

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.)

Docket No. SC89284

The Honorable Donald L. McCullin,)
Judge of Division No. 20 of the)
Circuit Court, City of St. Louis,)
Missouri,)

SUBJECT TO PROTECTIVE
ORDER AND FILED UNDER
SEAL

Respondent.)

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. MC CULLIN, CIRCUIT JUDGE

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

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JURISDICTIONAL STATEMENT

This action is before this Court on Relators' Petition for Writ of Mandamus and/or Prohibition. Relators seek a Writ of Prohibition to prohibit the trial court from exercising jurisdiction over this matter in the City of St. Louis and Relators seek a Writ of Mandamus to order the trial court to transfer this case to the Circuit Court of Boone County. The Missouri Court of Appeals, Eastern District, denied Relators petition for writ of mandamus and/or prohibition. (L.F. 1296)¹ This Court issued a preliminary Writ in Prohibition on May 20, 2008. Relators seek to have the Writ made permanent and the issuance of a Writ of Mandamus. This Court has jurisdiction to issue and determine original remedial writs pursuant to Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS

Plaintiffs here claim injuries allegedly sustained at the outset of a surgery performed by Dr. Pitt on Plaintiff Jane Doe (Sadaf Qamar) (hereinafter "Plaintiff Qamar") during which her liver and vascular system were entered inadvertently and some gas was allowed to enter her bloodstream. Boone County is where Dr. Pitt, his group,

¹ The Legal File herein includes all previously-filed motions and the "Joint Exhibits" filed by BJC Health System ("BJC") in SC89282, and adopted herein, by Relators. *See* Memorandum of Relators, James Bruce Pitt, D.O., and Columbia Surgical Associates, Inc., Adopting the Exhibits of BJC Health System Filed in Petition for Writ of BJC Health System. Cites to "Joint Exhibits" will appear as "L.F. #" in this Brief.

and the hospital where the surgery was conducted are all located, and where Plaintiff Qamar then resided. Dr. Pitt has never been an employee of BJC.

On or about October 7, 2004, Plaintiff Qamar, by and through her husband as durable power of attorney, her husband individually, and her children (together “Plaintiffs”) filed this action for damages in the Circuit Court of the City of St. Louis, in which they allege that the defendants Pitt and Columbia Surgical Associates Inc., (his group) were negligent during a diagnostic laparoscopy, during which her liver was punctured and carbon dioxide entered her circulatory system instead of her abdomen. (Petition, L.F. 1-21, ¶14-21) In their Petition, the only allegations Plaintiffs make with regard to venue vis a vis Defendant BJC are as follows:

Defendant BJC has offices and/or agents for the transaction of its usual course of business located within the City of St. Louis, Missouri, and thus venue is proper in the Circuit Court of the City of St. Louis, Missouri; (L.F. 5, ¶12), and

Defendant BJC Health System (hereinafter “BJC”) 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 Center, 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 Center, and that BJC is the parent corporation presently overseeing the operations of Barnes-Jewish Hospital, St. Louis Children's Hospital, Boone Hospital Center, Christian Northeast-Northwest Hospital, Missouri Baptist Hospital, Washington University Medical 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* and the other aforementioned hospitals and health care centers.

(L.F. 3, ¶6). (emphasis added).

All care and treatment of Plaintiff Qamar occurred in Boone County, Missouri; no care or treatment occurred within the City of St. Louis. *See* Petition for Writ of Mandamus and/or Prohibition, at 5, ¶3 and Answer to Petition for Writ of Mandamus and/or Prohibition, at 2, ¶3; *see also* Petition, L.F. 1-21. The registered agents for all Defendants (including Relators), except Defendant BJC, are located in Columbia, Boone County, Missouri.² (L.F. 1-2). Defendant BJC, Defendant Boone Hospital Center, and Respondent Columbia Surgical Associates, Inc., are all separately incorporated entities. (Petition, L.F. 3-4, ¶¶4-6) Thus, Plaintiffs' Petition admits many of the crucial venue facts helpful to Relators, including: (1) that the location of defendant Boone Hospital

² The registered agent of Defendant BJC Health System is located in St. Louis County, Missouri, at 3015 North Ballas Roads, St. Louis Missouri 63131. (L.F. 1).

Center's registered office and registered agent is in Boone County, Missouri; and (2) that the allegedly negligent events occurred only at Boone Hospital Center. (*See* Petition, L.F. 1-21)

Relators filed their Motion to Transfer Venue, asserting that BJC was pretensively joined in an effort to create venue. (L.F. 22-33) Thereafter, Plaintiffs filed their Response to Relators' Motion to Transfer Venue, in which they asserted that venue was proper in the City of St. Louis. (L.F. 34-52) In addition, other Defendants filed motions to dismiss and/or transfer venue on similar grounds, and Plaintiffs filed responses thereto. (L.F. 53-139) Thereafter, Relators filed the First Supplemental Affidavit of James Bruce Pitt, D.O., in support of their Motion to Transfer Venue, attesting that Relator Pitt exercised his own independent skill and judgment in making all decisions relating to the medical care and treatment he provided to Plaintiff Qamar. (L.F. 140-41) In this affidavit, Relator Pitt attested that neither BJC nor Boone Hospital Center controlled or had the right to control his independent medical decisions with respect to Plaintiff Qamar, he is not and never has been an employee or agent of Boone Hospital Center or BJC, and was not acting as an employee or agent of either in his capacity as a physician rendering medical care and treatment to Plaintiff Qamar as mentioned in the Petition. (L.F. 141, ¶¶ 4-6) Relators then filed their Memorandum in Support of their Motion to Transfer Venue. (L.F. 142-49)

On May 3, 2006, Plaintiffs filed their First Amended Petition adding several Defendants.³ (First Amended Petition, L.F. 150-79) Relators then filed their Second Joint Motion to Transfer Venue, (L.F. 180-96), and Plaintiffs filed their Response to Relators' Second Joint Motion to Transfer Venue, (L.F. 197-219). Defendants Boone Hospital Center and BJC Health System similarly filed motions to transfer venue (and supporting affidavits), and Plaintiffs filed responses thereto. (L.F. 220-324)

Two of the newly-added defendants, Chris Martin, M.D., and Columbia Nephrology & Internal Medicine, P.C., submitted a motion to transfer venue and an affidavit in support. (L.F. 322-24) In that affidavit, Defendant Dr. Martin attested: (1) that he exercised his own independent skill and judgment in making all medical care and treatment decisions regarding Plaintiff Qamar, and that neither Boone Hospital Center, CH Allied Services, Inc., nor BJC controlled or had the right to control his independent medical decisions; and (2) that he was not an employee or agent, servant, whether actual or ostensible, of Boone Hospital Center, CH Allied Services, Inc., or BJC and was not acting as an employee or agent of BJC in his capacity as a physician rendering medical care and treatment to Plaintiff Qamar. (L.F. 323, ¶¶ 3-5)

³ Dr. Kim Morse, M.D. and Womens Health Associates, Inc., were named in the Petition, however, they were dismissed without prejudice on May 10, 2005, and then named as Defendants again on May 3, 2006, along with Dr. Chris Martin, M.D., and Columbia Nephrology and Internal Medicine, P.C.

On November 22, 2006, Plaintiffs filed an Amended Supplemental Response to all Defendants' Motions to Dismiss or Transfer for Improper Venue. (L.F. 325-980). Included with that filing were numerous exhibits submitted in opposition to the various motions to dismiss or transfer venue. (Exhibits included with Joint Exhibit 18, L.F. 357-980).⁴ The trial court, on December 4, 2006, ordered that, in order to preserve the confidentiality of the parties, venue discovery and any and all documents related thereto, all venue briefing and documents, including all memoranda in support of and in opposition to motions to transfer and all exhibits thereto, shall be filed under seal. (Order Regarding Procedure for Filing Venue Briefing, L.F. 981-83)

On October 30, 2007, Defendant BJC filed its Memorandum of Law in support of its Motion to Dismiss and/or Transfer Venue. (L.F. 984-1183) Relators adopted the Memorandum of Law of Defendants BJC and Boone Hospital Center. (L.F. 1184-1185) Also on October 30, 2007, all Motions to Dismiss and/or Transfer Venue of all Defendants, including Relators, were called, heard, and taken under submission. As of October 30, 2007, Kimberly Karol Morse, M.D.; Women's Health Associates, Inc.; Chris

⁴ The Exhibits attached to Plaintiffs' Amended Supplemental Response are numbered 1-42, however, no documents were submitted with exhibit numbers 6, 30-33, 36, or 38-40, and so, no such Exhibits are in the Legal File. This is meant only to clarify why those numbers are without Exhibits in the Legal File and is not meant to imply any nefarious motive on behalf of Plaintiffs or Plaintiffs' Counsel.

J. Martin, M.D.; and Columbia Nephrology and Internal Medicine, P.C., were dismissed without prejudice from the lawsuit. (L.F. 1186-91)

On February 27, 2007, Respondent entered his order denying Defendant BJC's Motion to Dismiss and/or Transfer Venue, but did not rule on the other defendants' (including Relators') motions to transfer venue. (L.F. 1193-1201) On March 12, 2008, Respondent entered his Orders denying the Motions to Transfer Venue of the remaining defendants (including Relators). (L.F. 1202-14)

On March 20, 2008, Relators filed a Petition for Writ of Mandamus and/or Prohibition in the Court of Appeals, Eastern District. (ED91082) Also on March 20, 2008, Defendants BJC and Boone Hospital Center each filed similar Petitions for Writ of Mandamus and/or Prohibition. (ED91081 and ED91083, respectively) On March 24, 2008, the Eastern District issued three preliminary Orders in Prohibition. (L.F. 1215-17) Respondent filed answers on April 4, 2008. (L.F. 1218-94) On April 7, 2008, the Eastern District ordered the Preliminary Orders in Prohibition quashed and the Writs denied. (L.F. 1295-97) Relators (and Defendants BJC and Boone Hospital Center) then filed Petitions for Writ of Mandamus and/or Prohibition in this court. (SC89283 for Boone Hospital Center and SC89282 for BJC)

This Court issued a Preliminary Writ of Prohibition on May 20, 2008, which Respondent answered on June 18, 2008. This Briefing ensues.

STANDARD OF REVIEW

Mandamus is an affirmative remedy in nature and should be issued to compel the performance of an act which is required by law, but the performance of which has been

refused. *State ex rel. McDonnell Douglas Corp. v. Gaertner*, 601 S.W.2d 295, 296 (Mo. App. E.D. 1980). Mandamus also lies to require the performance of a ministerial act. *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820, 823 (Mo. banc 1994). Where the trial court fails to exercise a ministerial duty to transfer a case to a county in which venue is proper, mandamus must issue. *Id.* at 821; *State ex rel. Domino's Pizza, Inc. v. Dowd*, 941 S.W.2d 663, 664 (Mo. App. E.D. 1997). Moreover, where the trial court retains an improperly venued case, it acts in excess of its jurisdiction, and the error is so fundamental that it provides the basis for a writ of prohibition. *State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. banc 1985). "Prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue." *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28, 32 (Mo. App. E.D. 2002).

POINTS RELIED ON

I. Relators are entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County, Missouri, because Plaintiffs Filed Their First Amended Petition adding new defendants on May 3, 2006, and therefore Section 508.010.4, As Amended By HB 393, Applies To Determine Venue, So Venue is Appropriate Only In The County Where Plaintiff Qamar was first injured which pursuant to Section 538.232, RSMo. means where Plaintiff Qamar First Received Medical Treatment By A Defendant For A Medical Condition At Issue Which In This Case Is Boone County, Missouri, In That It Is Not Disputed That Such Treatment Occurred in Boone County.

Cases

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

Statutes

Section 538.232, RSMo (2005)

Section 508.010.4, RSMo (2005) (as amended by HB 393)

II. Relators are entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County, Missouri, because Plaintiffs Pretensively joined BJC as a defendant, as established on two independent bases namely in that (1) the petition failed to plead the necessary elements to set out a claim for relief as to BJC and (2) the information available to Plaintiffs at the time the Petition was filed did not support a reasonable objective legal opinion that a case could be made against BJC and accordingly Section 355.176.4 Requires That The Underlying Action Be Brought In Boone County in that Boone Hospital Center is the Only Remaining Nonprofit Corporation Defendant and it is located in Boone County and maintains its registered agent there, which is also where the cause of action accrued pursuant to that Statute as well as 508.010.4 RSMo.

Cases

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)

Ritter v. BJC Barnes Jewish Christian Health Systems, 987 S.W.2d 377 (Mo. App. E.D. 1999)

Statutes

Section 355.176, RSMo

ARGUMENT

I. Relators are entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County, Missouri, because Plaintiffs Filed Their First Amended Petition adding new defendants on May 3, 2006, and therefore Section 508.010.4, As Amended By HB 393, Applies To Determine Venue, So Venue is Appropriate Only In The County Where Plaintiff Qamar was first injured which pursuant to Section 538.232, RSMo. means where Plaintiff Qamar First Received Medical Treatment By A Defendant For A Medical Condition At Issue Which In This Case Is Boone County, Missouri In That It Is Not Disputed That Such Treatment Occurred in Boone County.

The question at the heart of this Appeal is whether the law requires that a private surgeon in Boone County commencing an operation on a patient in Boone County at a hospital in Boone County should have to defend that medical care in the Circuit Court for the City of St. Louis. Plaintiffs brought this cause of action in the City of St. Louis alleging brain and nerve damage from medical malpractice, specifically that Plaintiff Qamar's liver and vascular system were inadvertently entered when defendant Dr. Pitt placed a surgical trocar in Plaintiff Qamar's abdomen and began introducing gas through that entry point at the start of a surgery in Columbia, Missouri, the city where Dr. Pitt, his group, and the hospital where the surgery was conducted are all located, and where the patient resided at the time of the alleged injury.

Although Plaintiffs brought this case in the City of St. Louis, as a matter of law venue is proper only in Boone County: *See State ex rel Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). 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 determined at the time that amended petition is filed. In this case, the First Amended Petition adding two new defendants to the case was filed on May 3, 2006, and hence that is the date the suit was “brought.” *Linthicum*, 57 S.W.3d at 858.

Section 508.010.4, *as amended by HB 393*, would apply to a venue determination in this case:

(4) Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the State of Missouri, venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.

Section 508.010.4, RSMo. Per Section 538.232, RSMo., in a medical malpractice action, plaintiff is considered first injured “only in the county where the plaintiff first received treatment by a defendant for a medical condition at issue in the case.”

The First Amended Petition alleges that Plaintiff was first admitted as a patient at Boone Hospital Center and that all of the medical care at issue occurred only at Boone Hospital Center. (*See* First Amended Petition, L.F. 150-79; *see also* Answer to Relators James Bruce Pitt, D.O., and Columbia Surgical Associates, Inc.’s Petition for Writ of Mandamus And/Or Prohibition, 2, ¶3 (admitting Paragraph 3 of Relators’ Petition, which

states that all care and treatment of Plaintiff Qamar occurred in Boone County)) It is uncontroverted that Defendant Boone Hospital Center is located in Boone County. (*See e.g.*, Plaintiffs’ Response to Relators Motion to Transfer Venue, L.F. 34-52) Hence, Respondent was required to transfer the case to Boone County pursuant to § 508.010.4, as amended by HB 393.

In fairness, it should be noted that in *State ex rel. Burns v. Whittington*, 219 S.W.3d 224 (Mo. banc 2007), this court held that a suit alleging illness caused by exposure to toxic material which was amended to become a wrongful death suit upon the death of the plaintiff was not brought anew so as to trigger new venue consideration based upon the date of the amendment, so the amendments of HB393 to section 508.010, RSMo., were held not to apply.

However, of critical importance, *Burns* specifically noted that the amendment involved *did not add any defendants*. *Burns*, 219 S.W.3d at 225 (emphasis supplied). Moreover, there is no language in *Burns* to suggest that *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), is overruled or otherwise limited. *Linthicum* stands for the proposition that *when one or more defendants are added* to a petition, the action is “brought” (and correspondingly venue is re-examined), at the time amended petition is filed.

Because, according to *Linthicum* the extant cause of action was brought after the effective date of HB 393, Relators are entitled to a writ prohibiting Respondent from exercising jurisdiction over the underlying matter and a writ mandating that Respondent transfer the underlying matter to Boone County.

II. Relators are entitled to an order prohibiting Respondent from taking any further action in this case except transferring this entire case to Boone County, Missouri, because Plaintiffs Pretensively joined BJC as a defendant, as established on two independent bases namely in that (1) the petition failed to plead the necessary elements to set out a claim for relief as to BJC and (2) the information available to Plaintiffs at the time the Petition was filed did not support a reasonable objective legal opinion that a case could be made against BJC and accordingly Section 355.176.4 Requires That The Underlying Action Be Brought In Boone County in that Boone Hospital Center is the Only Remaining Nonprofit Corporation Defendant and it is located in Boone County and maintains its registered agent there, which is also where the cause of action accrued pursuant to that Statute as well as 508.010.4, RSMo.

Missouri law does not allow a party to be joined to a lawsuit solely for the purpose of manipulating venue. The pretensively joined defendant should be disregarded for purposes of determining venue. Venue is pretensive if: (1) the petition fails to state a claim for which relief can be granted against the resident defendant; or (2) the record in support of a motion asserting pretensive joinder establishes there is no cause of action against the resident defendant and the information available at the time the Petition was filed would not support a reasonable legal opinion that a case could be made against that defendant. *Hefner v. Dausmann*, 996 S.W.2d 660, 663 (Mo. App. S.D. 1999) (citing *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. banc 1996)); *See also State ex rel Malone v. Mummert*, 889 S.W.2d 822, at 824-25 (Mo. banc 1994).

The plaintiff has the burden of showing venue is proper. “The procedure for challenging venue is now expressed in Rule 51.045, but the burden of showing that venue is proper has been with the plaintiff when venue is challenged.” *Igoe v. Department of Labor and Industrial Relations*, 152 S.W.3d 284, 288 (Mo. banc 2005).

A. Plaintiff Fails The First Prong Of The Pretensive Joinder Analysis Because The Allegations Of Plaintiffs’ First Amended Petition Fail To State A Claim Against Defendant BJC.

As noted above, the first prong of the pretensive joinder analysis is whether plaintiffs have validly stated a legally recognized cause of action against BJC. *Hefner*, 996 S.W.2d at 663. It is well established under Missouri law that BJC may only be sued along with its affiliates or agents if plaintiffs validly claim: (1) “control sufficient to pierce the corporate veil,” and/or (2) that “the alleged control by BJC Health System affected the health care at issue and caused the alleged injury.” *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528, 531 (Mo. banc 2003) (hereinafter *Neill*).

- 1. To the extent Plaintiffs claim BJC is liable for Boone Hospital Center based upon the notion of corporate veil piercing, the allegations are legally insufficient.**

Plaintiffs admit both BJC and Boone Hospital Center are separate Missouri corporations. (See First Amended Petition, L.F. 150-51 (Caption), 152-53, ¶¶5-6). Defendants also confirmed this fact with information from the Missouri Secretary of State’s Office. (See L.F. 110-18, 287-95). Plaintiffs’ First Amended Petition does not contain any allegations of control by BJC over the separately incorporated defendant

Boone Hospital Center that even hint at the so-called corporate veil piercing theory. Under Missouri law, a parent corporation is not liable for the conduct of one of its subsidiary corporations unless an exception to their corporate separateness is pled and proven. *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 644 (Mo. banc 2002). For an exception to apply, Plaintiffs would have to plead and prove Defendant Boone Hospital Center was a mere sham corporation of BJC and designed to perpetuate a fraud upon the Plaintiffs. This is required proof even if one corporation totally owns the other and even if one corporation exercises some degree of control over the corporation whose conduct is the basis of the claim. *See Neill*, 121 S.W.3d at 531; *State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138, 140-41 (Mo. App. E.D. 2002) (hereinafter *BJC Health*); *Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d 377, 384-87 (Mo. App. E.D. 1999). Once again, Plaintiffs' First Amended Petition contains no alter ego allegations.

2. To the extent Plaintiffs claim BJC is liable on the basis of control of the Boone Hospital Center, the allegations are legally insufficient.

The second possible source of a cause of action against BJC regards BJC's alleged "control" over Boone Hospital Center. However, Missouri law is clear that no liability can attach to Defendant BJC based upon its relationship with Boone Hospital Center unless "the alleged control by defendant BJC Health System affected the health care at issue and caused the alleged injury." *Neill*, 121 S.W.3d at 531.

In his Order regarding Relators' Motion to Dismiss, Respondent applied an incorrect standard to find Plaintiffs had stated a claim against BJC in order to obtain

venue in the City of St. Louis. Respondent simply held Plaintiffs have pleaded “that BJC had control over Boone Hospital Center.” The correct standard, however, is not simply one of control over the hospital, but rather one of *control affecting the health care at issue and causing the alleged injury*.

Plaintiffs’ only allegations against BJC revolve around general allegations of control by BJC over Relators and other defendants. However, *Neill* requires more: Plaintiffs must make specific allegations of *how* Defendant BJC’s allegedly controlled the *health care* at Boone Hospital Center such that it affected the health care provided to Plaintiff Qamar and caused the alleged injuries. 121 S.W.3d 528, 531. Two cases were discussed in *Neill*, and the court discussed the specificity of the allegations in each, which the court considered sufficient:

In one case, the plaintiffs claimed that the medical providers administered substandard medical care “following the cost saving procedures set up by defendant BJC.” In the other case, plaintiffs claimed that “BJC maintains control over [the other defendant], including control and oversight of the adoption, promulgation and use of standards, protocols, and procedural guidelines,” and that BJC-in 22 specific ways-directly affected the health care and caused the alleged.

Neill, 121 S.W.3d at 531. In stark contrast, here Plaintiffs’ First Amended Petition does not contain such allegations of specific control by BJC over Relators or that any control directly affected the health care to Plaintiff Qamar and caused her alleged injuries. This failure by Plaintiffs is fatal to even possibly stating a claim against BJC. Accordingly,

Respondent should have disregarded BJC's presence in the venue analysis and found that venue in the City of St. Louis was improper.

Respondent's Answer and briefing in the Court of Appeals below (ED91082) contains numerous examples of unfounded statements of law or fact, which serve to underscore the weakness of the position taken by Plaintiffs in the Circuit Court by Respondent herein regarding the "control" and "piercing the corporate veil" issues. For example, Plaintiffs argue on behalf of Respondent that they have pled "alter ego" and joint venture theories in the First Amended Petition, going so far as to assert the evidence is "abundant" that the affiliation agreement between BJC and the affiliated hospitals has been used as a subterfuge on the public. In fact there are no such allegations. Further, the Court of Appeals in *Ritter* has already held, as a matter of law, that the affiliation agreement serves legitimate business purposes and is not a subterfuge. 987 S.W.2d at 384-85.

Nowhere in Plaintiffs' Petition or First Amended Petition are there any allegations, beyond legal conclusions, specifying in what manner any alleged control by BJC affected the health care provided to Plaintiff Qamar at Boone Hospital Center and caused her alleged injuries. Plaintiffs' unsupported legal conclusion that BJC "exercises control" over Boone Hospital Center (*See* Petition L.F. 3-4, ¶ 6; First Amended Petition, L.F. 152-53, ¶ 6) is insufficient to state a claim against BJC under Missouri law. Plaintiffs fail to plead what the alleged "control" consisted of and how it specifically affected health care to Qamar and caused her alleged injuries.

3. To the extent Plaintiffs claim BJC is liable based upon control over the individual non-corporate Defendants, the allegations are legally insufficient.

Additionally, to the extent Plaintiffs are attempting to claim defendant BJC is liable for the alleged medical malpractice for the actions of the individual non-corporate Defendants; such allegations are legally insufficient to state a claim. Plaintiffs' First Amended Petition does not contain any specific counts or allegations that the emergency department physicians on May 6 and 8, 2004, or that Relator Pitt on May 14, 2004, were employees or agents of defendant BJC such that it is liable for their alleged actions or inactions. (*See* First Amended Petition, L.F. 150-79). Moreover, any such attempts to plead employment or agency fall short because they are mere conclusions and do not contain any factual allegations to establish that health care providers at Boone Hospital Center who were employees/agents/servants of Defendant BJC and how that impacted the health care Plaintiff Qamar received. *See Downey v. Mitchell*, 835 S.W.2d 554, 556 (Mo. App. E.D. 1992); *Eyberg v. Shah*, 773 S.W.2d 887, 890 (Mo. App. S.D. 1989). Missouri law is clear that the failure to include such factual allegations means dismissal of a petition is warranted. *See e.g., Berkowski v. St. Louis County Bd. of Election Com'rs*, 854 S.W.2d 819, 823 (Mo. App. E.D. 1993); *Eyberg*, 773 S.W.2d at 890; *Downey*, 835 S.W.2d at 556.

For all of the above reasons, Plaintiffs lose under the first prong of the test for proving the necessary control to avoid dismissal for pretensive joinder, and hence Respondent erred in considering BJC's presence in its venue analysis against Relators.

B. *Plaintiffs’ First Amended Petition fails the second prong of the pretensive joinder analysis because the discovery, case law, and affidavits in this case show Plaintiffs as of the time suit was brought, could not have had an objective, realistic belief under the law and facts that they had a valid claim against BJC, particularly in light of Plaintiffs’ Counsel’s knowledge of the law of Missouri, as it applies to BJC and its affiliate hospitals from their experiences in Ritter v. Barnes Jewish Christian Health Systems, 987 S.W.2d 377 (Mo.App. E.D. 1999).*

Venue is pretensive if (1) the petition on its face fails to state a claim against the [joined] defendant; or (2) 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 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.

Malone, 889 S.W.2d at 824-825 (citing *State ex rel Shelton v. Mummert*, 879 S.W.2d 525, 527 (Mo. banc 1994) (quoting *State ex rel Toastmaster, Inc. v. Mummert*, 857 S.W.2d 869, 870-71 (Mo. App. E.D. 1993))). *Malone* further stated: “The test for pretensive joinder is an objective one, requiring a “realistic belief that under the law and the evidence a [valid] claim exists.” *Id.* at 825.

The *law* and the corresponding deficiencies in Plaintiffs' pleading have already been discussed, and correspondingly establish that Plaintiffs' did not have an objective realistic expectation that they had pleaded a legally sufficient case against BJC.

As for whether the *information* available at the time the claim was brought would support an objective realistic belief that a legally-recognized case could be proven against BJC, there is an uncharacteristically expansive fact base upon which to draw. Specifically, the striking similarities between the case at bar and the *Ritter v. Barnes Jewish Christian Health Systems*, 987 S.W.2d 377 (Mo.App. E.D. 1999), case underscore that Plaintiffs cannot state a claim against BJC.

1. The Ritter Case

Almost ten years ago, the Court of Appeals, Eastern District, decided the case of *Ritter*, which involved a claim *brought by current Plaintiffs' Counsel* alleging that the BJC parent corporation was somehow legally responsible for alleged medical negligence that occurred during gallbladder surgery performed by a private physician at Christian Hospital. 987 S.W.2d at 377. The fact pattern of the *Ritter* case and the core argument of alleged control by the BJC parent is the functional mirror image of the issues and facts in the case at bar. After a thorough analysis of the pleadings, the evidence and the law, in response to the defense motion for summary judgment, the *Ritter* court held that Ritter had failed to carry their burden – which was to show that the BJC parent corporation had the right to control, or in fact, did control the health care delivered to plaintiff Ritter, and accordingly granted summary judgment to BJC. *Id.*, at 388.

The core facts in the *Ritter* case relative to the claimed liability of the BJC parent corporation are nearly identical to the core facts in this case. For example, both cases involved surgery performed at an affiliate hospital of the BJC parent corporation; the physicians in each case were not employees of the hospitals involved, nor employees of defendant BJC; the claimed negligence had to do with how the surgery was performed by the private physicians and did not involve any claims that hospital employees, such as nurses, were at fault. *Id.*, at 381, 386.

In holding that Missouri law would not impose liability on the BJC parent corporation for the gallbladder surgery performed at Christian Hospital, the court recited the corporate entity doctrine and its exceptions (alter ego and direct participatory control) and then stated in pertinent part in its opinion:

Here, the Affiliation Agreement and witness testimony would support a finding that BJC exerts some control over Christian Hospital. *However, the evidence also makes clear that it did so for business reasons, while observing autonomy in the individual entities.* Although BJC has control over some of Christian Hospital's affairs and it participates in many of Christian Hospital's activities, *it does not have control or right to control over medical care of patients at Christian Hospital.* [citations omitted]. In particular, BJC did not have control or participate directly in Mr. Ritter's surgery. The evidence would not support a finding that BJC has actual, participatory or the right to control over Christian Hospital with respect to patient care including Mr. Ritter's surgery. *Thus, there is no evidence to*

support finding an agency relationship between BJC and Christian Hospital.

Id., at 385 (emphasis added). Further,

Ritter must establish that BJC and Christian Hospital have equal right to control health care delivery, the business venture or undertaking in which Christian Hospital is engaged. *She must show that BJC participated in making decisions regarding delivery of health care and, in particular, Mr. Ritter's surgery.* [citation omitted]. There has been no such showing. Ritter merely argues that a right of control over budget matters and the board of directors are sufficient. *Indirectly, these matters may have an effect on health care delivery, but they will not support a finding that BJC has the right to control the way in which Christian Hospital delivers health care.*

Id., at 388 (emphasis added). The court affirmed the trial court's granting of summary judgment to defendant BJC. *Id.*

There are two points that are particularly worth mentioning about *Ritter* and its application to this case. First, the case is now almost a decade old and no case has ever overturned its holdings as to the BJC parent's potential liability for health care provided at one of its affiliate hospitals. Of course, the *Ritter* court was not breaking new ground with its decision, but was skillfully applying traditional Missouri law to the health care setting. In any event, for almost ten years, Missouri lawyers have been aware of what a plaintiff must do to be able to have even a colorable claim against the BJC parent

corporation for allegedly negligent health care at one of its affiliate hospitals. On a related note, as noted at the outset of this discussion, the same Plaintiffs' law firm was involved in both *Ritter* and the underlying matter herein. This is particularly relevant for prong number two of the pretensive joinder analysis, because Plaintiffs' Counsel's participation in *Ritter* clearly demonstrates that long before they brought this suit, Plaintiffs' Counsel herein had an unusually extensive knowledge of the facts and legal issues discussed in *Ritter*.

Secondly, *Ritter* should, in and of itself, and without the need to consider the points which follow, control the outcome of this petition for writ and cause this Court to make absolute its Writ of Prohibition and issue a Writ of Mandamus, mandating that the trial court transfer this action to Boone County, Missouri.

Plaintiffs rely largely upon the Amended and Restated System Affiliation Agreement (hereafter "ARSAA") (L.F. 1015-72), to support their position here, however the ARSAA makes it clear that affiliate hospitals to the agreement have granted certain powers and authority to the BJC parent, but have retained all other powers. In the ARSAA, Section 4.3, entitled "Powers Reserved to the Institutions", it is clear "[e]ach Institution shall retain all powers not granted to the Parent Corporation..." (See L.F. 1038). *There is no mention in the ARSAA about oversight or control of health care at the system hospitals being granted to the BJC parent corporation.* (See L.F. 1015-72). In order to state a cause of action against BJC, BJC's "control" must have affected the healthcare that caused the alleged injury, thus the ARSAA is irrelevant under *Neill*, in fact *if anything*, the ARSAA supports Relators' argument that Plaintiffs could not have

had a reasonable belief of a cause of action against BJC, because it clearly does not impart such control over Boone Hospital Center to BJC. *See* 121 S.W.3d at 531

This issue was also analyzed in *Ritter*, where the court listed the powers allocated between the BJC parent and the affiliates and institutions. 987 S.W.2d at 382. The *Ritter* court specifically found that among the powers retained by the hospitals and not granted to the system parent corporation is the right to control the medical care of patients at the affiliate hospital. *Id.*, at 385. *In reviewing the same affiliation agreement as is involved here*, the court stated: “Although BJC has control over some of Christian Hospital’s affairs and participates in many of Christian Hospital’s activities, it *does not have control or right to control over medical care of patients* at Christian Hospital.” *Id.* (emphasis added). Thus, not only is the ARSAA objectively irrelevant under Missouri law (for the purpose to which Plaintiffs wish to apply it), but Plaintiffs’ Counsel clearly had *actual knowledge* of the Court’s interpretation of the ARSAA, under Missouri law, and knowledge that AARSA is irrelevant to establish a claim against BJC: The Missouri Court of Appeals, Eastern District, told them so almost ten years ago in *Ritter v. Barnes Jewish Christian Health Systems*, 987 S.W.2d 377 (Mo. App. E.D. 1999).

Next, most of the venue documents Plaintiffs submitted with their Amended Supplemental Response to Defendants’ Motion to Dismiss, (L.F. 325-980), were examined, analyzed, and rejected by the *Ritter* court. The system-wide policies Plaintiffs claim show control of defendant BJC over Boone Hospital Center do not help their case. (L.F. 331-332). First, it is clear that Plaintiffs are not claiming any of these policies involves any issues in the health care that is the subject of this lawsuit – *i.e.* the surgery

which Relator Pitt performed. Second, the court in *Ritter* specifically addressed these system-wide policies and found that they did not lead to the imposition of liability for the BJC parent corporation. 987 S.W.2d at 383. Thus Plaintiffs' Counsel had objective knowledge regarding this "evidence," in that this analysis was readily available to any attorney in the form of the published *Ritter* opinion, and personal knowledge, in that Plaintiffs' Counsel personally participated in the *Ritter* case (and so was clearly aware of its holdings).

The *Ritter* opinion also addressed BJC's authority to review budgets of affiliate hospitals and found that it did not create the kind of control that could result in liability being imputed from an affiliate hospital to the parent corporation. See 987 S.W.2d at 382. The court found that uniform human resource policies as being within the powers of the BJC parent corporation is not sufficient to create the necessary control, nor was the fact that the CEO of the BJC parent corporation can remove and appoint a senior executive officer of a system institution. *Id.*; see also L.F. 1034. Missouri law allows one corporation to have the same officers but to not be considered one controlled by the other, unless it can be proven that corporate formalities have been ignored.

There is nothing about the BJC parent corporation providing services to the system affiliates that somehow makes the parent corporation liable for the conduct of the affiliate hospitals in providing health care. Again, the *Ritter* court was well aware of how the system was formed and how it operated and the Missouri Court of Appeals, Eastern District, advised all attorneys in Missouri, especially Plaintiffs' Counsel, that more was needed to join BJC to a suit against an affiliate hospital. It found no issue with the parent

corporation providing centralized services, such as human resources, fund raising, strategic planning, capital finance and other such administrative activity as was identified to be in furtherance of the system's overall goals. *Ritter*, 987 S.W.2d at 381.

Similarly, that Defendant BJC is authorized to negotiate for system affiliates with third parties is not sufficient to make BJC liable for the conduct of Boone Hospital Center in the underlying matter. The *Ritter* opinion recited this power and held such a role for the BJC parent corporation did not result in imposing liability on the parent corporation. *Id.*, at 382.

Additionally, Plaintiffs erroneously claimed BJC and Boone Hospital Center were in a joint venture. Plaintiffs, however, have not pled a joint venture theory in the First Amended Petition, making that theory beyond the scope of the pleadings. (*See e.g.*, L.F. 150-79) Further, the elements of a joint venture require plaintiffs to plead and prove the following: (1) an express or implied agreement among members of the association; (2) a common purpose to be carried out by the members; (3) a community of pecuniary interest in that purpose; and (4) that each member has an equal voice or an equal right in determining the direction of the enterprise. *Eads v. Kinstler Agency, Inc.*, 929 S.W.2d 289, 292 (Mo. App. E. D. 1996). The parties must intend to create a contract of joint venture and then actually create a joint venture. *Jeff-Cole Quarries, Inc. v. Bell*, 454 S.W.2d 5, 16 (Mo. 1970).

None of the elements joint venture are either pled or proven to exist by the evidence in this case. Plaintiffs erroneously argue the system affiliation agreement constitutes a joint venture. This argument was one that Plaintiffs' Counsel presented in

the *Ritter* case and which that court rejected. 987 S.W.2d at 387 (holding the mere participation in an affiliation agreement by two corporations did not equate with a joint venture). Thus Plaintiffs cannot have had a reasonable belief of the existence of a cause of action against BJC, thereby failing the second prong of the pretensive joinder analysis.

In their Amended Supplemental Response to the various motions to transfer venue, Plaintiffs contend Defendant BJC can be held liable because: a) it had agents, servants or employees who were involved in the care at issue at Boone Hospital Center (L.F. 335-37, 343-46); b) its control over Boone Hospital Center was “apparent” on some level, such that it is responsible for whatever occurred at Boone Hospital Center (L.F. 329-35, 337-40, 346-48); and c) Defendant BJC and Defendant Boone Hospital Center were in a joint venture (L.F. 348-51).

None of Plaintiffs’ arguments, however, satisfy the legal standard for imposing liability on one corporation for the conduct of an affiliated corporation. These arguments include allegations that BJC has the power to set guidelines for the delivery of health care through the system affiliate agreement (L.F. 329-31), has system-wide policies (L.F. 331-32), has a BJC compliance program (L.F. 332-34), a BJC Center for Quality Management (L.F. 334), a BJC News Forum and corporate compliance programs (L.F. 334-35), exercises approval power over affiliate hospitals’ budgets (L.F. 337-38), exercises control over the board of directors of affiliate hospitals (L.F. 338), has “integrated” and assumed many services of affiliate hospitals (L.F. 339-40), and has the ability to negotiate and contract on behalf of affiliate hospitals (L.F. 340). Not one of these nine attempted attacks contains any connection with Missouri law on the liability for corporations such

as BJC and, in light of Plaintiffs' Counsel's participation in *Ritter*, Plaintiffs cannot argue that it reasonably thought that these factors were sufficient for jurisdiction to be proper in St. Louis. Missouri precedent is clear that such liability can occur only under either an alter ego theory or under a proper vicarious liability theory.

Here, Plaintiffs' have not even tried to allege an alter ego theory of recovery in the First Amended Petition. (*See generally* First Amended Petition L.F. 150-79). As to the more common vicarious liability theory, Plaintiffs fall short for a number of reasons. First and foremost, none of these attacks deals with the health care at issue – Plaintiff Qamar's care at Boone Hospital Center in May 2004. Rather, they involve activity the BJC parent is purportedly involved in, through its relationship with system affiliate hospitals. In *Ritter*, however, the court explained the rationale for the formation of BJC Health System noting that it did *not* involve control of the healthcare, but rather it left the autonomy of the affiliate hospitals intact. 987 S.W.2d at 381.

It is clear from *Ritter*, and the cases upon which it relied, that in order to hold BJC vicariously liable for the acts of Boone Hospital Center, the control or right to control must relate to the physical activities of Boone Hospital Center or to the details of the manner in which the work is done by Boone Hospital Center. *Id.*, at 385 (citing *J.M. v. Shell Oil Company*, 922 S.W.2d 758, 764 (Mo. banc 1996)). Utilizing this legal principle, the court in *Ritter* held that for that plaintiff's claim to survive, she would have to produce evidence sufficient to support a finding that the BJC parent exercised sufficient control or had the contractual right to control the performance of the surgery at issue there. *Ritter*, 987 S.W.2d at 386.

The bottom line is that of the “evidence” upon which Plaintiffs rely to argue that they had a reasonable belief that they had a legitimate cause of action against BJC here established to be irrelevant and/or insufficient in *Ritter v. Barnes Jewish Christian Health Systems*, 987 S.W.2d 377 (Mo. App. E.D. 1999), a case in which Plaintiffs’ Counsel actively participated, therefore Plaintiffs and Plaintiffs’ Counsel could not have had a reasonable belief that this same “evidence” established a cause of action against BJC herein. These facts dispel any notion of Plaintiffs’ reasonable belief that venue was proper in St. Louis, thus this Court should make permanent its Writ of Prohibition and issue a Writ of Mandamus to Respondent, mandating that Respondent transfer this action to Boone County, Missouri.

2. Additional evidence known as of the First Amended Petition.

All of the above evidence caused Plaintiffs to fail the second prong of the pretensive joinder case as of the very first time they filed suit. After much discovery, they filed the First Amended Petition here (bringing in additional defendants). “[V]enue should be determined anew on the addition of new defendants.” *State ex rel Bierman v. Neill*, 90 S.W.3d 464, 464 (Mo. banc 2002) (citing *Linthicum*, 57 S.W.3d at 855). Plaintiffs’ First Amended Petition was filed on May 3, 2006. (L.F. 179) At that time, Plaintiffs and Plaintiffs’ Counsel were undeniably aware of even more facts.

The discovery and deposition testimony in the case set out below further details and confirms that Plaintiffs do not currently have, nor did they have at the time of filing the Petition (or First Amended Petition), an objective, good faith belief that a claim could be made against Defendant BJC. By August 2, 2005, Relator Pitt had submitted two

affidavits in support of the Relators' motions to transfer venue. (L.F. 22-33, 140-41). Both establish all of Relator Pitt's care and treatment to Plaintiff Qamar occurred only in Boone County. (See L.F. 22-33, 140-41). Relator Pitt clearly states that BJC and Boone Hospital Center did not control or have the right to control his actions. (See L.F. 141, ¶ 4). Finally, the affidavits establish Relator Pitt was not an employee or agent of BJC or Boone Hospital Center while rendering care to Plaintiff Qamar. (See e.g., L.F. 141, ¶ 5).

Thus, even if Plaintiffs' knowledge at the time of filing its Petition had been limited enough to support a reasonable belief of a claim against BJC,⁵ Plaintiffs' knowledge base was "updated" when it filed the First Amended Petition on May 3, 2006, to include all discovery up to that point – especially Relator Pitt's affidavits. Under these circumstances Plaintiffs cannot have had a reasonable belief of a cause of action against BJC.

Further, the September 21, 2007 deposition testimony of Plaintiff Qamar shows that even then (not to mention at the time of filing both the Petition and First Amended Petition) she did not have a good faith basis for the belief that a claim could be made against BJC. She testified she had no idea what Defendant BJC Health System was, nor was she aware of the relationship between Defendants BJC and Boone Hospital Center at the time of the events at issue. (See L.F. 1178)

⁵ An assumption which is highly doubtful, particularly in light of *Ritter v. Barnes Jewish Christian Health Systems*, 987 S.W.2d 377 (Mo.App. E.D. 1999).

Neither does Plaintiff Haider's September 21, 2007 deposition testimony provide a good faith basis for the belief that a claim could be made against BJC. Dr. Haider does 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. (*See* L.F. 1181). He does not believe somebody from BJC directed Relator Pitt in providing care to his wife. (*See* L.F. 1181). Furthermore, he does not have any information that BJC controlled any of the health care providers at Boone Hospital Center. (*See* L.F. 1182). Thus, especially in light of *Ritter*, and fact that this suit was "brought" when the First Amended Petition was filed, Plaintiffs cannot reasonably argue that they had a reasonable belief of a cause of action against BJC. Plaintiffs therefore also fail the second prong of the pretensive joinder analysis.

Not surprisingly, Plaintiffs offer only unsubstantiated denials in response to the affidavit of Relator Pitt stating that no one controlled him in the health care he provided to Plaintiff Qamar. (L.F. 1223-24, ¶¶ 13-15; *see also* Answer to Relators' Petition for Writ of Prohibition, ¶¶ 11-12). They do not offer any of the required facts or evidence to support their claim that Relator Pitt is an employee or agent of BJC (nor of Boone Hospital Center), or to establish control over the actions he took for which he is being sued, and hence nothing to support an objective reasonable opinion that a case could be made. The only thing approaching agency allegations in the First Amended Petition consists of a circular and legally defective statement that each Defendant is the agent, employee and servant of every other Defendant. No Missouri case recognizes such language as properly pleading agency. Furthermore, and perhaps more importantly,

plaintiff did not offer in the Circuit Court or in the Court of Appeals one piece of information or evidence to support their agency allegations to somehow remedy the legally defective pleading.

3. After Disregarding The Presence Of The Pretensively Joined Defendant, BJC, – As Respondent Was Required To Do In This Case –Venue Is Improper Pursuant To § 355.176.4, R.S.Mo. Or As Indicated in Point I, Section 508.010.4, RSMo., As Amended By HB 393, And In Either Event, The Case Must Be Transferred To The Circuit Court Of Boone County.

Plaintiffs pretensively joined BJC. Respondent, therefore, should have disregarded the pretensively-joined BJC for purposes of the venue analysis for Relators in this case. Once BJC's presence is disregarded, the only Missouri non-profit corporate defendant remaining is Defendant Boone Hospital Center.

If venue in this case is not governed by *508.010.4, as amended by HB 393*, as set out in Point I, then venue in this case is governed by the nonprofit corporation venue statute, § 355.176.4, RSMo.(1994), and in this case either statute has the same result. This Court has held that § 355.176.4, RSMo. (1994) is a special venue statute that governs when a nonprofit corporation is sued alone as well as when it is sued with other corporations or individuals. *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 145 (Mo. banc 2002) (hereinafter, *SSM v. Neill I*); *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 145, 146 (Mo. banc 2002) (hereinafter, *SSM v. Neill II*).

Pursuant to § 355.176.4, RSMo., suits against a nonprofit corporation shall be commenced only in one of the following locations:

1. The county in which the nonprofit corporation maintains its principal place of business;
2. The county where the cause of action accrued; or
3. The county in which the office of the registered agent for the nonprofit corporation is maintained.

§ 355.176.4, RSMo.(1994); *SSM v. Neill I*, 78 S.W.3d at 141.

Boone Hospital Center is a Missouri nonprofit corporation. (*See* L.F. 110). Venue, therefore, is only proper in the Circuit Court of Boone County because: (1) the location of Boone Hospital Center's registered office and registered agent is in Boone County; (2) the allegedly negligent events at issue occurred only at Boone Hospital Center in Boone County; and (3) Boone Hospital Center has its principal place of business located in Boone County. (*See* L.F. 110, 150-79). None of these pertinent venue facts have been disputed by Plaintiffs. In fact, Plaintiffs continue to admit these venue facts in their Answer to Relators' Petition for Writ of Prohibition and/or Mandamus.

BJC was pretensively joined as explained above. Therefore, Respondent should have transferred the case to the Circuit Court of Boone County. This would be the result of applying Section 508.010.4, RSMo., *as amended by HB 393*, because of *Linthicum* in which case pretensive joinder is irrelevant. Had there never been the HB 393 Amendment to 508.010.4, or if it were subordinate to § 355.176.4, RSMo., then venue

would still be in Boone County because BJC was pretensively joined, and pursuant to §355.176.4, RSMo., Boone Hospital Center must be sued in Boone County, and the same result would be reached on that whether the analysis were done: 1) at the first time the suit was brought pretensively joining BJC, or 2) later when the First Amended Petition thereby brought the suit anew because of *Linthicum*, at which date Plaintiffs knowledge of the impropriety of naming BJC as a party was even more unfounded.

CONCLUSION

For the foregoing reasons, 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 this Writ 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 _____ day of _____ 2008, addressed to the following:

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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 _____ 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 ____ day of _____, 2008.

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