)

Scott v. SSM Healthcare of St. Louis, 70 S.W.3d 560 (Mo. App. E.D. 2002)

State ex rel. Doe Run Resources Corp. v. Neill, 128 S.W.3d 502 (Mo. banc 2004)

III. A WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE BECAUSE VENUE PROPERLY LIES IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS BECAUSE WHEN PLAINTIFFS FILED THEIR PETITION, VENUE WAS PROPER PURSUANT TO § 355.176.4 RSMO (1994) AND THE 2005 REVISED § 508.010 RSMO WAS NOT IN EFFECT AT THE TIME PLAINTIFFS' CAUSE OF ACTION WAS FILED.

State ex rel. Rothermich v. Gallagher, 816 S.W. 2d 194, 196 (Mo. banc 1991)

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

§ 355.176.4 RSMo (1994)

§ 508.010 RSMo (Supp. 2005)

§ 538.300 RSMo (Supp. 2005)

§ 538.305 RSMo (Supp. 2005)

IV. A WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE BECAUSE VENUE IS PROPER IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS BECAUSE EVEN IF § 538.305 RSMO AND THE 2005 REVISED § 508.010 RSMO WERE APPLIED, THE APPLICATION WOULD NOT RESULT IN A CHANGE OF VENUE BECAUSE PLAINTIFFS' AMENDED PETITION DID

NOT CONSTITUTE A NEW CAUSE OF ACTION AND THE CLAIMS AGAINST THE NEW PARTIES WERE BASED ON THE SAME SET OF OPERATIVE FACTS UNDERLYING THE ORIGINAL CLAIM.

Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315 (Mo. banc 2002)

Marston v. Juvenile Justice Center of the 13th Circuit, 88 S.W.3d 534 (Mo. App. W.D. 2002)

State ex rel. Burns v. Whittington, 219 S.W.3d 224 (Mo. banc 2007)

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

§ 508.010 RSMo (Supp. 2005)

§ 508.010(4) RSMo (2000)

§ 538.305 RSMo (Supp. 2005)

V. A WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE BECAUSE THE STATE CONSTITUTIONAL BAN ON RETROSPECTIVE LAWS BARS RETROSPECTIVE APPLICATION OF THE 2005 VENUE STATUTE, § 508.010 RSMO.

Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315 (Mo. banc 2002)

Cook v. Newman, 142 S.W.3d 880 (Mo. App. W.D. 2004)

State ex rel. LeNave v. Moore, 408 S.W.2d 47 (Mo. banc 1966)

Trailiner Corp. v. Director of Revenue, 783 S.W.2d 917 (Mo. banc 1990)

Article I, § 13, Missouri Constitution

§ 508.010 RSMo (Supp. 2005)

§ 538.300 RSMo (Supp. 2005)

ARGUMENT

I. A WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE BECAUSE PLAINTIFFS' PETITION ADEQUATELY PLEADED A CAUSE OF ACTION AGAINST DEFENDANT BJC IN THAT PLAINTIFFS PLEADED THAT DEFENDANT BJC AND THE REMAINING DEFENDANTS WERE AGENTS OF ONE ANOTHER, THAT BJC CONTROLLED THE HEALTH CARE AT ISSUE, AND THAT BOONE HOSPITAL WAS THE ALTER EGO OF BJC.

A. Standards of Review

1. Prohibition

Relator seeks a writ of prohibition prohibiting the Circuit Court of the City of St. Louis from taking any further action because, according to Relator, venue is not proper in the City of St. Louis. Whether a writ should issue is purely a legal question. This is because prohibition considers whether the lower court has jurisdiction to act at all. Review by this Court of a purely legal question is *de novo*. *Blakely v. Blakely*, 83 S.W.3d 537, 540 (Mo. banc 2000).

The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their jurisdiction. *State ex rel. Douglas Toyota III, Inc., v. Keeter*, 804 S.W.2d 750, 751 (Mo. banc 1991).

A writ of prohibition does not issue as a matter of right. *Derfelt v. Yokum*, 692 S.W.2d 300, 301 (Mo. banc 1985). One court should not substitute its judgment or discretion for that of another court properly vested with jurisdiction and exercising its

discretion within the legitimate boundaries of that jurisdiction. *State ex rel. Douglas Toyota III*, 804 S.W.2d at 751.

A writ of prohibition should be issued only judiciously and with great restraint. *Derfelt*, 692 S.W.2d at 301. A writ of prohibition is proper only when the facts and circumstances of the particular case demonstrate "*unequivocally*" that there exists an extreme necessity for preventive action. Id. (emphasis added). Absent such conditions, the court should decline to act. Id.

2. Pretensive Joinder

Under *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 825 (Mo. banc 1994) there are two tests to determine whether joinder is pretensive. This Point addresses only the first test - "whether, after reasonable inquiry of the law under the circumstances, plaintiffs have put forward a claim either under existing law, under a non-frivolous argument for the extension, modification or reversal of existing law, or under a non-frivolous argument for the establishment of new law." Id. at 825. "The standard for determining [pretensive joinder] ... is less stringent than that required either to grant summary judgment or to sustain a motion to dismiss for failure to state a claim." Id.

Point II herein addresses the second prong of the *Malone* test.[4]

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[4] Point IA of Relator Boone Hospital's arguments are addressed by Respondent in Point I. Point IB of Relator Boone Hospital's arguments are addressed by Respondent in Point II, herein. Point II of Relator Boone Hospital's arguments are

B. Plaintiffs Properly Pleaded Their Cause of Action against BJC.

In Point IA of its Brief, Relator Boone Hospital contends that Plaintiffs pretensively joined BJC as a defendant because, it argues, BJC's conduct, as alleged on the face of the First Amended Petition, does not invoke substantive principles of law to sufficiently plead a cause of action against BJC. (Relator Boone Hospital's Brief at pp. 11-20.)

Even though the test under a pretensive joinder rubric is less stringent than the test applied for a motion to dismiss or a grant of summary judgment, *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 825 (Mo. banc 1994), "[w]hen reviewing dismissal of a petition, a court allows a pleading its broadest intendment, treats all facts alleged as true, construes allegations favorable to plaintiff and determines whether averments invoke principles of substantive law entitling plaintiff to relief." *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003).

With regard to what facts must be pled, Missouri law holds that Plaintiffs are not required to plead the evidence by which the ultimate facts will be established. *City of Ballwin v. Hardcastle*, 765 S.W.2d 324, 328-329 (Mo. App. E.D. 1989). Additionally, the petition will be found sufficient if its allegations, accorded reasonable and fair intendment, state a claim that can call for invocation of principles of substantive law which may entitle a pleader to relief. *Major v. Frontenac Inds, Inc.*, 899 S.W.2d 895, 899

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addressed by Respondent in Points III, IV and V.

(Mo. App. E.D. 1995). A missing element is not fatal if that element can be inferred from the facts pleaded. *Threats v. General Motors Corp.*, 890 S.W.2d 327, 328 (Mo. App. E.D. 1994). Last, in these situations all of the plaintiff's facts are accepted as true, and "no attempt is made to weigh any facts alleged as to whether they are credible or persuasive." *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501 (Mo. App. E.D. 1999).

1. Plaintiffs' petition was legally sufficient because it asserted the legally required facts to invoke relief against BJC under the theory that BJC was in an agency relationship with the individually named defendants.

Relators claims that Plaintiffs' First Amended Petition contains no specific counts or allegations that the health care providers involved in the plaintiffs' care and treatment, or defendant Pitt were employees or agents of defendant BJC. (See, Relator Boone Hospital's Brief at pp. 13-14). This is not true. Plaintiffs alleged both legally sufficient facts, and alleged facts that would allow a court to grant relief under a theory of agency between BJC and the individually named defendants. (Exhibit 10 at ¶¶ 4, 8, 10, 12).

Plaintiff First Amended Petition (and initial petition), pled:

"Defendant BJC Health System . . . is and was at all times herein mentioned a Missouri corporation in good standing which may sue or be sued in its own name, and 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, including Boone Hospital, and that BJC is the parent corporation presently overseeing the operation of . . . Boone . . . and numerous other hospitals and health care centers and that BJC exercises control over Boone in many areas including areas that affect the medical care provided to plaintiff Sadaf Qamar in 2004 and the other aforementioned hospitals and health care centers."

(See, Exhibit 10, Plaintiffs' First Amended Petition at ¶ 6; Exhibit 1, Petition at ¶ 6).

Furthermore, Plaintiffs' pleadings stated:

"Defendants BJC and Boone Hospital acted by and through their agents, servants, and employees, whether actual, ostensible, or apparent, to provide health care services, as more fully set forth below, to plaintiff . . . , and that all such employees, servants, and agents provided said services while acting within the scope and course of their respective employment, service or agency; at all times herein, BJC and Boone and their agents, servants, and employees were acting as the agents, servants, or employees of each other."

(See, Exhibit 10 at ¶ 11; Exhibit 1 at ¶ 9).

Thus, the trial court found that Plaintiffs had pled sufficient facts and invoked principles of substantive law which entitled them to Relief. (See, Exhibit 26, Trial Court Order at L.F. 1197).

Plaintiffs alleged that Defendant BJC was negligent in the care and treatment of Sadaf Qamar. Plaintiffs alleged that the nurses, technicians, administrator, and physicians who cared for Sadaf were employed by BJC and that BJC is directly liable for their actions. (Exhibit 10 at ¶¶ 6, 11, 12, 34-38, 44-45). Plaintiffs alleged that the negligent acts and omissions of BJC's employees or agents were committed within the scope and course of employment or agency. (Id. at ¶¶ 11-12). Further, Plaintiffs alleged that BJC held itself out, through express statements, that it employs the caregivers providing the services at Boone Hospital. (Exhibit 10 at ¶ 6). The Court may also, by this fact, infer BJC's implied consent to the agency, whether actual, apparent, or ostensible, of such caregivers. Such favorable inferences should be given these facts, and it is not necessary to plead the evidence by which such facts will be proved. *Kennedy v. Kennedy*, 819 S.W.2d 406, 408 (Mo. App. S.D. 1991).

As for the substantive law regarding agency, there are legally recognizable causes of action in situations similar to that of the present case. See, *Keller v. Missouri Baptist Hospital of Sullivan*, 800 S.W.2d 35, 37 (Mo. App. E.D. 1990); *Scott v. SSM Healthcare of St. Louis*, 70 S.W.3d 560, 566-567 (Mo. App. E.D. 2002). Thus, there are substantive principles of law that support this claim.

Looking at these pleadings, and nothing else, while affording great leniency and any reasonable inferences to be drawn to be given to the pleader, it is easy to see why the trial court reached its decision. Plaintiffs' pleading does allege specific counts against BJC through its agency relationship with the individually named defendants. All that is

needed is that the pleadings introduce enough information that will entitle a pleader to substantive relief. *Major*, 899 S.W.2d at 899.

Relator cannot, and has not shown that Plaintiffs failed to plead the legal requirements of the agency relationship to entitle them to relief against BJC.

2. Under the *Malone-Mummert* standard, the allegations set forth in Plaintiffs' First Amended Petition make out the basis for a reasonable legal opinion that BJC is and should be liable for controlling the health care at issue in this case.

Relator Boone Hospital claims that Plaintiffs' First Amended Petition does not contain any allegations of sufficient control by defendant BJC over the separately incorporated defendant Boone Hospital Center that might support finding BJC liable. (See, Relator Boone Hospital's Brief at pp. 14-21). In 2004, this Court held that "BJC may be sued along with its affiliates or agents 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." *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528, 531 (Mo. banc 2003) (emphasis added). Relator argues that Plaintiffs did not meet the pleading requirement set forth in this holding.

The trial court, in determining whether Plaintiffs pleadings were sufficient to state a cause of action against BJC for controlling the health care delivered by Boone Hospital, decided that they were. (See, Exhibit 26). The trial court stated specifically:

> "The exhibits attached to Plaintiffs' response to the motion to dismiss tend to 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, that BJC exercises approval power over its subsidiaries' budgets and has authority over all items which affect the bottom line, the BJC exercises control over its subsidiaries' board of directors, that BJC has integrated and assumed many services of its members institutions, and that BJC has the power to contract and negotiate with third parties on behalf of the member institutions."

(See, Exhibit 26 at L.F. 1196-97). It is clear from the facts set forth at pages 15-18 herein, that BJC controls health care and its members institutions, that courts have previously determined that BJC maintains control over health care (see e.g., *State ex rel. BJC Health Systems v. Neill*) and that in this case, "Plaintiffs have similarly pleaded that BJC had control over Boone Hospital Center." (See, Exhibit 26 at L.F. 1196-97).

Relator Boone Hospital argues that there are no allegations, beyond mere conclusions, that any control by BJC affected the health care rendered to Sadaf Qamar at Boone Hospital and caused her injury. (See, Relator Boone Hospital's Brief at p. 19).

At least one court has recognized the inherent difficulty of ferreting out ultimate facts from conclusions of law and from evidentiary facts, particularly at the pleading stage:

> "The line between 'ultimate fact' and 'conclusion of fact or of law' is not easily drawn, and some allegations may in one context be deemed to be one of ultimate fact while in another, where from a pragmatic viewpoint some of the words do not give sufficient information to an opponent of the character of the evidence to be introduced or of the issues to be tried, allegations may be deemed to be conclusions of a fact or of a law."

Einhaus v. O. Ames Co. , 547 S.W.2d 821, 825 (Mo. App. 1977).

Similarly in *DeFino v. Civic Center Corporation*, 718 S.W.2d 505 (Mo. App. E.D. 1986), the issue of conclusory pleading arose in the context of a plaintiff's attempt to plead a claim for civil conspiracy. The court stated:

> Defendants attack the pleadings on the ground that it pleads conclusions not facts. However, the nature of plaintiffs' lawsuit is such that they could not specifically allege the facts that are known to defendants and unknown to plaintiffs. Plaintiffs are outsiders to the transactions between defendants and others and are foreclosed from determining the nature of the alleged transactions until the discovery stage of the lawsuit.

Id. at 511.

Here, Plaintiffs' First Amended Petition states:

> ". . . 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 numerous other hospitals and health care centers 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 . . . ."

(Exhibit 10 at ¶ 6)(emphasis added).

Furthermore, the Petition states:

> "Defendants BJC and Boone Hospital acted by and through their agents, servants, and employees, whether actual, ostensible, or apparent, to provide health care services, as more fully set forth below, to plaintiff Sadaf Qamar, and that all such employees, servants, and agents provided said services while acting within the scope and course of their respective employment, service or agency; at all times herein, BJC and Boone Hospital and their agents, servants, and employees were acting as the agents, servants, or employees of each other."

(Exhibit 10 at ¶ 11).

Like the plaintiffs in *DeFino*, the plaintiffs are outsiders to the specific control exercised by BJC in abdominal laparoscopy procedures, and under the *Malone-Mummert* standard the allegations set forth in Plaintiffs' First Amended Petition adequately state a

claim based on BJC's exercise of control to affect the health care at issue in this case. That is all that is required under Missouri law.[5]

3. Plaintiffs' petition was legally sufficient because they asserted the legally required facts and elements to invoke the exception to intercorporate liability.

Relator Boone Hospital next claims that Plaintiff's First Amended Petition does not contain any allegations of control by defendant BJC over the separately incorporated defendant Boone Hospital Center sufficient to pierce the corporate veil. (See, Relator Boone Hospital's Brief at pp. 17-19).

Although Plaintiffs have pled that Defendant BJC is a separate corporation from Defendant Boone Hospital Center, there are situations in which one corporation shows such domination and control over another that the latter corporation becomes an adjunct or alter ego of the first. *Real Estate Investors Four, Inc. v. American Design Group, Inc.*, 46 S.W.3d 51, 56 (Mo. App. E.D. 2001). In fact, as stated above, the Missouri Supreme

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[5] While Relator Boone Hospital claims Plaintiffs' efforts to plead control are "particularly lame" given the testimony of Plaintiffs' experts in this case, (Relator Boone Hospital's Brief at p. 19), Relator fails to realize the analysis on a pretensive joinder motion focuses on the information available to Plaintiffs at the time the Petition was filed. "Even if the Plaintiffs' reasonable belief subsequently proves false, it is 'irrelevant' to the pretensive joinder determination." *Doe Run*, 128 S.W.3d at 505-06.

Court has held that "BJC may be sued along with its affiliates or agents if plaintiffs validly claim 'control sufficient to pierce the corporate veil . . ." *State ex rel. BJC Health System v. Neill*, 121 S.W.3d at 531. Here, contrary to Relator's assertions, Plaintiffs have pled control sufficient to pierce the corporate veil.

Multiple factors are taken into account to determine whether one corporation has exercised control over another:

> (1) The parent corporation owns all of most of the capital stock of the subsidiary; (2) The parent and subsidiary corporations have common directors or officers; 3) The parent corporation finances the subsidiary; (4) The parent corporation subscribes to all of the capital stock of the subsidiary or otherwise causes its incorporation; (5) The subsidiary has grossly inadequate capital; (6) The parent corporation pays the salaries and other expenses or losses of the subsidiary; (7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation; (8) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own; (9) The parent corporation uses the property of the subsidiary as its own; (10) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest; and (11) The formal legal requirements of the subsidiary are not observed.

Real Estate Investors Four, Inc., 46 S.W.3d at 56-7.

Plaintiffs have pled that BJC is the parent corporation overseeing operations at Boone Hospital and that BJC exercises control over Boone Hospital. (Exhibit 10 at ¶¶ 6, 11). Further, statements published on BJC's Website at http://www.bjc.org, expressly represent these facts as set forth in Plaintiffs' Amended Petition. (See, Exhibit 18, tab 23 at L.F. 905-19).

Further, if the agency issue was analyzed under a corporate veil theory, the evidence is abundant that BJC Health System and the affiliation agreement has been used as a subterfuge to defeat a public convenience and to perpetuate a fraud. To the general public, Boone Hospital appears to be owned and controlled by BJC. (See facts at pages 17-18 herein). BJC has gone to great lengths to convince the residents of Columbia, Missouri that BJC System runs Boone Hospital. Advertisements appeared which encouraged Boone County residents to choose Boone Hospital and BJC as its health care provider. (Exhibit 18, tab 10 at L.F. 868; Exhibit 18, tab 16 at L.F. 802; Exhibit 18, tab 18 at L.F. 808). No less than 72 signs declaring the BJC System's ownership were erected by BJC at Boone Hospital. (Exhibit 18, tab 28 at L.F. 939). In the front of Boone Hospital, there are three flags: a United States flag, a Missouri state flag and a BJC Health System flag. (See, Minutes from Board of Trustees Meeting dated 12/18/1995, Exhibit 18, tab 28 at L.F. 943).

The Affiliation Agreement gave the system wide ranging powers and control to implement its system objectives which include quality patient care. (See, Exhibit 18, tab

2). Further, the Best Practice Exchange teams which are led by a BJC facilitator and a representative from each member hospital have been formed. (Exhibit 18, tab 11 at L.F. 698). BJC controls the staff at Boone Hospital through the Center for Quality Management of BJC Health System, the BJC Corporate Compliance Program and BJC Codes of Conduct. The BJC Center for Quality Management convenes forums to discuss and come up with health care standards and develops uniform health care guidelines, protocols and standing order forms. (Exhibit 18, tab 8 at L.F. 654).

BJC has complete authority over Boone County Hospital, BJC directly employs the nursing and technical staff, and BJC advertises and holds itself out to the public as a provider of health care at Boone Hospital.

When the aforementioned factors are taken into consideration, it is apparent that BJC exercises control over Boone Hospital, and Plaintiffs have pled this element of control sufficiently to invoke the exception to intercorporate liability and hold Defendant BJC accountable for acts of negligence that occurred at Boone Hospital.

II. A WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE BECAUSE VENUE IN THE CITY OF ST. LOUIS IS PROPER AND IS NOT PRETENSIVE BECAUSE THE FACTS KNOWN TO PLAINTIFFS AT THE TIME THE CASE WAS FILED SUPPORTED A REASONABLE LEGAL OPINION THAT A CASE COULD BE MADE AGAINST BJC. FURTHER, THE FACTS SET OUT IN DEFENDANTS' AFFIDAVITS ARE THEMSELVES CONTROVERTED AND PROVIDE NO BASIS FOR A JUDICIAL DETERMINATION THAT JOINDER OF BJC WAS PRETENSIVE.

A. Standard of Review

As previously noted, *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 824-25 (Mo. banc 1994) recognizes two tests to determine whether joinder is pretensive. This Point II addresses the second *Malone* test. (Respondents' Point I addressed the first *Malone* test). Under this second *Malone* test, joinder is pretensive if two elements exist: [1] the petition does state a cause of action against the joined defendant, but the record, pleadings and facts presented in support of a motion asserting pretensive joinder establish that there is, in fact, no cause of action against the joined defendant **and** [2] that the **information available at the time the petition was filed** would not support a reasonable legal opinion that a case could be made against the joined defendant. Id.

Bottger v. Cheek is instructive on the proper procedure and the relative burdens. There, plaintiff brought suit against Barnes Hospital and others in the City of St. Louis. *Bottger v .Cheek*, 815 S.W.2d 76, 78 (Mo. App. E.D. 1991). Prior to trial, and after

discovery, plaintiff dismissed Barnes Hospital, the resident venue defendant. Id. The remaining defendants then challenged venue as pretensive. The Court focused its analysis on what the plaintiff knew at the time she filed her lawsuit. Id. at 79-80.

> Assuming the facts alleged in plaintiff's petition are sufficient to state a claim showing plaintiff entitled to recover against the resident defendant, the burden rests upon the non-resident defendant moving for dismissal to show the alleged facts are not true and cannot be proven. This may be accomplished through testimony, affidavits, depositions, interrogatories, requests for admissions, or other evidence. Plaintiff may counter such proof by coming forward with evidence demonstrating that, at the time the action was commenced, he had reason to believe the facts alleged against the resident defendant were true and capable of proof at trial. The fact this belief is subsequently discovered to be erroneous is irrelevant provided the information available at the time of filing was such as to give rise to a reasonable legal opinion that a submissible case could be made against the resident defendant. Thus, despite the subjective connotation of the term 'honest belief' the standard is an objective one, perhaps more appropriately denominated as a 'realistic belief' that under the law and the evidence a justiciable claim exists.

Bottger, 815 S.W.2d at 80 (emphasis added).

Where the plaintiff can point to a specific fact that supports his belief that a cause of action existed, joinder is not pretensive. *State ex rel. Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502, 506 (Mo. banc 2004).

The party claiming pretensive joinder bears the burdens of both proof and persuasion. *Doe Run*, 128 S.W.3d at 504; *Malone*, 889 S.W.2d at 824. The trial court's decision is reviewed for abuse of discretion. *Bottger*, 815 S.W.2d at 79.

To prevail, defendants must show that plaintiffs did not have a realistic belief that BJC was in an agency relationship with its co-defendants, that BJC exercised control sufficient to pierce the corporate veil or that the alleged control by BJC Health System affected the health care at issue.

B. Information available to Plaintiffs at the time the Petition was filed supports a reasonable legal opinion that a case could be made against BJC.

Plaintiffs brought suit against Defendant BJC because they had a good faith belief under the law and the facts that they had a valid claim against BJC. As stated above, Boone Hospital appears to the general public to be owned and controlled by BJC. Moreover, Plaintiffs had a good faith belief at the time of filing their petition that BJC's control over Boone Hospital affected the health care at issue.

Because Plaintiffs had a good faith belief at the time of filing that they had a valid claim against Defendant BJC, Defendant BJC was not pretensively joined and

Respondent did not err in denying Relator's Motion to Dismiss, or in the Alternative, to Transfer Venue.

1. Documents and evidence available to plaintiffs at the time of filing show that plaintiffs had an objective basis for a reasonable legal opinion that plaintiffs could make a case against BJC.

Documents and evidence available to plaintiffs at the time of filing in October of 2004 establish that Plaintiffs had an objective, reasonable belief that they had a valid claim against BJC.

a. Documents and evidence showing that, to the general public, Boone Hospital appeared to be owned and controlled by BJC.

Advertisements encouraged Boone County residents, including Plaintiffs, to choose Boone Hospital and BJC as its health care provider. (See, Exhibit 33 at L.F. 1261). A BJC flag as well as 72 signs declaring the BJC System's ownership were purchased and erected by BJC at Boone Hospital. (See, Exhibit 18, tab 29 at L.F. 939; Minutes from Board of Trustees Meeting Dated 12/18/1995, Exhibit 18, tab 29 at L.F. 943). BJC Health System d/b/a BJC Health Care continues to hold itself out as delivering health care services, including "inpatient services," at its "13 hospitals" and presents "BJC Health Care employment opportunities," including opportunities for employment at "Boone Hospital" on its website at http://www.bjc.org. (Exhibit 23). Further, Sadaf

Qamar believed Dr. Pitt worked for Boone Hospital and she chose Boone Hospital due to its affiliation with BJC. (Affidavit of Syed Haider, Exhibit 33 at L.F. 1261).

b. Documents and evidence showing that BJC controlled or had the right to control the health care at issue.

"The BJC Center for Quality Management" convenes forums among BJC and its affiliates to discuss, come up with and implement health care standards and develop uniform health care guidelines, protocols and standing order forms. (Deposition of William C. Dunagan, M.D., Exhibit 18, tab 8 at L.F. 654[6]; Exhibit 18, tab 10 at L.F. 687; Exhibit 18, tab 41 at L.F. 951). The Center was responsible for the "careful balance between quality and cost management, and continually serve[d] as a think tank for the development and implementation of quality initiatives. (Exhibit 18, tab 14 at L.F. 747). Through the Center, BJC measured quality in five key areas: clinical outcomes and health status; access to and continuity of care; customer satisfaction; human resources and work environment; financial performance. (Id.) The Progress report states:

> In addition quality improvement teams are testing new ways to benchmark and improve clinical services. For example, using a best-practice approach, BJC held a

[6] The deposition of Dr. Dunagan is dated December 23, 2004 which is after the time of filing of Plaintiffs' original petition. However, the information and documents referenced in the deposition were known by Plaintiffs' counsel at the time of pleading.

system-wide workshop that led to new clinical guidelines to help physicians decide when to perform a Cesarean section.

(Id. at L.F. 748).

Additionally, this Progress Report states:

Another program called Accelerated Clinical Improvement (ACI) was piloted in BJC hospitals. ACI, aimed at rapidly improved care delivery, gives doctors, nurses and care providers a model for working together to give patients the highest quality care for the least cost.

(Id. at L.F. 748).

BJC had a system-wide "Central Venous Catheter Insertion Policy". (Exhibit 18, tab 22 at L.F. 899). It is on "BJC Health Systems" letterhead. The policy applies to "all staff who insert central venous catheters in the BJC Health System." (Id. at L.F. 899). The following five pages of the document describe the method by which this medical procedure shall take place according to BJC guidelines.

Plaintiffs had evidence at the time of filing that BJC controls the staff at Boone Hospital through the BJC Corporate Compliance Program and BJC Codes of Conduct. (Exhibit 18, tab 21 at L.F. 872). The Best Practice Exchange teams are led by a BJC facilitator and a representative from each member hospital. (Exhibit 18, tab 11 at L.F. 698). Furthermore, Plaintiffs had knowledge of coordinated systems between BJC and their affiliates that included: Risk Management, Legal Services, and Managed Care Contract Services. (Exhibit 18, tab 12 at L.F. 713; Exhibit 18, tab 4 at L.F. 469).

Furthermore, the Affiliation Agreement between BJC and its affiliates gave the system wide ranging powers and control to implement its system objectives which include quality patient care. (See, Exhibit 18, tab 2 at L.F. 378). BJC has complete authority over Boone County Hospital, BJC directly employs the nursing and technical staff, and BJC advertises and holds itself out to the public as a provider of health care at Boone Hospital.

Based on these facts, Plaintiffs could reasonably believe that BJC controlled the health care administered by their affiliate hospitals, including Boone Hospital. These reasonable beliefs, when merged with the case law and precedent available, underscore that at the time the lawsuit was filed, Plaintiffs had a reasonable belief as to BJC's liability.

Because Missouri Law has held that while physicians and nurses are free to exercise independent medical judgment, such independence does not preclude a finding that the physician or nurses were employees of a hospital, this theory of agency for recovery is legitimate. *Keller*, 800 S.W.2d at 37. Additionally, even where a doctor may have an agreement with the hospital calling him an "independent contractor," if the hospital asserts sufficient control over the activities of the doctors or nursing staff, then agency may be found. *Scott*, 70 S.W.3d, 566-567. Plaintiffs good faith belief is based upon this well-established precedent, backed with sufficient evidence of BJC's control and right to control health care, which sets forth a legitimate theory of recovery under these facts.

C. The facts that form the basis for the Pitt affidavits were controverted before the trial court.

Relator relies on affidavits filed by Dr. Pitt wherein Pitt attests that he was not controlled by BJC or Boone Hospital and that he was not an employee or agent of BJC or Boone Hospital while rendering health care to plaintiff. (Relator Boone Hospital's Brief at pp. 26). A comprehensive review of the documents submitted by Plaintiffs in response to the venue motions, establishes that the "information available at the time of filing was such to give rise to a reasonable legal opinion that a submissible case could be made against the resident defendant." *Bottger*, 815 S.W.2d at 80. (See, facts herein at pp. 15-18 and 35-36, 41-44; see also, Exhibit 32 L.F. 1223-24 at ¶¶ 13-15; Exhibit 18).[7]

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[7] Relator BJC argues that Plaintiff 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. (Relator BJC's Brief at p. 51). It is undisputed that Sadaf Qamar was brain injured as a result of the medical care and treatment she received in May 2004 and that the brain injury prevents her from living independently or recalling events. The reason Sadaf Qamar testified she didn't know what BJC means is because of the brain injury - not because she had never heard of the entity. Sadaf Qamar chose to go to Boone Hospital because of its affiliation with BJC. (Exhibit 33 at L.F. 1261). Moreover, BJC's argument regarding Plaintiff Haider's testimony is clearly controverted. (Exhibit 33 at L.F. 1260-62).

Under *Malone*, uncontroverted facts may defeat a Plaintiffs' venue choice only where those facts were known to the Plaintiffs at the time they filed their petition, *Malone*, 889 S.W.2d at 825. Affidavits that suggest a state of the facts determined after the petition was on file, and which do no more than controvert the facts pleaded in the petition, do not shine a helpful light on the analysis of what plaintiff knew at the time the lawsuit was filed. Where, as here, the plaintiffs can point to specific facts that support their belief that a cause of action existed against BJC at the time of the filing of the petition, joinder is not pretensive. This is so even if subsequent developments show that Plaintiffs belief was not correct. "Even if the plaintiffs' reasonable belief subsequently proves false, it is 'irrelevant' to the pretensive joinder determination." *Doe Run*, 128 S.W.3d at 506 (quoting *Bottger*, 815 S.W.2d at 79).

Moreover, even if plaintiffs had been aware of these affidavits prior to the filing of the petition, the affidavits are self-serving, contradictory, conclusory and disputed. These affidavits (because of plaintiffs controverted evidence) failed to meet Relators' burdens of production and persuasion to show a lack of reasonable belief. The affidavits post-date the filing of plaintiffs' petition. They recite "facts" that are ostensibly believed to be true by Pitt, not "facts" that were known to plaintiffs (or even believed by plaintiffs at this time)[8] ; the affidavits contain legal conclusions and the documents filed by the Plaintiffs

[8] Relator Boone Hospital claims Plaintiffs never had information that BJC employed Pitt or controlled his surgical decisions. (Relator Boone Hospital's Brief at p.

and the reasonable inferences that flow from those documents controvert the "factual" recitations in the affidavits.

D. *Ritter v. BJC* is readily distinguishable; the fact that plaintiffs' attorneys were involved in prior litigation involving BJC in the *Ritter* case does not deprive plaintiffs of their reasonable beliefs in this case.

Relator also claims that Plaintiffs are not entitled to the benefits of their reasonable belief because they were involved in prior litigation involving BJC. (See, Relator Boone Hospital's Brief, pp. 18, 24-26) Relator contends that based on the Missouri Court of Appeals, Eastern District holding in *Ritter v. BJC*, Plaintiffs' counsel knew that BJC couldn't be held liable under this factual situation. *Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d 377 (Mo. App. E.D. 1999); (See, Relator BJC's Brief, pp. 40-53).

The holding in *Ritter* is not controlling here. In *Ritter*, plaintiffs sued BJC along with other defendants alleging damages from injuries sustained while under the care of the named defendants. *Ritter*, 987 S.W.2d at 380. The incident occurred at Christian Hospital. Id. at 381. The plaintiff asserted four theories supporting the contention that BJC should be held liable: agency, vicarious liability, apparent authority, and joint

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21). This is not true and has been controverted by Plaintiffs' filings. (See, Exhibit 33 at L.F. 1261 and Plaintiffs' Response to Boone Hospital's Motion for Summary Judgment, Exhibits A1-A41).

venture. Id. BJC then moved for summary judgment which was granted by the trial court. Id.

On appeal, the appellate court was asked to determine if there were sufficient facts to uphold a finding that BJC could be found liable as a separate corporation from Christian Hospital. Id. at 384. First, the court found that the Affiliation Agreement and witness testimony were factually insufficient to withstand summary judgment as to the agency allegation. Id. at 385. Next, it was found that plaintiff did not produce facts to support a finding BJC exercises sufficient control or has the contractual right to control the subsidiary's performance of the plaintiff's surgery. Id. at 386. Third, the court found that the plaintiff did not provide sufficient evidence to maintain a dispute as to apparent authority by BJC.[9] Id. Last, it was found that plaintiffs contention that the similar economic interests of the corporations and the right of BJC to control budget matters and the subsidiaries board of directors did not constitute a joint venture. Id. at 388. Thus the court upheld the trial court's ruling that summary judgment was appropriate.

This holding is not applicable to this case for the following reasons. First, *Ritter* was a summary judgment proceeding and did not involve a pretensive joinder analysis. But, *Ritter* can be defeated on more than review standard grounds. Concerning the means

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[9] In *Ritter v. BJC*, the plaintiff, Robert D. Ritter, Jr., died unexpectedly from an electrocution injury. No evidence was thus available on his reliance or belief on the apparent agency theory.

by which the plaintiffs case can be proven, *Ritter* discusses the Amended Affiliation Agreement. Id. at 381. In fact, the bulk of the appellate opinion is spent discussing how the agreement, standing alone, is not sufficient to find control over the subsidiary. Id. Here, however, numerous other facts have been discovered since *Ritter* and asserted by the Plaintiffs to support their arguments. (See, facts cited at pp. 15-18 herein). The *Ritter* case deals with significantly less facts available to the plaintiff at a summary judgment inquiry that calls for much more factual inquiry than is required in our case. Moreover, as the trial court held: "Plaintiff has not alleged that the relationship here is the same as was found by the trial court in *Ritter*." (See, Exhibit 26 at L.F. 1197).

Moreover, Plaintiffs' counsel's law firm has participated in several similar cases after *Ritter* in which this Court has held that venue is proper in the City of St. Louis when BJC is sued for acts of negligence occurring at one of its affiliate hospitals. (See, Order of the Honorable Patricia L. Cohen, dated April 6, 2006, denying Relator's Petition for Writ of Prohibition in the case of *State ex rel. Midwest Hematology-Oncology Consultants, Inc. & Deborah A. Wienski, M.D. v. Ohmer*, No. ED87467 (underlying case of *Zavack v. BJC Health System, Missouri Baptist Medical Center, Midwest Hematology-Oncology Consultants, Inc., and Deborah A. Wienski, M.D.*, Cause No. 042-07667), Exhibit 33 at L.F. 1256; Orders of the Honorable Clifford H. Ahrens, dated January 17, 2003, denying Relators' Petitions for Writs of Prohibition in the cases of *State ex rel. Neill*, No. ED82267 and No. ED82268 (underlying case of *Trimble, et al. v. BJC Health System, Missouri Baptist Medical Center, and John P. Hess, M.D.*, Cause No.

012-00056), Exhibit 33 at L.F. 1258). See also, *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528 (Mo. banc 2003). Contrary to Relator Boone Hospital's assertion, the documents submitted by Plaintiffs to support venue did not pre-date the *Ritter* opinion. (Relator Boone Hospital's Brief at p. 25). Many of the documents and depositions post date *Ritter* by several years. (See, e.g., Exhibit 18, tab 8; Exhibit 18, tab 9; Exhibit 18, tab 11; Exhibit 18, tab 21; Exhibit 18, tab 22; Exhibit 18, tab 23; Exhibit 18, tab 41; Exhibit 18, tab 42.)

III. A WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE BECAUSE VENUE PROPERLY LIES IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS BECAUSE WHEN PLAINTIFFS FILED THEIR PETITION, VENUE WAS PROPER PURSUANT TO § 355.176.4 RSMO (1994) AND THE 2005 REVISED § 508.010 RSMO WAS NOT IN EFFECT AT THE TIME PLAINTIFFS' CAUSE OF ACTION WAS FILED.

A. Standard of Review

Because this issue raised in this writ proceeding requires the Court's interpretation of a statute, *de novo* review is necessary as the Court seeks to give effect to the legislative intent. *Carmack v. Mo. Dep't of Agriculture*, 31 S.W.3d 40, 46 (Mo. App. W.D. 2000).

B. The 2005 Revised § 508.010 was not in effect at the time Plaintiffs' cause of action was filed in October of 2004.[10]

Venue in Missouri is determined solely by statute. *State ex rel. Rothermich v. Gallagher*, 816 S.W. 2d 194, 196 (Mo. banc 1991). Plaintiffs filed this cause of action on October 7, 2004 against Defendants Pitt, Columbia Surgical Associates, CH Allied Services, Inc., d/b/a Boone Hospital, BJC, Kimberly Morse, M.D., and Women's Health Associates, Inc. (Exhibit 1). The cause of action was filed against these defendants pursuant to § 355.176.4, the not for profit venue statute. When this cause of action was

[10] Respondents' Points III, IV and V address Relator Boone Hospital's Point II at pp. 28-30 of its Brief.

filed, the pertinent part of the statute read that suit could be brought only in the county in which the cause of action accrued, in the county in which the not for profit corporation maintained its principal place of business, or the county in which its registered office was located. Section 355.176.4 RSMo. (1994); *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140 (Mo. banc 2002). At the time this cause of action was filed, it was well established that this not for profit corporate venue statute governed all cases in which a not for profit was a defendant even if individuals or for profit corporations were named as additional defendants. *SSM Health Care*, 78 S.W.3d at 145; *State ex rel. St. John's Mercy Healthcare v. Neill*, 95 S.W.3d 103, 105 (Mo. banc 2003). When the cause of action was filed on October 7, 2004, venue was proper because BJC, a not for profit corporation, has its principle place of business in the City of St. Louis.

House Bill 393 (commonly known as Missouri's Tort Reform law) was passed on March 29, 2005 and was codified at §§ 538.205-538.230 RSMo (Supp. 2005). The effective date of the tort reform law was August 28, 2005. See, H.B. 393, codified at § 538.305 RSMo (Supp. 2005) ("The provisions of this act, except for § 512.099, RSMo, shall apply to all causes of action filed after August 28, 2005").

Venue was proper in the City of St. Louis because when this matter was filed on October 7, 2004, the cause of action was filed before the new venue laws came into effect. Pursuant to § 538.300, the newly enacted version of § 508.010 is applicable only to causes of action filed after August 28, 2005 and plaintiffs have not filed a new cause of action subsequent to August 28, 2005 by filing a first amended petition joining additional

parties. Defendants mistakenly assert that the phrase “causes of action filed after August 28, 2005" is synonymous with the phrase “add a party or parties by amendment.” Pursuant to legislative intent and judicial interpretation (as discussed in detail in Point IV below), plaintiffs’ amended petition does not constitute a “new cause of action” and thus, the new tort venue rules are not implicated.

IV. A WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE BECAUSE VENUE IS PROPER IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS BECAUSE EVEN IF § 538.305 RSMO AND THE 2005 REVISED § 508.010 RSMO WERE APPLIED, THE APPLICATION WOULD NOT RESULT IN A CHANGE OF VENUE BECAUSE PLAINTIFFS' AMENDED PETITION DID NOT CONSTITUTE A NEW CAUSE OF ACTION AND THE CLAIMS AGAINST THE NEW PARTIES WERE BASED ON THE SAME SET OF OPERATIVE FACTS UNDERLYING THE ORIGINAL CLAIM.

A. Standard of Review

Because this issue requires the Court's interpretation of a statute, *de novo* review is necessary as the Court seeks to give effect to the legislative intent. *Carmack v. Mo. Dep't of Agriculture*, 31 S.W.3d at 46.

B. Because the addition of defendants did not involve different or additional operative facts than were pled originally, venue should be decided based on the applicable statute at the time of the original petition.

Plaintiffs filed a First Amended Petition on May 3, 2006 adding Defendants Chris Martin, M.D., and Columbia Nephrology & Internal Medicine, P.C. (Exhibit 10). These two defendants were dismissed on September 20, 2007. (Exhibit 24). Defendants argue that venue should be re-analyzed pursuant to *State ex rel. Linthicum v. Calvin*, 57 S.W. 3d

855 (Mo. banc 2001) and that the 2005 revised venue statute should be applied. (Relator BJC's Brief at pp. 57-58).

It is worth reiterating that pursuant to § 538.305, the provisions of H.B. 393 (2005), including the new venue statute, § 508.010 RSMo (Supp. 2005), "shall apply to all causes of action filed after August 28, 2005." (emphasis added). Section 538.305 does not define the term "cause of action" nor does it define the term "filed". See, § 538.305 RSMo (Supp. 2005). "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988).

A new cause of action does not automatically arise when additional parties are added. Here, Plaintiffs filed their cause of action on October 7, 2004. Notably, when joining defendants Martin and Columbia Nephrology in May of 2006, plaintiffs did not assert a new or different cause of action. Because Plaintiffs' First Amended Petition joined additional defendants did not state a new cause of action, the 2005 revised venue provisions do not apply.

This Court's opinion in *State ex rel. Burns v. Whittington* is instructive. *State ex rel. Burns v. Whittington*, 219 S.W.3d 224 (Mo. banc 2007). In *Burns*, a husband and wife, Alfred and Rowe Burns, filed suit on August 22, 2005 in the City of St. Louis. Alfred Burns alleged that his exposure to Defendant's benzene containing products caused him to develop acute leukemia; Rowe Burns filed a loss of consortium claim. In

January of 2006, Alfred Burns died as a result of his leukemia. Id. at 225. A First Amended Petition was filed in March of 2006. Id. The trial court granted defendant's motion to transfer venue finding that the filing of an amended petition setting forth a wrongful death claim constituted the filing of a new cause of action which implicated the new tort venue rules. Id.

This Court disagreed holding that amending the petition to include a claim for wrongful death does not state a new cause of action within the meaning of the new venue statute. *Burns*, 219 S.W.3d at 225. This Court began its analysis by looking at the legislative intent behind the new venue statute. The legislature did not define the terms "filed" or "cause of action." Id. "The primary rule of statutory interpretation is to give effect to the legislative intent as reflected in the plain language of the statute." Id. In the absence of statutory definitions, the plain and ordinary meaning of a term may be derived from a dictionary, and also by considering the context of the statute. *Burns*, 219 S.W.3d at 225. Relying on precedent, the Court defined a "cause of action" as "a group of operative facts giving rise to one or more bases for suing." Id. citing *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002). "A cause of action remains the same even though additional or different theories of evidence or law might be advanced to support it." *Burns*, 219 S.W.3d at 225. It was found that a cause of action is considered a negligent act or omission by a party in a tort case. Id. Drawing on this logic, the Court reasoned that the changing of a personal injury claim to a wrongful death claim was derivative of the underlying tortious act. Id. Because the wrongful death claim

was based on the same set of operative facts, it did not constitute a new cause of action and the pre-tort reform statute controlled. Id.

As was determined in *Burns*, to the extent that joining a party does not involve different or additional operative facts that were pled originally, venue should be decided based on the applicable statute at the time of the original petition. Claims can arise out of the same set of operative facts even though different legal theories are advanced. The term "cause of action" is defined in *Burns* as "a group of operative facts giving rise to one or more bases for suing." *Burns*, 219 S.W.3d at 225. This definition centers on the factual bases for the claims, not the legal theories. *Chesterfield Village, Inc*. 64 S.W.3d at 319. A cause of action does not change even though additional or different evidence or legal theories might be advanced to support it. Id. at 319-20. None of the definitions restricts the term "cause of action" to include claims against all defendants to a court proceeding. Rather, the term "cause of action" has been consistently defined in Missouri case law as a set of facts that entitles plaintiff to relief. See, *State ex rel. Burns v. Whittington*, 219 S.W.3d at 225; *Chesterfield Village, Inc*., 64 S.W.3d at 319-20.

The set of facts entitling plaintiffs to relief in this case were before the Court in October of 2004 when the lawsuit was initially filed. The same "group of operative facts" contained in the original petition provided another bases on which to bring suit, that is, to add defendants responsible for the same events contributing to the injury. Thus, the newly joined defendants were simply additional parties responsible for the same tortious acts alleged in the original petition. By joining defendants, Plaintiffs have simply

added different legal theories for recovery based on the exact events that gave rise to the original petition.[11] Just as in *Burns*, here, no new tortious act, or cause of action was filed in the First Amended Petition and just as in *Burns*, the same set of operative facts were present in the amended petition as in the original claim. Accordingly, just as in *Burns*, the 2005 venue provisions should not apply.

Relator mistakenly relies on *State ex rel Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001) for the proposition that venue should be re-analyzed and the case should be transferred because new defendants were added to the lawsuit. (Relator Boone Hospital's Brief at pp. 29-30).

In *Linthicum*, the plaintiff, Kathy Penny, was injured when she fell from a car of a ferris wheel at a county fair in Farmington, Missouri. In August of 1998, the plaintiff filed a one-count petition in the Circuit Court of St. Francois County against the operator

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[11] Kimberly Morse, M.D. and Women's Health Associates, Inc., were named as defendants when Plaintiffs' Petition was originally filed on October 7, 2004. (Exhibit 1). Defendants Morse and Women's Health Associates, Inc., were dismissed without prejudice on May 10, 2005 (Exhibit 22), rejoined as defendants on May 3, 2006 (Exhibit 10) and dismissed a second time on October 11, 2006. (Exhibit 23). Chris Martin and Columbia Nephrology & Internal Medicine P.C. were originally named as defendants on May 3, 2006. (Exhibit 10). Defendants Martin and Columbia Nephrology were dismissed on September 20, 2007. (Exhibit 24).

of the ferris wheel. *Linthicum*, 57 S.W.3d at 856. Plaintiff subsequently filed amended petitions in the St. Francois County suit, bringing in two corporations that were previous owners of the ferris wheel. Id.

Approximately two years, plaintiff voluntarily dismissed the St. Francois County lawsuit without prejudice and refiled her action in the City of St. Louis. In refiling her action, plaintiff named Harold Linthicum as the sole defendant. Id. Linthicum was a resident of Arkansas who had been employed by the operator of the ferris wheel. He had not been named in the original suit. On the following day, the plaintiff was granted leave to amend her petition and to add as defendants the three defendants from the St. Francois County action, as well as two additional defendants. Id. at 856. Plaintiff premised venue in the City of St. Louis on the fact that the sole defendant when the case was brought in the City was a non-resident individual, and that venue was therefore proper under § 508.010(4) RSMo (2000), which provides that where all defendants are non-residents, suit may be "brought" in any county. Id.

Defendant Linthicum moved to transfer venue, which was denied by the trial court. A writ proceeding followed where Linthicum argued that plaintiff's failure to include the St. Francois County defendants in the original City of St. Louis petition constituted "pretensive non-joinder." *Linthicum*, 57 S.W.3d at 865. Linthicum argued that plaintiffs were manipulating the venue statute to gain venue in the City. Id.

The four-judge majority in *Linthicum* did not to address the claim of pretensive non-joinder. Rather, the Court held that while venue in the city may have been

appropriate when it was originally "brought," the action was actually "brought again" when plaintiff filed her amended petition the next day, naming Missouri residents whose presence would have defeated venue had they been included in the original refiled lawsuit.[12] The majority remanded the case to the trial court "to reconsider the propriety of venue as of the day the underlying petition was amended to include Missouri residents." *Linthicum*, 57 S.W.3d at 857-58.

In *Linthicum*, this Court determined when a case was "brought." In determining a suit is "brought" (again) when additional defendants were added, the Court gave effect to the legislative intent present in the definition of the word "brought." Id. at 858.

Here, the statute that is in need of interpretation and application, § 538.305 RSMo, was not at issue, nor was it even in existence at the time the *Linthicum* decision was decided. *Linthicum* is not applicable or instructive here.

In 2005, the legislature amended the tort venue laws. When examining the meaning of a statute, the primary role of a court is to ascertain the intent of the legislature from language used and to give effect to that intent if possible. *Trailiner Corp. v. Director of Revenue*, 783 S.W.2d 917, 920[1] (Mo. banc 1990). In the 2005

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[12] In this case, even if Defendants Martin and Columbia Nephrology had been included in the original petition, the venue determination and analysis would have remained the same. The joinder of Defendants Martin and Columbia Nephrology cannot be argued to have been done to manipulate the venue statute.

amendments, the General Assembly no longer used the word "brought" for a determination of venue in tort cases. When the General Assembly alters a statute, courts are obligated to deem the alteration as having an effect – the legislature's actions cannot be deemed meaningless. *State v. Bouse*, 150 S.W.3d 326, 334 (Mo. App. W.D. 2004). Moreover, when the General Assembly amends a statute, it is presumed that the legislature is aware of the courts' interpretation of the statute. *Marston v. Juvenile Justice Center of the 13th Circuit*, 88 S.W.3d 534, 538 (Mo. App. W.D. 2002). It follows then that if the legislature had intended to have venue analyzed each time a defendant was added to a lawsuit, that it would have continued to use the word "brought" in the 2005 tort venue laws.

At the time the legislature enacted the new tort venue law in 2005, it had the benefit of the *Linthicum* opinion. Nonetheless, the legislature chose to use the words when a "cause of action" is filed, not when a suit is brought. This Court has analyzed the language of the new tort venue laws in the *State ex rel. Burns v. Whittington* case. Adopting the well - reasoned logic of this Court in *Burns* and giving effect to the legislature intent in the new tort venue laws, no new cause of action was filed by joining additional defendants in this case.

V. A WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE BECAUSE THE STATE CONSTITUTIONAL BAN ON RETROSPECTIVE LAWS BARS RETROSPECTIVE APPLICATION OF THE 2005 VENUE STATUTE, § 508.010 RSMO.

A. Standard of Review

Because this issue requires the Court's interpretation of a statute, *de novo* review is necessary as the Court seeks to give effect to the legislative intent. *Carmack v. Mo. Dep't of Agriculture*, 31 S.W.3d at 46.

B. The state constitutional ban on retrospective laws bars retrospective application of the 2005 venue statute to this cause of action.

Article I, § 13 of the Missouri Constitution provides in relevant part that "no . . . law . . . retrospective in its operation . . . can be enacted." This constitutional provision means that no statute "can be allowed to operate retrospectively so as to affect . . . past transactions to the substantial prejudice to the parties interested. A law must not give to something already done a different effect from that which it had when it transpired." *Rice v. Huff*, 22 S.W.3d 774, 782-83 (Mo. App. W.D. 2000) (quoting *State ex rel. Clay Equip. Corp. v. Jensen*, 363 S.W.2d 666, 670 (Mo. banc 1963)); see also, *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006) (quoting *Squaw Creek Drainage Dist. No. 1 v. Turney*, 138 S.W. 12, 16 (1911)).

There is a presumption under Missouri law that a new statue or statutory amendment operates prospectively only, unless it is procedural or remedial in nature.

See, e.g., *Wellner v. Director of Revenue*, 16 S.W.3d 352, 354 (Mo. App. W.D. 2000); *State ex rel. Webster v. Cornelius*, 729 S.W.2d 60 at 65 (Mo. App. E.D. 1987).

As the Court of Appeals explained,

> Substantive laws creates, defines and regulates rights; procedural law prescribes a method of enforcing rights or obtaining redress for their invasion. The distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit.

Cook v. Newman, 142 S.W.3d 880, 893 (Mo. App. W.D. 2004) (citations omitted).

A law is retrospective in operation if it takes away or impairs vested or substantial rights acquired under existing laws or imposes new obligations, duties or disabilities with respect to past transactions. *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. banc 1993); See also, *Hess v. Chase Manhattan Bank USA, N.A.*, 220 S.W.3d 758 (Mo. banc 2007). Here, because the lawsuit was on filed in October of 2004, plaintiffs' interest in the lawsuit vested into a substantive right prior to the enactment of the new tort venue law.

Additionally, the longstanding Missouri rule is that a procedural statute does not apply to a cause of action existing at the time the statute was enacted **unless** the Missouri legislature has expressed a contrary intention. *State ex rel. LeNave v. Moore*, 408 S.W.2d 47 (Mo. banc 1966). The Missouri legislature has expressed a clear intention that the current version of RSMo § 508.010 applies only to causes of action filed after August 28,

2005. § 538.300 RSMo (Supp. 2005). When examining the meaning of a statute, the primary role of a court is to ascertain the intent of the legislature from language used and to give effect to that intent if possible. *Trailiner Corp. v. Director of Revenue*, 783 S.W.2d at 920. The term "cause of action" is not defined by RSMo § 538.300. To determine legislative intent, the court must consider undefined words used in the statute according to their plain and ordinary meaning as derived from a dictionary. *Racherbaumer v. Racherbaumer*, 844 S.W.2d 502, 504 (Mo. App. E.D. 1992). At the time the new tort venue laws were passed, a cause of action was defined as a group of operative facts giving rise to one or more bases for suing. *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d at 318 (citing Black's Law Dictionary 214 (7th ed.1999)).

Because the Missouri legislature has expressed a clear intention that the new tort venue laws only apply to cause of action filed after August 28, 2005 and because this cause of action was filed on October 7, 2004, the new tort venue laws are not applicable.

CONCLUSION

In Point I, Plaintiffs established that the claims asserted against BJC, the resident defendant, met or surpassed the deferential standard of review for a motion to transfer venue. In Point II, Plaintiffs established that the information available at the time of filing was such as to give rise to a reasonable legal opinion that a submissible case could be made against the resident defendant. *Doe Run*, 128 S.W.3d at 506. A writ of prohibition is discretionary and there is no right to have the writ issued. It is well established that a writ of prohibition is an extraordinary remedy which should rarely be granted, and is to be used with great caution, forbearance, and only in cases of extreme necessity. Because Relators failed in their burden of production and in their burden of persuasion, a writ should not issue.

Furthermore, the Missouri legislature has expressed a clear intention that the current version of § 508.010 applies only to "cause of action filed after August 28, 2005." Because this cause of action was filed on October 7, 2004, the 2005 tort venue laws do not apply to this case. There is no dispute that this cause of action accrued and was filed prior to the effective date of the new tort venue laws. Accordingly, the new tort venue laws may not be applied to this case. Application of House Bill 393, or any of its provisions such as § 508.010 RSMo. (Supp. 2005) would violate Article I, § 13 of the Missouri Constitution which prohibits laws from operating retrospectively. Because the Missouri legislature has expressed a clear intention that the 2005 venue rules apply only

to causes of action after August 28, 2005, it would be unconstitutional to apply the new law retrospectively.

For all these reasons, the preliminary writ of prohibition issued by this Court should be quashed.

GRAY, RITTER & GRAHAM, P.C.

By: _____

Stephen R. Woodley, #36023
Joan M. Lockwood, #42883
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
(314) 241-4140 (Fax)

Attorneys for Plaintiffs and on behalf of Respondent The Honorable Donald L. McCullin

RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Supreme Court Rule 84.06(c), that the foregoing Respondent's Brief complies with the limitations contained in Rule 84.06(b) and contains 14,632 words (exclusive of the appendix) and that counsel relied on the word count of the word processing system used to prepare the brief (WordPerfect 12 format). Counsel further certifies that the disks containing electronic copies of the Respondent's Brief have been scanned for viruses and are virus free.

GRAY, RITTER & GRAHAM, P.C.

By: _____

Stephen R. Woodley, #36023
Joan M. Lockwood, #42883
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
(314) 241-4140 (Fax)

Attorneys for Plaintiffs
and on behalf of Respondent
The Honorable Donald L. McCullin

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Respondent's Brief, along with one 3 ½ inch diskette containing a true and accurate electronic copy of the Brief, was served upon the parties hereto by mailing a copy thereof by U.S. Mail, postage prepaid, on this 28th day of August, 2008, to:

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

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

Mr. 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 Columbia Surgical Associates, Inc., James Bruce Pitt

Mr. Paul N. Venker
Mr. Michael R. Barth
Williams Venker & Sanders LLC
100 N. Broadway, 21st Floor
St. Louis, MO 63102
314-345-5000
314-345-5055 (fax)
Attorneys for BJC Health System

Attorneys for Plaintiffs
and on behalf of Respondent
The Honorable Donald L. McCullin

APPENDIX

APPENDIX INDEX