

IN THE MISSOURI SUPREME COURT

NO. SC85135

STATE OF MISSOURI, ex rel. BJC HEALTH SYSTEM and
MISSOURI BAPTIST MEDICAL CENTER,

Relators,

v.

THE HONORABLE MARGARET M. NEILL, Circuit Court Judge,
22nd Judicial Circuit Court (St. Louis City),

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION
CIRCUIT COURT OF ST. LOUIS CITY CAUSE NO. 012-0056

BRIEF OF RELATORS

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JURISDICTIONAL STATEMENT

This is an original proceeding in prohibition to prohibit Respondent, the Honorable Margaret M. Neill (or the current Presiding Judge for the Circuit Court for the City of St. Louis), from taking any further action in this case except to transfer the entire case to the Circuit Court for St. Louis County.

Pursuant to Article V, Section 4, of the Missouri Constitution, the Missouri Supreme Court is authorized to issue extraordinary original remedial writs.

STATEMENT OF FACTS

On January 5, 2001, plaintiffs, the spouse and surviving children of Hazel Trimble, filed a wrongful death and lost chance of survival action entitled “*David Trimble, Individually, and as Plaintiff Ad Litem, Roger D. Trimble, Thomas A. Trimble, Timothy A. Trimble, Daniel K. Trimble, and Patricia D. Wilson v. BJC Health System, a Missouri Not-For-Profit Corporation, and Missouri Baptist Medical Center, a Missouri Not-For-Profit Corporation*”, being Cause No. 012-56 in the Circuit Court of the City of St. Louis, Missouri. (Petition, *Exhibit 1*)¹ (For the Court’s convenience, an additional copy of the Petition is filed herewith at Tab 1, pages A1-A14, of Relators’ separately bound Appendix). Plaintiffs named as defendants two Missouri not-for-profit corporations, Missouri Baptist Medical Center (“Missouri Baptist”) and BJC Health System (“BJC”). (*Exhibit 1, caption*). The basis of plaintiffs’ claims surrounded a June 11-14, 2000, hospitalization of Hazel Trimble at Missouri Baptist Medical Center in St. Louis County. (*Exhibit 1, ¶ 7*).

¹ Unless otherwise noted, all exhibit references are to the exhibits attached to Relators’ Suggestions in Support of Petition for Writ of Mandamus and/or Prohibition, filed with this Court on February 28, 2003.

The allegations of the Petition include, but are not limited to, that defendant BJC Health System maintains control over Missouri Baptist Medical Center (*Exhibit 1, ¶¶ 3 and 4*); that decedent came under the care and treatment of both BJC and Missouri Baptist (*Exhibit 1, ¶¶ 8 and 10*); and that as a direct and proximate result of the negligence and carelessness of each of them, decedent sustained injuries (*Exhibit 1, ¶¶ 8 and 11*). (*See also Index to Key Allegations of Trimble First Amended Petition, submitted as Exhibit 17*). Plaintiffs' Petition admits that all the care and treatment to their decedent occurred at defendant Missouri Baptist Medical Center, which is located in St. Louis County. (*Exhibit 1, ¶¶ 4, 7 and 10*).

The caption of the Petition, as well as the body of the Petition, specifically listed the defendants as separate Missouri not-for-profit corporations along with the names and addresses of the registered agents as the party to be served. (*Exhibit 1, caption and ¶¶ 3-4*). The service address for each not-for-profit corporation was located in St. Louis County, Missouri. (*Exhibit 1, caption*).

On January 29, 2001, each not-for-profit corporation was served through its registered agent in St. Louis County according to the proofs of service executed by the sheriff of St. Louis County. (Returns of Summons for BJC Health System and Missouri Baptist Medical Center, submitted as

Exhibit 2). Therefore, pursuant to Missouri Rule of Civil Procedure 55.25(a) and 51.045, these defendants each had thirty days, up to and including, February 28, 2001, in which to file a responsive pleading.

On February 28, 2001, which is thirty (30) days from the date of service of summons, defendants Missouri Baptist and BJC Health System each timely filed a Motion to Dismiss or in the Alternative to Transfer. (See Motion of Defendant BJC Health System to Dismiss or in the Alternative to Transfer, submitted as *Exhibit 3*; see Motion of Defendant Missouri Baptist Medical Center to Dismiss or in the Alternative to Transfer, submitted as *Exhibit 4*)². Among other issues, each motion alleges that venue in the City of St. Louis is improper pursuant to § 355.176.4, and that plaintiffs pretensively joined BJC Health System in an improper attempt to establish venue in the Circuit Court of the City of St. Louis. (*Exhibit 3*, ¶ 8; see *Exhibit 4*, ¶ 6).

Plaintiffs' Response to the Motions to Transfer did not challenge any of the facts that cause § 355.176.4, RSMo, to govern venue herein. (See *Exhibits 5 and 6*). Furthermore, therein plaintiffs admitted that venue is

² For the Court's convenience, these motions are also submitted herewith at Tabs 2 (A15-A18) and 3 (A19-A23), respectively, to Relators' separately bound Appendix.

determined pursuant to § 355.176.4. (See *Exhibit 5*, ¶ 8; see *Exhibit 6*, ¶ 6). Plaintiffs did not directly dispute that Missouri Baptist can be sued only in St. Louis County, nor did they dispute that defendant BJC Health System also can be sued in St. Louis County. (*Exhibits 5 and 6*). Plaintiffs (1) did not dispute that the alleged cause of action against both defendants accrued at Missouri Baptist in St. Louis County; (2) did not dispute that Missouri Baptist Medical Center has its principal place of business and registered agent located in St. Louis County; and (3) did not dispute that defendant BJC Health System has its registered agent within an office located in St. Louis County. Instead, plaintiffs incorrectly, and without any valid support, alleged that venue is proper in the City of St. Louis for Missouri Baptist because venue is proper as to defendant BJC Health System. (*Exhibit 5, para. 8, and Exhibit 6, para. 6*).

On September 12, 2001, plaintiffs filed a First Amended Petition adding Dr. John Hess as a defendant. (See Plaintiffs' First Amended Petition, submitted as *Exhibit 7*). In response to the First Amended Petition, defendants Missouri Baptist and BJC filed a Memorandum to the Court adopting their previously filed Motions to Dismiss, or in the Alternative, to

Transfer Venue.³ (See Memorandum to the Court of Defendants Missouri Baptist Medical Center and BJC Health System, submitted as *Exhibit 8*).

On May 6, 2002, defendants BJC Health System and Missouri Baptist filed a Memorandum to Court submitting four (4) exhibits in support of their previously filed motions to dismiss or in the alternative motions to transfer.

(*Exhibit 9*). These defendants submitted Certificates of Fact from the Missouri Secretary of State's Office regarding the location in St. Louis County of the office of the registered agents of BJC Health System and Missouri Baptist Medical Center. (*Exhibit 9*; see also A155-A162).

Defendants also submitted an Affidavit of Carolyn Roth attesting that the office of Missouri Baptist's registered agent when plaintiffs brought this action and at the time plaintiffs filed the Amended Petition was located in St. Louis County; that all the care Missouri Baptist Medical Center provided to

³ Plaintiffs' First Amended Petition added paragraph 5 and Counts III and IV. The allegations against defendants Missouri Baptist and BJC Health System remained the same. Thus, these defendants' adoptions of their previous motions in response to the First Amended Petition are off one paragraph from paragraph 5 to the end of the First Amended Petition. These defendants note this minor inconsistency and apologize for any inconvenience.

Hazel Trimble, as alleged in plaintiffs' Petition, occurred only at Missouri Baptist Medical Center; and that Missouri Baptist Medical Center has only one address which is located at 3015 North Ballas Road, St. Louis County, Missouri 63131. (*Exhibit 9*; see also A163-A164).

On May 7, 2002, Respondent called and heard these defendants' Motions to Dismiss, or in the Alternative, to Transfer Venue, as well as the Motion of John Hess, M.D. to Transfer Venue. After hearing arguments, Respondent took all defendants' motions under submission and allowed the parties to file briefs on the issue. (See May 7, 2002 Order, which is submitted as *Exhibit 10*).

On May 14, 2002, defendants Missouri Baptist and BJC filed their Memorandum of Law in support of their Motions to Dismiss, or in the Alternative, Motions to Transfer Venue. (See Memorandum of Law of Defendants Missouri Baptist Medical Center and BJC Health System in Support of Their Motions to Dismiss, or in the Alternative, Motions to Transfer, submitted as *Exhibit 11*)⁴. The Memorandum of Law fully outlined defendants' numerous arguments, which included that venue in the

⁴ For the Court's convenience, an additional copy of the Memorandum of Law is submitted herewith at Tab 4 (A24-A171) to Relators' separately bound Appendix.

City of St. Louis is improper pursuant to § 355.176.4, and attached fourteen (14) exhibits which were copies of all the relevant supporting documents. (See *Exhibit 11*, including internal exhibits).

On July 31, 2002, Respondent denied all defendants' motions to transfer venue as untimely. Despite evidence to the contrary, Respondent found that BJC Health System and Missouri Baptist Medical Center did not timely file their motions to dismiss or transfer venue and denied their motions. (See July 31, 2002 Order, submitted as *Exhibit 12*)⁵.

On September 19, 2002, Defendants Missouri Baptist and BJC Health System sought relief from the Court of Appeals for the Eastern District of Missouri by seeking a writ of mandamus and/or prohibition compelling Respondent, in light of the timely filed Motions to Dismiss or Transfer, to take no further action in the case except to transfer the matter to St. Louis County as the exclusive venue within which Missouri Baptist can be sued under the facts of this case. (Court of Appeals Case No. *ED81798*). After Respondent filed Suggestions in Opposition to the Petition for Writ indicating that there was no dispute that the motions to transfer filed by

⁵ For the Court's convenience, an additional copy of Respondent's July 31, 2002, Order is submitted at Tab 5 (A172-A176) of Relators' separately bound Appendix.

Missouri Baptist and BJC were timely filed, the Court of Appeals issued an order directing Respondent to rule on the merits of the Motions to Dismiss or Transfer. In that order, the Court of Appeals stated in part, “It is therefore clear that the basis for Respondent’s denial of the motions to dismiss or transfer is erroneous and cannot stand. Relators are clearly entitled to relief.” (See *Order dated October 29, 2002, page 2*, submitted as *Exhibit 13*).

On November 27, 2002, Respondent issued an order stated to be in response to the Court of Appeals’ October 29, 2002, order. In her order, Respondent found: (1) that plaintiffs have adequately pleaded joint liability between Missouri Baptist and BJC Health System, which she must take as true; (2) that plaintiffs’ claims against BJC Health System are to be tried separately from plaintiffs’ claims against Missouri Baptist Medical Center because Respondent erroneously found that BJC had not carried its burden of proving that venue is not proper as to the claim against BJC; (3) that plaintiffs’ claims against Missouri Baptist Medical Center are to be transferred to the Twenty-First Judicial Circuit in St. Louis County pursuant

to § 476.410, RSMo; and (4) that the motion of defendant BJC to transfer is denied. (See *November 27, 2002 order* submitted as *Exhibit 14, page 11*)⁶.

On December 31, 2002, Defendants Missouri Baptist and BJC Health System sought relief from the Court of Appeals for the Eastern District of Missouri by seeking a writ of mandamus and/or prohibition compelling Respondent to transfer the entire action to St. Louis County given her finding of properly pleaded allegations of joint liability and that Missouri Baptist can only be sued under the facts of this case and § 355.176.4 in St. Louis County. (Court of Appeals Case No. *ED82268*). Relators' argued that Respondent's November 27, 2002, order was in excess of her jurisdiction in that: (1) she failed to carry out her ministerial duty to grant the motions of both Relators BJC and Missouri Baptist to transfer the venue of this *entire* case to St. Louis County pursuant to § 355.176.4, RSMo; (2) to accomplish this, Respondent erroneously interpreted Rule 51.045 ("Transfer of Venue When Venue Improper") to permit her to exercise judicial discretion in ruling on a motion to transfer venue where the pertinent venue facts are not in dispute, and; (3) furthermore, Respondent committed an

⁶ For the Court's convenience, an additional copy of Respondent's November 27, 2002 Order is submitted at Tab 6 (A177-A188) of Relators' separately bound Appendix.

abuse of discretion in implementing her erroneous interpretation of Rule 51.045 by ordering separate trials for allegedly jointly liable defendants, in contravention of Missouri public policy, Supreme Court Rule 66.02, and §510.180, RSMo. Further, Relators argued that this matter squarely raises the issue of transferring an entire case under Supreme Court Rule 51.045 when venue is clearly improper as to one allegedly jointly liable defendant.

On January 17, 2003, the Court of Appeals denied Defendants' Petition for Writ of Mandamus and/or Prohibition. (See January 17, 2003 *Order*, submitted as *Exhibit 15*).

On January 16, 2003, Plaintiffs Trimble sought relief from the Court of Appeals for the Eastern District of Missouri by seeking a writ of mandamus and/or prohibition compelling Respondent to transfer the entire action to the St. Louis City Circuit Court given her finding of properly pleaded allegations of joint liability between Missouri Baptist and BJC Health System. (Court of Appeals Case No. *ED82355*). On January 23, 2003, the Court of Appeals denied Plaintiffs' Petition for Writ of Mandamus and/or Prohibition. (See January 23, 2003 *Order*, *Exhibit 16*).

On February 28, 2003, Missouri Baptist Medical Center and BJC Health System filed in this Court their Petition for Writ of Mandamus and/or Prohibition and Suggestions in Support. (*SC85135*). On April 1, 2003, this

Court entered a Preliminary Writ of Prohibition. On May 1, 2003, Respondent filed an Answer and Return to the Preliminary Writ of Prohibition.

On February 26, 2003, plaintiffs filed in this Court their Petition for Writ of Mandamus and/or Prohibition and Suggestions in Support. (*SC85132*). On April 1, 2003, this Court entered a Preliminary Writ of Prohibition. On May 1, 2003, Respondent filed an Answer and Return to the Preliminary Writ of Prohibition.

On March 3, 2003, defendant Dr. John Hess filed in this Court his Petition for Writ of Mandamus and/or Prohibition and Suggestions in Support. (*SC85138*). On April 1, 2003, this Court entered a Preliminary Writ of Prohibition. On May 1, 2003, Respondent filed an Answer and Return to the Preliminary Writ of Prohibition.

POINTS RELIED ON

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE PURSUANT TO SECTION 355.176.4, RSMo, THE EXCLUSIVE VENUE FOR THE CLAIMS AGAINST NON-PROFIT CORPORATION MISSOURI BAPTIST MEDICAL CENTER IS IN ST. LOUIS COUNTY IN THAT IT IS UNDISPUTED THAT THE PERTINENT VENUE FACTS ARE THAT THE CAUSE OF ACTION ACCRUED THERE, ITS PRINCIPAL PLACE OF BUSINESS WAS AND IS LOCATED THERE AND THE OFFICE OF ITS REGISTERED AGENT WAS AND IS LOCATED THERE, AND RESPONDENT THEREFORE, HAD A MINISTERIAL DUTY UNDER SECTION 476.410, RSMo, AND RULE 51.045 TO TRANSFER THE ENTIRE CASE TO ST. LOUIS COUNTY.

State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 140 (Mo. banc 2002).

State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 145 (Mo. banc 2002).

Bell v. St. Louis County, 879 S.W.2d 718 (Mo. App. E.D. 1994).

Section 355.176, RSMo

Section 476.410, RSMo

Supreme Court Rule 51.045

II. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE RESPONDENT EXCEEDED HER JURISDICTION AND ABUSED HER DISCRETION IN THAT SHE *SUA SPONTE* SEVERED FOR SEPARATE TRIAL THE CLAIMS AGAINST MISSOURI BAPTIST MEDICAL CENTER FROM THOSE AGAINST ALLEGED JOINT TORTFEASOR BJC HEALTH SYSTEM, IN CONTRAVENTION OF MISSOURI POLICY AND LAW, INCLUDING SUPREME COURT RULE 66.02 AND SECTION 510.180, RSMo.

State ex rel. BJC Health System v. Neill, 86 S.W.3d 138 (Mo. App. E.D. 2002).

Bhagvandos v. Beiersdorf, Inc., 723 S.W.2d 392 (Mo. banc 1987).

Guess v. Escobar, 26 S.W.3d 235 (Mo. App. W.D. 2000).

Carter v. Tom's Trucking Repair, Inc., 857 S.W.2d 172 (Mo. banc 1993).

Supreme Court Rule 66.02

Section 510.180, RSMo

ARGUMENT

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE PURSUANT TO SECTION 355.176.4, RSMo, THE EXCLUSIVE VENUE FOR THE CLAIMS AGAINST NON-PROFIT CORPORATION MISSOURI BAPTIST MEDICAL CENTER IS IN ST. LOUIS COUNTY IN THAT IT IS UNDISPUTED THAT THE PERTINENT VENUE FACTS ARE THAT THE CAUSE OF ACTION ACCRUED THERE, ITS PRINCIPAL PLACE OF BUSINESS WAS AND IS LOCATED THERE AND THE OFFICE OF ITS REGISTERED AGENT WAS AND IS LOCATED THERE, AND RESPONDENT THEREFORE, HAD A MINISTERIAL DUTY UNDER SECTION 476.410, RSMo, AND RULE 51.045 TO TRANSFER THE ENTIRE CASE TO ST. LOUIS COUNTY.

Standard of Review

A writ of prohibition will be issued only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power. *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. banc 2002). Because improper venue is a fundamental defect, a court that acts when venue is improper acts in excess of its jurisdiction, and prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue. *Id.*

A. Respondent erred by failing to apply § 355.176.4 and the holdings of *State ex rel. SSM Health Care St. Louis v. Neill* to transfer the entire case to the Circuit Court of St. Louis County.

1. The only proper venue for claims against Missouri Baptist is St. Louis County

As a nonprofit corporation, and pursuant to § 355.176.4, RSMo (1994),⁷ Missouri Baptist can be sued *only* in one of the following three

⁷ For the Court's convenience, a copy of § 355.176, with the historical version of subsection 4, submitted at Tab 7 (A189) of Relators' separately bound Appendix. Subsection 4 of § 355.176, RSMo (1994) is still in effect. *State ex rel. SSM Health Care v. Neill*, 78 S.W.3d 140, 143 (Mo. banc 2002).

locations: (1) the county in which the nonprofit corporation maintains its principal place of business; (2) the county where the cause of action accrued; and (3) the county where the office of the registered agent for the nonprofit corporation is located. As acknowledged by Respondent (*Exhibit 14*, pages 3-4; see also A179-A180) Missouri Baptist can be sued *only* in the Circuit Court of St. Louis County under the facts of this case. There is no dispute that the alleged cause of action against Missouri Baptist accrued in St. Louis County, its registered agent is located in St. Louis County, and its principal place of business is located in St. Louis County. (*Exhibits 1-4, 7, 9, and 11*).

In *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140 (Mo. banc 2002), on facts essentially identical to the present case, this Court held that § 355.176.4 governs venue in ALL suits against nonprofit corporations. *Id.* at 144; see also, *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 145 (Mo. banc 2002). The underlying facts in *State ex rel. SSM Health Care St. Louis v. Neill* involved a medical malpractice action against an individual physician and a healthcare corporation. 78 S.W.3d at 141. SSM Health Care filed a motion to transfer venue, arguing that the nonprofit corporate venue statute applies, and under it, venue in St. Louis City is improper. *Id.* The trial judge, the Honorable Margaret Neill, denied the motion holding that § 355.176.4 does not apply when a nonprofit

corporation is sued together with an individual. *Id.* After granting a petition for writ of prohibition, the Supreme Court ordered the preliminary writ be made absolute and directed Judge Neill to grant the motion to transfer venue of the entire case to St. Louis County. *Id.* at 145.

In coming to its holding, this Court closely analyzed the language of § 355.176.4 when compared to other venue statutes, including §§ 508.010, 508.040 and 508.050. *Id.* at 143-44. This Court concluded that §355.176.4, RSMo, provided the “exclusive venues” in which a nonprofit corporation can be sued. *Id.* at 144-45 (emphasis added). Therefore, § 355.176.4 in effect acts as a venue trump card over all other venue statutes and all other venues that might be proper to other defendants, whether individual or corporate. Thus, all other venue rights yield to it. *Id.*

In the case at bar, the *only* venue proper for all defendants and improper as for none is St. Louis County. Respondent concedes in her November 27, 2002, order that the only proper venue for Missouri Baptist is in St. Louis County; it is a nonprofit corporation and as such can *only* be sued (1) where it maintains its principal place of business (St. Louis County), (2) where the cause of action accrued (St. Louis County), or (3) the location of the office for its registered agent (St. Louis County). (See *Exhibit 14*). Pursuant to § 355.176.4, the Circuit Court of St. Louis County

is the exclusive venue within which Missouri Baptist can be sued.

Furthermore, defendant BJC is a Missouri nonprofit corporation with its registered agent in St. Louis County and the alleged cause of action against it, if any, accrued at Missouri Baptist, which is only located in St. Louis County. (See *Exhibits 1-4, 7, 9, 11*). Thus, the only proper venue for both of these nonprofit corporations is in St. Louis County. Accordingly, Respondent erroneously failed to discharge her ministerial duty to transfer the entire case, and the writ of prohibition should be made absolute.

2. Rule 51.045 and § 476.410, RSMo, required that Respondent transfer venue of the entire case to St. Louis County.

By severing the claims against Missouri Baptist and failing to transfer the entire case to St. Louis County, Respondent has failed to discharge her ministerial duty to transfer venue under Rule 51.045 and §476.410, RSMo.⁸ Respondent's November 27, 2002, order ignored the directives of Rule 51.045 and of §476.410.

⁸ For the Court's convenience, copies of Rule 51.045 and § 476.410 are submitted at Tabs 8 (A190) and 9 (A191), respectively, of Relators' separately bound Appendix.

The language of Supreme Court Rule 51.045 could not be any more clear that the entire case is to be transferred. In pertinent part, that Rule states: “When a transfer of venue is ordered, the entire civil action shall be transferred unless a separate trial has been ordered.” Therefore, Respondent should have transferred the *entire* case to St. Louis County. Obviously, the record herein shows that no order for a separate trial of any claim or issue had been ordered at the time of the submission of the motions to transfer venue. (See *Exhibit 18*, for trial Court’s Minute Record). Moreover, no party moved for a separate trial. (*Exhibit 18*).

Further, pursuant to § 476.410, “[t]he division of a circuit court in which a case is filed laying venue in the wrong division or wrong circuit shall transfer the case to any division or circuit court in which it could have been brought.” (Emphasis added). Decisions interpreting this statute make clear that its language means what it says: the case is to be transferred and no claims are to be severed and left behind. *See, Bell v. St. Louis County*, 879 S.W.2d 718, 719-20 (Mo. App. E.D. 1994)(where special venue statute for municipal corporations mandated that St. Louis County was the exclusive proper venue as to claims against St. Louis County, court transferred entire case to St. Louis County upon co-defendant’s transfer

motion even after plaintiffs had dismissed defendant St. Louis County before the motion hearing).

3. There is no venue conflict between the venue rights of Missouri Baptist and BJC Health System.

Respondent asserts in her November 27, 2002, order that this case presents an unsolvable venue question of two non-profit corporations having a conflict over two separate mutually exclusive venue locations for each. (*Exhibit 14*). Venue is a personal privilege of a defendant granted by statute. *Bizzell v. Kodner Dev. Corp.*, 700 S.W.2d 819, 822 (Mo. banc. 1985). In analyzing venue statutes, the court is required to harmonize them with each other if possible. *State ex rel. Baker v. Goodman*, 274 S.W.2d 293, 296-97 (Mo. banc 1954). Here, however, venue in St. Louis County is proper for all defendants. Pursuant to § 476.410, RSMo, Respondent's ministerial duty is clear – transfer the entire case to a proper venue in which it could have been brought.

To come to this false conflict issue, Respondent relies on the cases decided under the special venue statute for suits against Missouri municipal corporations (§ 508.050, RSMo). (See *Exhibit 14*, page 5). That statute provides in pertinent part that “[s]uits against municipal corporations as defendant or co-defendant shall be commenced only in the county in which

the municipal corporation is situated.” Section 508.050, RSMo. No doubt, that statute is unwittingly framed to create a unique venue impasse, but likely only when claims against two municipal corporations situated in different counties are involved. E.g. *State ex rel. City of Springfield v. Barker*, 755 S.W.2d 731, 734 (Mo. App. S.D. 1988) (holding that where two municipal corporations of different counties were defendants in one action, action could be commenced in either county in which a defendant municipal corporation was situated, creating an exception to § 508.050 which provides that suits against municipal corporations shall be commenced only in county in which municipal corporation is situated). That is simply because the applicable venue statute has only one authorized location, which is the county where the municipal corporation is located. Thus, when two municipal corporations are properly sued in the same action, one municipal corporation will necessarily have to yield to the other. *Barker*, supra, at 734. The alternative – that there is no venue to bring such an action – is simply too absurd to be viable. The fact remains, though, that this scenario is not involved in the case at bar because St. Louis County provides a proper venue for all defendants.

There is no “venue impasse” here. In stark contrast to the single venue of the municipal corporation venue statute, § 355.176.4, RSMo, for

non-profit corporations, provides three proper venues (as discussed hereinabove). Consequently, the likelihood of a venue impasse under this statute is much less likely. In any event, it certainly is not present in this case in that it is undisputed that St. Louis County is a proper venue for all defendants. The law mandates that, if possible, Respondent simply transfer the entire case to a venue that is proper as to all defendants. Rule 51.045; § 476.410, RSMo. In this case, that venue is St. Louis County.

II. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE RESPONDENT EXCEEDED HER JURISDICTION AND ABUSED HER DISCRETION IN THAT SHE *SUA SPONTE* SEVERED FOR SEPARATE TRIAL THE CLAIMS AGAINST MISSOURI BAPTIST MEDICAL CENTER FROM THOSE AGAINST ALLEGED JOINT TORTFEASOR BJC HEALTH SYSTEM, IN CONTRAVENTION OF MISSOURI POLICY AND LAW, INCLUDING SUPREME COURT RULE 66.02 AND SECTION 510.180, RSMo.

Standard of Review

A writ of prohibition will be issued only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power. *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. banc 2002). Because improper venue is a fundamental defect, a court that acts when venue is improper acts

in excess of its jurisdiction, and prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue. *Id.*

A. Respondent acted in excess of her jurisdiction in undertaking any task pursuant to Supreme Court Rule 51.045 other than transferring the entire case to St. Louis County.

The undisputed venue facts pertinent to the operation of § 355.176.4, RSMo, mandate that Respondent transfer this entire case to St. Louis County. Plaintiffs did not challenge below any of the valid venue facts. (*Exhibits 5 and 6*). On that basis alone, Respondent should have transferred the case because she had no jurisdiction to do anything else. *State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138, 141 (Mo. App. E.D. 2002). Nor did any party hereto, including plaintiffs, move to have the Circuit Court sever any claims in the case for separate trial. (See *Exhibit 18* for Court Minutes). Under the facts and the law, there can be no mistake that plaintiffs are attempting to plead against defendants Missouri Baptist and BJC Health System as joint tortfeasors.

Additionally, Respondent's reliance on cases dealing with the concept of each claim in a petition needing to have its own basis for venue to support her analysis is misplaced. First, the cases Respondent discussed (on page 5

of her order, *Exhibit 14*) did not involve claims arising out of the same event, nor were the defendants alleged to be true joint tortfeasors. *E.g. State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290, 291-92 (Mo. banc 1979). Second, those cases involved a plaintiff's attempt to create venue by joining claims which claims did not satisfy the requirement of proper venue. *E.g., State ex rel Farrell v. Sanders*, 897 S.W.2d 125, 126 (Mo. App. E.D. 1995)(claims of family members against defendant driver held to be not joint liability with family members' claims against insurer on coverage for same vehicular accident because nature of claims were different). Third, unlike the cases Respondent relied on, in this case there is a proper venue as to all parties – St. Louis County.

B. Respondent acted contrary to Missouri law and abused her discretion in ordering a separate trial for defendant BJC Health System.

Respondent has abused her discretion in splitting plaintiffs' jointly pleaded claims against defendants Missouri Baptist and BJC into two cases pending in different venues in that she: (1) failed to follow the legal policy of judicial economy in Missouri that claims against joint tortfeasors are to be tried in a single trial; (2) disregarded Rule 66.02 (and its parallel in §510.180, RSMo) in ordering a separate trial for defendant BJC; and (3)

erred in determining that plaintiffs' allegations of joint liability should be disregarded for purposes of venue.

Missouri legal policy, statute and court rule make clear that the same claims against allegedly joint tortfeasors are to be tried in a single trial. In early Missouri law, the public policy of judicial economy made clear that claims against separate defendants sued on the same claim or issue should have a single trial. *See Hunt v. Missouri R.R. Co.*, 14 Mo. App. 160 (Mo. App. E.D. 1883). More recently, Missouri's affirmation of this view was stated in *Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W. 2d 392, 395 (Mo. banc 1987) ("The policy of the law is to try all issues arising out of the same occurrence or series of occurrences together.").

Missouri codified the concept of judicial economy in early versions of what is now § 510.180, RSMo,⁹ which sets forth the few circumstances for permitting a separate trial. That statute is very similar in its factors to those set forth in Missouri Supreme Court Rule 66.02,¹⁰ which also sets forth the

⁹ For the Court's convenience, a copy of § 510.180, RSMo, is submitted at Tab 11 (A194-A195) of Relators' separately bound Appendix.

¹⁰ For the Court's convenience, a copy of Missouri Supreme Court Rule 66.02 is submitted at Tab 10 (A192-A193) of Relators' separately bound Appendix.

few circumstances for permitting a court to order a separate trial. That Rule provides in pertinent part that a court “in the furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, may order a separate trial of any claim, ...or of any separate issue or of any number of claims... or issues”. Rule 66.02. Such a decision is within the discretion of the trial court and will not be disturbed unless there has been an abuse of discretion. *Guess v. Escobar*, 26 S.W.3d 235, 239 (Mo. App. W.D. 2000). A discretionary ruling is presumed correct, and an abuse of discretion occurs only if the reviewing court finds the trial court’s ruling is clearly against the logic of the circumstances and so arbitrary and unreasonable that it shocks the sense of justice. *Id.* In considering whether a trial court abused its discretion in deciding to sever the case for separate trials, the court must keep in mind that “[t]he policy of the law is to try all issues arising out of the same occurrence or series of occurrences together.” *Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392, 395 (Mo. banc 1987); *Guess v. Escobar, supra*, at 239, *citing Bhagvandoss*.

Review of all cases in the annotations for Rule 66.02, and its companion statute § 510.180, RSMo, reveals no court having ordered a separate trial for alleged joint tortfeasors. *E.g., Guess v. Escobar, supra*, at 239 (medical malpractice case involving two health care providers, whose

defense theories were that their respective roles in the care at issue were not intertwined with each other; court held to have properly denied the plaintiff's motion to sever); *Hunt v. Missouri R.R. Co.*, 14 Mo. App. 160 (Mo. App. E.D. 1883) (court found that there was a single cause of action in the wrongful death claim of the plaintiff against the two allegedly jointly liable defendants, and therefore, no abuse of discretion in trial court's denial of defendants' respective motions for separate trials).

In the case at bar, Respondent did not articulate any legal or factual analysis in her *sua sponte* decision to order separate trials for defendants BJC and Missouri Baptist. She merely concluded that separate trials promoted judicial economy. Her decision on the motion to transfer venue was erroneously linked with her determination of the validity of plaintiffs' allegations that defendants BJC and Missouri Baptist are both active joint tortfeasors in the health care at issue. (*Exhibit 14*, p. 10 and 11).

Plaintiffs' alleged theory is that defendants Missouri Baptist and BJC acted as joint tortfeasors for health care at Missouri Baptist in June 2000. For example, Counts I and II of the petition herein are directed against both those defendants. In Count I, plaintiffs set forth 22 paragraphs of alleged negligence on the part of both of these defendants, with both of them mentioned in each of those subparagraphs. (See *Exhibit 7*, ¶ 12(a)-(v), for a

copy of the First Amended Petition; and *Exhibit 17*, for an index to the key allegations of the First Amended Petition). The relief and damages plaintiffs seek from both these two defendants is the same -- for reparation for the injury to, and death of, Hazel Trimble in June 2000.

The notion that discovery must proceed to conclusion before ruling on a venue transfer motion is against the logic of the circumstances. That would mean that such venue motions would never be decided until at least plaintiffs' experts' depositions have been completed and a motion for summary judgment is ripe for filing. As a practical matter, this has been the situation for venue motions based solely on pretensive joinder of the BJC parent corporation since Judge Robert Dierker was presiding judge of the 22nd Circuit. That approach, however, is not necessary in cases involving §355.176.4, RSMo as the basis for transferring venue.

The position that judicial economy is served by ordering separate trials here is quickly shown to be untenable. The prospect of the parties being required to participate in discovery in two cases pending in two separate circuit courts is reason enough. However, the cost of going through almost identical trials in two separate courthouses and the prospect of inconsistent verdicts further demonstrates the magnitude of the problems created. These are the very practical considerations that must have led to the

public policy of the law being to try a single case and not to sever bits and pieces of a case into different smaller cases. E.g., *Carter v. Tom's Trucking Repair, Inc.*, 857 S.W.2d 172, 176-77 (Mo. banc 1993) (court held that trial court's refusal to dismiss a co-defendant who had settled with plaintiff, but who was facing cross-claims was not error).

This Court has recognized that concerns about apportionment of fault and the potential for inconsistent verdicts should not be overlooked or discounted. *Id.* at 177. In *Carter, supra*, the Court stated: "The need for a single jury to apportion fault among all potentially culpable parties and thereby promote judicial economy and preclude inconsistent verdicts is reason enough for [all parties] to remain in the case." *Id.* Even further, what is to happen when these two cases are tried to verdict and the parties want to appeal? Are they to be reconsolidated for appeal because they involve many of the same issues of liability and damages? Does this not simply make more work for the court of appeals?

Clearly, Respondent acted in excess of her jurisdiction in doing anything but transferring this entire case to St. Louis County. Furthermore, Respondent abused her discretion in ordering a separate trial for defendant BJC Health System and not transferring plaintiffs' claims against it to St. Louis County.

CONCLUSION

Relators BJC Health System and Missouri Baptist Medical Center request that this Court make absolute its Preliminary Writ of Prohibition, thereby precluding Respondent (or the current presiding judge for the Circuit Court for the City of St. Louis) from taking any further action, other than to transfer the entire case to the Circuit Court for St. Louis County, where venue is proper as to all defendants, and to grant such other and further relief as this Court deems just and proper.

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CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court 84.06(b) and, according to the word count function on Microsoft Word 2000 by which it was prepared, contains 6,832 words of proportional type, exclusive of the cover, Certificate of Service, this Certificate of Compliance, the signature block, and the appendix. Microsoft Word 2000 was used to prepare Relators' brief.

The undersigned further certifies that the diskette filed herewith containing the Relators' Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) and that it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copy of the foregoing Brief, a copy of Relators' Separately Bound Appendix, and a 3-1/2 inch diskette containing Relators' Brief were hand-delivered (unless otherwise indicated) this 30th day of May 2003, to:

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