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,	)	
	)	NO. SC85534
VS.	)	
HON. MARGARET M. NEILL, PRESIDING JUDGE, MISSOURI CIRCUIT COURT, TWENTY-SECOND JUDICIAL CIRCUIT, CITY OF ST. LOUIS,	)	
RESPONDENT.	)	

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

REPLY BRIEF OF RELATORS

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INTRODUCTION

This case presents the following question: Is the Circuit Court of the City of St. Louis a proper venue for a medical malpractice action arising out of a child's delivery at the University of Missouri Medical Center in Columbia, Boone County, Missouri, where the sole basis for maintaining venue in the City of St. Louis is the place of residence of Malaika B. Horne, Ph.D., a member of the Board of Curators of the University of Missouri, a public corporation protected by sovereign immunity, and an individual who had no involvement in the mother's pre-natal care or the child's delivery?

In an attempt to answer this question in the affirmative, Respondent makes two principal arguments. First, Respondent argues Plaintiffs' First Amended Petition stated a claim against The Curators of the University of Missouri and the individual members of the Board of Curators, including Dr. Horne. Second, Plaintiffs assert they possessed a reasonable legal opinion that their claim against Dr. Horne was viable at the time they first filed suit against her.

Respondent's arguments should be denied. Neither supports the conclusion that venue was proper in the Circuit Court of the City of St. Louis based on Dr. Horne's status as a member of the Board of Curators of the University of Missouri and her place of residence in St. Louis City. Respondent's Brief is telling for what it does not say.

Respondent makes no argument that The Curators had, in fact, waived its sovereign immunity, an immunity that pre-existed the filing of Plaintiffs' lawsuit. Respondent makes no argument that the holding in *Langley v. Curators of the Univ. of*

Mo., 73 S.W.3d 808 (Mo. App. W.D. 2002), a case addressing the same insurance plan at issue in this case, was wrongly decided. Respondent makes no argument that summary judgment was wrongly entered in favor of The Curators and the individual members of the Board of Curators based on sovereign immunity. And, finally, Respondent does not address the fact that Plaintiffs did not claim that Dr. Horne was the venue-fixing defendant until after the Court's decision in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), was issued. (Exhibit 13.)

Under these circumstances, Dr. Horne's joinder as a party defendant was pretensive. Plaintiffs' First Amended Petition failed to state a claim against Dr. Horne as matter of law. Their First Amended Petition and Amendment by Interlineation disclose no facts supporting a reasonable legal opinion that a claim could be maintained against her in any capacity. Therefore, the Court's preliminary writ of prohibition should be made permanent.

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.

Respondent argues that Relators' request for relief in prohibition should be denied because Plaintiffs stated a viable claim against Dr. Horne. Respondent maintains Plaintiffs' action survives Relators' pretensive venue challenge because Plaintiffs pleaded a sovereign immunity waiver in their First Amended Petition, and stated a cognizable claim against Dr. Horne under a *respondeat superior* theory. Respondent's argument should be denied.

Plaintiffs' First Amended Petition, which was filed on May 31, 2001, did not state a claim against The Curators or the individual members of the Board of Curators. (Exhibit 2.) At the time Plaintiffs filed their First Amended Petition, the pleading requirements to state a claim against The Curators were clear. It was incumbent on Plaintiffs to plead the existence of a general liability plan that covered their claims against The Curators. *Brennan v. Curators of the Univ. of Mo*., 942 S.W.2d 432, 436 (Mo. App. W.D. 1997). The rule in *Brennan* imposes a two-prong pleading requirement. The plaintiff must allege: (1) the existence of the general liability plan; and (2) that the plan covers the plaintiff's claim against The Curators. *Id*.

As explained by the Western District, "the only way for appellants to penetrate the Curators' immunity is to demonstrate the existence of the General Liability Plan *and* that [the plan] covers the claims asserted by appellants against the Curators." *Id*. (emphasis in original). This Plaintiffs failed to do. Absent in Plaintiffs' First Amended Petition is any allegation that The Curators had waived sovereign immunity. (Exhibit 2.)

Plaintiffs did not attempt to plead a sovereign immunity waiver until October 7, 2002, sixteen months later, when they filed their Amendment by Interlineation. (Exhibit 8.) In their Amendment, Plaintiffs alleged the individual members of the Board of Curators had "waived sovereign immunity pursuant to § 537.610 by the adoption of the University of Missouri Medical Professional and Patient General Liability Plan." (*Id*.) Their Amendment also failed to state a claim under *Brennan*. There is no averment that the Plan specifically covered their claims against The Curators or the individual members of the Board of Curators. (Exhibit 8.)

Nor could Plaintiffs so allege. The decision in *Langley v. Curators of the Univ. of Mo*., 73 S.W.3d 808 (Mo. App. W.D. 2002), which was decided almost eight months before they filed their Amendment by Interlineation, makes plain that The Curators had not waived sovereign immunity. The court in *Langley* addressed the same Plan as the one now before the court and held the plaintiff's claim against The Curators failed as a matter of law. *Id*. at 811-12. In so ruling, the court relied on the Plan's following language: "'[N]othing in this 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.'" *Id*. *See also* Exhibit A-1 to Exhibit 16. (A25.)

Respondent's argument that Plaintiffs' First Amended Petition stated a theory of individual liability against Dr. Horne is no less flawed. Even if The Curators and the individual members of the Board of Curators had waived sovereign immunity, which they did not, Plaintiffs' First Amended Petition did not state a viable claim against Dr. Horne, individually, based on *respondeat superior* principles.

Respondent's argument ignores the nature of The Curators. It is a public corporation. Section 172.020, R.S.Mo. 2000. The individual members of the Board of Curators are its officers; they are vested with its governance. MO. CONST., art. IX, § 9(a). The members of the Board of Curators are akin to the directors of a private corporation. Therefore, Dr. Horne, as an individual member of the Board of Curators, cannot be held vicariously liable for the negligence of healthcare professionals employed at the

University's medical center. She is not their employer. The Curators, a public corporation, is.

Contrary to Respondent's argument, there is no allegation in Plaintiffs' First Amended Petition that the defendant healthcare professionals were "the agent[s] servant[s] and employee[s] of the curator defendants." (Respondent's Brief at 9, 12.) Rather, Plaintiffs pleaded they were the employees of "the University of Missouri-Columbia Hospital and Clinics, and The Curators of the University of Missouri." (Exhibit 2 at 4-5.)

Nor could Dr. Horne or the other individual board members be their employers. This Court rejected an identical argument against individual school district board members in *Rennie v. Belleview School Dist*., 521 S.W.2d 423, 424-25 (Mo. banc 1975). The Court explained:

> Persons employed to do [the school district's] work, while selected by the directors, are not the servants of the directors, but are the servants of the district. The relation of master and servant, or of principal and agent, does not exist in such cases, and hence the doctrine of respondeat superior does not apply between the directors and such persons.

Id. at 425 (quoting *Antin v. Union School Dist*., 280 P. 664, 667 (Ore. 1929)).

The Court's decision in *Rennie* disposes of Respondent's individual liability argument.

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). This rule is no less true of officers of public corporations. The doctrine of *respondeat superior* is simply unavailable for holding public officers vicariously liable for the acts or omissions of subordinate public employees. *Rennie*, 521 S.W.2d at 424-25; *Jackson v. Wilson*, 581 S.W.2d 39, 46 (Mo. App. W.D. 1979). As a matter of law, public officers cannot be held liable for the fault of subordinate public employees unless the officers were negligent in hiring the employees or directed, encouraged, ratified, or personally participated in their acts. *Jackson*, 581 S.W.2d at 46.

Consistent with the holding in *Hemphill v. Moore*, 661 F.Supp. 1192, 1195 (E.D. Mo. 1987), which dismissed claims against individual members of the Board of Curators, Plaintiffs have alleged no facts stating a claim of individual liability against Dr. Horne. Absent are any allegations linking her to Plaintiffs' alleged injuries. *Id*. There is no contention that she hired the defendant healthcare providers, much less directed, encouraged, ratified, or participated in Plaintiffs' care and treatment.

As Plaintiffs did not state a cognizable claim against Dr. Horne under any circumstances, Relators request the Court to make permanent the preliminary writ of prohibition. Plaintiffs' claim against Dr. Horne provides no basis to fix venue in the Circuit Court of the City of St. Louis.

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.

Respondent's second point addresses the alternative prong of the pretensive joinder test. Joinder is not pretensive where the information available at the time plaintiffs file their action supports a "reasonable legal opinion" that a claim could be maintained against the resident defendant. *State ex rel. Toastmaster, Inc. v. Mummert*,

857 S.W.2d 869, 871 (Mo. App. E.D. 1993). Respondent's argument focuses exclusively on The Curators' sovereign immunity. Dr. Horne's individual liability is not addressed.

Respondent asserts the University's Medical Professional and Patient General Liability Plan was susceptible to a different construction from the one reached by the court in *Langley v. Curators of the Univ. of Mo*., 73 S.W.3d 808 (Mo. App. W.D. 2002), which was handed down after they filed their action against Dr. Horne. Respondent's argument suggests that Plaintiffs' counsel knew of the Plan and could have reasonably believed that a waiver had occurred. Respondent also excuses Plaintiffs' original failure to plead a sovereign immunity waiver based on an uncertainty in the law. Respondent's argument should be denied.

Respondent takes a different tack in this Court. Originally, Respondent ruled that Relators' venue challenge failed because there was no showing that Plaintiffs were aware of a self-insurance policy that specifically excluded a sovereign immunity waiver. (Exhibit 1 at 5; A5.) Now Respondent implies Plaintiffs knew of the Plan, but reasonably believed there was a waiver.

Neither course advances Plaintiffs' position that venue is proper in the City of St. Louis based on Dr. Horne's residence. The alternative prong of the pretensive joinder test is an objective one. What Plaintiffs actually knew is irrelevant. The focus is on the information available at the time they filed their First Amended Petition. *State ex rel. Toastmaster, Inc.*, 857 S.W.2d at 871. The test requires a realistic belief under the law and the evidence that a justiciable claim against Dr. Horne existed. *Id*. Plaintiffs cannot satisfy this burden.

Consider the law and facts objectively knowable at the time Plaintiffs filed their First Amended Petition:

- Section 537.600, R.S.Mo. 2000, provides the doctrine of sovereign immunity is the general rule and protects public entities from liability for negligent acts.
- The Curators is a public corporation. *Todd v. Curators of Univ. of Mo*., 347 Mo. 460, 147 S.W.2d 1063, 1064 (1941); *Brennan v. Curators of the Univ. of Mo*., 942 S.W.2d 432, 434 (Mo. App. W.D. 1997); and Section 172.020, R.S.Mo. 2000.
- The Curators and the individual members of the Board of Curators are protected by sovereign immunity, absent an applicable exception. *Brennan*, 942 S.W.2d at 434.
- The insurance available to a public entity does not waive sovereign immunity unless it provides for coverage of liability other than the two exceptions set forth in Section 537.600. *Id*. at 436.
- Extant case law decided *before* Plaintiffs filed their action required plaintiffs to plead a sovereign immunity waiver through averments showing the existence of insurance covering Plaintiffs' specific claim. *Id*. at 436-37.

- The University's Medical Professional and Patient General Liability Plan was a matter of public record. Section 490.020 of the Collected Rules and Regulations of The Curators of the University of Missouri.
- The Plan stated: "Nothing in this 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.)
- Extant case law decided *before* Plaintiffs filed their action made plain that a public entity does not waive its sovereign immunity by maintaining an insurance policy that includes a provision stating the policy is not meant to constitute a sovereign immunity waiver. *State ex rel. Board of Trustees of the City of North Kansas City Mem'l Hosp. v. Russell*, 843 S.W.2d 353, 360 (Mo. banc 1992); *Casey v. Chung*, 989 S.W.2d 592, 594 (Mo. App. E.D. 1998).
- Extant case law decided *before* Plaintiffs filed their action provided that *respondeat superior* claims could not be maintained against public officers for the acts or omissions of subordinate public employees. *Rennie v. Belleview School Dist.*, 521 S.W.2d 423, 424-25 (Mo. banc 1975); *Jackson v. Wilson*, 581 S.W.2d 39, 46 (Mo. App. W.D. 1979).
- Plaintiffs were aware of no facts that Dr. Horne had personally participated in their care and treatment. No such facts are pleaded in their First Amended Petition. (Exhibit 2.)

Under these circumstances, all of which pre-existed the filing of Plaintiffs' lawsuit against Dr. Horne, Plaintiffs could not have had a reasonable legal opinion that a viable claim existed against The Curators or against the individual members of the Board of Curators, including Dr. Horne. In no way did the law and the facts, which were available to Plaintiffs at the time they filed their First Amended Petition, support a reasonable legal conclusion that sovereign immunity had been waived and a cause of action against Dr. Horne could be maintained.

Respondent's final argument addressing Relators' policy considerations does not compel a contrary conclusion. Maintenance of an action against Dr. Horne, in her capacity as a member of the Board of Curators, despite sovereign immunity and the absence of *respondeat superior* liability, solely to fix venue in a forum deemed favorable by the Plaintiffs – a forum that has no connection to their claim – advances no salutary purpose and defeats public policy. The Court so recognized in its decision in *Rennie v. Belleview School Dist*., 521 S.W.2d 423, 425 (Mo. banc 1975):

> "To permit a recovery (against members of school district boards) . . . would be to establish a principle which would paralyze the public service. Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates."

(quoting *Robertson v. Sichel*, 127 U.S. 507, 515, 8 S.Ct. 1286, 1290 (1888)).

These same concerns are no less applicable to Plaintiffs' attempt to state a claim against Dr. Horne, an individual member of the Board of Curators, in the face of sovereign immunity and the absence of *respondeat superior* liability.

As The Curators did not waive sovereign immunity, and there was no reasonable basis for a legal opinion that The Curators had done so, and no claim of individual liability existed against Dr. Horne as a matter law, Dr. Horne's residence in St. Louis City did not provide a basis for fixing venue in the Circuit Court of the City of St. Louis. Therefore, the preliminary writ of prohibition should be made permanent.

CONCLUSION

A permanent writ of prohibition should issue.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned certifies that a copy of Relators' Reply Brief and a disk containing same were deposited on this 23rd day of January, 2004, 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 23rd day of January, 2004.

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Relators' Reply Brief contains 3,658 words, and that the computer disk filed with Relators' Reply Brief under Rule 84.06 has been scanned for viruses and is virus-free.

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