IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel.
JAMES GREEN, M.D., et al.

Relators

vs.

HON. MARGARET M. NEILL, etc.

Respondent

No. SC 85534

ORIGINAL PROCEEDING IN PROHIBITION

BRIEF OF RESPONDENT

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Introduction

The joinder of a defendant is not pretensive, and venue dependent upon the residence of that defendant is not improper, if the petition states a cause of action against the defendant and the facts that were available when the plaintiff sued the defendant were sufficient to support a reasonable legal opinion that his claim was actionable. *State ex rel. Smith v. Gray,* 979 S.W.2d 190, 193 (Mo. 1998). The reasonableness of the plaintiff's legal opinion is measured objectively on the basis of information available to him. *State ex rel. Malone v. Mummert,* 889 S.W.2d 822, 824-25 (Mo. 1994). A party alleging pretensive joinder bears the burden of proving that the facts known to the plaintiff could not have supported a reasonable belief in the viability of his claim. *Smith, supra* (citing *Breckenridge v. Sweeney,* 920 S.W.2d 901, 902 (Mo. 1996)).

In the action underlying this writ proceeding, the respondent afforded the relators ample time and opportunity to make the requisite showing. She concluded that they had failed to carry their burden of proof and persuasion. The respondent's refusal to transfer the case is amply supported by the record. This Court's preliminary order in prohibition should be quashed and the relator's petition for a writ of prohibition should be dismissed.

I.

The relators are not entitled to an order requiring Judge Neill to transfer the underlying action to a venue other than the City of St. Louis, because the plaintiffs in that action stated a viable claim against the defendant Malaika B. Horne, Ph.D., a resident of the City of St. Louis, and Judge Neill's order denying the relators' objection to venue was an act within her jurisdiction, in that the plaintiffs alleged that (A) the defendant Board of Curators of the University of Missouri had waived sovereign immunity and (B) the defendant health care professionals whose negligence caused the plaintiffs' harm had been acting as the agents and employees of the Board of Curators and Dr. Horne.

In the end, the plaintiffs in the underlying action relied on Dr. Horne's residence in the City of St. Louis as their rationale for venue in that circuit. The relators contend that the joinder of Dr. Horne was pretensive because the plaintiffs' failed to allege an actionable claim against her, that her residence in the City of St. Louis cannot avail the plaintiffs, and thus that this Court must direct Judge Neill to transfer the case to another circuit. Relator's Br. at 14-31. The relators' argument cannot withstand analysis and the case should remain in the plaintiffs' chosen venue.

A. Plaintiffs' Allegation That Sovereign Immunity Was Waived

The relators argue first that the plaintiffs' petition was insufficient because it failed to allege a waiver of the Board of Curators' sovereign immunity. Id. at

23-26. Of course the relators acknowledge that a governmental agency waive sovereign immunity to the extent that it procures liability insurance for particular types of tort claims. *Id.* at 22 (citing § 536.610.1, MO. REV. STAT.) And the relators allow that the plaintiffs asserted such a waiver by the Board of Curators in an amendment to their petition. *Id.* at 24. The relators insist, however, that the plaintiffs' allegation was insufficient to withstand their motion to dismiss the petition for failure to state a cause of action. Id. at 23-26.

The latter contention runs headlong into two rules—one for the evaluation of motions to dismiss generally and another pertinent to the assessment of venue objections in particular—that can offer the relators no quarter. First, the bedrock rule governing the adjudication of motions to dismiss for failure to state a cause of action provides: "In determining whether sufficient facts exist, the petition is broadly construed in the plaintiff's favor, with all allegations and reasonable inferences accepted as true." *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. 1997). Second, this Court's test for the sufficiency of a plaintiff's venue allegations is even more favorable to the pleader:

> Whether a petition states a claim against defendants for purposes of establishing venue is a difficult issue. The standard for determining this is less stringent than that required either to grant summary judgment or to sustain a motion to dismiss for failure to state a claim.

State ex rel. Malone v. Mummert, 889 S.W.2d 822, 825 (Mo. 1994). The plaintiffs' amended petition satisfied both of those standards.

The amended petition alleged that the Board of Curators "waived sovereign immunity pursuant to § 537.610 by the adoption of the University of Missouri Medical Professional and Patient General Liability Plan." Ex. 8; App. at A-21.[1] Under the tests articulated in *Klemme* and *Malone*, it is at least reasonable to infer from that claim that the Board of Curators had provided insurance for the liability of its professional medical employees to their patients and that the provision of that insurance was intended to waive the board's immunity from such claims as specified in the pertinent statute. The relators' contention that the plaintiffs alleged only "a legal conclusion," Relator's Br. at 24, is facile and unreasonable:

• The adoption of a liability insurance plan is a matter of fact;

• The description of the insurance coverage as applicable to patients' claims against the Board of Curators' medical professionals likewise is a matter of fact;

• The specification of the board's purpose in providing that coverage is a matter of fact; and

[1] The exhibits to which reference is made in this brief are the exhibits attached to the relators' petition for a writ of prohibition. The appendix pages to which reference is made in this brief are the appendix pages included in the relators' brief.

• The provisions of § 537.610 certainly are matters of law, but their existence and their function as motive for the Board of Curators' election to provide liability insurance coverage are matters of fact as well.

One wonders—and the relators do not suggest—what additional fact the plaintiffs might have been required to set forth. The relators rely upon *Brennan v. The Curators of the University of Missouri*, 942 S.W.2d 432 (Mo.App.W.D. 1997), in support of their claim that the present petition was insufficient to survive their motion to dismiss. Relator's Br. at 24-25. That reliance is inapt. In that case, the plaintiffs "failed to plead in any count of the petition that the Curators waived sovereign immunity." *Brennan* at 433. The cornerstone of the Court of Appeals' ruling was its observation that the plaintiffs "failed to plead facts alleging the Curators adopted the General Liability Plan." *Id.* at 436-37; *see also Hummel v. St. Charles City R-3 School District*, 114 S.W.3d 282, (Mo.App.E.D. 2003) (affirming the dismissal of the plaintiff's petition because she had failed to allege the existence of insurance applicable to her claim); *State ex rel. Public Housing Agency of the City of Bethany v. Krohn*, 98 S.W.3d 911 (Mo.App.W.D. 2003) (noting in dictum that a plaintiff's claim against a public agency "would be barred by sovereign immunity because he has not pled . . . that [the agency] waived sovereign immunity by the purchase of liability insurance"). No such omission occurred in the present case.

B. Plaintiffs' Allegation of Dr. Hornes' Negligence

The relators argue that the plaintiffs did not plead a viable theory of individual liability with respect to Dr. Horne. The plaintiffs alleged that Dr. Horne and the other individual curators operated the facility at which their damage occurred. Ex. 2 at 4. They alleged that their injury was caused by the negligence of individual health care professionals who were acting as the "agent servant and employee of the curator defendants." *Id.* at 4-5. And they described the negligent acts and resulting injuries in detail. *Id.* at 5-8. Those allegations stated a cognizable claim against Dr. Horne.

It is well established that "an employer is liable under the theory of *respondeat superior* for damages attributable to the misconduct of an employee or agent acting within the course and scope of the employment or agency." *State ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 825 (Mo. 1995). When sovereign immunity does not apply or has been waived, a governmental employer is liable under that theory for an employee's negligent conduct. *Best v. Schoemehl*, 652 S.W.2d 740, 742 (Mo.App.E.D. 1983). The plaintiffs stated a claim against Dr. Horne in her individual capacity based upon *respondeat superior* liability. The relators' insistence that the plaintiffs failed to allege an actionable claim or a viable theory for recovery against Dr. Horne is not tenable.

The relators' reliance upon *Smith v. Consolidated School District No. 2*, 408 S.W.2d 50 (Mo. 1966), is misplaced. Relators' Br. at 26-27. In Smith, this Court did reject a claim based upon the purported respondeat superior liability of a

school superintendent for the negligence of a school teacher. *Id.* at 53-54. But the rationale of that decision was clearly stated and is inapposite to the circumstances of this case:

> The theory that Cradock, the physical education instructor, was an employee of Herndon, the Superintendent, and that Herndon would be liable for his acts in a master-servant relationship, is wholly fallacious. It is a matter of public knowledge, and we may say of judicial notice, that all teachers in the public schools are employees of the school district . . . The superintendent may presumably recommend, but he does not employ.

Id.

The relators argue that the "[p]laintiffs' claim against Dr. Horne is analogous to the claim against the superintendent in Smith." Relators' Br. at 27. That is not so. The Board of Curators is analogous to the school district rather than the school superintendent. The plaintiffs alleged that the health care professionals whose negligence gave rise to their claims were the employees and agents of the board and its members. The relators offered Judge Neill no proof that this allegation was false. Neither is the allegation false as "a matter of public knowledge."

Hemhill v. Moore, 661 F.Supp. 1192 (E.D.Mo. 1987), also relied upon by the relators, also is unavailing. Relators' Br. at 28-29. The theory of respondeat superior liability is nowhere considered in that case. The district court found the

individual curators protected from liability in their official capacity by the sovereign immunity provisions of U. S. CONST. AMEND. XI. *Id.* at 1194-95. The court concluded that the curators had no liability to the plaintiff in their individual capacity because "the plaintiff relies upon the "policies and customs" of the Curators to establish liability and alleges no acts directly linking the Curators to the alleged injuries." *Id.* at 1195.

Finally, the relators' invocation of *Lynch v. Blanke, Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147 (Mo.App.E.D. 1995), cannot salvage their position. Relators' Br. at 29-30. That decision stands for nothing more than the proposition that "[u]nder Missouri law, merely holding a corporate office will not subject one to personal liability for the misdeeds of the corporation." *Id.* at 153. The relators' insistence that "[t]he holding in Lynch is fatal to . . . a claim of individual liability against Dr. Horne," and that "[s]uing Dr. Horne in her capacity as a curator is analogous to suing a director of a corporation for the corporation's torts," is unfounded. The law governing liability of individuals associated with a private corporation for claims against the corporation has its own unique and historical rationale:

> The independent legal existence of a corporation is a basic component of corporate law and of the economic policy it supports . . . Ignoring the separate existence of a corporation and imposing personal liability . . . for debts of the corporation is an extraordinary act to be taken "only when necessary to promote justice."

O'Hazza v. Executive Credit Corporation, 431 S.E.2d 318, 321 (Va. 1993); see also Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U.CHI.L.REV. 89, 93-97 (1985) (explaining the economic theory that underlies the insulation of individuals associated with private corporations from corporate liabilities).

The relators contend that "[p]laintiffs' only allegation against Dr. Horne is that she is a member of the Board of Curators." That simply is not so. The plaintiffs alleged that Dr. Horne and the other individual curators operated the facility at which their damage occurred. Ex. 2 at 4. They alleged that their injury was caused by the negligence of individual health care professionals who were acting as the "agent servant and employee of the curator defendants." *Id.* at 4-5. They described the negligent acts and resulting injuries in detail. *Id.* at 5-8. And, in amendment by interlineation, they alleged that the board and the individual curators had waived sovereign immunity by providing insurance coverage for medical malpractice claims. Ex. 8. Those allegations stated a cognizable claim against Dr. Horne under the standards articulated by this Court in *Klemme* and *Malone*.

II.

The relators are not entitled to an order requiring Judge Neill to transfer the underlying action to a venue other than the City of St. Louis, because the information available at the inception of the case did not preclude plaintiffs' counsel from entertaining a reasonable legal opinion that the plaintiffs' claim against Dr. Horne was viable at that time, in that (A) the Board of Curators previously had adopted a medical malpractice liability insurance plan and procured excess coverage from a private insurance company, (B) in *Langley v. Curators of the University of Missouri,* 73 S.W.3d 808 (Mo.App.W.D. 2002), a Missouri appellate court found it necessary to construe the plan and policy language in order to determine whether the board had intended to waive sovereign immunity by providing that coverage, (C) that court made no suggestion that the plaintiffs who sought a different construction of the plan and policy had acted unreasonably or in bad faith, and (D) the language of the insurance documents existing at the time that the plaintiffs asserted their claim against Dr. Horne thus supported a reasonable belief that the board had waived sovereign immunity for claims based upon professional medical negligence.

Preface

The plaintiffs commenced the underlying action during May, 2001. Ex. 7. The Board of Curators had adopted its malpractice liability insurance plan and procured supplemental liability insurance from a private carrier prior to that time,

and the facts pertaining to that coverage generally available during May, 2001. Relators' Br. at 36.

The medical malpractice self-insurance plan defined "covered person" as the Board of Curators and its administrative personnel and provided coverage for "all sums which the covered person shall become legally obligated to pay as damages because of injury to a . . . patient arising out of the operations of a medical facility." Ex. 16 (Ex. A-1 at 1, 3-4). The section of the plan labeled "Exclusions," which purports to identify claims to which "[t]he Plan does not apply," makes no mention of claims that otherwise would be precluded by the doctrine of sovereign immunity. *Id.* (Ex. A-1 at 5-8). The final section of the plan is labeled "Miscellaneous Provisions." Id. (Ex. A-1 at 12-14). In the final sentence of the final paragraph of a subsection entitled, "Actions Against The Plan," the following statement appears: "[N]othing in the Plan shall be construed as a waiver of any *governmental* immunity of the [board] nor of any of its employees in the course of their official duties." Id. (Ex. A-1 at 13) (emphasis added).

The excess coverage policy makes no mention of sovereign immunity or official immunity. Ex. 16 (Ex. A-2). The policy does contain the following declaration in its "Coverages" section:

> We will pay those sums, in excess of the amount payable under the terms of any underlying insurance, that the insured becomes legally obligated to pay as damages because of injury or damage to which

> this insurance applies, provided that the underlying insurance also applies, or would apply but for the exhaustion of its applicable limits of insurance.

Id. (Ex. A-2 at 3).

In *Langley v. Curators of the University of Missouri*, 73 S.W.3d 808 (Mo.App.W.D. 2002), decided approximately one year after the present action had been commenced, the Court of Appeals found it necessary to construe the language of the board's self-insurance plan and its commercial policy of excess coverage in order to determine whether the provision of medical malpractice liability insurance "evinces the intent of the Curators to waive their sovereign immunity." *Id.*, 73 S.W.3d at 812. The Court concluded that there had been no waiver. The court did not suggest that the contention of the Langley plaintiffs for a different construction had been advanced unreasonably or in bad faith.

Available Information Regarding Waiver of Sovereign Immunity

The relators argue that it was impossible at the time that the plaintiffs alleged a waiver of sovereign immunity for one to have held a reasonable legal opinion that such a waiver had occurred. Relators' Br. at 32-42. They claim as well that no facts could have supported a reasonable legal opinion that Dr. Horne had individual liability for any medical malpractice claim. Neither contention is sound.

The relators are off the mark first in suggesting that the information available to the plaintiffs and their counsel must be considered as of the time that

the plaintiffs amended their petition to allege a waiver of sovereign immunity. *Id.* at 32-37. That suggestion facilitates the relators' argument that *Langley v. Curators of the University of Missouri, supra,* which held that the Board of Curators had not waived sovereign immunity by virtue of its liability plan and supplemental policy and which was decided several months before the plaintiffs expressly alleged the waiver of sovereign immunity, rendered any subsequent belief to the contrary unreasonable. As the relators acknowledge, however, *State ex rel. Toastmaster, Inc. v. Mummert,* 857 S.W.2d 869 (Mo.App.E.D. 1993), specifies that the test for pretensive joinder is whether information available *at the inception of a case* precluded a reasonable belief that the plaintiff's claim was viable. Relators' Br. at 33. *Langley* was decided long after the plaintiffs in this case filed suit against Dr. Horne and the other defendants.

The relators are wrong also in their contention that the plaintiffs' counsel must have been unaware of the insurance coverage provided by the Board of Curators at the time suit was filed and that counsel's purported ignorance of facts constituting a waiver of sovereign immunity would be determinative of the test articulated in *Toastmaster.* Relators' Br. at 36-37. The relators argue that the plaintiffs' claim is precluded because their attorneys did not allege the existence and effect of the board's insurance coverage when they filed their original petition, that counsel thus lacked "a basis in fact to reasonably believe that an exception to the Curators' sovereign immunity existed," and that the plaintiffs therefore "could

not have formed a reasonable legal conclusion that a viable claim existed against the Curators or against Dr. Horne." *Id.*

As the relators note elsewhere in their brief, however, the test promulgated in *Toastmaster* is an objective one based upon "the factual evidence available at the time the plaintiffs file their petition," rather than upon what the plaintiffs' lawyers actually "knew and believed." *Id.* at 33 (citing *Toastmaster,* 857 S.W.2d at 871). And as the relators insist, the facts establishing the Board of Curators' provision of medical malpractice liability insurance "were objectively knowable" when the plaintiffs commenced their action: "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." Relator's Br. at 36.

The plaintiffs' omission of allegations regarding sovereign immunity from their original petition is just as readily attributable to uncertainty regarding the necessity of asserting an immunity waiver in that initial pleading. On the one hand, the Court of Appeals for the Western District had concluded that a petition seeking recovery against the Board of Curators for medical malpractice must contain an allegation that sovereign immunity has been waived. *Brennan v. Curators of the University of Missouri, supra*. But the court reached that conclusion only by declining to follow *Greene County v. State,* 926 S.W.2d 701 (Mo.App.W.D. 1996), in which it had held: "[T]he State waived its right to rely on the defense of sovereign immunity . . . by failing to specifically raise the issue."

Id. at 704.[2] With the law in that state the plaintiffs' failure to allege a waiver of sovereign immunity was not tantamount to proof that counsel either was unaware of the existing insurance coverage or, more to the point, lacked a reasonably held legal opinion that such a waiver had occurred.

Conclusion

In the Circuit Court the relators bore the burden of proving that the plaintiffs' assertion of a claim against Dr. Horne was pretensive. The respondent concluded with good reason that the relators had failed to carry that burden. In this Court the relators bear the burden of establishing that the respondent's ruling was an act in excess of her authority. They have failed to carry that burden. This Court should quash its preliminary order in prohibition and dismiss the relator's petition.

[2] The Court of Appeals explained in *Brennan:* "The holding in *Greene County* indicates that sovereign immunity is an affirmative defense . . . Sovereign immunity may be an affirmative defense, but, other than *Greene County*, there is little authority for that proposition." 942 S.W.2d at 436; *contra Molasky v. Brown,* 720 S.W.2d 412, 414 (Mo.App.E.D. 1986) (holding that official immunity is an affirmative defense that must be pled and proved by the defendant).

III.

The relators are not entitled to an order requiring Judge Neill to transfer the underlying action to a venue other than the City of St. Louis, because the establishment of rules governing venue is the exclusive province of the legislature and the public policy arguments advanced by the relators would require this Court to intrude upon that province, in that the relators have called upon the Court to establish rules and limitations regarding actions against the Board of Curators and its members that the legislature has not seen fit to enact.

The relators contend that the venue issue raised in this proceeding for an extraordinary writ—i.e., whether a member of the University of Missouri Board of Curators may be sued individually in the Circuit Court for the county in which she resides—ought to be resolved as a matter of public policy. Relators' Br. at 39-42. That would be a bad idea.

The enactment of rules establishing venue for judicial proceedings is a matter within the exclusive province of the legislature. *State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker,* 955 S.W.2d 931, 933 (Mo. 1997). Courts may not engraft upon venue legislation additional concepts "that do not appear explicitly or by implication" in the statutory language. *Willman v. McMillen*, 779 S.W.2d 583, 586 (Mo. 1989). The legislature has not seen fit to enact a statute that specifies or limits the venues in which claims against the Board of Curators or individual curators may be brought. Perhaps that is because the

board operates the state's university system and thereby has a pervasive presence—often a profound presence—in so many different potential venues. Surely it reflects a failure of the legislature to conclude that the protection advocated by the relators—who of course are not the Board of Curators—is necessary or appropriate.

Whatever the legislature's reason, it has not taken action to provide special venue rules for the Board of Curators or its members. "[E]xcept for the restrictions imposed by the state constitution, the power of the state legislature is unlimited and practically absolute." *Curchin v. Missouri Industrial Development Board,* 722 S.W.2d 930, 936 (Mo. 1987). It possesses plenary power to enact legislation. *State ex rel. Upchurch v. Blunt,* 810 S.W.2d 515, 516-17 (Mo. 1991). It provided for the existence and operation of the board. Ch. 172, MO.REV.STAT. It establishes the locations and the conditions of venue. *Bunker Resource, supra.* The adoption of "public policy" measures limiting the rights of citizens to bring the Board of Curators and its members to court ought to await the action of the General Assembly.

CONCLUSION

For the reasons set forth in this brief, this Court's preliminary order in prohibition should be quashed and the relators' petition for a writ of prohibition or mandamus should be dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the requirements of Mo.R.Civ.P. 84.06. The brief contains 4,383 words as determined by the software application Microsoft Word for Macintosh version X. The diskette filed with this brief bears a copy of the brief and has been scanned for viruses and is virus-free.

One copy of this brief and one diskette bearing a copy of the brief were sent by first class mail on January 6, 2004, to:

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