IN THE SUPREME COURT FOR THE STATE OF MISSOURI

State of Missouri, ex rel., James Bruce Pitt, D.O., and Columbia Surgical Associates, Inc. Relators, vs. The Honorable Donald L. McCullin, Judge of Division No. 20 of the Circuit Court, City of St. Louis, Missouri, Respondent.	)	Docket No. SC89284

ON APPEAL FROM THE
CIRCUIT COURT OF DIVISION NUMBER 20 OF THE CIRCUIT COURT,
CITY OF ST. LOUIS, TWENTY SECOND CIRCUIT
THE HONORABLE DONALD L. MCCULLIN, CIRCUIT JUDGE

REPLY BRIEF OF RELATORS JAMES BRUCE PITT, D.O. AND COLUMBIA SURGICAL ASSOCIATES, INC.

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INTRODUCTION

Respondent's Brief does nothing to undercut the fundamental arguments in Relators' Opening Brief listed below, which compel a Writ of Prohibition preventing Respondent from exercising jurisdiction in this case and a Writ of Mandamus ordering Respondent to transfer the case to Boone County:

- At its most basic level, it does not make any sense to force a private doctor, working at a hospital in Boone County, to defend an action in St. Louis City, based upon events which occurred only in Boone County, simply because that hospital has ***some relationship*** with a hospital in St. Louis City.
- Venue is re-determined when a plaintiff adds a new defendant, and the plaintiffs herein added new defendants after the date that the revised Section 508.010 went into effect, thus, the revised Section 508.010 governs this action.
- Plaintiffs herein have not alleged sufficient facts to show that BJC Health System controlled, in any relevant way, Boone Hospital Center, such that BJC Health System was an appropriate defendant.
- Plaintiffs herein had no reasonable basis to believe that BJC Health System was an appropriate defendant in this action, especially in light of *Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d 377 (Mo. App. E.D. 1999).

Respondent's arguments in its brief do not refute the valid legal arguments asserted by Relators and are unsupported by the law as well as the necessary facts, and hence, the Writs of Prohibition and Mandamus should issue, such that the underlying case can proceed in Boone County, Missouri, where the incident occurred.

ARGUMENT

I. (Reply to Brief of Respondent Points I and II) The Law of Missouri Requires That Venue Be Re-Considered Whenever A New Defendant Is Brought Into An Action, Thus Amended Section 508.010.4 Applies Herein, Because Plaintiffs Herein Amended Their Petition To Add New Defendants After The Amendments To Section 508.010.4 Went Into Effect.

According to this Court, venue is ascertained as of the day the cause of action is "brought," and per *Linthicum*, when a plaintiff amends **to add defendants**, venue is to be re-determined at the time that amended petition is filed. *State ex rel Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). This Court stated in no uncertain terms that "[f]or purposes of section 508.010, a suit instituted by summons is 'brought' **whenever a plaintiff brings a defendant into a lawsuit,** whether by original petition or **by amended petition**." *Id*. at 858 (emphasis supplied); *see also Budd Co. v. O'Malley*, 114 S.W.3d 266, 269 (Mo. App. W.D. 2002) (citing *Linthicum*).

Respondent focuses on *Burns v. Whittington*, 219 S.W.3d 224 (Mo. banc 2007), as being "instructive," arguing that amendment of a petition does not restart the venue analysis, and indeed it does not, where the amendment merely adds another theory of recovery against the same parties, so long as that new theory depends upon the same

operative facts. That, however, has no relevance to the situation here, where the Plaintiff elected to amend to add two totally new defendants, a doctor, and the doctor's medical group. This distinction is real, not an invention of Defendants here, and is a distinction noted by this Court in the *Burns* opinion. *Linthicum* made it clear that **the triggering event for re-visiting venue is the amendment of a petition to bring one or more new defendants into a lawsuit.** *Burns* is in lockstep with that, as it involved no such amendment, and this Court so noted.

A. *Respondent's attempt to distinguish the words "brought" and "filed" or to assert that they indicate an intent to strike down Linthicum is based neither in law nor in legislative intent.*

Respondent's argument regarding the "brought" or "filed" language is unavailing. Neither *Linthicum*, nor any other case, has so distinguished these words as terms of art, in such a manner as Respondent proposes. *See generally Linthicum*, 57 S.W.3d at 858 n.2; *Private Nursing Service, Inc. v. Romines*, 130 S.W.3d 28, 29-30 (Mo. App. E.D. 2004); *see also Harper Industries, Inc. v. Sweeney*, 190 S.W.3d 541, 543 n.6 (Mo. App. S.D. 2006). Particularly, this Court in *Linthicum* cited to Blacks Law Dictionary to note that "the terms 'commenced' and 'brought' are commonly deemed to be synonymous." 57 S.W.3d at 858 n.2. Thus, cases often interchange the words "filed" and "brought" such that there can be no valid argument that such terms are so strictly defined that the use of the word "brought" in *Linthicum* and the use of the word "filed" in Section 538.305 means that the legislature intended that *Linthicum* no longer applies to determine venue when a new defendant is added to a petition. *See e.g.*, *Private Nursing*, 130 S.W.3d at

29-30 ("Venue is determined as the case stands when brought … when this case was brought, or filed…."); *Harper Industries*, 190 S.W.3d at 543 n.6 (citing *Private Nursing*).

Paradoxically, Respondents make much of the legislative intent in the amendments of House Bill 393, attempting to urge the notion that the use of the word "file" in Section 538.305, was deliberately intended to render *Linthicum* impotent and irrelevant. *See* Respondent's Brief. It is common knowledge that *Linthicum* closed a loophole by which plaintiffs were manipulating venue, such that doctors and businesses were being sued in venues all over the state rather than where the defendant actually existed or where the alleged negligence occurred. Regardless of one's political preference for or against tort reform, it is beyond question that with regard to venue in malpractice cases, the driving intent behind House Bill 393 and in particular Section 508.010.4, was to ensure that a doctor accused of an error in his hometown, would not find himself defending it across the state. Hence, to assert, as plaintiffs assert here, that the legislature actually intended by its language that its tort reform amendment strike down *Linthicum* or render it impotent, stretches inference and reason so far beyond the breaking point that nothing more need be said.

Missouri law requires that when a new defendant is added to a petition, the trial court must re-consider venue, regardless of whether the term "commence," "file," or "brought" is used. In the underlying matter, Plaintiffs amended their Petition to add new defendants after the amendments to Section 508.010.4 went into effect, thus Respondent was compelled to re-consider venue at that time, using Amended Section 508.010.4.

B. *Plaintiffs' good intentions cannot save their venue argument, because there is no "secret motivation" aspect to the bright line set out in Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001).*

Respondent suggests that Plaintiffs get a free pass from application of *Linthicum*, so long as when they amend to add new parties, they have no evil intent to manipulate venue. Respondent's Brief at 32 n.6 ("The joinder of [the added Defendants] cannot be argued to have been done to manipulate the venue statute."). While *Linthicum* may have come about, at least in part, to close a loophole whereby plaintiffs were manipulating venue, the rule set out in *Linthicum* is a bright line, elegant in its simplicity, that never inquires as to disputable matters such as intent. Rather, the sole question is an objective one: Whether plaintiff has amended to add one or more defendants. If the answer is yes, venue is re-visited at the time of the amendment, and in this case, that amendment occurred after Section 508.010.4 was in effect.

II. (Reply to Brief of Respondent Point III) Respondent's Argument Regarding Retrospective Application Of Section 508.010.4 Is Confusing And Irrelevant, Because Even If This Is A "Retrospective Application," Missouri Law Is Clear That Retrospective Application Of Procedural Or Remedial Statutes Is Permissible And Missouri Law Is Clear That A Venue Statute Is Procedural.

In Respondent's Point III, Respondent argues that, even if venue was to be re-calculated according *to Linthicum*, applying Section 508.010.4, as amended, would violate the constitutional ban on retroactive application of substantive laws. Respondent's Brief at 35-37. First and foremost, there is nothing retrospective about this.

Linthicum requires that when plaintiff amends and adds one or more new defendants, venue is re-visited because the case is considered brought anew. Unquestionably, the amendment adding new defendants occurred in May 2006, well beyond August 2005, when the tort reform went into effect. Hence, the application of 508.010.4 in May 2006 would be prospective not retrospective, which is precisely why Respondent is now forced to engage in this elaborate and illogical construct that:

> The legislature intended a distinction between synonyms "brought" and "filed:"
>
> 1) without ever saying that it was making such a distinction;
>
> 2) even though case law sets out no such distinction between those synonyms, and in fact uses the terms interchangeably (as discussed in Section I(A), *supra*); and
>
> 3) the legislature was intending to make this distinction to strike down *Linthicum* while in the very process of closing plaintiff venue loopholes and trying to see that a doctor is sued where he allegedly committed the negligence, not across the state.

That argument is so flawed and unreasonable on its face that nothing more need be said to respond to it.

Moreover, even if this did involve a retrospective application of 508.010.4, Respondent's arguments to that point are not well taken. It appears that Respondent's first position is that the venue statute is a substantive statute, *e.g.*, "plaintiffs' interest in the lawsuit vested into a substantive right prior to the enactment of the new tort venue law," (Respondent's Brief at 36). Relators agree that the Missouri Constitution ***does*** prohibit

retroactive application of ***substantive laws***, while generally permitting retroactive application of ***procedural laws***. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769-70 (Mo. banc 2007). Substantive laws "relate[s] to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit." *Id*. at 769. Pursuant to that definition, however, it is clear that a venue statute is procedural, not substantive: It relates to Plaintiffs' procedure used in carrying out its suit, it does not change the rights and duties giving rise to their alleged cause of action. However – and quite fortunately – this Court has already eliminated any potential for doubt and declared that venue statutes (and even Section 508.010 in particular) are procedural. *LeNeve v. Moore*, 408 S.W.2d 47 (Mo. banc 1996); *see also Mendelsohn v. State Board of Registration for the Healing Arts*, 3 S.W.3d 783 (Mo. banc 1999) (holding that a statute that affected venue, among other things, was procedural); *Nichols v. Fuller*, 449 S.W.2d 11, 13-14 (Mo. App. 1969). *LeNeve* also cited to an American Law Reports noting that "[n]o cases prohibiting the retroactive application of venue statutes on constitutional grounds have been found." 408 S.W.2d at 48.

The puzzlement is that Respondent cited to *LeNeve*, Respondent's Brief at 37, so it is perplexing that Respondent, being aware of *LeNeve*, ever made the argument that Section 508.010 is a substantive statute.

Respondent appears to argue alternatively that even if Section 508.010 is procedural, it cannot be applied retroactively because of the exception noted below in *LeNeve*:

> We are of the opinion that a venue statute, as a general rule, is procedural or remedial in character and may apply to a cause of action existing at the time it was enacted, unless the Legislature has expressed a contrary intention.

408 S.W.2d at 48. Respondent then appears to return to the argument that because Section 538.305 applies to "causes of action filed after August 28, 2005," that this reveals a "clear intent" to apply this procedural statute prospectively only, despite the presumption that such statutes are applied retroactively, because *Linthicum* used the term "brought." However, as discussed in Section I(A), *supra*, these terms are used synonymously by courts. Thus, Respondent's legislative intent argument is again irrelevant to the matter at hand, and there can be no constitutional prohibition on applying Section 508.010.4 herein.

Section 508.010 is a venue statute, and under Missouri law venue statutes are procedural and generally applied retroactively. Thus, there is no constitutional prohibition on applying Section 508.010.4 to determine venue as of the date that Plaintiffs amended their Petition to add new defendants, unless there is some clear legislative intent to the contrary. There is no such intent evidenced in Section 508.010 or Section 538.305, particularly in light of the Legislature's true intent of protecting Missouri residents from being forced to defend causes of actions in unrelated venues. Thus, Section 508.010, as amended by House Bill 393, applies herein.

III. (Reply to Brief of Respondent Point IV) Respondent Fails To Allege Control Of Boone Hospital Center By BJC Health System Sufficient To State A Cause Of Action Against BJC Health System, Because Respondent Does Not Specifically Address Any Control *Relevant* To The Health Care At Issue.

The pretensive joinder issue only becomes relevant if this Court decides that Section 508.010.4, as amended, does not apply herein.

In the pretensive joinder section of its brief, Respondent argues generically that BJC was not pretensively joined because it "controlled" the health care at issue and Boone Hospital Center was the "alter ego" of BJC. Under *State ex rel. BJC Health System v. Neill,* 121 S.W.3d 528, 531 (Mo. banc 2003), BJC may only be sued along with its affiliates or agents if plaintiffs properly plead a claim asserting: (1) that "the alleged control by BJC Health System affected the health care at issue and **caused the alleged injury**" and/or (2) "control sufficient to pierce the corporate veil." Both of these arguments of Respondent fail, particularly in light of the fact that Respondent does not allege any control in such a manner as actually relates to the health care that allegedly caused the injury to Plaintiff Qamar.

A. *Respondent does not allege any control by BJC of Boone Hospital Center which is actually relevant to the care at issue in this case, namely Dr. Pitt's placement of the trochar in the liver and consequent introduction of the insufflation medium, carbon dioxide, into the blood stream of Plaintiff Qamar.*

As discussed extensively in Relators' Opening Brief at pages 15 through 17, *Neill* requires that "the alleged control by defendant BJC Health System affected the health care at issue **and caused the alleged injury**." 121 S.W.3d at 531 (emphasis supplied). The injury is brain damage. The alleged cause is Dr. Pitt placing the laparoscopic trochar into the liver, which in turn allowed the insufflation gas to enter the blood stream, causing perfusion problems for the brain resulting in brain damage. That event, and that damage were set out in the original pleading when this case was first brought. Plaintiffs' counsel is very experienced in medical malpractice claims, and hence is well aware, along with much of the general public, that laparoscopic surgery is major surgery, but performed without the usual large abdominal incision. Instead the surgeon introduces the laparoscopic trochar tube (surgical device and camera) through the abdominal wall into the free abdominal space, then inflating the abdomen with gas (insufflation), then performing the surgery on whatever organ through this trochar sleeve while watching the video image provided by the laparoscope. As alleged here, placing the trochar into the abdomen and directly into the liver rather than the free abdominal space, and introducing the insufflation gas directly into the liver and thereby directly into the blood stream, would all be the actions of the surgeon, and any medical malpractice attorney as well as most of the public knows that. Hence, what matters here is control by BJC over the surgeon, and that is never pleaded.

Dr. Pitt's identity and involvement as well as that of his affiliation with a private medical group, Columbia Surgical Associates, Inc. were both known to Plaintiffs as they were named defendants in the original Petition. Being a surgeon, Dr. Pitt was already

highly unlikely to have been an employee of any hospital, much less a hospital two hours away from where he did the surgery. His being affiliated with a private medical group effectively and practically precluded any reasonable possibility of his being an employee of a hospital, and there has never been a claim that either BJC or Boone owned the medical group. Hence, it was unmistakably clear from the outset that the damage in this case involved the actions of a private surgeon employed by his private medical group, not Boone Hospital, BJC, or any other hospital. He was precisely what anyone would reasonably expect - a private doctor, employed by a private medical group, doing a surgical procedure at a hospital where he had privileges. The mere fact that a private doctor has surgical privileges at a hospital has never been held in this state to be sufficient grounds to hold the hospital responsible for the doctor's actions.

In order for venue to have been proper **at the time this case was first brought**, BJC, the only resident defendant, would have had to have sufficient control over Dr. Pitt's actions in placing the trochar to be liable for his actions. *Neill,* 121 S.W.3d at 531. Nothing remotely resembling that has even been presented, because those facts do not exist, nor (as indicated above) was there any basis to reasonably believe that they did. Plaintiffs' only allegations of control in either their Petition or Respondent's Brief are general allegations of control of Boone Hospital by BJC, and some sort of business relationship far short of an allegation of alter ego, neither of which matter, given the fact that this case and the alleged damage to Plaintiff all involved the placement of the trochar directly into the liver and bloodstream. Respondent cannot, and in fact does not, point to any specific instances of direct control by BJC of Dr. Pitt or his medical group, nor any

specific instances of control by Boone Hospital of Dr. Pitt or his medical group. Hence, whatever the nature of the relationship between Boone and BJC may be, and whatever control over Boone BJC may have, there has never been allegation or reasonable belief that either or both controlled Dr. Pitt or his surgical group. Accordingly, there can be no possible connection between BJC's "control" and the damages alleged here. Without a connection between BJC's "control" and the damages alleged here, and with no reasonable basis to believe such control over Dr. Pitt existed, venue was never proper in the first place.

Respondent now attempts to invent a "piercing the corporate veil" claim from the insufficient allegations in Plaintiffs' Petition. Respondent and Plaintiffs cannot create this allegation for the first time at this stage of the proceedings. Furthermore, just as the other control arguments made here were defeated in *Ritter v. Barnes Jewish Christian Health Systems*, 987 S.W.2d 377 (Mo. App. E.D. 1999), the court in *Ritter* also addressed, and rejected, an "alter ego" theory against BJC.

In order for Plaintiffs to pierce the corporate veil under an "alter ego" theory, she must allege:

> 1) Control, not mere majority or complete stock control, but ***complete domination, not only of finances, but of policy and business practice*** in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

2) Such ***control must have been used by the corporation to commit fraud or wrong***, to perpetrate the violation of statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and

3) The ***control and breach of duty must proximately cause the injury*** or unjust loss complained of.

Real Estate Investors Four, Inc. v. American Design Group, Inc., 46 S.W.3d 51, 56 (Mo. App. E.D. 2001) (emphasis added); *see also Ritter*, 987 S.W.2d at 384-85.

Ritter addressed these issues in a similar case against BJC and an affiliate hospital, and found that the elements necessary to pierce the corporate veil were lacking. *Id*. Relators' brief discusses the similarities between the *Ritter* case and this one at length, so such a discussion is unnecessary herein. However, it is important to note that, in *Ritter*, a case in which counsel for Plaintiffs participated, the court found that there was not sufficient control over the relevant health care, there was no nefarious motive or fraud[1] perpetuated by the affiliation, and there certainly could be no proximate causal

[1] Even though Respondent asserts that BJC and Boone Hospital Center were engaged in a fraudulent purpose to deceive the people of Boone County into believing that Boone Hospital Center was actually BJC, Plaintiffs have not alleged any such fraud with the specificity required under the Missouri Rules of Civil Procedure for fraud pleadings. Missouri Rule of Civil Procedure Rule 55.15.

relationship between any alleged control by BJC over the affiliated hospital and the plaintiff's damages. *Id*. at 385.

Moreover, ***even if*** such an allegation were otherwise sufficient, it is facially deficient for the further reason that Plaintiffs *still* cannot, and do not, allege the appropriate causal connection between any alter ego control by BJC over Boone Hospital Center such that either entity controlled the actions of a private physician employed by a private medical group. It is of no consequence that BJC may have dictated to Boone what size letters to use on its signs, what flags to fly, or even what coffee to serve and how much to charge for it. It is of no consequence whether BJC told Boone's nurses how they must dress a wound, or change an IV, or write a doctor's order, because none of that would get Plaintiffs where they need to be. Plaintiffs' problem remains that there never was any basis for any allegation or reasonable belief that either BJC or Boone either employed Dr. Pitt or his medical group, or told him how, when, or where to place that trochar, or when to introduce the carbon dioxide insufflation medium into this patient or any other patient. Thus, Respondent's attempt to first create an alter ego claim now fails completely for all of the deficiencies stated above, as does the superfluous argument that BJC and Boone have a relationship whereby BJC has some control over Boone, since there is no pleading as to how that relationship, whatever it is, has proximately caused the damages alleged.

IV. (Reply to Brief of Respondent Point V) Respondent Provides No Credible Reasoning As To How Plaintiffs or Plaintiffs' Counsel Could Have Had An Objective, Realistic Belief That Plaintiffs Had A Valid Claim Against BJC.

Relators' Opening Brief as well as Point III above have already set out many of the reasons why Plaintiffs' counsel could not have had an objective reasonable belief that Plaintiffs had a valid claim against BJC at the time of the original filing. As noted in Relators' Opening Brief, Plaintiffs knew even more at the time the suit was brought again in 2006, and hence that evidence will not be repeated here.

Of note, as indicated earlier in this brief, Plaintiffs knew of Dr. Pitt and his being affiliated with a private medical group which they also sued at the outset, but never did they specifically allege Dr. Pitt or his group were agents or employees of Boone or BJC, because of course they had no reasonable basis then or now to believe Dr. Pitt or his medical group were agents or employees of Boone or BJC. Plaintiffs urge that they were "outsiders" to the specific control exercised by BJC in abdominal laparoscopy procedures. Respondent's Brief at 48. As medical malpractice attorneys they knew well that no hospital controls where a surgeon places the trochar and when to introduce the gas. If they had ever encountered such a preposterous situation of a hospital controlling a surgeon as to how to place his laparoscopic instruments into the patient and when to insufflate, they would be sure to have mentioned it in their brief to support their personal "reasonable belief" as "outsiders." They did not because of course no such situation exists or has been encountered by them ever, nor would such a situation be reasonably

expected by any medical malpractice attorney or member of the general public for that matter.

Plaintiffs note that Missouri law recognizes that physicians who exercise independent judgment can still be employees of a hospital. The problem is that Dr. Pitt was not, nor was his group, nor (as discussed earlier) was either remotely likely to be, nor did Plaintiffs allege that they were. Hence, there was neither a reasonable belief nor an allegation that Dr. Pitt or his medical group were employed by BJC. By the time the case was brought again in 2006, Plaintiffs again failed to allege Dr. Pitt or his medical group were employees of BJC, which is appropriate as they had no cause for such a belief. In fact, Plaintiffs did allege Dr. Pitt was an agent – but not of BJC. Rather, they accurately alleged Dr. Pitt was an agent of his private medical group, Colombia Surgical Associates, Inc. (Exhibit 10, paragraph 24).

Respondent argues that Plaintiff Qamar's and Plaintiff Haider's depositions are irrelevant, because Plaintiff Qamar is brain damaged and cannot recall events. Looking then only to Plaintiff Haider's testimony alone (as there is no claim of his incompetence), it establishes that even at the time of his deposition in 2007, he did not have any information about whether any of the health care providers who cared for his wife at Boone Hospital Center were actually employees of BJC (L.F. 1181); he does not believe somebody form BJC directed Pitt in providing care to his wife (L.F. 1181); and he does not have any information that BJC controlled any of the health care providers at Boone Hospital Center.

Obviously Haider's testimony provides no basis for asserting agency of whatever nature, or control, or employment. Respondent's sole response to that comes in a single sentence at the end of a footnote, stating that "Plaintiff Haider's testimony is clearly controverted." Respondent's Brief at 59, 60 n.9, referencing Exhibits 33, L.F. 1260-62. The problem is that this reference by Respondent is to an affidavit filed by Dr. Haider in March of 2008, far post-dating his deposition, and contradicting what his wife Qamar had said in her deposition which we are asked to ignore. He presumably did not believe the assertions by her, as he would have said so in his deposition a year before this affidavit, so those cannot be a basis for a good faith belief that Dr. Pitt was an agent or employee of BJC.

Moreover, even if believed, the affidavit is insufficient to establish an objective good faith belief in agency or employment, falling woefully short of the reasonable belief requirement. It alleges that his wife Qamar, now brain damaged, had a belief that Dr. Pitt had an "affiliation" with Boone Hospital Center, and Dr. Pitt never told her he was not employed by Boone. Obviously, that is a far cry from a belief that Boone employed or controlled Dr. Pitt in his surgery, and it is totally silent as to any belief that BJC employed or controlled Dr. Pitt in his surgery. It does not even set out the means by which Boone, BJC or Dr. Pitt would have caused her to reach this belief which she did not testify to, but which she allegedly once had. It is an insufficient basis for a good faith belief of agency or employment by Boone, much less by BJC.

Lastly of course, this supposed belief by Qamar, in addition to its other multitude of deficiencies, is not in a vacuum. Her counsel also had a knowledge base and as

pointed out extensively already, that knowledge base would further defeat any chance for an objectively reasonable belief that BJC employed Dr. Pitt or controlled his surgery.

CONCLUSION

For the reasons set out in each of the points raised by Relators in their Opening Brief, none of which have been validly refuted by Respondent, and any one of which would mandate a different ruling by Respondent, Respondent has acted without or in excess of his jurisdiction in denying Relators' Amended Motion to Transfer Based on Improper Venue. Relators have no other adequate remedy by appeal or otherwise and would suffer irreparable harm if these Writs were not to issue. This Court should issue a Writ of Prohibition preventing Respondent from exercising jurisdiction in this case and a Writ of Mandamus ordering Respondent to transfer the case against Relators to Boone County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was placed in a sealed envelope, clearly addressed, with proper postage fully prepaid, and deposited in the United States mail at St. Louis, Missouri on this 12th day of September, 2008, to the undersigned counsel:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of Relators James B. Pitt & Columbia Surgical Associates, Inc., complies with the limitations contained in Rule 84.06 and that:

(1) The signature block above contains the information required by Rule 55.03;
(2) The brief complies with the limitations contained in Rule 84.06(b);
(3) The brief contains 5,176 words, as determined by the word count feature of Microsoft Word;
(4) I am filing with this brief a computer disk which contains a copy of the above and foregoing brief in the Microsoft Word format; and
(5) That the attached computer disk has been scanned for viruses and that it is virus free.

I further certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the service list the 12th day of September, 2008.

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