

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

STATEMENT OF FACTS 6

ARGUMENT 9

 Standard of Review 9

 I. 9

 II. 16

 III. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Brown v. Childress,

41 S.W.3d 926 (Mo. App. S.D. 2001) 12

Euge v. Golde,

551 S.W.2d 928 (Mo. App. St. L. 1977) 13

Ferguson v. Lang,

107 S.W.2d 7 (Mo. Div. 1 1937) 13, 14

Goodson v. State,

978 S.W.2d 363 (Mo. App. E.D. 1998) 13, 14

Green Acres Land & Cattle Co., Inc. v. State,

766 S.W.2d 649 (Mo. App. W.D. 1988) 18

Labrier v. Anheuser Ford, Inc.,

621 S.W.2d 51 (Mo. banc 1981) 12, 13

Orange Theatre Corp. v. Rayherstz Amusement Corp.,

139 F.2d 871 (3d. Cir. 1944) 11

Pippas v. Pippas,

330 S.W.2d 132 (Mo. App. 1960) 10

State ex rel. Allen v. Barker,

581 S.W.2d 818 (Mo. banc 1979) 19

State ex rel. Bell v. St. Louis County,

879 S.W.2d 718 (Mo. App. E.D. 1994) 25, 26

<i>State ex rel. Bitting v. Adolf,</i>	
704 S.W.2d 671 (Mo. banc 1986)	19
<i>State ex rel. BJC Health Systems v. Neill,</i>	
86 S.W.3d 138 (Mo. App. E.D. 2002).	18
<i>State ex rel. Bohannon v. Adolph,</i>	
724 S.W.2d 248 (Mo. App. E.D. 1987)	10
<i>State ex rel. Breckenridge v. Sweeney,</i>	
920 S.W.2d 901 (Mo. Banc 1996)	9, 16
<i>State ex rel. City of Springfield v. Barker,</i>	
755 S.W.2d 731 (Mo. App. S.D. 1988)	19, 26
<i>State ex rel. Clark v. Gallagher,</i>	
801 S.W.2d 341 (Mo. banc 1990)	25
<i>State ex rel. DePaul v. Mummert,</i>	
870 S.W.2d 820 (Mo. banc 1994)	12
<i>State ex rel. Farrell v. Sanders,</i>	
897 S.W.2d 125 (Mo. App. E.D. 1995)	19
<i>State ex rel. Ferguson v. Corrigan,</i>	
959 S.W.2d 113 (Mo. banc 1997).	12
<i>State ex rel. Fielder v. Kirkwood,</i>	
138 S.W.2d 1009 (Mo. banc 1940)	9
<i>State ex rel. Johnson v. Griffin,</i>	
945 S.W.2d 445 (Mo. banc 1997)	10

<i>State ex rel. Linthicum v. Calvin,</i>	
57 S.W.3d 855 (Mo. banc 2001)	9
<i>State ex rel. Sims v. Sanders,</i>	
886 S.W.2d 718 (Mo. App. E.D. 1994)	19, 28
<i>State ex rel. SSM Healthcare St. Louis v. Neill,</i>	
78 S.W.3d 140 (Mo. banc 2002)	17, 23, 24, 26
<i>State ex rel. Todd v. Romines,</i>	
806 S.W.2d 690 (Mo. App. E.D. 1991)	29
<i>State ex rel. Webb v. Satz,</i>	
561 S.W.2d 113 (Mo. banc 1978)	20, 23, 24
<i>State ex rel. White v. Marsh,</i>	
646 S.W.2d 357 (Mo. 1983)	11

Statutes

Mo. Rev. Stat. § 355.066 (1997)	22
Mo. Rev. Stat. § 355.176.4 (1994)	16, 17, 20, 22, 23, 24, 25, 26, 27, 29
Mo. Rev. Stat. § 508.010 (1929)	17
Mo. Rev. Stat. § 508.040 (1939)	20, 23, 24, 25

Rules of the Missouri Supreme Court

Rule 44.01	6, 9, 11, 14, 15
------------------	------------------

Rule 51.045 7, 10, 11, 12, 14, 29

Rule 55.27 11, 12

Rules of the Twenty-Second Judicial Circuit

Rule 21.7 9, 14, 15

Other Authorities

Black’s Law Dictionary 1 (6th ed. 1990) 24

STATEMENT OF FACTS

The underlying cause of action is a wrongful death case. On June 11, 2000, decedent Hazel I. Trimble was admitted to Missouri Baptist Medical Center (“MBMC”). Petition of Relator Hess (hereinafter “Petition”), Exhibit 10 at ¶ 7.¹ During Mrs. Trimble’s hospitalization, she was under the joint care and treatment of Relator Hess and the other named defendants. (Exhibit 10 at ¶ 8). On June 13, 2000, Mrs. Trimble underwent care and treatment by Relator, BJC and MBMC, including percutaneous transluminal coronary angioplasty (“PTCA”), suffered various injuries, including injury to her right femoral artery and internal bleeding, and she ultimately bled to death on June 14, 2000. (Exhibit 10 at ¶¶ 8, 11, 21).

Plaintiffs filed their initial petition against BJC Health System and MBMC on January 9, 2001. (Exhibit 1). On September 12, 2001, Plaintiffs filed their First Amended Petition, adding Relator herein, Hess, as a defendant. (Exhibit 10). In October 2001, counsel for Relator Hess contacted Plaintiffs’ counsel who agreed to grant Hess additional time up to and including November 26, 2001 in which to answer and respond to the First Amended Petition. Relator’s counsel filed an “Entry of Appearance” to this effect on or about October 26, 2001. (Exhibit 12). Relator’s counsel did not obtain an order by Respondent granting an extension of time under Rule 44.01. A-4. Although apparently mailed to Plaintiffs’ counsel on November 20, 2001, Relator’s Motion to Transfer venue

¹ Unless otherwise noted, exhibit references herein are to the exhibits as attached to Relator Hess’s Petition.

was not filed until sometime later. (Exhibit 26 at 2). Relator's Motion to Transfer bears a stamped date showing of November 29, 2001. (Exhibit 15).

The trial court heard all defendants' venue motions on May 7, 2002, and took the motions under submission. (Exhibit 20). Plaintiffs' counsel raised the issue of waiver at the hearing on defendants' motions based on information obtained from the trial court's case minute entries. (Exhibit 4). The minute entries state that Relator's Motion to Transfer was filed on November 28, 2001. (Exhibit 4).

On July 31, 2002, Respondent issued her Order ruling on all Defendants' motions. (Exhibit 26). The sole issue addressed to Relator Hess in this Order was the issue of waiver regarding Relator's original motions to transfer. (Exhibit 26 at 2). The trial court ruled that Relator Hess waived venue under Rule 51.045 for failing to timely file a motion to transfer. (Exhibit 26 at ¶ 2). The trial court did not reach the merits of the venue motions. On September 19, 2002, Defendants BJC and MBMC sought their first petitions for extraordinary writ(s), in the Court of Appeals for the Eastern District of Missouri, Cause No. ED81798. (Exhibit 27 and 28). Plaintiffs filed their Suggestions in Opposition thereto on September 30, 2002. *See* Suggestions in Opposition to Relator's Petition (hereinafter "Suggestions"), Exhibit A. Relator Hess did not file a petition for writ at that time. The Court of Appeals thereafter entered its Order granting Respondent "thirty (30) days to set aside the order of July 31, 2002 on her own motion and thereafter rule on the pending motions." (Exhibit 29 at 2 (emphasis added)). Relator Hess did not take part in cause No. ED81798, nor did the Court of Appeals' Order (Exhibit 29) address Respondent's ruling as to Hess in any way.

On November 27, 2002, Respondent entered her Order denying BJC's motion to dismiss for failure to state a claim, ordering separate trials for Defendants BJC and Missouri Baptist, and transferring the case against MBMC to St. Louis County. (Exhibit 30 at 11). The Court of Appeals, thereafter, issued its Order denying BJC and MBMC's first petition for extraordinary writ(s) in Cause No. 81798. (Exhibit 31). BJC and MBMC then filed an additional Petition with the Court of Appeals in Cause No. ED 82268, seeking essentially the same relief as was sought and denied in Cause No. ED 81798 and this Petition was also denied. (Suggestions, Exhibit B). Hess then filed a petition for extraordinary writ(s) in the Court of Appeals for the Eastern District, which was likewise, denied. (Exhibit 32 and 33). On February 26, 2003, Plaintiffs filed their petition for extraordinary writ(s) with this Court, in Cause No. SC85132.² Hess now files the current Petition with this Court.

²

BJC and MBMC have also filed their Petition with this Court on February 28, 2003, in Cause No. SC85135.

ARGUMENT

Standard of Review

Writs of Mandamus are only issued to compel performance of a clear, unequivocal, preexisting and specific right. *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. Banc 1996). Likewise, prohibition is discretionary and there is no right to have the writ issued. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo. banc 2001). In every case “judicial discretion must be reckoned with and applied with judicial self-restraint.” *State ex rel. Fielder v. Kirkwood*, 138 S.W.2d 1009, 1010 (Mo. banc 1940).

I. RELATOR HESS SHOULD BE DENIED AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TRANSFERRING THIS CASE FROM ST. LOUIS CITY TO ST. LOUIS COUNTY BECAUSE RELATOR HESS WAIVED ANY OBJECTION TO VENUE BY NEGLECTING TO FILE A TIMELY MOTION TO TRANSFER VENUE, BECAUSE THE ISSUE DOES NOT INVOLVE PERSONAL JURISDICTION OR A DEFENSE, AND BECAUSE THE QUESTION OF TIMELINESS IS DIRECTED TO THE DISCRETION OF THE TRIAL COURT AND RULE 44.01 AND LOCAL RULE 21.7 ARE DISCRETIONARY RULES.

Relator contends that the trial court abused its discretion in holding that Hess waived his right to challenge venue. It has long been an established rule in Missouri that if a party fails to “timely” raise the issue of improper venue then the issue is deemed waived.

State ex rel. Johnson v. Griffin, 945 S.W.2d 445, 446-447 (Mo. banc 1997); *State ex rel.*

Bohannon v. Adolph, 724 S.W.2d 248, 249 (Mo. App. E.D. 1987). When such waiver occurs, a court may not transfer a case on the basis of improper venue. *Johnson*, 945 S.W.2d at 446-47. The question of timeliness is addressed to the sound discretion of the trial court. *Pippas v. Pippas*, 330 S.W.2d 132, 135 (Mo. App. 1960).

Rule 51.045 now controls the issue of timely preservation of the issue of venue and requires that a motion be “timely filed” to preserve the issue of venue. Rule 51.045(a). The Rule has clearly defined what is required of a “timely” motion to transfer. Rule 51.045, as effective on January 1, 2001, provides:

(a) An action filed in the court where venue is improper shall be transferred to a court where venue is proper if a motion for such transfer is timely filed. Any motion to transfer venue shall be filed:

(1) Within the time allowed for responding to an adverse party’s pleading . . .

If a motion to transfer venue is not timely filed, the issue of improper venue is waived.

Rule 51.045 (emphasis added).

Hess was served with Plaintiffs’ Amended Petition on September 27, 2001. (Exhibit 11). Hess did not file his motion to transfer venue until sometime in November, 2001. (Exhibit 4; 15; and 26 at 2). Although apparently mailed by November 20, 2001, it bears a stamped date of November 29, 2001, (Exhibit 15) three days beyond the November 26 time extension agreed to by Plaintiffs’ counsel. (Exhibit 12). Under Rule 51.045, Relator had to raise the issue of venue by timely filed motion. The motion was not “timely filed” as

required under Rule 51.045 and the issue of improper venue was, accordingly, waived.

Rule 51.045 (a). The Relator's Petition should, therefore, be denied.

A. State ex rel. White v. Marsh Does Not Require the Relief Sought.

Relator cites to *State ex rel. White v. Marsh*, 646 S.W.2d 357, 361 (Mo. 1983), for the proposition that an agreement of counsel is indistinguishable from an extension ordered under Rule 44.01(b) under the present circumstances. Relator's Suggestion in Support at 10. *White* is distinguishable. The issue before this Court in *White*, was whether personal jurisdiction had been waived by a general appearance. *White*, 646 S.W.2d at 361. In addition, in *White*, an order had been entered; the Court looked to Rules 55.27 and 44.01 and found that the defendant was in compliance by raising the defense of lack of jurisdiction by motion under Rule 55.27 (a)(2), within an extension of time granted in accordance with Rule 44.01(b) by court order, which extended the time of an agreement between counsel. *White*, 646 S.W.2d at 358-59.

In *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871 (3d. Cir. 1944), the primary case relied on in *White*, 646 S.W.2d at 360-61, the Third Circuit Court of Appeals articulated the rule and distinguished between an objection to jurisdiction and an objection to venue. *Orange Theatre*, 139 F.2d at 873. The circuit court held that while approval of the district court is necessary before a challenge to venue may be filed outside the time limit for a response pursuant to a stipulation by the parties, the rule is different with regard to challenges to personal jurisdiction. *Id.* Based on this holding, on which *White* relied, *White* cannot stand for the proposition offered by Relator.

This Court has expressly overruled the “quirk” in Missouri law melding venue and personal jurisdiction. *State ex rel. DePaul v. Mummert*, 870 S.W.2d 820, 821-22 (Mo. banc 1994). In addition, this Court, through Rule 51.045, now requires that the issue of “improper venue” be raised by motion, and, therefore, not by answer. Rule 51.045. Further, recent amendment to Rule 55.27(g) shows that the rule no longer includes “improper venue,” and demonstrates that venue is not a defense that may be raised other than by timely motion. Rule 55.27(g). As distinguished from the issue treated in the *White* case, venue is no longer a “defense.”

Where there is any inconsistency, the Missouri Supreme Court Rules supersede statutes on procedural issues. *State ex rel. Ferguson v. Corrigan*, 959 S.W.2d 113, 115 (Mo. banc 1997). The Court has clearly defined what constitutes a timely motion under the Rule and such a motion is required in order to raise and preserve the issue of improper venue. When the language of the court rule is clear and unambiguous, application of the rule is required and there is no discretion. *Brown v. Childress*, 41 S.W.3d 926, 928 (Mo. App. S.D. 2001). In addition, Relator’s file stamped motion indicates it was not filed until after the time extended by stipulation with Plaintiffs’ counsel November 26, 2001. (Exhibit 12). The minute entries indicate it was filed November 28, but the file stamp indicates November 29, 2001. (Exhibits 4 and 15). Relator mistakenly relies on *Labrier v. Anheuser Ford, Inc.*, 621 S.W.2d 51, 54 (Mo. banc 1981), *Euge v. Golde*, 551 S.W.2d 928 (Mo. App. St. L. 1977) and *Ferguson v. Lang*, 107 S.W.2d 7, 10 (Mo. Div. 1 1937) to argue his motion was timely filed. Like the movant in *Goodson v. State*, 978 S.W.2d 363, 365 (Mo. App. E.D. 1998), Relator’s position is merely that it is “probable” that the motion

arrived in the clerk's office or home but was not stamped until some later time. *Goodson*, 978 S.W.2d at 365. The Court in *Labrier*, found persuasive additional facts such as parenthetical entries "(Filed as of Dec. 20, 1978)" seven days before the file stamped date and evidence that a docket fee had been paid on December 20, 1978. *Labrier*, 621 S.W.2d at 51. In *Euge*, the court considered evidence that the petition in question stamped as "received" as a timely date, although it was later stamped as being filed on an untimely date. *Euge*, 551 S.W.2d at 931.

An important distinction is noted by the Court in *Ferguson*, 107 S.W.2d at 10-11. In the cases in which courts have ignored dates stamped as mistakes or clerical errors and determined the "real" date of filing of a pleading, "there was no question about it having actually been lodged with and received by the proper offices." *Id.* at 11. It is competent in such instances "to show the actual time or date of the filing and upon satisfactory proof thereof the instrument would be considered filed at that time." *Id.*

The court held in *Ferguson*, however, that "[m]erely leaving or lodging the instrument in the office in which it is to be filed without the knowledge of the officer authorized to receive it would not, of course, constitute a filing within the meaning of that term." *Id.* at 11. The acceptance of the proper officer for that purpose is required. *Id.* (emphasis added).

Relator here argues a likelihood based on the date of mailing and Missouri courts have declined to adopt such a "mailbox rule." *Goodson*, 978 S.W.2d at 365. Relator argues that the Circuit Clerk "concluded" he had the motion "by November 26, 2001, at the latest" and that the Circuit Clerk's letter to Plaintiff's counsel "certified" this fact.

Relator's Brief at 29. The Circuit Clerk, however, also states in this letter that "[i]f for some reason the pleading did not arrive on November 21, it could not have been received by my office before Monday, November 26, as the office was closed for the Thanksgiving holidays, November 22 and 23, 2001." (Exhibit 21, Exhibit A). Therefore, Relator fails to show the actual date filed and does not show the instrument was lodged with the knowledge of the proper officer authorized to receive it. *Ferguson*, 107 S.W.2d at 11. When the pleading was actually lodged and received by the proper officer is still questionable. *See Id.* The Respondent had no discretion to ignore the timeliness requirement of Rule 51.045(a). Relator waived the issue of improper venue by failing to raise the issue by a timely filed motion. Relator's Petition, therefore, should be expeditiously denied.

B. Rule 44.01(b) and Local Rule 21.7 Are Discretionary Rules.

Relator indicates that the Respondent somehow abused her discretion in basing her ruling as to waiver on the absence of an order approving an extension of time entered by stipulation, and by failing to look to Local Rule 21.7, under which, Relator urges a stipulation between counsel "can be enforced so long as it is filed with the court." (Relator's Suggestions in Support at 11-12) (emphasis added).

Rule 44.01(b) is clearly discretionary and states that the court "may" in its "discretion" grant an extension of time. Rule 44.01(b). Local Rule 21.7 states that: "No agreement, understanding or stipulation of the parties concerning any pending cause, or any matter of proceeding therein, will be recognized or enforced by the Circuit court unless made in writing and filed in the cause or made in open court." Rule 21.7 of the Rules of the Twenty-Second Judicial Circuit (emphasis added). By its terms, Local Rule 21.7 only

provides that “[n]o agreement . . . or stipulation . . . will be recognized . . . unless . . .” This is also clearly a discretionary rule and does not require the trial court to enforce such agreements or stipulations. Relator is not entitled to the extraordinary relief requested.

II. RELATOR HESS IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TRANSFERRING THIS CASE FROM ST. LOUIS CITY TO ST. LOUIS COUNTY BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS UNDER § 355.176.4, RSMo 1994, IN THAT BJC, A NONPROFIT CORPORATION, MAINTAINS ITS PRINCIPAL PLACE OF BUSINESS IN ST. LOUIS CITY.

This Court need not consider Relator’s Motion to Transfer Venue. As shown above, Relator has waived the issue of improper venue and is not entitled to have that motion considered here via an extraordinary writ. *Breckenridge*, 920 S.W.2d 902. Hess states, however, that “[n]ow Relator Hess will be required to defend this case in an improper venue ” because Respondent’s Order of November 27, 2002 did not transfer the case against him to St. Louis County. Relator’s Suggestions in Support at 13. The issues now raised are based on Relator’s “join[ing]” in BJC and MBMC’s venue motions. Relator’s Brief at 30. As noted above, this Court has this issue before it in Cause Nos. SC85132 and SC85135. Even if Relator’s Petition were entitled to consideration on these grounds, he is still not entitled to the relief sought.

The primary basis for an extraordinary writ, as alleged by Relator, is that Respondent failed to transfer venue of the entire case to St. Louis County “despite unambiguous law requiring her to do so.” Relator’s Suggestions in Support at 14; Brief at 30. As noted in Respondent’s Order of November 27, 2002, the law is “unclear as to how the venue issue should be resolved where there are two nonprofit corporations named as defendants, where

the plaintiff has alleged joint liability, and where venue is proper as to one but not the other.” A-11 (emphasis added). In *SSM v. Neill*, the “narrow issue presented for review” to this Court was “whether the special nonprofit corporation statute, section 355.176.4, or the general venue statute, section 508.010 governs venue when a nonprofit corporate defendant is joined with an individual or corporate for-profit defendant.” *State ex rel. SSM Healthcare v. Neill St. Louis*, 78 S.W.3d 140, 142 (Mo. banc 2002) (emphasis added).

Contrary to Relator’s assertion that the facts here are “nearly identical” to those in *SSM v. Neill*, (Relator’s Suggestions in Support at 24; Brief at 39), the facts have at least one very important distinction, the presence of an additional, properly joined, jointly liable nonprofit corporation that has its principal place of business in the City of St. Louis. (Exhibit 30 at 8-9). BJC has its principal place of business in the City of St. Louis and this fact has never been disputed. (Exhibit 30 at 4, n. 2). Clearly venue is proper as to BJC in the City of St. Louis. *SSM v. Neill*, 78 S.W.3d at 141, 145. The holding in the *SSM v. Neill* case does not preclude venue in the City of St. Louis under these circumstances. Quite the contrary, the City of St. Louis under the facts present here, is one of the “permissible venues for suits against nonprofit corporations.” *SSM v. Neill*, 78 S.W.3d. at 145. The language of § 355.176.4, “limits permissible venues” (plural) “for suits against nonprofit corporations” (plural) “only to one of the three locations designated in the statute, even when other defendants, including individuals, are also sued.” *Id.* (parentheticals and emphasis added). The Respondent, therefore, did not abuse her discretion in refusing to transfer the case against BJC and Hess to St. Louis County.

Likewise, the facts, allegations, and procedural posture differ in crucial respects from those in *State ex rel. BJC Health Systems v. Neill*, 86 S.W.3d 138 (Mo. App. E.D. 2002). The court in *BJC v. Neill* did not address the fact that BJC and Barnes Jewish Hospital are each subject to venue in the City of St. Louis because of the principal place of business of each. Rather, the court determined that plaintiffs did not allege sufficient control by BJC and did not allege any negligence specifically against Barnes Jewish. *BJC v. Neill*, 86 S.W.3d at 141. The venue facts as to these other nonprofit entities were, therefore, not considered.

In the present case, in contrast, Plaintiff's allegations are not made solely "by virtue of the affiliation agreement between BJC and MBMC. *See BJC v. Neill*, 86 S.W.3d at 140-41. The Respondent properly denied BJC's motion to dismiss and found that Plaintiffs here have properly pleaded a basis for joint liability. A-10,11. For purposes of this writ, it must be assumed that Plaintiffs have properly joined these Defendants. *Green Acres Land & Cattle Co., Inc. v. State*, 766 S.W.2d 649, 651 (Mo. App. W.D. 1988)). Any fair reading of the petitions will affirm Respondent's denial of BJC's motion to dismiss. (Exhibit 1 and 10).

This Court has held, however, that "[t]he question of proper venue must be resolved by the statutes relating to venue and by the rules relating to the propriety of joinder of defendants, for the question of venue is contingent upon proper joinder of parties defendant." *State ex rel. Allen v. Barker*, 581 S.W.2d 818, 825 (Mo. banc 1979) (emphasis added). Common or joint liability "is the touchstone for the determination of whether venue may be predicated upon the residence of a co-defendant." *State ex rel.*

Farrell v. Sanders, 897 S.W.2d 125, 126 (Mo. App. E.D. 1995) (citing *State ex rel. Jinkerson v. Koehr*, 826 S.W.2d 346 (Mo. banc 1992)). Similar holdings are consistent with the general line of cases which discuss the interrelation of the venue statutes and the rules governing joinder of claims. *State ex rel. Bitting v. Adolf*, 704 S.W.2d 671 (Mo. banc 1986), (citing *State ex rel. Farmers Insurance Co., Inc. v. Murphy*, 518 S.W.2d 655 (Mo. banc 1975)). The relationship between the venue statutes and the rules pertaining to joinder is well established and is applicable when determining venue, even under a special venue statute. *State ex rel. City of Springfield v. Barker*, 755 S.W.2d 731, 733 (Mo. App. S.D. 1988). Therefore, it is not necessary to employ a separate analysis into the propriety of venue on each presented claim where, as here, there is joint liability. See *State ex rel. Sims v. Sanders*, 886 S.W.2d 718, 721 (Mo. App. E.D. 1994).

The principles developed in this line of cases, therefore, clearly apply with equal validity to any analysis concerning a plaintiff's choice between multiple permissible venues where there is common liability among the defendants. In applying these principles the inquiry should focus on whether the suit is brought within one of the permissible venues for suits against nonprofit corporations. Under Missouri law, the question of proper venue here cannot be resolved only under the venue statute. The rules of joinder must also be employed to determine the issue. *Allen*, 581 S.W.2d at 825. Because a separate analysis of venue as to each defendant properly alleged to be jointly liable is not required, Respondent should have ruled that venue as to BJC made venue good as to joint tortfeasor MBMC. Instead, she retained the cause as to BJC and sent the claim against jointly liable MBMC to St. Louis County.

A. Venue as to one nonprofit corporation is venue as to all under § 355.176.4.

It is beyond question that a court has venue over all corporate defendants properly joined if there is venue over any one of them. *State ex rel. Webb v. Satz*, 561 S.W.2d 113, 115 (Mo. banc 1978). Respondent's order transferring the case against MBMC is contrary to this Court's holding in *Satz*, decided under § 508.040, RSMo. 1939, and to Missouri law as set forth in the above line of cases. *Id.* In *Satz*, the corporate (for-profit) defendants made the same argument advanced by the defendants in this case. In *Satz*, plaintiffs did not file suit in the county where the cause of action accrued and only one of several defendants had an office for its business in the plaintiffs' chosen venue. The defendants argued that plaintiffs were required to file in the county where venue was good as to each individual defendant, for example, where the cause of action accrued. *Id.* at 113-14.

This Court carefully examined the language of § 508.040, giving meaning to the broad language and plurality of certain words:

We observe that the statute commences in broad terms by stating that "Suits against corporations shall be commenced"; this language refers both to a suit against a single corporation or against several corporations. There is nothing which would in the ordinary understanding of these words limit their application to one or the other and not include both. The statute then . . . goes on to provide that venue will also lie "in any county where such corporations" have certain offices or

agents. The words “in any county” are plain enough. What is meant by the next succeeding words, “where such corporations”?

These words refer back to the corporations against which suits can be commenced mentioned at the beginning of the sentence and, as said, this can be either one or more.

Accordingly, the meaning is that any county where one or more of the corporations has an office or agent of the specified type is a county where an action against corporations can be commenced. The statute applies, true, when the only defendant is a single corporation, but to declare that it has no application when there are plural defendants, all corporations, is to ignore the broad language with which the statute begins.

Id. at 115 (emphasis added).

The Court in *Satz* readily divined the legislature’s intent that venue as to one corporation is venue as to all by its use of the plural, “corporations.” The nonprofit venue statute is no different, as long as it is correctly interpreted.

1. The nonprofit venue statutes define corporation in the plural.

As noted, § 355.176.4 begins, “suits against a nonprofit corporation shall be commenced . . .” (emphasis added). Throughout this section “corporation” is singular. However, the legislature, in its wisdom, defined “corporation” for us. § 355.066, RSMo. 1997, “Definitions,” provides in pertinent part: “Unless the context otherwise requires or

unless otherwise indicated, as used in this chapter, the following terms mean: . . . (6)

‘Corporation,’ public benefit and mutual benefit corporations.” (emphasis added to point out the plural). *Id.*

Thus, wherever “corporation” appears, it must be read to mean “corporations.” Under *Satz*, venue as to one nonprofit defendant is venue as to all nonprofit defendants properly joined.

The nonprofit Defendants have argued that the context of the singular “corporation” requires that it not be read to mean the plural, so that the definition of § 355.066(6) does not control. The obvious question would be: Why? Surely the legislature was mindful of this Court’s decision in *Satz* when it instructed readers of Chapter 355 to consider “corporation” in its plural form. The legislature also was aware of the distinction – for purposes of determining venue – between defendants who are properly joined and defendants who are improperly joined solely to create venue.

Despite this precedent, Defendant has argued that Plaintiffs must find that one venue where the hospitals’ proverbial moons collide, and file suit there. This is exactly the argument made by the defendants in *Satz*, an argument this Court rejected. *Satz*, 561 S.W.2d at 114 (“it is claimed by the . . . defendants . . . that s[ection] 508.040, RSMo 1969, requires actions against multiple corporate defendants to be brought either in the county where all such defendants maintain an office or agent or in the county where the cause of action accrued.”)

2. The Court has determined that § 355.176.4 applies to suits against more than one nonprofit corporation.

In *SSM v. Neill*, this Court noted that § 508.040 and § 355.176.4 are “similarly worded.” *SSM v. Neill*, 78 S.W.3d at 143. The Court’s analysis, in *SSM v. Neill*, however, did not address the issue presented here, but rather “whether the special nonprofit corporation statute . . . or the general venue statute . . . governs when a nonprofit corporate defendant is joined with an individual or corporate for-profit defendant.” *Id.* at 142. The Court’s analysis of the venue statutes in *SSM v. Neill* concentrated on the presence of the word “only” in § 355.176.4, but did not include the phrase “suits against a nonprofit corporation.” *Id.* at 144. The Court unquestionably held, however, that § 355.176.4 applied in suits against more than one nonprofit defendant. *Id.*

When interpreting a statute, the “Court is required to give meaning to every word of the legislative enactment.” *Id.* An interpretation that renders a term “mere surplusage, included for no reason” is disfavored. *Id.* The Court, mindful of this canon of statutory interpretation, has already interpreted § 355.176.4 such that its opening phrase “[s]uits against a nonprofit corporation . . .” does not limit the statute’s effect only to suits against a single nonprofit corporation. The meaning of “a” in the opening phrase cannot, therefore, be limited to the singular and must mean “any one of a great number” and be applicable to more than one individual object. Black’s Law Dictionary 1 (6th ed. 1990) (emphasis added). Any other reading under the Court’s interpretation, is internally inconsistent.

The nonprofit statute’s opening language must, then, be read as broadly as that of the corporate venue statute § 508.040. Any succeeding references to a nonprofit corporation logically and necessarily refer back to any one of the corporations sued and this can mean “one or more.” *Satz*, 561 S.W.2d at 115. Therefore, a consistent reading of the statute

requires that the portion delineating the “permissible venues,” *SSM v. Neill*, 78 S.W.3d at 145, must refer back to any nonprofit corporation sued under the statute. Venue as to one corporate defendant under such a statute, is venue as to all such corporate defendants. *Satz*, 561 S.W.2d at 115.

This interpretation of the statute does not conflict with the Court’s analysis regarding the word “only.” This Court has made plain in *SSM v. Neill*, that the legislature intended in § 355.176.4 to limit the “permissible venues for suit against nonprofit corporations [plural] only to one of the three locations designated in the statute, even when other defendants, including individuals, are also sued.” *SSM v. Neill*, 78 S.W.3d at 145 (emphasis added, bracket to point out the plural). The City of St. Louis, here, is one of those locations. Logically, where there are two nonprofit corporations, the same statute would determine venue just as § 508.040 applies to all actions against corporations unless an individual is also joined. In the latter circumstance, the difference between the Court’s holding in *Neill* and its holding in *Satz* is merely that the nonprofit corporate statute controls even if an individual or other nonprofit entity is added. Nowhere in the nonprofit venue statute, however, is there any suggestion that venue must be addressed separately as to multiple nonprofit defendants. Quite to the contrary, to do so would flout this Court’s well-reasoned *Satz* decision as well as longstanding Missouri law.

Further, what evidence exists that § 355.176.4 was intended to frustrate the plaintiff’s ability to select between multiple “permissible venues” authorized under the statute? Plaintiffs are permitted latitude in the choice of the forum both at common law and under the various venue statutes. *State ex rel. Clark v. Gallagher*, 801 S.W.2d 341,

342 (Mo. banc 1990). There is nothing in the wording of the statute to suggest that one basis for venue is preferred over another. Section 355.176.4 is unique among the “special venue statutes” providing for multiple bases for venue and is to be distinguished from the venue statute considered in *State ex rel. Bell v. St. Louis County*, the county venue statute that provides for venue only in one place, “in the circuit court of such county.” *State ex rel. Bell v. St. Louis County*, 879 S.W.2d 718, 719 (Mo. App. E.D. 1994). Further, as in *SSM v. Neill*, in *Bell* there was only one defendant subject to the special venue statute at issue. *Bell*, 879 S.W.2d at 718-20.

What of the case in which there is no one venue that satisfies the nonprofit venue statute as to both defendants? Respondent herself postulated this eventuality: “This situation could arise if plaintiff was treated successively at hospitals in Boone County and in the City of St. Louis, there is a single injury caused by the co-mingled negligence of each, and neither hospital has its registered agent in the County in which the other is located.” *See* Exhibit 30 at 9, n. 8. In such a circumstance, plaintiffs would without question be allowed to choose which venue would apply. *City of Springfield*, 755 S.W.2d at 734; *Bell*, 879 S.W.2d at 719. Under a statute that provides multiple “permissible venues” for each nonprofit corporate defendant, any one of which would suffice against a jointly liable, nonprofit co-defendant however, it is not necessary to employ such an exception.

In sum, this Court should follow its decision in *Satz* that venue as to a properly joined defendant under a statute that provides multiple permissible venues, is venue as to all such defendants. This Court has already held that § 355.176.4 is not limited to suits against

a single nonprofit corporation. *SSM v. Neill*, 78 S.W.3d at 144. A reading which interprets the statute's opening phrase broadly to include corporations (plural), but then limits the applicability of the succeeding enumerated basis for venue on a singular basis, corporation by corporation, is internally inconsistent. The reading of § 355.176.4, which the Court's analysis in *Satz* requires, gives consistent meaning to all the statute's words and associated definitions, and harmonizes joinder and venue in a manner not achieved by Respondent's order.

III. RELATOR HESS IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TRANSFERRING THIS CASE FROM ST. LOUIS CITY TO ST. LOUIS COUNTY BECAUSE SEPARATE EVALUATION OF VENUE FOR EACH TORTFEASOR IS IMPROPER AND EVALUATION OF VENUE AS TO HESS IS IRRELEVANT UNDER § 355.176.4.

Relator urges the court to now consider in the alternative “the Separate Venue of Relator Hess.” Relator’s Suggestions in Support at 27; Brief at 43. Relator evidently believes that under the Court of Appeals’ Order of October 29, 2002 (Exhibit 29), the Respondent was required to withdraw her order of July 31, 2002, as to Relator Hess’s waiver of venue. Relator’s Suggestions in Support at 27. Relator herein was not the subject of the Court of Appeals’ Order of October 29, 2002, which was directed to Respondent only as to defendants BJC and MBMC in Cause No. ED 81798. (Exhibit 29). The issue of Hess’ waiver having not been addressed by the Court of Appeals in Cause No. ED 81798, Hess was not entitled to a reconsideration of his motion under the Court of Appeals’ Order of October 29, 2002. Respondent issued her Order of November 27, 2002 (Exhibit 30), complying with the Court of Appeals’ Order (Exhibit 29) to consider the merits of BJC and MBMC’s venue motions. The Court of Appeals has since denied Hess’s separate petition for extraordinary writ on the bases asserted herein. (Exhibit 33).

Relator Hess has further argued that “[i]f Respondent is correct in that venue must be determined against each defendant separately... then Relator Hess’ portion of the case

should be transferred to St. Louis County.” Relator’s Suggestions in Support at 27. As shown above, Plaintiffs have sufficiently alleged that defendants and each of them undertook to provide the care and treatment to the decedent, Mrs. Trimble, and that the defendants, including Hess, and each of them caused the death of Mrs. Trimble. (Exhibit 10 at ¶ 8). Plaintiffs have also alleged that each defendant acted as the agent or employee of each of the other defendants. (Exhibit 10 at ¶ 7). Further Plaintiffs have alleged that BJC provides health care services through its employees and agents whether actual, ostensible, or apparent (Exhibit 10 at ¶ 3) that BJC and MBMC acting through their agents and employees offered interventional cardiology procedures and treatments to decedent (Exhibit 10 at ¶ 6), and that at all times each Defendant acted as an agent or employee of each of the other Defendants. (Exhibit 10 at ¶ 7). Plaintiffs also clearly allege that the death of decedent was caused by the negligence and carelessness of each of the Defendants (Exhibit 10 at ¶ 8), and the specific counts against Hess incorporate these allegations. (Exhibit 10 at ¶ 19). Considering these well pleaded, ultimate facts, Plaintiffs have adequately alleged that all Defendants are joint tortfeasors, acting in a concerted course of action, and Relator’s argument on this point has no merit. Only in the absence of joint liability of the Defendants must venue against each Defendant must be analyzed separately. *Sims*, 886 S.W.2d at 720-21 (*citing Turnbough*, 589 S.W.2d 290) (rule is “entirely consistent with *Turnbough*’s holding that common or joint liability, not joinder, is the touchstone for the determination of whether venue may be predicated on the residence of a co-defendant”). However, where as here, the Defendants share joint liability in a single action, venue as to one Defendant establishes venue as to the other. *State ex rel. Todd v.*

Romines, 806 S.W.2d 690, 691-92 (Mo. App. E.D. 1991). Even if a separate determination of venue were called for, however, the presence and residence of Hess is irrelevant under the applicable venue statute, § 355.176.4. Relator's Petition should be expeditiously denied.

CONCLUSION

Relator waived the issue of improper venue by failing to file a timely motion to transfer under Rule 51.045. Respondent's rulings on timeliness and filing were within the discretion of the trial court. Where the issue of venue has been waived, the trial court has no discretion and may not transfer the case. For these reasons, the Relator's Petition should be expeditiously denied and the Court need not consider the venue arguments raised by Relator herein. Relator, however, is not entitled to the relief requested on the venue issues presented in the case below: how venue should be resolved where there are two nonprofit corporations named as defendants, the plaintiff has sufficiently alleged joint liability, and there is proper venue as to one of these nonprofit corporate defendants. Respondent did not fail to follow Missouri law by recognizing that the City of St. Louis is a permissible venue as to defendant BJC under Mo. Rev. Stat. § 355.176.4. The question of venue must be resolved with reference to Missouri's joinder rules, and joint liability is the touchstone for determining whether venue may be predicated on a properly joined defendant. The Court has this issue before it in Cause No. SC85132, and should resolve the issue consistent with its holding in *Satz*, that venue as to one corporation under a statute with multiple bases for venue, is venue as to all such corporations, and the case against Missouri Baptist Medical Center should be transferred back to the City of St. Louis. Hess'

presence is wholly irrelevant to any determination of venue under the relevant nonprofit venue statute and Relator's Petition is without merit. For the foregoing reasons, Hess' petition for extraordinary writ(s) should be expeditiously denied.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing was served upon the parties hereto by hand delivery on this 20th day of June, 2003, to:

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RULE NO. 84.06(b) and (g) CERTIFICATE

I hereby certify that this Brief complies with the limitations contained in Rule No. 84.06(b) and that this brief contains 6797 words according to the word count of Corel Word Perfect Version 9.

I hereby certify that this disk has been checked for viruses in compliance with Rule No. 84.06(g) and that it is virus free.

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