IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL. JAMES GREEN, M.D., T. ISAKSON, M.D., AND CHRISTINA L. LITHERLAND, M.D., RELATORS, VS. HON. MARGARET M. NEILL, PRESIDING JUDGE, MISSOURI CIRCUIT COURT, TWENTY-SECOND JUDICIAL CIRCUIT, CITY OF ST. LOUIS, RESPONDENT.	)	NO. SC85534

ORIGINAL PROCEEDING IN PROHIBITION

ON PRELIMINARY RULE IN PROHIBITION FROM THE SUPREME COURT OF MISSOURI TO THE HONORABLE MARGARET M. NEILL, CIRCUIT JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

BRIEF OF RELATORS

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Defendant Malaika B. Horne, Ph.D., a member of the Board of Curators of the University of Missouri, whose joinder as a party defendant was pretensive as shown by the face of Plaintiffs' pleadings, in that:

A. The facts knowable to Plaintiffs at the time they filed their First Amended Petition and their Amendment by Interlineation do not support a reasonable legal conclusion that The Curators of the University of Missouri had waived sovereign immunity; and

B. Plaintiffs have pleaded no facts stating a claim against Dr. Horne based on her individual liability as a state official for conduct undertaken in her official capacity as a member of the Board of Curators because Plaintiffs have alleged no conduct on her part that is connected to the alleged medical malpractice. 14

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the time they sued Dr. Horne, in that there was no factual basis supporting a reasonable legal opinion that a claim could be stated against her for the following reasons:

A. The facts knowable to Plaintiffs at the time they filed their First Amended Petition and their Amendment by Interlineation do not support a reasonable legal conclusion that The Curators of the University of Missouri had waived sovereign immunity; and

B. There were no facts supporting a reasonable legal conclusion that a claim existed against Dr. Horne based on individual liability separate and distinct from her official capacity as a member of the Board of Curators. 32

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Jurisdictional Statement

Relators James Green, M.D., T. Isakson, M.D., and Christina Litherland, M.D., brought this proceeding in prohibition, or in the alternative, in mandamus to obtain interlocutory review of a venue determination made by Respondent, the Honorable Margaret M. Neill, Presiding Judge of the Circuit Court of the City of St. Louis, on May 9, 2003, in which Respondent denied Relators' renewed motion to transfer for improper venue and pretensive joinder. (A1.) The underlying action, *Marcus McElmurray, et al. v. Kathleen Paulson, M.D., et al.*, Cause No. 012-01652 (Mo. Cir. Ct., St. Louis City), is a medical malpractice action arising out of the delivery of Marcus McElmurray at the University Hospital and Clinics in Columbia, Boone County, Missouri.

The Court has jurisdiction because it issued a Preliminary Writ of Prohibition on September 30, 2003. Under Article V, Section 4 of the Missouri Constitution, the Court has authority to determine and issue remedial writs.

STATEMENT OF FACTS

A. Introduction

This original proceeding for a writ of prohibition or, in the alternative, for a writ of mandamus, arises from the case, *Marcus McElmurray, et al. v. Kathleen Paulson, M.D., et al.*, Cause No. 012-01652 (Mo. Cir. Ct., St. Louis City), a medical malpractice action filed in the Circuit Court of the City of St. Louis. The Plaintiffs in *McElmurray* are Marcus McElmurray and his mother, Melinda Houston, who live in Columbia, Boone County, Missouri. (Exhibit 3 at 1-2, Plaintiffs' Answers to Interrogatories.)[1]

Plaintiffs claim that Defendant Kathleen Paulson, M.D., and others committed medical malpractice during Marcus McElmurray's delivery, which took place at the University Hospital and Clinics in Columbia, Boone County, Missouri, on January 6, 2000. (Exhibit 2, First Amended Petition; A12-20.) The University Hospital and Clinics is operated by the University of Missouri-Columbia, which is also located in Boone County, Missouri.

Relators James Green, M.D., T. Isakson, M.D., and Christina Litherland, M.D., are three of the four remaining defendants in the *McElmurray* action. They are not residents of the City of St. Louis. (Exhibit 4, Green Affidavit; Exhibit 5, Isakson Affidavit; Exhibit 6, Litherland Affidavit.) The remaining defendant, Dr. Kathleen Paulson, is a resident of the State of Arkansas. (Exhibit. 7, Petition.)

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[1] The exhibits cited herein are the exhibits to Relators' Petition for a Writ of Prohibition, which was filed in this Court on September 2, 2003.

B. Plaintiffs' Initial Pleadings in the *McElmurray* Action

Plaintiffs originally filed their action in the City of St. Louis on May 30, 2001, against a single defendant, Dr. Kathleen Paulson, a resident of the State of Arkansas. (Exhibit 7.) The next day, in a *Linthicum*-style procedure, Plaintiffs filed a First Amended Petition adding The Curators of the University of Missouri, d/b/a University of Missouri-Columbia Hospital and Clinics, d/b/a University Hospitals as a party defendant. (Exhibit 2; A12.) The Curators of the University of Missouri (The Curators) is a public corporation responsible for operating and governing the University of Missouri. Section 172.020, R.S.Mo. 2000. (A27.)

The Plaintiffs also named twelve additional individual defendants, including nine individuals who at the time were members of the Board of Curators of the University of Missouri, namely, Paul W. Steel, John A. Mathes, Angela M. Bennett, Paul T. Combs, Dr. Malaika B. Horne, Mary L. James, M. Sean McGinnis, Connie Hage Silverstein, and Hugh E. Stephenson, Jr., M.D. (Exhibit 2 at 4, ¶ 7; A15.) Relators were also among the new defendants added by Plaintiffs. (Exhibit 2 at 4-5, ¶¶ 8, 10, 11; A15-16.)

None of the individual curators, except Dr. Horne, was a resident of the City of St. Louis. (Exhibit 2 at 2; A13.) At the time they filed their First Amended Petition, Plaintiffs' only allegation in support of St. Louis City venue was that Defendant Paulson was a non-resident of the State of Missouri and, therefore, venue was proper at the time they filed their original Petition under Section 508.010(4). (Exhibit 2 at 3, ¶ 3; A14.) Section 508.010(4) allows a plaintiff to pick any county in Missouri for venue when no defendant is a Missouri resident.

Plaintiffs did not allege in their First Amended Petition (Exhibit 2) or in their Amendment by Interlineation (Exhibit 8) that Dr. Horne, in her individual capacity, was involved in the labor, delivery, and birth of Marcus McElmurray. The only allegation against Dr. Horne is that she is a member of the Board of Curators of the University of Missouri, which is vested with the authority and responsibility to govern and operate the University of Missouri-Columbia Hospital and Clinics. (Exhibit 2 at 4, ¶ 7; A15.)

For their initial responsive pleading, all Defendants, including Relators, filed a Motion to Transfer for Improper Venue/Pretensive Non-Joinder and Memorandum in Support, contending the omission of the in-state defendants from the original Petition was pretensive. (Exhibits 9 and 10.) Although Plaintiffs had not yet pleaded the residence of Dr. Horne as a basis for venue in the City of St. Louis, Defendants also asserted the joinder of The Curators was pretensive because no cause of action could be stated against The Curators and the individual members of the Board of Curators because of sovereign immunity. (Exhibit 9 at 3-4, ¶¶ 15-16.) With their venue motion, The Curators and the individual board members also filed a Motion to Dismiss in which they asserted Plaintiffs had failed to state a cause of action against them and that they were protected from suit under sovereign immunity, official immunity, and by public policy. (Exhibit 11.)

Before the Defendants' motions could be heard, the Court handed down its decision in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). Thereafter, Defendants filed Supplemental Suggestions in Support of their Motion to Transfer for Improper Venue (Exhibit 12) because it was clear under the Court's *Linthicum* decision that venue must be examined at the time Plaintiffs filed their First

Amended Petition. Defendants again asserted that the City of St. Louis was not a proper venue for this case because the joinder of The Curators and the individual board members was pretensive. (Exhibit 12.)

Plaintiffs first attempted to predicate venue in the City of St. Louis on Dr. Horne's residence in their Supplemental Response to Defendants' Motion to Transfer for Improper Venue filed on November 16, 2001, in response to the *Linthicum* decision and Defendants' Supplemental Suggestions in Support. (Exhibit 13.) However, before the *Linthicum* decision, Plaintiffs predicated venue exclusively on the argument that venue was fixed at the time they filed their original Petition and, therefore, was proper under Section 508.010(4). (Exhibit 2 at 3, ¶ 3; A14.) Plaintiff so acknowledged in their Reply Denying Allegations of Improper Venue/Pretensive Joinder/Pretensive Non-Joinder, which they filed on July 8, 2002. (Exhibit 14.)

C. The Curators' Summary Judgment Motion

The Curators and the individual members of the Board of Curators re-asserted their sovereign immunity defense in their Motion for Summary Judgment. (Exhibit 15.) As their venue motion was premised on The Curators' immunity from suit, all Defendants, including Relators, adopted and incorporated by reference The Curators' Motion for Summary Judgment and Suggestions in Support into their venue motion. (Exhibit 12 at 4.)

Consistent with their venue transfer motion, The Curators' summary judgment motion asserted:

- The Curators is a public entity with the status of a governmental body under MO. CONST., art. IX, § 9(a). (Exhibit 15 at 2, ¶ 1.)

- The Curators is a public corporation that operates the University of Missouri under Section 172.020. (*Id*.)
- Section 537.600 provides that governmental entities are immune from suit, except in specified situations, neither of which applies here. (*Id*. at 2, ¶ 2.)
- Section 537.610.1 provides the governing body of each political subdivision may purchase liability insurance for tort claims brought against the state or political subdivision and that "[s]overeign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state." (*Id*. at 2, ¶ 3.)
- The Curators did not waive its sovereign immunity by obtaining insurance because the Medical, Professional and Patient General Liability Plan (the "Plan") states in Article XII, Section 2, that nothing in it shall be construed as a waiver of governmental immunity. (*Id*. at 2-3, ¶ 4.)
- The Plan provides that "[n]othing in the Plan shall be construed as a waiver of any governmental immunity of . . . the Board of Curators of the University of Missouri nor any of its employees in the course of their official duties." (Exhibit A-1 at 13 to Exhibit 16; A25.)

- The Curators and the individual curators are immune from suit; therefore, Plaintiffs' claim against them, collectively and individually, was barred. (Exhibit 15 at 3, ¶¶ 6-7.)

In response to The Curators' summary judgment motion, Plaintiffs obtained leave to file an Amendment by Interlineation to their First Amended Petition, in which they first asserted The Curators had waived sovereign immunity. (Exhibit 8.) Defendants adopted their summary judgment motion and venue transfer motion as their Answer and Affirmative Defense to the Amendment. (Exhibit 17.)

In their Response to The Curators' summary judgment motion, Plaintiffs argued the preservation of governmental immunity in the University's Self-Insurance Plan (the "Plan," Exhibit A-1 to Exhibit 16) did not apply to Plaintiffs' claim against the University and The Curators. (Exhibit 18 at 3-5, ¶¶ 6-7).

In their Legal Memorandum in Response to the Motion for Summary Judgment (Exhibit 19 at 5-6), Plaintiffs cited the opinions of the Western District of the Missouri Court of Appeals in *Brennan v. Curators of the Univ. of Mo.*, 942 S.W.2d 432 (Mo. App. W.D. 1997), and *Langley v. Curators of the Univ. of Mo.*, 73 S.W.3d 808 (Mo. App. W.D. 2002). Plaintiffs filed their Legal Memorandum on the same day they first alleged The Curators had waived sovereign immunity. (*See* Exhibit 8 at 1; Exhibit 18 at 1.)

In *Brennan* and *Langley*, the Western District upheld the dismissal of The Curators from actions for medical malpractice on the basis of sovereign immunity. In *Brennan*, the Western District held that plaintiffs must plead and prove both the existence of a plan and that the plan covers the claims asserted in order to survive a motion to dismiss in the face of The Curators' sovereign immunity. *Brennan*, 942 S.W.2d at 436. In *Langley*, the Western District examined the language of the Plan, which provides the basis for immunity in this case, and held that as the Plan contains a specific non-waiver clause, the plaintiffs in *Langley* could not establish a sovereign immunity waiver. *Langley*, 73 S.W.3d at 811-12.

On January 29, 2003, Respondent entered summary judgment for The Curators of the University of Missouri, d/b/a University of Missouri-Columbia Hospital and Clinics, d/b/a University Hospitals, and all of the individually named curators, including Dr. Horne. (Exhibit 20.) Respondent held Plaintiffs' claim was barred by the doctrine of sovereign immunity. (Exhibit 20 at 3-4; A9-10.) In the same order, Respondent denied The Curators' venue motion as untimely, but made no ruling on Relators' separate venue motion. (Exhibit 20 at 1-2; A7-8.)

D. Respondent's Order of May 9, 2003

After Respondent's order of January 29, 2003, Relators re-submitted their venue motion for Respondent's consideration, along with their Second Supplemental Suggestions in Support (Exhibit 21), in which they explained their venue motion, originally filed on August 20, 2001, was timely because Plaintiffs attempted to effect service by mail under Rule 54.16 (Exhibit 22), and no acknowledgement of service was returned by Relators. Thus, Relators' entries of appearance on August 6, 2001, operated as their service date under Rule 55.25(a). *In re ID v. BCD*, 941 S.W.2d 658, 660-61 (Mo. App. S.D. 1997). (Exhibit 21 at 4-6.) In her order of May 9, 2003, Respondent agreed with Relators, finding their venue motion had been timely filed. (Exhibit 1 at 4; A4.)

In their Second Supplemental Suggestions, Relators asserted Dr. Horne's residence could not serve as a basis for venue in the City of St. Louis. (Exhibit 21.) Relators explained the joinder of Dr. Horne for venue purposes was pretensive because Respondent had found Plaintiffs' claim against The Curators and the individual board members to be barred by sovereign immunity. (*Id*. at 6-7.)

On May 9, 2003, Respondent denied Relators' Motion to Transfer for Improper Venue. (Exhibit 1; A1.) In so ruling, Respondent held:

- Relators did not assert the pretensive joinder of Dr. Horne in their original venue motion.
- Only the second prong of the "pretensive joinder" test was applicable to this case.
- Relators did not meet their burden to show that Plaintiffs lacked a reasonable legal opinion that a claim against Dr. Horne existed.

(Exhibit 1 at 5-6; A5-6.)

E. This Proceeding for Extraordinary Relief

After Respondent's Order of May 9, 2003, Relators filed a Petition for a Writ of Prohibition or, in the Alternative, for a Writ of Mandamus in the Eastern District of the Missouri Court of Appeals, being Appeal No. ED83246. On August 15, 2003, the Eastern District denied Relators' Petition. (Exhibit 26.) This proceeding followed when the Court issued a preliminary writ of prohibition on September 30, 2003.

POINTS RELIED ON

I. Relators are entitled to an order prohibiting Respondent from taking any action other than transferring the underlying lawsuit to a proper venue, because venue in the Circuit Court of the City of St. Louis is improper for an action based on alleged medical malpractice that took place at the University Hospital and Clinics in Boone County, because venue in the City of St. Louis rests on the presence of Defendant Malaika B. Horne, Ph.D., a member of the Board of Curators of the University of Missouri, whose joinder as a party defendant was pretensive as shown by the face of Plaintiffs' pleadings, in that:

A. Plaintiffs' claim against Dr. Horne, as a member of the Board of Curators of the University of Missouri, is barred as a matter of law by the doctrine of sovereign immunity; and

B. Plaintiffs have pleaded no facts stating a claim against Dr. Horne based on her individual liability as a state official for conduct undertaken in her official capacity as a member of the Board of Curators because Plaintiffs have alleged no conduct on her part that is connected to the alleged medical malpractice.

State ex rel. Coca Cola Bottling Co. of Mid-Am. v. Gaertner, 681 S.W.2d 445 (Mo. banc 1984)

Langley v. Curators of the Univ. of Mo., 73 S.W.3d 808 (Mo. App. W.D. 2002)

Brennan v. Curators of the Univ. of Mo., 942 S.W.2d 432 (Mo. App. W.D. 1997)

Smith v. Consolidated School Dist. No. 2, 408 S.W.2d 50 (Mo. banc 1966)

II. Alternatively, Relators are entitled to an order prohibiting Respondent from taking any action other than transferring the underlying lawsuit to a proper venue, because venue in the Circuit Court of the City of St. Louis is improper for an action based on alleged medical malpractice that took place at the University Hospital and Clinics in Boone County, because venue in the City of St. Louis rests on the presence of Defendant Malaika B. Horne, Ph.D., a member of the Board of Curators of the University of Missouri, whose joinder as a party defendant was pretensive based on the facts known by Plaintiffs at they time they sued Dr. Horne, in that there was no factual basis supporting a reasonable legal opinion that a claim could be stated against her for the following reasons:

A. The facts knowable to Plaintiffs at the time they filed their First Amended Petition and their Amendment by Interlineation do not support a reasonable legal conclusion that The Curators of the University of Missouri had waived sovereign immunity; and

B. There were no facts supporting a reasonable legal conclusion that a claim existed against Dr. Horne based on individual liability separate and distinct from her official capacity as a member of the Board of Curators.

State ex rel. Coca Cola Bottling Co. of Mid-America v. Gaertner, 681 S.W.2d 445 (Mo. banc 1984)

State ex rel. Toastmaster, Inc. v. Mummert, 857 S.W.2d 869 (Mo. App. E.D. 1993)

Langley v. Curators of the Univ. of Mo., 73 S.W.3d 808 (Mo. App. W.D. 2002)

Brennan v. Curators of the Univ. of Mo., 942 S.W.2d 432 (Mo. App. W.D. 1997)

STANDARD OF REVIEW

A prohibition action is an original proceeding brought to confine a lower court to the proper exercise of its jurisdiction. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856 (Mo. banc 2001). Prohibition is a discretionary writ. The writ will issue "to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *Id*. The use of prohibition "may be appropriate to prevent unnecessary, inconvenient, and expensive litigation." *Id*.

One proper use of prohibition is to prevent a court from proceeding with an action when venue is improper. "Because improper venue is a fundamental defect, a court that acts when venue is improper acts in excess of its jurisdiction." *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. banc 2002) (citing *State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. banc 1985)). Accordingly, "[p]rohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue." *Id*. (quoting *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28, 32 (Mo. App. E.D. 2002)).

Alternatively, relief by mandamus is also appropriate where a trial court improperly denies a motion to dismiss or to transfer for improper venue. *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 823 (Mo. banc 1994). Mandamus is the proper remedy where a court fails to perform its ministerial duty to transfer a case from an improper venue to a court of proper venue. *State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker*, 955 S.W.2d 931, 933 (Mo. banc 1997); *State ex rel. DePaul Health Ctr.*, 870 S.W.2d at 823.

Relators here have invoked both prohibition and mandamus. The authority of the Court to act if it concludes that Respondent has acted in the absence of jurisdiction is clear.

Venue here turns on a question of pretensive joinder. When a trial court resolves an issue of pretensive joinder on the basis of a written record, as occurred here, no deference needs to be given to any trial court assessment of credibility. *Hefner v. Dausman*, 996 S.W.2d 660, 663 (Mo. App. S.D. 1999).

ARGUMENT

I. Relators are entitled to an order prohibiting Respondent from taking any action other than transferring the underlying lawsuit to a proper venue, because venue in the Circuit Court of the City of St. Louis is improper for an action based on alleged medical malpractice that took place at the University Hospital and Clinics in Boone County, because venue in the City of St. Louis rests on the presence of Defendant Malaika B. Horne, Ph.D., a member of the Board of Curators of the University of Missouri, whose joinder as a party defendant was pretensive as shown by the face of Plaintiffs' pleadings, in that:

A. Plaintiffs' claim against Dr. Horne, as a member of the Board of Curators of the University of Missouri, is barred as a matter of law by the doctrine of sovereign immunity; and

B. Plaintiffs have pleaded no facts stating a claim against Dr. Horne based on her individual liability as a state official for conduct undertaken in her official capacity as a member of the Board of Curators because Plaintiffs have alleged no conduct on her part that is connected to the alleged medical malpractice.

1. Introduction

The question presented by this original proceeding in prohibition is whether Malaika B. Horne, Ph.D., a member of the Board of Curators of the University of Missouri was pretensively joined to create venue in the City of St. Louis. Absent the joinder of Dr. Horne as a party defendant, there is no other basis upon which venue in the

City of St. Louis may be justified. Dr. Horne's residence in the City of St. Louis is the only connection between the underlying medical malpractice action and the City of St. Louis. Plaintiffs are residents of Boone County, the alleged malpractice occurred at the University Hospital and Clinics in Boone County, and no other defendant resides in the City of St. Louis.

Courts will not permit plaintiffs to engage in the pretense of joining defendants for the sole purpose of obtaining venue where it otherwise would not exist. *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 824 (Mo. banc 1994). Pretensive joinder exists (1) where the pretensive nature of the joinder appears on the face of the pleadings, and (2) where there is in fact no cause of action against the resident defendant. *State ex rel. Coca Cola Bottling Co. of Mid-America v. Gaertner*, 681 S.W.2d 445, 447 (Mo. banc 1984). As to the second prong, this Court has explained that "joinder is pretensive if accomplished without an honest belief, based on the law and the evidence, that a justiciable claim exists against the party joined." *Id*. at 447-48.

The two prongs of the pretensive-joinder test are applied in the disjunctive. Joinder is pretensive if either prong is met. *Hefner v. Dausman*, 996 S.W.2d 660, 663 (Mo. App. S.D. 1999).

When these principles are applied to the facts in this case, only one conclusion may be drawn – venue in the City of St. Louis based on Dr. Horne's place of residence is improper under both prongs of the pretensive-joinder test. Plaintiffs' First Amended Petition and Amendment by Interlineation fail to state a claim upon which relief can be granted against Dr. Horne. Further, even if Plaintiffs' pleadings could be construed to state a claim on the actual facts known to Plaintiffs at the time they filed their First Amended Petition and their Amendment by Interlineation, there were no facts supporting a reasonable legal opinion that a claim could be stated against Dr. Horne. The reasons follow:

First, Dr. Horne was pretensively joined because Plaintiffs' claim against her is barred by the doctrine of sovereign immunity. Section 537.600 and Section 537.610.1 govern Plaintiffs' action.[1] Section 537.600 extends sovereign immunity to The Curators of the University of Missouri. *Langley v. Curators of the Univ. of Mo.*, 73 S.W.2d 808, 811-12 (Mo. App. W.D. 2002). Section 537.610.1 creates an exception to that immunity to the extent an insurance policy applies to the claim and operates as an immunity waiver. However, the Section 537.610.1 exception has no application here because The Curators' Medical, Professional and Patient General Liability Plan, by its terms, preserves The Curators' sovereign immunity. (*See* Exhibit A-1 to Exhibit 16; A25.) Thus, as no cause of action exists against The Curators or the individual curators, Plaintiffs' joinder of Dr. Horne is pretensive as a matter of law.

[1] All statutory citations are to R.S.Mo. 2000.

Second, Plaintiffs' joinder of Dr. Horne is pretensive because Plaintiffs have pleaded no facts supporting an independent cause of action against Dr. Horne. Plaintiffs cannot state a claim against Dr. Horne based on her individual liability as a state official because Plaintiffs have alleged no conduct on her part that is connected with the alleged medical malpractice. *Smith v. Consolidated School Dist. No. 2,* 408 S.W.2d 50, 55 (Mo. banc 1966); *Hemphill v. Moore*, 661 S.W.2d 1192, 1195 (E.D. Mo. 1987). Thus, even if the individual members of the Board of Curators could be subject to suit, no claim could be stated against Dr. Horne in her capacity as a curator. Restated, suing Dr. Horne, in her individual capacity as a curator, is akin to suing a director of a corporation for the corporation's torts. However, absent participation in the wrong, directors of corporations cannot be held individually liable for the corporations' wrongs. *Zipkin v. Health Midwest*, 978 S.W.2d 398, 414 (Mo. App. W.D. 1998).

In the remainder of this point, Relators will address the first prong of the pretensive-joinder test. In their next point, they will address the test's second prong.

2. Relators raised Dr. Horne's pretensive joinder in their original venue motion.

Before addressing the reasons why Dr. Horne's joinder as a party defendant is pretensive, it is necessary to first dispose of a procedural issue. In denying Relators' Renewed Motion to Transfer for Improper Venue, Respondent held that Relators had failed to assert the pretensive joinder of Dr. Horne in their original venue motion. (Exhibit 1 at 5; A5.) Respondent erred in so ruling.

As Plaintiffs' sole venue allegation in their First Amended Petition was the propriety of venue under Section 508.010(4), Relators' original venue motion focused on Plaintiffs' failure to join the in-state defendants as parties defendant at the time they filed their original Petition. (Exhibit 9.) As Plaintiffs did not originally allege Dr. Horne's residence as a basis for venue in St. Louis City, Relators had no obligation to challenge venue on that basis. *State ex rel. Bierman v. Neill*, 90 S.W.3d 464, 465 (Mo. banc 2002).

Nevertheless, Relators did, in fact, assert the impropriety of venue based on Dr. Horne's residence in their initial venue motion. (Exhibit 9 at 3-4, ¶¶ 15-16.) They did so specifically in paragraphs 15 and 16 of their motion:

> 15. The original filing as to Dr. Paulson does not deprive the defendants herein of their venue rights and venue is not proper as to the moving defendants herein as they do not reside in the City of St. Louis. While Dr. Horne resides in the city, she was pretensively joined and plaintiffs have no cause of action against her based on immunity.
>
> 16. The joinder of The Curators of the University and the individuals in their capacity as Curators of the University of Missouri does not establish venue in the Circuit Court of the City of St. Louis as their joinder is pretensive because plaintiffs have no claim against them due to the doctrines of sovereign immunity, official immunity and public policy.

(Exhibit 9 at 3-4, ¶¶ 15-16.)

Therefore, to the extent Respondent's Order of May 9, 2003, is based on Relators' failure to preserve their venue challenge, the Order has no basis in fact. Although they had no cause to do so at the time, Relators, contrary to Respondent's Order, specifically objected to venue in the City of St. Louis based on the pretensive joinder of Dr. Horne as a defendant.

3. Dr. Horne's joinder is pretensive on the face of Plaintiffs' First Amended Petition.

Plaintiffs' First Amended Petition – the operative pleading for purposes of determining venue – demonstrates Plaintiffs did not state a claim against Dr. Horne because: (1) Plaintiffs' pleading does not set forth any allegations that sovereign immunity had been waived; and (2) there is no allegation Dr. Horne, in her individual capacity, participated in the alleged medical malpractice. Consider the pertinent allegations in Plaintiffs' First Amended Petition:

- Plaintiffs allege The Curators of the University of Missouri is an entity organized, incorporated, created, and existing under and by virtue of law with the capacity to sue and be sued, and at all times mentioned, operating by and through its agents, servants, and employees acting within the course and scope of their employment, agency and service. (Exhibit 2, ¶ 4; A15.)
- Plaintiffs allege The Curators, doing business as the University of Missouri Hospital and Clinics, operates, controls, and does business as the University Hospital in Columbia, Missouri. (Exhibit 2, ¶¶ 5-6; A15.)
- Plaintiffs allege the individual curators, including Dr. Horne, are members of the Board of Curators of the University of Missouri, and are vested with the authority and responsibility to, and at all times mentioned did, govern and operate the University of Missouri-Columbia Hospital and Clinics.

(Exhibit 2, ¶ 7; A15.)

- Plaintiffs allege Plaintiff Melinda Houston came under the care of Dr. Kathleen Paulson, Dr. James Green, Dr. T. Isakson, Dr. Christina Litherland, and other health care professionals employed by the University of Missouri-Columbia Hospital and Clinics for obstetrical care and treatment. (Exhibit 2, ¶¶ 8-15; A15-16.)
- Plaintiffs allege Dr. Paulson (Exhibit 2, ¶ 17; A17), Dr. Green, Dr. Litherland, and Dr. Isakson (Exhibit 2, ¶ 18; A17-18), and the University of Missouri-Columbia Hospitals and Clinics' *nurses and professional staff* (Exhibit 2, ¶ 19; A18-19) were negligent in their care and treatment.

Plaintiffs' Amendment by Interlineation to their First Amended Petition also fails to state a claim against Dr. Horne. Their amendment simply alleges The Curators "waived sovereign immunity pursuant to § 537.610 by the adoption of the University of Missouri Medical Professional and Patient General Liability Plan." (Exhibit 8; A21.)

These allegations do not state a claim against Dr. Horne in her capacity as a curator or in her individual capacity; therefore, her joinder is pretensive on the face of Plaintiffs' pleadings.

4. As a curator, Dr. Horne is protected from suit by sovereign immunity.

Plaintiffs allege Dr. Horne is a curator of the University of Missouri from whom they seek recovery for the alleged medical negligence of several health care professionals. However, under Missouri law, Dr. Horne is immune from suit for any action taken in her capacity as a curator absent a waiver of sovereign immunity. Respondent granted summary judgment for The Curators and Dr. Horne because no such waiver exists in this case. (Exhibit 20.)

Missouri case law is clear on the requisite factual elements of waiver of sovereign immunity that must be pleaded and proven to survive a motion to dismiss. Plaintiffs did not satisfy these pleading requirements. Nor can they prove that sovereign immunity had, in fact, been waived.

a. The Curators, as a public corporation, and the individual members of the Board of Curators are immune from suits for medical malpractice because of sovereign immunity.

The Curators of the University of Missouri is "a public corporation for educational purposes" and an "agency or arm of the State." *Todd v. Curators of the Univ. or Mo*., 147 S.W.2d 1063, 1064 (1941). The Missouri Constitution, the Revised Statutes of Missouri, and the applicable case law establish The Curators, as a public corporation, and the individual members of the Board of Curators are protected by sovereign immunity in medical malpractice actions.

The Missouri Constitution, in Article IX, Section 9(a), vests the government of the University of Missouri in the Board of Curators. (A26.) Section 172.020 establishes the University as a public corporation and body politic with the name "The Curators of the University of Missouri." (A27.) Section 172.020 charges The Curators with the University's governance and operation. Thus, as a public entity with the status of a governmental body, The Curators is immune from suit in the absence of an express statutory provision. *Krasney v. Curators of the Univ. of Mo*., 765 S.W.2d 646, 649 (Mo. App. W.D. 1989).

The doctrine of sovereign immunity, as set forth in Section 537.600, provides that governmental entities are immune from suit, except for two narrow exceptions that are inapplicable here. Missouri law also provides that the governing body of a political subdivision may purchase liability insurance for tort claims brought against the state or political subdivision. Section 537.610.1. However, "[s]overeign immunity . . . is waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state." *Id*. "Liability of a political subdivision for torts is the exception to the general rule of sovereign immunity, hence it is incumbent on a party seeking to establish such liability to demonstrate an exception exists." *Langley v. Curators of the Univ. of Mo*., 73 S.W.3d 808, 811 (Mo. App. W.D. 2002), *quoting State ex rel. Ripley Cty. v. Garrett*, 18 S.W.3d 504, 509 (Mo. App. S.D. 2000).

While a self-insurance plan for the University of Missouri does exist, The Curators did not waived its sovereign immunity by obtaining insurance because the Medical, Professional and Patient General Liability Plan (the "Plan") states in Article XII, Section 2, that nothing in the Plan shall be construed as a waiver of The Curators' immunity. (Exhibit A-1 to Exhibit 16; A25.) The Plan, which is a public record, is set forth in Section 490.020 of the Collected Rules and Regulations of The Curators of the University of Missouri. It provides as follows:

> Nothing in the Plan shall be construed as a waiver of any governmental immunity of the Employer, the Board of Curators of the University of Missouri nor any of its employees in the course of their official duties.

(Exhibit A-1 to Exhibit 16; A25.)

The Western District construed the Plan's language in *Langley*, another medical malpractice action against The Curators. There, in granting summary judgment for The Curators, the Western District held the Plan did not waive The Curators' sovereign immunity. In support, the court cited the non-waiver language in Article XII, Section 2. 73 S.W.3d at 811-12.

Consistent with the holding in *Langley*, The Curators, as a public corporation, and the individual members of the Board of Curators are immune from suit in this case. As Plaintiffs' cause of action against Dr. Horne rests solely on her capacity as an individual curator, the claim against her is barred by sovereign immunity. Article XII, Section 2 of The Curators' Plan permits no other conclusion. As Plaintiffs cannot sue Dr. Horne as a matter of law, her presence as a party defendant is irrelevant for venue purposes.

b. Plaintiffs did not sufficiently plead a sovereign immunity waiver.

The Curators and the individual members of the Board of Curators are protected by sovereign immunity. Therefore, Plaintiffs had the burden to show that an exception to sovereign immunity existed. *Langley v. Curators of the Univ. of Mo*., 73 S.W.3d 808, 811 (Mo. App. W.D. 2002). However, Plaintiffs did not plead a waiver of the doctrine; therefore, their First Amended Petition and all supporting pleadings failed to state a claim against The Curators, as a public corporation, and against Dr. Horne, individually.

For the first time in their Amendment by Interlineation filed on October 7, 2002, nearly one and one-half years after they filed their First Amended Petition, Plaintiffs alleged The Curators waived sovereign immunity by adopting the Medical, Professional and Patient General Liability Plan. (Exhibit 8; A21.) While the clause "by the adoption of the University of Missouri Medical Professional and Patient General Liability Plan" in the Amendment is to be construed under Rule 55.05 as a factual statement on the existence of the Plan, the phrase "waived sovereign immunity" is a legal conclusion, which does not meet the rule's requirements.

Rule 55.05 requires "a short and plain statement of the facts showing that the pleader is entitled to relief." *Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147, 153-54 (Mo. App. E.D. 1995). In ruling on a motion to dismiss, a court is to liberally construe the allegations and include "reasonable inferences fairly deducible from the facts stated." *Id.* However, exceptions to sovereign immunity are to be construed narrowly. *See* Sections 537.600 and 537.610. Further, "the averment of a legal conclusion is not a statement of an issuable fact and is to be treated as no statement at all." *Smith v. Consolidated School Dist. No. 2*, 408 S.W.2d 50, 56 (Mo. banc 1966).

In *Brennan v. The Curators of the Univ. of Mo.*, 942 S.W.2d 432 (Mo. App. W.D. 1997), a medical malpractice case against The Curators, the Western District identified the elements that must be pleaded against The Curators for a claim to survive a motion to dismiss. The court held the only way for plaintiffs to penetrate The Curators' immunity is to demonstrate the existence of a general liability plan and establish that the plan covers the plaintiffs' claims, explaining the purchase of liability insurance does not waive sovereign immunity unless it provides for coverage of liability other than the two exceptions in Section 537.600. *Id*. at 436.

Plaintiffs' pleadings do not meet this standard. Nowhere in their First Amended Petition or in their Amendment by Interlineation do Plaintiffs state that the Plan covers their medical negligence claim. (Exhibits 2 and 8; A12, A21.) Although the existence of the Plan is alleged in their Amendment, Plaintiffs only state as a legal conclusion that the Plan constitutes a waiver, and they do not allege any facts supporting this bare conclusion. (Exhibit 8; A21.)

As held in *Brennan*, the existence of the Plan, by itself, does not give rise to a sovereign immunity waiver *unless it provides coverage for the claim at issue*. Plaintiffs' pleadings do not allege the existence of such coverage, and coverage cannot be fairly or reasonably inferred from the conclusory allegation in Plaintiffs' Amendment by Interlineation. Section 537.610.1 only provides for the waiver of sovereign immunity in limited circumstances, namely, to the maximum amount of *and only for the purposes covered by* an insurance policy. Thus, the court in *Brennan* held a statement that a plan exists does not equate to a statement that the plan covers the claim. Instead, a statement of facts establishing coverage for the harm is necessary to state a claim against The Curators. 942 S.W.2d at 436.

Here, Plaintiffs' failure to include such a fact statement in their First Amended Petition and their Amendment by Interlineation is fatal to their claim against The Curators, as a public corporation, and the individual members of the Board of Curators.

Therefore, Dr. Horne's joinder in this case as a party defendant must be ignored in determining the propriety of venue in the City of St. Louis.

5. Plaintiffs' First Amended Petition did not allege any negligent conduct on Dr. Horne's part in an individual capacity.

Plaintiffs' First Amended Petition also fails to state a claim against Dr. Horne in her individual capacity. First, Plaintiffs do not allege Dr. Horne participated in Marcus McElmurray's delivery. Second, the allegations against Dr. Horne pertain exclusively to her status as a curator, an official of the State of Missouri, and not in her individual capacity. (Exhibit 2 at 4, ¶ 7; A15.) Therefore, as her conduct as a member of the Board of Curators cannot not provide the basis for individual liability, her status also cannot provide the basis for establishing venue in the City of St. Louis, an otherwise improper forum.

There is no Missouri case specifically addressing the pretensive joinder of individual curators of the University of Missouri in a medical malpractice case. However, the decisions of this Court and other courts sitting in Missouri demonstrate Plaintiffs cannot state a claim against Dr. Horne as a matter of law.

In *Smith v. Consolidated School Dist. No. 2*, 408 S.W.2d 50 (Mo. banc 1966), this Court addressed the liability of a school district, its superintendent, and a physical education teacher for injuries sustained by a student in a wrestling class. The plaintiff based his claim on the individual defendants' negligent failure to control various wrestling activities and on the school district's failure to eliminate wrestling, employ a competent superintendent to control the activities, and employ competent teachers. The defendants asserted sovereign immunity on the school district's behalf. Amongst the defenses asserted on the individual defendants' behalf was governmental immunity for discretionary actions. In reviewing the doctrine of sovereign immunity, the Court recognized the abolition of the doctrine was an issue for the legislature and held the doctrine barred the plaintiff's claim. *Smith*, 408 S.W.2d at 54-55.

As to the superintendent, the Court noted the plaintiff alleged generally that the superintendent had "failed to properly instruct the plaintiff, failed to ascertain if he understood the instructions given and the dangers involved, failed to employ 'proper supervision,' failed to select and employ a competent instructor, failed to eliminate wrestling from the curriculum, and that defendants, though present at the time of the occurrence, failed to warn plaintiff or to stop the wrestling." *Id*. at 55.

In rejecting the plaintiff's claim, the Court observed the plaintiff alleged no facts directly connecting the superintendent with a duty to instruct anyone in the wrestling course, to check on the plaintiff's knowledge of wrestling, or personally supervise the activities. The Court also noted the superintendent was not required to eliminate wrestling from the curriculum because it was not an unauthorized activity. *Id*. at 55.

The Court's decision in *Smith* demonstrates Plaintiffs cannot state a claim against Dr. Horne in her individual capacity. Plaintiffs' claim against Dr. Horne is analogous to the claim against the superintendent in *Smith*. Their claim arises out of alleged negligence in the delivery of Marcus McElmurray. The only reference in Plaintiffs' First Amended Petition to Dr. Horne, individually, is her position on the Board of Curators and, along with the other curators, her authority and responsibility to govern and operate the University of Missouri-Columbia Hospital and Clinics. (Exhibit 2 at, ¶ 7; A15.)

Marcus McElmurray's delivery was performed and supervised by board certified medical doctors and other professional health care providers who are alleged to have acted negligently in specific medical management decisions. There is no indication that Dr. Horne, a Ph.D. – not an M.D. – was present in Columbia, Missouri, at the time of the child's labor and delivery. Dr. Horne is not alleged to have been involved in the alleged malpractice or even to have known of the circumstances giving rise to the claim before Plaintiffs filed suit. Nor is Dr. Horne alleged to have failed to promulgate some policy or procedure for the operation of the hospital generally, or the obstetrics unit specifically, that would have somehow altered the outcome in this case.

As in *Smith*, the Court need not address whether Dr. Horne's sovereign immunity from suit supports a finding of pretensive joinder in this case. Plaintiffs' pleadings show the pretensive nature of Dr. Horne's joinder apparent on their face. Therefore, under the first prong of the "pretensive joinder" test articulated by the Court in *State ex rel. Coca Cola Bottling Co. of Mid-Am. v. Gaertner*, 681 S.W.2d 445, 447-48 (Mo. banc 1984), Respondent should have transferred this case to an appropriate venue.

Other cases confirm that Plaintiffs pretensively joined Dr. Horne. In *Hemphill v. Moore*, 661 F.Supp. 1192, 1195 (E.D. Mo. 1987), the district court held as a matter of law that the plaintiff failed to state claims against individual members of the Board of Curators of the University of Missouri in their individual capacities because he alleged no acts directly linking the individual curators to his alleged injuries. In *Hemphill*, the plaintiff, a state prisoner, charged The Curators and the individual members of the Board of Curators with failing to provide him with adequate medical care because The Curators had contracted with the Missouri Department of Corrections to provide medical services to Missouri inmates.

The claim against Dr. Horne, in her individual capacity as a curator, is also analogous to the claims against corporate officers sued in their individual capacity. As held in *Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147, 153 (Mo. App. E.D. 1995), actions taken by corporate officers in their corporate capacity do not provide the basis for individual liability, much less serve as a basis for making venue determinations.

In *Lynch*, a former employee of a corporation sued for wrongful discharge in the Circuit Court of the City of St. Louis. He named as defendants both the corporation that employed him, a resident of St. Louis County, and the corporation's president, a resident of the City of St. Louis. On the defendants' motion, the trial court found the corporate president had been pretensively joined, dismissed the case against him, and transferred the action against the corporation to St. Louis County, the proper venue. The Eastern District affirmed the transfer. The court acknowledged the corporate president had been the one who fired the plaintiff and that the plaintiff had pleaded the president had terminated him. 901 S.W.2d at 154. Nevertheless, the court held the plaintiff did not allege the president "participated" in the discharge because the plaintiff did not plead the president acted in an individual capacity, but instead specifically pleaded the president was "*acting for*" the corporation. *Id*. (emphasis in original).

The holding in *Lynch* establishes a corporate officer does not participate in the corporation's tort unless the officer does so in an individual capacity. If the officer is acting for the corporation, he does not participate in the alleged wrongdoing for purposes of individual liability. Restated, merely holding a corporate office does not subject one to personal liability for the corporation's misdeeds. *See, e.g.*, *Grothe v. Helterbrand*, 946 S.W.2d 301, 304 (Mo. App. S.D. 1997); *Lynch*, 901 S.W.2d at 153; and *Boyd v. Wimes*, 664 S.W.2d 596, 598 (Mo. App. W.D. 1984).

This case warrants the same conclusion. The holding in *Lynch* is fatal to Plaintiffs' attempt to state a claim of individual liability against Dr. Horne. Indeed, when Dr. Horne's alleged conduct is compared to the corporate officer in *Lynch*, there is even less of a basis for a claim against her based on individual liability. Plaintiffs' only allegation against Dr. Horne is that she is a member of the Board of Curators. (Exhibit 2 at, ¶¶ 4-5; A15.) She is not alleged to have taken part in the alleged negligence or to have failed to promulgate a policy relating to any ultimate issue. Suing Dr. Horne, in her capacity as a curator, is analogous to suing a director of a corporation for the corporation's torts. However, absent participation in the wrong, corporate directors cannot be held personally liable for the corporation's acts. *Zipper v. Health Midwest*, 978 S.W.2d 398, 414 (Mo. App. W.D. 1998).

The statement in paragraph 7 of Plaintiffs' First Amended Petition that Dr. Horne, along with the other curators, is "vested with the authority and responsibility to . . . govern and operate" the Hospital is simply a statement of Dr. Horne's official duties as an individual curator. (Exhibit 2 at 4, ¶ 7; A15.) Thus, no act on Dr. Horne's part is alleged to have caused Plaintiffs any injury. Further, the authority and responsibility

Plaintiffs seek to claim as the basis for their action against Dr. Horne vest in her only by virtue of her official capacity as a curator; they are not vested in her individually.

The decision in *Lynch* teaches that if the officer is acting for the corporation, the officer is not participating in the corporation's alleged torts in an individual capacity and so the officer must be disregarded in determining venue. Therefore, as Plaintiffs cannot state a claim against Dr. Horne in her individual capacity, venue cannot be predicated on her place of residence in the City of St. Louis. Therefore, Relators request the Court to make permanent the preliminary writ of prohibition and direct Respondent to transfer this case to a proper venue.

II. Alternatively, Relators are entitled to an order prohibiting Respondent from taking any action other than transferring the underlying lawsuit to a proper venue, because venue in the Circuit Court of the City of St. Louis is improper for an action based on alleged medical malpractice that took place at the University Hospital and Clinics in Boone County, because venue in the City of St. Louis rests on the presence of Defendant Malaika B. Horne, Ph.D., a member of the Board of Curators of the University of Missouri, whose joinder as a party defendant was pretensive based on the facts known by Plaintiffs at they time they sued Dr. Horne, in that there was no factual basis supporting a reasonable legal opinion that a claim could be stated against her for the following reasons:

A. The facts knowable to Plaintiffs at the time they filed their First Amended Petition and their Amendment by Interlineation do not support a reasonable legal conclusion that The Curators of the University of Missouri had waived sovereign immunity; and

B. There were no facts supporting a reasonable legal conclusion that a claim existed against Dr. Horne based on individual liability separate and distinct from her official capacity as a member of the Board of Curators.

1. Introduction

Respondent found that Relators failed to show that Plaintiffs lacked a reasonable legal opinion that there existed facts supporting a claim against Dr. Horne at the time they filed their First Amended Petition. (Exhibit 1 at 5; A5.) Respondent explained: "[T]there is no showing that Plaintiffs were aware of a self-insurance policy that specifically excluded a wavier of sovereign immunity." (Exhibit 1 at 5; A5.) In so holding, Respondent erred in applying the second prong of the pretensive-joinder test. Contrary to precedent, Respondent impermissibly imposed on Relators the burden to prove that Plaintiffs knew there was a self-insurance policy, and the burden to prove that Plaintiffs knew the policy specifically excluded a sovereign immunity waiver.

The controlling test for pretensive joinder is an "objective" one. *State ex rel. Toastmaster, Inc. v. Mummert*, 857 S.W.2d 869, 871 (Mo. App. E.D. 1993). As the Court held in *State ex rel. Coca Cola Bottling Co. of Mid-Am. v. Gaertner,* 681 S.W.2d 445, 447 (Mo. banc 1984), the second prong requires a court to determine whether there is, in fact, a cause of action against the resident defendant. In *State ex rel. Toastmaster, Inc.*, the Eastern District made clear it is not enough to support venue that the plaintiffs have an "honest belief" that they can state a claim against the resident defendant; rather, the factual evidence available at the time the plaintiffs file their petition must support a "reasonable legal opinion" that a case could be made against the resident defendant. 857 S.W.2d at 871. This test requires a court to look to the factual evidence and does not allow a court simply to rely on the plaintiffs' claim as to what their lawyer knew and believed, as Respondent did in her Order denying Relators' renewed motion to transfer venue. (Exhibit 1 at 5; A5.)

When Plaintiffs first alleged a sovereign immunity waiver, they knew as a matter of law that there was no waiver. In their First Amended Petition, which they filed a day after they filed their original Petition against Dr. Paulson alone, Plaintiffs did not plead that The Curators, as a public corporation, or that the individual members of the Board of

Curators had waived their sovereign immunity for medical malpractice claims by adopting a self-insurance plan, as discussed in *Brennan v. Curators of the Univ. of Mo.*, 942 S.W.2d 432 (Mo. App. W.D. 1997).

Plaintiffs did not plead a sovereign immunity waiver until they filed their Amendment by Interlineation, which they filed *after Langley v. Curators of the Univ. of Mo.*, 73 S.W.3d 808 (Mo. App. W.D. 2002), was decided. (Exhibit 8; A21.) In *Langley*, the Western District held The Curators' self-insurance plan did not waive The Curators' immunity. *Id*. at 811-12. In their subsequent legal memorandum in opposition to The Curators' summary judgment motion, Plaintiffs acknowledged the *Langley* decision. (Exhibit 19 at 6.) Therefore, Plaintiffs knew they did not have a reasonable legal opinion that The Curators' immunity had been waived.

2. The facts knowable at the time Plaintiffs filed their First Amended Petition do not support a reasonable legal conclusion that The Curators had waived sovereign immunity.

Respondent's Order suggests Relators had to prove that Plaintiffs knew that Dr. Horne was not amenable to suit in order to succeed on their motion to transfer venue. However, the law governing pretensive joinder imposes no such requirement. As held in *Toastmaster*, the test is not what was actually known by the plaintiff's attorney, but what conclusions were reasonably knowable based on the facts available at the time the plaintiff's pleading was filed. 857 S.W.2d at 871. This is an "objective" test. *Id*.

Plaintiffs did not have a reasonable belief to state a claim of individual liability against Dr. Horne. Nor did they have a reasonable belief to maintain a claim against her based on The Curators' waiver or non-waiver of sovereign immunity.

On the sovereign immunity issue, consider the facts alleged in Plaintiffs' First Amended Petition. (Exhibit 2; A12.) These allegations demonstrate what reasonable legal conclusions could be drawn from the facts objectively knowable at the time Plaintiffs first brought their claim against Dr. Horne in May 2001.

When Plaintiffs added Dr. Horne as a party defendant, they identified four physicians who participated in Marcus McElmurray's delivery. Each physician is alleged to have been negligent in specific ways. (Exhibit 2 at 6-8, ¶¶ 17-20; A17-19.) No such claims are made against Dr. Horne individually; in fact, Dr. Horne is not alleged to have participated in Plaintiffs' care in any way. Plaintiffs' allegations against Dr. Horne relate exclusively to her role as a member of the Board of Curators of the University of Missouri. (Exhibit 2 at 4, ¶ 7; A15.) Therefore, whether a claim could be stated against Dr. Horne turns on whether The Curators could be held liable. As there is no basis in fact to support a reasonable legal conclusion that a claim against The Curators existed, there is no basis to conclude that a claim against Dr. Horne existed in her official capacity as a curator.

Missouri law governing The Curators is settled. Article IX, Section 9(a), of the Missouri Constitution vests the Board of Curators with the governance of the University of Missouri. (A26.) Under Section 172.020, The Curators, as a public corporation and body politic, operates the University of Missouri. (A27.) Therefore, The Curators are immune from liability in tort absent an express statutory provision to the contrary. *Krasney v. Curators of the Univ. of Mo.*, 765 S.W.2d 646, 649 (Mo. App. W.D. 1989).

Section 537.600 codifies the immunity of governmental entities with two narrow exceptions, neither of which applies here. Only under Section 537.610.1 does a possible waiver of immunity arise for this type of claim.

As held in *Brennan v. Curators of the Univ. of Mo.*, a plaintiff must show not only that an insurance policy exists, but also that it applies to the subject claim in order to establish that The Curators is not entitled to sovereign immunity because of the insurance exception under Section 537.610.1. 942 S.W.2d at 436. Therefore, the law identifying what facts must exist to come to a reasonable legal conclusion that a viable claim exists against The Curators was clear at the time Plaintiffs filed their First Amended Petition.

These facts were objectively knowable in May 2001. The Plan is a public record. It is set forth in Section 490.020 of the Collected Rules and Regulations of The Curators of the University of Missouri. It is freely available on the University's website. http://www.system.missouri.edu/uminfo/rules/benefits/490020.htm.

Yet, Plaintiffs, in their First Amended Petition, pleaded no facts on The Curators' sovereign immunity, the existence of an insurance policy or plan, or the application of a policy or a plan to their claim. Restated, Plaintiffs failed to plead in May 2001 the *only* objectively knowable basis for a possible exception to The Curators' sovereign immunity, namely, the existence and application of the Plan to Plaintiffs' claim.

If Plaintiffs were unaware of the existence of the Plan in May 2001, then they were also unaware of this requisite fact to the application of the Section 537.610.1 sovereign immunity exception. That is, if Plaintiffs objectively cannot be said to have known the Plan or policy existed, they did not have a basis in fact to reasonably believe that an exception to The Curators' sovereign immunity existed. Therefore, Plaintiffs could not have formed a reasonable legal conclusion that a viable claim existed against The Curators or against Dr. Horne, as a member of the Board of Curators. In no way do the facts, which were available to Plaintiffs at the time they filed their First Amended Petition, support a reasonable legal conclusion that a cause of action against Dr. Horne existed.

3. Facts knowable at the time Plaintiffs filed their Amendment by Interlineation do not support a reasonable legal conclusion that a claim existed against Dr. Horne.

Plaintiffs first alleged the existence of the Plan in their Amendment by Interlineation, which they filed on October 7, 2002. (Exhibit 8; A21.) At this time, Plaintiffs had a copy of The Curators' insurance policy. On the same day Plaintiffs filed their Amendment, they also filed their Legal Memorandum in Response to The Curators' summary judgment motion (Exhibit 19 at 5-6), in which they cited *Langley v. Curators of the Univ. of Mo.*, 73 S.W.3d 808 (Mo. App. W.D. 2002). Plaintiffs acknowledged that in *Langley* "the Western District found that the purchase of an excess policy did not act as a waiver of sovereign immunity." (Exhibit 19 at 5-6.)

Plaintiffs' citation to *Langley* compels only one conclusion. They did not have a reasonable legal conclusion that a claim could be stated against The Curators based on a waiver of sovereign immunity. They knew of the *Langley* case when they filed their Amendment by Interlineation, which shows they were on notice of the controlling authority demonstrating The Curators, as a public corporation, and the individual members of the Board of Curators were protected by sovereign immunity.

In *Langley*, the Western District considered the *very* language in the Plan at issue in this case and held the language preserved The Curators' sovereign immunity. 73 S.W.3d at 811-12. Thus, aware of the Plan, on notice of its non-waiver clause, and with knowledge of the *Langley* decision, Plaintiffs could not have had a reasonable legal conclusion that a cause of action against The Curators existed.

Restated, if Plaintiffs knew of the Plan as well as the *Langley* decision, Plaintiffs also knew The Curators had not waived its immunity from suit. Plaintiffs' assertion in their Amendment that The Curators had waived sovereign immunity under the Plan is simply wrong as a matter of law and fact. (Exhibit 8; A21.) If Plaintiffs knew of the Plan, they had notice of its terms. They also knew there was no sovereign immunity waiver. Over six months before Plaintiffs filed their Amendment, the Western District decided *Langley* in which the court held the Plan gave rise to no such waiver. 73 S.W.3d at 811-12. Therefore, Plaintiffs had no basis for a reasonable legal conclusion that a claim could be stated against Dr. Horne or any of the other curators based on a waiver of sovereign immunity at the time they filed their Amendment.

4. Even assuming a cause of action against The Curators existed at the time Plaintiffs filed their First Amended Petition, there were no facts supporting a reasonable legal conclusion that a claim existed against Dr. Horne individually.

Plaintiffs' only allegations against Dr. Horne relate to her official capacity as a member of the Board of Curators of the University of Missouri. (Exhibit 2 at 4, ¶ 7;

A15.) Dr. Horne did not participate in the medical management of Marcus McElmurray. She played no role in the alleged negligent conduct at issue. Plaintiffs have not alleged that Dr. Horne did or failed to do something that would have altered the outcome of this delivery. Absent such evidence, Missouri law holds that no claim for individual liability exists. *Lynch v. Blanke Baer & Bowey Krimko, Inc*., 901 S.W.2d 147, 153 (Mo. App. E.D. 1995). Thus, there were no facts that would have led to a reasonable legal conclusion that a claim against Dr. Horne – based on her individual liability – could be maintained. Therefore, Respondent should have dismissed this case or transferred it to a proper venue.

5. Policy considerations support granting a writ of prohibition or mandamus in this case.

The sovereign immunity of The Curators of the University of Missouri is created by statute and confirmed by case law. Exceptions to that immunity are narrowly construed. As this Court has held, the abrogation of sovereign immunity, if one is to be undertaken, is the duty of the legislature, not the courts. *Smith v. Consolidated School Dist. No. 2*, 408 S.W.2d 50, 54-55 (Mo. banc 1966).

Plaintiffs had no reasonable basis to believe The Curators or the individual members of the Board of Curators were amenable to suit under any theory. Dr. Horne's joinder, the only party in this case who resides in the City of St. Louis, is the product of forum shopping. If Plaintiffs were allowed to pursue this matter in the City of St. Louis, the law governing The Curators' sovereign immunity would be thrown into disarray. Although immune from suit in the vast majority of cases, plaintiffs could name The

Curators and individual board members in suits so long as one of the board members lived in the City of St. Louis for purposes of obtaining City venue.

Chapter 172 provides for the existence and operation of the Board of Curators. To represent the State's interests in the governance of its higher education system, the Board of Curators is comprised of nine individuals from all areas of the State, individuals who are appointed by the governor with the senate's advice and consent. MO. CONST., art. IX, § 9(a); Section 172.030. (A26, A28.) No more than one person from any one congressional district may be appointed to the Board. Section 172.030. (A28.) A curator's term of service is six years, with the terms of three curators expiring every two years. Section 172.040. (A29.) As the Board's composition changes every two years, if the residence of the individual members of the Board were the basis for venue, the proper venue for any given lawsuit against The Curators would change every two years. In such cases, plaintiffs seeking to sue The Curators would only be able to obtain St. Louis City venue if an action were filed during the six-year term a curator who happened to be a St. Louis City resident.

This random assignment of venue does not advance the purpose of Missouri's venue laws. Inconsistency and change, which are contrary to the venue statutes, subvert the purpose of venue to provide a convenient, logical, and orderly forum for litigation. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 196 (Mo. banc 1991).

Venue laws are designed to afford the parties a ready and convenient forum in which to prepare and try their cases. As the Honorable Michael A. Wolff noted in his separate opinion in *Linthicum*, St. Louis City is perceived as a venue favorable to plaintiffs. *See* 57 S.W.3d at 859-62 (Opinion of Wolff, J., dissenting and concurring in part). Therefore, plaintiffs have devised a number of ways to manipulate the venue statutes to pursue their actions in that forum. In *Linthicum*, the Court eliminated one method of attempted venue manipulation employed by Plaintiffs in this case.

The second method, naming Dr. Horne as a party defendant, is no less improper than the disapproved *Linthicum* procedure. Denied the use of that method here, Plaintiffs resorted to the stratagem of naming as a party defendant a St. Louis City resident who was immune from suit. Respondent's order here, if it becomes the law, would expand the number of cases that could be brought in the City of St. Louis. This result would only exacerbate the situation leading to Judge Wolff's call for legislative reform in *Linthicum.*

Moreover, other policy considerations are at issue. First, if plaintiffs were allowed to name the individual curators as defendants in suits in which they are uninvolved solely for the purpose of creating venue in a forum where venue would otherwise be improper, qualified individuals might be discouraged from serving on the Board of Curators out of the fear of individual liability and their desire to avoid the harassment of litigation.

Second, qualified candidates might be encouraged to relocate their residences from the City of St. Louis to ensure their appointment is free from harassment and claims of individual liability. Concomitantly, The Curators has an interest in knowing where it will be amenable to suit for many reasons, including efficiency and economy of its management of litigation. Therefore, the potential venue for lawsuits could become a consideration in the appointment of individuals to the Board of Curators.

Finally, the procedural devices employed by plaintiffs generally to manipulate venue serve only to further burden the residents of the City of St. Louis with jury service on cases unrelated to their community. Absent Dr. Horne's place of residence, Plaintiffs' claim has no connection to St. Louis City. The alleged malpractice did not occur there. Plaintiffs do not reside there. Nor do Relators or the only other remaining defendant, Dr. Paulson.

Nothing in Missouri's venue statutes requires the confusion of the law of sovereign immunity as it applies to The Curators, the discouragement of service on the Board of Curators by St. Louis City residents, or the further overburdening of the St. Louis City court system that would result from Plaintiffs' forum shopping. Therefore, the Court should make permanent its preliminary writ of prohibition.

As a matter of law, Plaintiffs' joinder of Dr. Horne was pretensive. She is immune from suit in her official capacity as a member of the Board of Curators. In the absence of any allegations connecting her to Plaintiffs' injury, no claim can be stated against her in an individual capacity. Therefore, the exercise of the Court's extraordinary jurisdiction is necessary to compel the transfer of this case from the City of St. Louis, an improper venue with no connection to Plaintiffs' claim, to a proper venue such as Boone County.

CONCLUSION

Relators James Green, M.D., T. Isakson, M.D., and Christina Litherland, M.D., respectfully request the Court to make permanent the preliminary writ of prohibition and direct Respondent to dismiss the claims in *Marcus McElmurray*, *et al. v. Kathleen Paulson*, *M.D.*, No. 012-1652 (Mo. Cir. Ct., St. Louis City), against the remaining Defendants and prohibit Respondent from taking any further action in the case other than the transfer of the case to a proper venue

Respectfully submitted,

____

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AFFIDAVIT OF SERVICE

The undersigned certifies that a copy of Relators' Brief and a disk containing same were deposited on this 5th day of December, 2003, in the United States Mail, postage prepaid, addressed to: Mr. Mark I. Bronson, Newman Bronson & Wallis, Attorneys for Respondent, 2300 West Port Plaza Drive, St. Louis, Missouri 6146-3213, and Mr. Michael A. Gross, Attorney for Respondent, 34 North Brentwood Boulevard, Suite 207, St. Louis, Missouri 63105.

T. Michael Ward #32816

Subscribed and sworn to before me this 5th day of December, 2003.

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Relators' Brief contains 10,972 words, and that the computer disk filed with Relators' Brief under Rule 84.06 has been scanned for viruses and is virus-free.

T. Michael Ward #32816

APPENDIX

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