

IN THE MISSOURI SUPREME COURT

NO. SC85215

STATE OF MISSOURI, ex rel. CHRISTIAN HOSPITAL NORTHEAST-
NORTHWEST and BJC HEALTH SYSTEM,

Relators,

v.

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

Respondent.

PROCEEDING IN PROHIBITION
CIRCUIT COURT OF ST. LOUIS CITY CAUSE NO. 012-0315

BRIEF AND APPENDIX 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

This is a medical negligence case in which Plaintiffs seek damages for treatment received during a hospitalization which occurred on February 1, 1999 at Christian Hospital in St. Louis County, Missouri. Plaintiffs filed their lawsuit in the City of St. Louis, naming three individual defendants and four corporate defendants. (See Exhibit 1 for Plaintiffs' Petition).¹ The corporate defendants included Relators BJC Health System (also "BJC") and Christian Hospital Northeast-Northwest ("Christian Hospital"), and two corporations which employ individual defendant doctors. The face of Plaintiffs' petition states that all defendants were to be served at addresses in St. Louis County. (See Exhibit 1, for the caption of the Petition). The Petition did not contain any allegation that venue was proper in the City of St. Louis and did not cite to any venue statute. (Exhibit 1).

In response to the petition, each of the named defendants filed motions challenging venue. (Exhibits 10-11). Relator Christian Hospital argued in its motion that venue is improper in the City of St. Louis based

¹ Unless otherwise noted, all exhibit references are to the Exhibits submitted in support of Relators' Petition for Writ of Prohibition and are attached to Relators' Suggestions in Support of Petition for Writ of Prohibition.

upon § 508.010, RSMo, the general venue statute. (Exhibit 10). Christian Hospital argued that none of the named defendants resided in the City of St. Louis for purposes of venue, and that all of the alleged acts of negligence occurred in the County, thus making venue improper in the City of St. Louis. (Exhibit 10, ¶¶ 5-10). Relator BJC argued, in part, that venue was improper in the City of St. Louis based upon § 355.176.4, RSMo, stating that venue pursuant to that statute would be improper in the City of St. Louis, because Christian Hospital could be sued only in St. Louis County under the facts of this case. (Exhibit 11, ¶ 5).

In response to the Defendants' motions, Plaintiffs filed replies out of time and without leave of court. Therein, Plaintiffs conceded that the individually named Defendants and their corporate entities resided for purposes of venue in St. Louis County and that the cause of action accrued in St. Louis County. (Exhibits 12-13). Plaintiffs further argued that venue was proper in the City of St. Louis for the entire case because Relator BJC had offices there. (Exhibits 12-13).

On May 23, 2001, Respondent issued her first venue order² in this case. (Exhibit 14). In that Order, Respondent denied the venue motions of the defendants, stating that the defendants had failed in their burdens of proof and persuasion and had waived the issue of improper venue as a matter

² A copy of Respondent's May 23, 2001 Order is attached at pages A1-A3.

of law by failing to present evidence that no defendant, either corporate or individual, had its residence in the City of St. Louis. (Exhibit 14, page 3). In response to Respondent's May 23, 2001, Order Relators filed motions to reconsider, seeking to supplement the record to produce the proof Respondent ruled the Relators had failed to provide initially. (Exhibit 15, filed July 3, 2001; Exhibit 16, filed August 30, 2001). Relators argued these motions to reconsider on February 11, 2002.

On February 19, 2002, Respondent issued her second venue order.³ (Exhibit 17). Therein, Respondent denied the Relators' motions to reconsider venue, stating that the motions were without merit, and denied Relators the opportunity to supplement the record. (Exhibit 17, pages 4-5). In the Order, Respondent acknowledged this Court's decision in the *State ex rel. Etter v. Neill* case, but stated that the *Etter* decision was "of no assistance to defendants here," because Relators had failed in their burden of proof and persuasion with regard to the assertions in their original motions. (Exhibit 17, page 6).

All defendants then joined in filing a Petition for Writ of Prohibition, initially denied by the Court of Appeals, Eastern District, (ED81110), and later filed with this Court. (SC84515). In a letter dated July 11, 2002, this

³ A copy of Respondent's February 19, 2002 Order is attached at pages A4-A13.

Court then ordered Respondent to reconsider her prior orders on venue in light of its decision in *State ex rel. SSM Health Care of St. Louis v. Neill*, 78 S.W.3d 140 (Mo. banc 2002). (Exhibit 18).

On August 21, 2002, after this Court issued its directive, Respondent issued her third Order⁴ on venue. (Exhibit 19). In this Order, Respondent acknowledged that Relator BJC had raised in its original venue motion that § 355.176.4, RSMo, governed venue in the case, but again denied the motions stating that no one had provided evidence that Christian Hospital was a non-profit corporation with its principal place of business in St. Louis County. (Exhibit 19, pages 2-3).

On September 24, 2002, this Court denied Relators' Petition for Writ of Prohibition without Opinion. (Exhibit 20).

On December 11, 2002, Relator Christian Hospital, by motion, sought leave from Respondent to amend and supplement their initial venue motion to assert venue was improper in the City of St. Louis based on § 355.176.4 and to provide the court with the proof Respondent was lacking (i.e. that Christian Hospital was a non-profit corporation with its principal place of business in St. Louis County). (Exhibit 21). With the motion for leave, Christian Hospital submitted its Amended Motion to Transfer for Improper

⁴ A copy of Respondent's August 21, 2002 Order is attached at pages A14-A17.

Venue, asserting § 355.176.4 as the applicable venue statute and including affidavit support for the fact that Christian Hospital's principal place of business and the location of its registered agent were in St. Louis County. (Exhibit 21). On December 12, 2002, BJC filed a memorandum to clerk joining Christian Hospital's motion to amend its Rule 51.045 Motion to Transfer Venue. (Exhibit 22).

On January 21, 2003, Respondent issued her fourth Order⁵ related to venue. (Exhibit 23). Respondent again denied Relators the opportunity to amend and supplement their venue motions, stating: (1) that Relators had failed in their burden of proof and persuasion in the first instance; (2) that Rule 51.045 of the Missouri Rules of Civil Procedure did not provide for successive or supplemental motions; (3) that allowing amendments would contravene the intent and purpose of the Missouri rules and case law relating to venue; and (4) that it would be improper at this "late" stage to allow Relators to amend and supplement their venue motions. (Exhibit 23, pages 3-4).

On March 21, 2003, Christian Hospital and BJC Health System filed a Petition for Writ of Prohibition in the Court of Appeals for the Eastern District of Missouri. (ED82697). On April 1, 2003, following the filing of

⁵ A copy of Respondent's January 21, 2003 Order is attached at pages A18-A21.

Respondent's Suggestions in Opposition, the Court of Appeals denied the Writ.

On April 16, 2003, Christian Hospital and BJC Health System filed a Petition for Writ of Mandamus and/or Prohibition in this Court. On May 27, 2003, following the filing of Respondent's Suggestions in Opposition, this Court entered its Preliminary Writ of Prohibition directed to the Honorable Margaret M. Neill. This Brief follows.

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 RELATORS PROPERLY RAISED IMPROPER VENUE UNDER RULE 51.045 IN THAT: (1) RELATORS RAISED IMPROPER VENUE AT THE EARLIEST OPPORTUNITY, THEREBY PRESERVING THEIR OBJECTION; AND (2) RESPONDENT, AFTER IMPOSING ON RELATORS THE BURDEN OF DISPROVING THE BASIS FOR VENUE IN THE CITY OF ST. LOUIS, ERRED IN DENYING RELATORS THE OPPORTUNITY TO SUPPLEMENT THE RECORD IN SUPPORT OF THEIR VENUE TRANSFER MOTIONS.

Mogley v. Fleming, 11 S.W.3d 740 (Mo. App. E.D. 1999)

State ex rel. Etter v. Neill, 70 S.W.3d 28 (Mo. App. E.D. 2002)

State ex rel. Bierman v. Neill, 90 S.W.3d 464 (Mo. banc 2002)

§ 355.176.4, RSMo

Missouri 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 UNJUSTLY APPLIED RULE 51.045 BY PERMITTING PLAINTIFFS TO FILE UNTIMELY REPLIES TO RELATORS' VENUE TRANSFER MOTIONS WHILE AT THE SAME TIME DENYING CHRISTIAN HOSPITAL THE OPPORTUNITY TO AMEND ITS VENUE TRANSFER MOTION.

State ex rel. Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470 (Mo. banc 2002)

State ex rel. Johnson v. Griffin, 945 S.W.2d 445 (Mo. banc 1997)

State ex rel. Bierman v. Neill, 90 S.W.3d 464 (Mo. banc 2002)

Missouri Supreme Court Rule 51.045

Missouri Supreme Court Rule 55.26(b)

Missouri Supreme Court Rule 55.33(d)

III. 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 CHRISTIAN HOSPITAL NORTHEAST-NORTHWEST IS IN ST. LOUIS COUNTY IN THAT IT IS UNDISPUTED THAT THE ALLEGED 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)

§ 355.176.4, RSMo

§ 476.410, RSMo

Missouri Supreme Court Rule 51.045

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 RELATORS PROPERLY RAISED IMPROPER VENUE UNDER RULE 51.045 IN THAT: (1) RELATORS RAISED IMPROPER VENUE AT THE EARLIEST OPPORTUNITY, THEREBY PRESERVING THEIR OBJECTION; AND (2) RESPONDENT, AFTER IMPOSING ON RELATORS THE BURDEN OF DISPROVING THE BASIS FOR VENUE IN THE CITY OF ST. LOUIS, ERRED IN DENYING RELATORS THE OPPORTUNITY TO SUPPLEMENT THE RECORD IN SUPPORT OF THEIR VENUE TRANSFER MOTIONS.

A. Standard for Issuance of a Remedial Writ

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.*

B. Respondent erroneously ruled that, as a matter of law, Christian Hospital failed to properly raise venue and had waived the issue of improper venue in that the record reflects that Relators in fact did timely raise improper venue.

In her January 21, 2003 Order, Respondent reiterated her previous ruling that Relators had failed in their burden of proof and persuasion and had waived, as a matter of law, the issue of improper venue. (Exhibit 23, page 3). According to Missouri case law, however, a party does not waive venue if the party timely objects to improper venue by motion, or in its responsive pleading. *State ex rel. Steinhorn v. Forder*, 792 S.W.2d 51, 53 (Mo. App. E.D. 1990) (pre-Rule 51.045). A close review of the record in this case shows that Relators did not waive venue. Further, Respondent should have permitted Relators to supplement their venue motions.

1. Missouri law clearly holds that raising improper venue at the earliest opportunity preserves that objection, even if the court denies the motion.

Venue refers to the site in which a court of competent jurisdiction may adjudicate an action. *Bellon Wrecking & Salvage Company v. David*

Orf, Inc., 983 S.W.2d 541, 546 (Mo. App. E.D. 1998). Defendants are given venue as a statutory privilege and can waive it if they so desire. *Bizzell v. Kodner Dev. Corp.*, 700 S.W.2d 819, 822 (Mo. banc 1985). The primary purpose of the Missouri venue statutes is to provide a convenient, logical and orderly forum for litigation. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 196 (Mo. banc 1991). Proper venue in Missouri is determined solely by statute. *Id.*

Rule 51.045 of the Missouri Rules of Civil Procedure⁶ requires a defendant to raise the issue of improper venue within the time allowed for a responsive pleading. Missouri courts have also held that the defense of improper venue must be raised at the “first opportunity” or it is waived. *Mogley v. Fleming*, 11 S.W.3d 740, 746 (Mo. App. E.D. 1999). The reason for this is that if the venue is improper, it inures to the benefit of the parties and the judicial system, for the purpose of efficient administration of justice, to bring the issue to the trial court’s attention at the earliest possible time. *Id.* at 746. Thus, a party may be deemed to have waived venue by undertaking any affirmative action relating to the merits of the case prior to filing a venue challenge. *State ex rel. Antoine v. Sanders*, 724 S.W.2d 502, 504 (Mo. banc 1987). In addition, venue may be waived when a party

⁶ A copy of Missouri Supreme Court Rule 51.045 is attached at pages A25-A26.

makes no motion or pleading on the issue, but otherwise subjects itself to the jurisdiction of the court. *Hoffman v. Sedlmayr Enterprises, Inc.*, 858 S.W.2d 814, 816 (Mo. App. W.D. 1993).

Missouri courts have specifically found a waiver of venue when a defendant goes to verdict on a vaguely pleaded general denial of proper venue in an answer, *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445, 446 (Mo. banc 1997); when a defendant files an answer which does not contain a venue challenge and also serves plaintiff with merit specific discovery requests before filing a motion to challenge improper venue, *State ex rel. Uptergrove v. Russell*, 871 S.W.2d 27, 29 (Mo. App. W.D. 1994); when a defendant enters an appearance and files pleadings relating to the merits of the case without challenging venue, *Mogley v. Fleming*, 11 S.W.3d 740 (Mo. App. E.D. 1999); when a defendant does not raise venue in the initial pleadings, but raises it for the first time during a pre-trial conference, *State ex rel. Meek v. Smith*, 974 S.W.2d 656 (Mo. App. E.D. 1998); and when a defendant files a motion for more definite statement and then files an answer without raising a challenge to venue, *State ex rel. Antoine v. Sanders*, 724 S.W.2d 502 (Mo. banc 1987).

On the other hand, Missouri courts have held that a defendant does not waive venue by appearing for a deposition, noticed by the opposing party, prior to the time required to file a responsive pleading in which the

defendants challenged venue, *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994); when a defendant files a proper objection to venue and simultaneously files merit specific discovery, *State ex rel. Steinhorn v. Forder*, 792 S.W.2d 51, 53 (Mo. App. E.D. 1990); or when a defendant appears for a hearing, and testifies before the court in the improper venue before entering a written appearance, *Ottmann v. Ottmann*, 764 S.W.2d 153, 155 (Mo. App. W.D. 1989). A defendant, who in a timely and proper manner raises improper venue, may thereafter prepare for trial, utilize all the procedures available for trial preparation, apply for or consent to continuances, and actually try the case on the merits without waiving venue. *State ex rel. Steinhorn v. Forder*, 792 S.W.2d at 53. Once a party timely objects to venue, the party does not have to reassert its challenge to venue at every step along the way. *Ottmann v. Ottmann*, 764 S.W.2d at 155.

Missouri courts have even held that a defendant does not waive venue by failing to appear after being served with the petition. *Keltner v. Keltner*, 950 S.W.2d 690 (Mo. App. S.D. 1997). Venue is not waived even as a consequence of default, since the defaulting defendant is not considered to be “before the court”. *Sullenger v. Cooke Sales & Services, Co.*, 646 S.W.2d 85, 88 (Mo. banc 1983), overruled on other grounds by *State ex rel. DePaul Health Center v. Mummert III*, 870 S.W.2d 820 (Mo. banc 1994).

Even if a party has been served with a petition and has been given timely notice of a hearing and still fails to respond or attend the hearing, that party has not waived the issue of venue. *Kueper v. Murphy Distributing*, 834 S.W.2d 875, 879 (Mo. App. E.D. 1992). Missouri courts have held that the defense of improper venue is waived only when the party entitled to assert it takes some affirmative act recognizing or accepting the court's jurisdiction without first asserting improper venue. *Keltner v. Keltner*, 950 S.W.2d 690, 691 (Mo. App. S.D. 1997).

When the case has been brought in the wrong venue and a proper and timely motion to transfer venue has been filed, § 476.410, RSMo⁷, requires the Circuit Court to transfer the case to a venue in which the case could have been brought. *Mogley v. Fleming*, 11 S.W.3d 740 (Mo. App. E.D. 1999). Rule 51.045 of the Missouri Rules of Civil Procedure also provides that an action filed in a court where venue is improper shall be transferred to a proper venue if a motion for such transfer is timely filed.

Turning to the case at bar, Respondent stated that she denied Relators' motion for leave to amend in part because Respondent had earlier determined that both Relators had waived the issue of improper venue. (Exhibit 23, pages 3-4). Respondent denied Christian Hospital leave to amend and supplement its venue motion, because Christian had raised

⁷ A copy of § 476.410, RSMo is attached at page A24.

improper venue, citing § 508.010, but not § 355.176.4,⁸ in its original Motion to Dismiss and/or For Transfer of Venue. Respondent stated that it would be improper to allow Christian to raise this venue issue “anew” after the case had been pending for two years. (Exhibit 23, page 4). Relator BJC, however, raised § 355.176.4 in its original motion, and Plaintiffs – at least implicitly – acknowledged that § 355.176.4 was the proper venue statute. (Exhibit 13, pages 2-4). Thus the issue was before the court from the beginning of the case. (Exhibit 11, page 2). Respondent acknowledged in her Order dated August 21, 2002, that BJC raised § 355.176.4 in its original venue motion. (Exhibit 19, p. 2). Respondent ruled, however, that BJC presented no proof that Christian had its principal place of business in St. Louis County, and therefore BJC failed in its burden of proof and persuasion and waived venue. (Exhibit 19, pages 2-3). This was her ruling, despite the fact that: (1) no party disputed that Christian’s principal place of business was in St. Louis County, and (2) on December 11, 2002, Christian Hospital provided evidence that Christian was a non-profit corporation. (Exhibit 15). In addition, nowhere in Plaintiffs’ petition do they allege or assert a basis for venue in the City of St. Louis based upon § 355.176.4. (Exhibit 1).

2. Respondent erroneously failed to follow the rulings in the *State ex rel. Etter v. Neill* and *State ex rel. Bierman v. Neill* cases.

⁸ A copy of § 355.176.4, RSMo is attached at pages A22-A23.

Christian Hospital's Motion for Rehearing and Reconsideration and Motion for Leave to Supplement the Record and Relators' Motions for Leave to Amend were an effort to: (1) address the additional burden of proof being imposed upon them by Respondent; and (2) to re-assert the non-profit venue statute officially revived by the Missouri Supreme Court in the opinion *State ex rel. SSM Health Care v. Neill*, 78 S.W. 3d 145 (Mo. banc 2002). Respondent's ruling on the Motions for Leave to Amend is inconsistent with the many venue cases holding that venue is only waived when it is not raised in the defendant's first responsive pleading. Moreover, Respondent's reasoning was specifically rejected in the *State ex rel. Etter v. Neill*, 70 S.W.3d 28 (Mo. App. E.D. 2002), decision, which held that a party should be permitted to supplement the record to address non-pleaded bases for venue. 70 S.W.3d at 32. Because Christian timely raised improper venue in its first motion (Exhibit 10), and because BJC raised § 355.176.4 in its original venue motion (Exhibit 11), and Plaintiffs implicitly agreed it was the governing venue statute, Respondent erred in ruling that Relators waived venue as a matter of law.

On the issue of supplementation, the case of *State ex rel. Bierman v. Neill*, 90 S.W.3d 464 (Mo. banc 2002), is illustrative. In that case, plaintiff originally brought a medical malpractice suit in St. Louis City against a single defendant, who was a resident of the State of California. 90 S.W.3d

at 464. Five days later, plaintiff added two St. Louis County residents as defendants. *Id.* Defendants timely filed a motion to transfer venue to St. Louis County on the ground of pretensive non-joinder, and the Honorable Margaret M. Neill denied the motion. *Id.* Thereafter, in light of this Court's decision in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), defendants asked Judge Neill to reconsider her previous order (much as Relators herein asked Judge Neill to reconsider her venue ruling in light of *SSM Health Care v. Neill*). *Id.* Judge Neill denied defendants' motion to reconsider on the basis that defendants had failed to adduce certain evidence at the original, pre-*Linthicum* hearing to carry their burden under a different venue statute; this despite the defendants having submitted with the motion for reconsideration un rebutted affidavits establishing that the cause of action accrued not in St. Louis City, but in St. Louis County. *Id.* at 464-65. In holding that Respondent had erred in denying defendants' motion to reconsider, this Court noted that defendants were not obligated to prove venue improper under statutes not raised by the plaintiff as a basis for venue. *Id.* at 465.

In this case, the only basis for venue in the City of St. Louis that was pleaded in Plaintiffs' petition was that BJC is licensed to conduct business in the City of St. Louis, and that BJC and Christian were united in an affiliation agreement. (Exhibit 1). At the same time, however, Plaintiffs' petition on

its face indicated that the defendants were to be served through their registered agents, all of which were in St. Louis County. (Exhibit 1, caption). In addition, the court file indicated that all of the Defendants were actually served with the petition in St. Louis County. (Exhibit 2-8 for proofs of service). Since Christian was arguing venue was improper in the City of St. Louis based upon § 508.010, Christian did not need to provide any additional proof, since the Plaintiffs' petition and the court file itself attested to the fact that the defendants were residents of St. Louis County for purposes of venue under § 508.010.

Here, like in *Bierman*, Relators sought to supplement the record and amend the venue transfer motions, in light of *SSM Health Care v. Neill*. As was the case in *Bierman*, Relators should have been allowed to supplement the record and amend their motions to address the additional burden placed on them by Respondent and to re-assert the non-profit venue statute as a basis for improper venue in the City of St. Louis.

Rather than rule on the substantive issue of proper venue, Respondent erroneously ruled that Christian failed in its burden of proof and persuasion and waived the issue of improper venue. This is the very same procedural scheme that was rejected in the *Etter* and *Bierman* decisions. Christian's initial Motion to Reconsider, filed July 3, 2001, was an effort to supplement the record to provide the proof Respondent deemed that Christian had failed

to earlier produce. In Respondent's second ruling on venue dated July 19, 2001, however, she again ruled that Christian had failed in its burden of proof and persuasion, stated that Christian's request to supplement the record was without merit, and denied it.

In *Etter*, however, the court held that "there is no reason to disallow . . . supplementation of the record where Respondent seeks to uphold venue on a basis that was never pleaded." *Id.* at 32. By denying Relators their request to amend and supplement their motions, Respondent ignored *Etter*, violated the Relators' venue rights, and exceeded her jurisdiction.

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 UNJUSTLY APPLIED RULE 51.045 BY PERMITTING PLAINTIFFS TO FILE UNTIMELY REPLIES TO RELATORS' VENUE TRANSFER MOTIONS WHILE AT THE SAME TIME DENYING CHRISTIAN HOSPITAL THE OPPORTUNITY TO AMEND ITS VENUE TRANSFER MOTION.

A. Standard for Issuance of a Remedial Writ

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.*

B. Respondent erroneously denied Christian Hospital the opportunity to amend its venue transfer motion while

**permitting Plaintiffs – tacitly or otherwise – to file untimely
replies to Relators’ venue transfer motions.**

Respondent’s January 21, 2003, Order denied Relators the opportunity to amend and supplement their venue motions, holding that Rule 51.045 “contains no provision for successive or supplemental pleadings.” (Exhibit 23, page 3). At the same time, however, Respondent allowed Plaintiffs to file their replies to the Defendants’ venue motions out of time and without leave of court, despite language in Rule 51.045 requiring a plaintiff to file a reply within ten days. Plaintiffs did not seek leave of court to file the Replies and no order granting leave was entered. One must infer that Respondent implicitly granted Plaintiffs leave to file the Replies because she did not hold that Plaintiffs had waived their arguments on proper venue by not timely filing the replies. *Cf., State ex rel. Vee-Jay Contracting v. Neill*, 89 S.W.3d 470, 472 (Mo. banc 2002).

Rule 51.045 of the Missouri Rules of Civil Procedure sets forth the procedure for transfer of venue when venue is improper. Rule 51.045(a) provides that a defendant shall file a Motion to Transfer Venue within the time allowed for responding to an adverse party’s pleading. Rule 51.045(b) provides that the opposing party has ten days to file a reply denying the allegations in the Motion to Transfer Venue. The rule does not contain: (1) a provision permitting a plaintiff to file a reply out of time; (2) a provision

permitting the trial court to consider a reply filed outside the ten days without leave of court; or (3) a provision permitting the court to extend the 10 day period [although Relators believe the court has discretion to do so]. The rule does provide, however, that when no reply is filed within 10 days, venue shall be transferred. Rule 51.045(b).

This Court recently explained the constraints of Rule 51.045 in the case of *State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470 (Mo. banc 2002). In the *Vee-Jay* case, plaintiffs filed no reply to the defendants' venue motion. This Court ruled that the plain language of the rule requires venue be transferred when no reply is filed. 89 S.W.3d at 472.

In the case at bar, Plaintiffs neither filed their replies within ten days, nor obtained leave of court.⁹ By the plain language of Rule 51.045, Respondent should have transferred the case. In the alternative, if Respondent was going to allow Plaintiffs to file their replies out of time,

⁹ Christian Hospital timely filed its venue transfer motion on March 22, 2001, with BJC timely filing its venue transfer motion on March 26, 2001. (See Exhibit 9 for a copy of the court's minute record). Plaintiffs did not file their answer and suggestions in opposition to the venue transfer motions until April 11, 2001, more than 10 days after the filing of the motions by both Relators. (Exhibit 9).

Respondent also should have given Relators leave to supplement and amend their venue motions.

Respondent relied on the case of *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445 (Mo. banc 1997), to conclude that Relators had not timely raised improper venue. (Exhibit 17, page 5; Exhibit 23, page 3). It is true that *Johnson* stands for the proposition that a defendant must raise improper venue at the earliest point in time. *Id.* at 447. However, *Johnson* also was a case where the defendant argued, on appeal, that its general assertion of improper venue was sufficient; it never sought leave to amend to assert a specific venue statute nor to allege supporting facts. *Id.* at 446. Not surprisingly, this Court held that the general assertion of “improper venue” was fatally deficient. *Id.* Importantly, though, *Johnson* did not reach or hold that leave to amend an improper venue assertion could not be sought or granted before the case concluded.

By contrast, all of the defendants in this case raised improper venue by motion in their first pleadings, and venue has been vigorously contested throughout the course of this litigation. The petition herein makes no reference to any act of negligence occurring in the City of St. Louis, and Plaintiffs even admit that the cause of action did not accrue in the City. (Exhibits 12, 13). Plaintiffs served each of the defendants, including Christian, personally and/or through their registered agents in St. Louis

County. None of the parties – including Plaintiffs -- contest the fact that Christian’s principal place of business is on Dunn Road in St. Louis County or that it is a non profit corporation.

Respondent commented that Relators waited too long to raise venue. The record shows a long and protracted effort to assert improper venue. Respondent’s first order denying venue transfer was entered just four months after the petition was filed. As a practical matter, resolution of the venue question in this case has been delayed as a result of Respondent’s repeated refusal to accept from Relators proof of matters about which there was and is no dispute. Supplementation and/or amendment to Relators’ original venue motion is in keeping with the purpose and intent of the *Johnson* case, not contrary to it. If Respondent had allowed Relators to supplement and amend their venue motions, particularly in light of Respondent’s acceptance of Plaintiffs’ untimely replies, Respondent could have ruled on the merits of the issue, and transferred the case to the appropriate venue long ago.

Furthermore, Respondent’s assertion that Rule 55.33(a) does not apply to motions challenging venue is erroneous. Rule 55.33(a) provides that responsive pleadings may be amended with leave of court, and that leave “shall be freely given when justice so requires.” The purpose of the rule is to liberally allow amendments when justice so requires.

Southwestern Bell v. Wilkins, 920 S.W.2d 544, 550 (Mo. App. E.D. 1996). Pursuant to this rule, Missouri courts have permitted amendments to petitions as well as to affirmative defenses. *E.g.*, *Century Fire Sprinklers v. CNA*, 87 S.W.3d 408, 418-19 (Mo. App. W.D. 2002). A venue motion is at least analogous to a “responsive pleading”.¹⁰ Allowing Christian to amend and supplement its venue motion would have allowed Respondent to rule on the merits of the issues that were before Respondent from the beginning of the case, and would have been consistent with the rules of civil procedure and case law relating to venue. *See* Rules 55.26(b); 55.33(d); and *State ex rel. Vee-Jay Contracting v. Neill*, 89 S.W.3d at 472.

It is noteworthy that this Court in *State ex rel. Bierman v. Neill*, 90 S.W.3d 464 (Mo. banc 2002) recently clarified Rule 51.045, relating to motions to transfer venue and replies thereto. There, this Court held that a

¹⁰ The contention that a venue motion is analogous to a responsive pleading was at the heart of this Court’s opinion in *State ex rel. Vee-Jay Contracting Co. v. Neill*, which held that a judge must transfer venue if the opposing party does not reply to a proper motion to transfer. 89 S.W.3d at 472. As this Court noted, “[t]his is but an application of the general rule that failure to file a required answer admits the allegations of the preceding pleading.” *Id.*

plaintiff who files a reply to a timely filed venue motion is bound by the admissions made and grounds for venue asserted in the reply. 90 S.W.3d at 465. The rationale is simple enough: a reply's failure to challenge pertinent facts and law stated in a Rule 51.045 motion admits those things, and the reply's failure to assert venue propositions abandons them. *Id.*

In the case at bar, Plaintiffs admitted in their venue motion replies that the cause of action did not accrue in the City of St. Louis. (Exhibits 12, page 3 and Exhibit 13, page 2). Plaintiffs did not dispute Christian's non-profit status, nor its St. Louis County principal place of business. Plaintiffs further stated that § 355.176.4 is still "good law". (Exhibits 12, page 4 and Exhibit 13, page 3). Plaintiffs argued, though, that venue is proper in the City of St. Louis under § 355.176.4, RSMo, because BJC has its principal place of business there. (Exhibits 12, pages 3-5; Exhibit 13, pages 2-4). Relators countered that venue is proper only in St. Louis County under §355.176.4 because Christian is located there, the cause of action accrued there, and the office of its registered agent is located there. *State ex rel. SSM Health Care v. Neill*, 78 S.W.3d 140, 145 (Mo. banc 2002). Further, St. Louis County is a venue proper for all defendants and improper as to none.

Respondent should have allowed Christian to supplement and/or amend its venue motion from the beginning, and should have considered the complete record before her. Doing so, she would have had to rule that §

355.176.4 governs, and that venue was only proper in St. Louis County. By denying Relators the right to have the supplemental information considered, and by refusing to permit Christian to amend its venue motion, Respondent has exceeded her jurisdiction, abused her discretion, and denied Relators their venue rights.

III. 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 CHRISTIAN HOSPITAL NORTHEAST-NORTHWEST IS IN ST. LOUIS COUNTY IN THAT IT IS UNDISPUTED THAT THE ALLEGED 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.

A. Standard for Issuance of a Remedial Writ

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.*

B. St. Louis County is the only proper venue for claims against Christian Hospital.

As a nonprofit corporation, and pursuant to § 355.176.4, RSMo (1994), Christian Hospital can be sued *only* in one of the following three 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. Furthermore, Christian Hospital can be sued *only* in the Circuit Court of St. Louis County under the facts of this case. As stated earlier, there is no dispute that the alleged cause of action against Christian Hospital 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, 12, 13, 15).

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 that under it, venue in St. Louis City was 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, this 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 to none is St. Louis County. Pursuant to § 355.176.4, the Circuit Court of St. Louis County is the exclusive venue within which Christian Hospital can be sued. Furthermore, Relator 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 Christian Hospital, which is only located in St. Louis County. (See Exhibits 1, 15). 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.

CONCLUSION

Relators Christian Hospital Northeast-Northwest and BJC Health System 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 7,513 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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The undersigned hereby certifies that a copy of the foregoing Brief and Appendix and a 3-1/2 inch diskette containing Relators' Brief were mailed, postage pre-paid this 24TH day of July 2003, to:

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