

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel.)
Chul Kim, M.D., Angela)
Patterson, M.D. and Westwood)
Medical Clinic, Inc.,)
)
Relators,)
)
vs.)
)
Honorable William C. Seay,)
)
Respondent.)

No. SC88473

Writ of Prohibition from Order of the Circuit Court of Cape Girardeau
County

Relators' Opening Brief

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TABLE OF CONTENTS

Table of Authorities.....2

Jurisdictional Statement.....4

Statement of Facts.....5

Points Relied On.....8

Argument.....10

Conclusion.....24

Certificate of Compliance.....26

Certificate of Service.....27

TABLE OF AUTHORITIES

Cases

Ezenwa v. Director of Revenue, 791 S.W.2d 854 (Mo. App. W.D. 1990).....8, 12

Freeman v. Leader Nat. Ins. Co., 58 S.W.3d 590 (Mo. App. E.D. 2001).....19

Golden Valley Disposal, LLC v. Jenkins Diesel Power, Inc., 183 S.W.3d 635 (Mo. App. S.D. 2006).....9, 19

Gray v. Lewis & Clark Expeditions, Inc., 12 F. Supp. 2d 993 (D. Neb. 1998)..9, 22

Joel Bianco Kawasaki Plus v. Meramec Valley Bank, 81 S.W.3d 528 (Mo. banc 2002).....22

Maxey v. Wenner, 686 S.W.2d 862 (Mo. App. E.D. 1985).....13, 14

Pierson v. Allen, 409 S.W.2d 127 (Mo. 1966).....8, 13

Richman v. Coughlin, 75 S.W.3d 334 (Mo. App. W.D. 2002).....19

State ex rel. East Carter County R-II School Dist. v. Heller, 977 S.W.2d 958 (Mo. App. S.D. 1998).....9, 15

State ex rel. Green v. Neill, 127 S.W.3d 677 (Mo. banc 2004).....10

State ex rel. Lebanon School District R-III v. Winfrey, 183 S.W.3d 232 (Mo. banc 2006).....20, 21

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001).....10

Statutes

Section 508.080, RSMo 2000.....8, 11, 14

Rules

Rule 44.01.....9, 22

<i>Rule 51.02</i>	8, 10, 14, 24
<i>Rule 51.03</i>	9, 12, 15, 16, 17, 19, 20, 23, 24
<i>Rule 55.25</i>	5, 9, 20, 21
<i>Rule 55.27</i>	9, 21
<i>Rule 55.33</i>	6, 9, 22
<i>Rule 84.22</i>	4
<i>Federal Rule of Civil Procedure 6(b)</i>	9, 22
<u>Constitutional Provisions</u>	
<i>Mo. Const. Art. V, sec. 4</i>	4

JURISDICTIONAL STATEMENT

Relators brought this original proceeding in prohibition because Respondent exceeded his jurisdiction on December 14, 2006 by granting Plaintiffs' application for change of venue and transferring this case from Cape Girardeau County to Crawford County. On March 23, 2007, Relators filed a petition for writ of prohibition or in the alternative for writ of mandamus in the Missouri Court of Appeals for the Southern District. The Southern District denied Relators' petition on April 9, 2007. On April 20, 2007, Relators filed a petition for writ of prohibition or in the alternative for writ of mandamus in this Court. On May 29, 2007, this Court issued a preliminary writ of prohibition.

This Court has jurisdiction pursuant to Article V, Section 4 of the Missouri Constitution, which vests this Court with jurisdiction to issue remedial writs, and Rule 97 of the Missouri Rules of Civil Procedure. Additionally, this proceeding is properly before this Court since the Southern District of the Court of Appeals previously denied Relators' petition. *See Rule 84.22.*

STATEMENT OF FACTS

This is a medical negligence action in which the Plaintiffs are asserting claims for wrongful death and lost chance of survival relating to the death of the decedent, Christopher O'Neil, who was in the care of the various healthcare provider defendants. *Ex. 2, A-33.*

The case was originally filed in Butler County on April 7, 2005. *Ex. 1, A-1.* Shortly thereafter, one of the Defendants, Poplar Bluff Regional Medical Center, filed a motion to transfer venue. *Ex. 3, A-77.* Plaintiffs then stipulated with the Defendants to change the venue from Butler County to Cape Girardeau County. Plaintiffs memorialized the stipulation by having Plaintiffs' attorney sign a proposed order under the heading "Approved as to Form" before it was ever filed with the court. *Ex. 4, A-78.* On July 11, 2005, Judge Mark Richardson signed the proposed order, which transferred the case to Cape Girardeau County. *Ex. 4, A-78.* It is undisputed that there was no hearing on the venue motion, that Plaintiffs' counsel did not appear, and that the previously approved order was simply signed by Judge Richardson in the ordinary course.

Nine months after the case was moved to Cape Girardeau County, Plaintiffs served a new defendant, Poplar Bluff No. 1, which is a nursing home that operates under the name "The Manor." The Manor was served with Plaintiffs' 7th Amended Petition on April 17, 2006. *Ex. 1, A-16.* Under Rule 55.25, The Manor was required to file its answer within 30 days; therefore, the due date of its answer was May 17, 2006. But The Manor never filed an answer to the 7th Amended

Petition. Plaintiffs then filed their 8th Amended Petition on May 22, 2006. *Ex. 1, A-19*. Under Rule 55.33(a)—which governs the due dates of answers to amended petitions—the due date of The Manor’s answer to the 8th Amended Petition was June 1, 2006, which was 10 days after the filing of the 8th Amended Petition. However, Plaintiffs informally agreed with The Manor to waive this due date, and The Manor did not file its answer until June 7, 2006. *Plaintiffs’ Answer and Return, at ¶¶ 20, 21; Ex. 1, A-20*.

Two days later, on June 9, 2006, Plaintiffs dismissed The Manor from the case. *Ex. 7, A-94*. But later that day, Plaintiffs attempted to withdraw their dismissal. *Ex. 8, A-96*. Then, on June 15, 2006, Plaintiffs filed their joint application for change of judge and change of venue. *Ex. 9, A-99*. Relators filed their objections to that application on June 19, 2006. *Ex. 10, A-102*. On July 6, 2006, Judge Benjamin Lewis granted Plaintiffs’ application for a change of judge. *Ex. 12, A-130*. The Supreme Court then assigned Respondent to the case. *Ex. 13, A-132*. On August 10, 2006, Relators filed a detailed memorandum explaining why Plaintiffs were barred from seeking a change of venue. *Ex. 14, A-133*.

On December 14, 2006, Respondent granted Plaintiffs’ application and transferred the case from Cape Girardeau County to Crawford County, which is within Respondent’s circuit. *Ex. 15, A-152*. None of the parties in this case have any connection to Crawford County.

Relators filed a Petition for Writ of Prohibition or in the Alternative for Writ of Mandamus in the Missouri Court of Appeals for the Southern District on

March 23, 2007. *Ex. 1, A-32*. The Southern District denied Relators' petition on April 9, 2007. *Ex. 16, A-154*. Relators then filed a Petition for Writ of Prohibition or in the Alternative for Writ of Mandamus in this Court on April 20, 2007. This Court issued its Preliminary Writ of Prohibition on May 29, 2007. *Ex. 17, A-155*.

POINTS RELIED ON

I. Relators are entitled to an order prohibiting Respondent from granting Plaintiffs' application for change of venue and transferring this case from Cape Girardeau County to Crawford County because Plaintiffs were barred by Rule 51.02 from seeking a change of venue in that they had stipulated to a previous change of venue from Butler County to Cape Girardeau County.

Ezenwa v. Director of Revenue, 791 S.W.2d 854 (Mo. App. W.D. 1990).

Pierson v. Allen, 409 S.W.2d 127 (Mo. 1966).

Rule 51.02.

Section 508.080, RSMo 2000.

II. Relators are entitled to an order prohibiting Respondent from granting Plaintiffs' application for change of venue and transferring this case from Cape Girardeau County to Crawford County because Plaintiffs' application for change of venue was untimely in that (1) it was filed later than 10 days after the original defendants' original answers were due to be filed; (2) it could not be timely based on the answer due date of the most-recently added defendant, The Manor, since Plaintiffs dismissed The Manor before they filed their application; and (3) even if The Manor's due date was relevant, Plaintiffs filed their application more than 10 days after that due date.

State ex rel. East Carter County R-II School Dist. v. Heller, 977 S.W.2d 958 (Mo. App. S.D. 1998).

Golden Valley Disposal, LLC v. Jenkins Diesel Power, Inc., 183 S.W.3d 635 (Mo. App. S.D. 2006).

Gray v. Lewis & Clark Expeditions, Inc., 12 F. Supp. 2d 993 (D. Neb. 1998).

Rule 51.03.

Rule 55.25.

Rule 55.27.

Rule 55.33.

Rule 44.01.

Federal Rule of Civil Procedure 6(b).

ARGUMENT

Standard of Review

A prohibition action is an original proceeding brought to confine a lower court to the proper exercise of its jurisdiction. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856 (Mo. banc 2001). A writ of prohibition will be issued “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. Green v. Neill*, 127 S.W.3d 677, 678 (Mo. banc 2004). When venue is improper, prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue. *Id.*

I. Relators are entitled to an order prohibiting Respondent from granting Plaintiffs’ application for change of venue and transferring this case from Cape Girardeau County to Crawford County because Plaintiffs were barred by Rule 51.02 from seeking a change of venue in that they had stipulated to a previous change of venue from Butler County to Cape Girardeau County.

Respondent exceeded his jurisdiction in granting Plaintiffs’ application for change of venue because Plaintiffs had previously stipulated to a change of venue from Butler County to Cape Girardeau County. Rule 51.02 limits a party’s ability to file a motion for change of venue or change of judge if that party previously agreed to a change of venue. The rule provides:

Change of Venue By Agreement. If at least thirty days before the trial date of a civil action triable by jury the parties shall file a stipulation agreeing upon removal of the civil action to a designated court of competent jurisdiction, the court shall order it removed to such other court. *Thereafter, no change of venue or change of judge shall be granted to any party stipulating to the change except where denial of the change of venue would deprive the moving party of a fair hearing or except where there is cause for a change of judge.*

(emphasis added).

The statutory counterpart to this rule, section 508.080, also allows parties to agree to a change of venue “[i]f at any time after commencement of a suit the parties shall agree in writing, duly filed, upon any other county or court of competent jurisdiction.”

Plaintiffs agreed in advance with Defendants to the earlier change of venue from Butler County to Cape Girardeau County. After one of the Defendants, Poplar Bluff Regional Medical Center, filed a motion to transfer venue, Plaintiffs agreed with the Defendants to move the case to Cape Girardeau County. *Ex. 3-4, A-77-78.* Specifically, after Plaintiffs had orally agreed to the change, Defendants prepared a proposed order for Judge Richardson, which they sent to Plaintiffs’ counsel. Plaintiffs memorialized their agreement to change the venue by having

their attorney sign the proposed order under the heading “Approved as to Form” before it was ever submitted to Judge Richardson. *Ex. 4, A-78.*

Plaintiffs argued to the trial court that “[s]igning as to ‘form’ only and not to ‘substance’ or ‘content’ memorializes that Plaintiffs did not agree to a venue change, and thus, disagreed with the content even though the order was not erroneous in its language.” *Ex. 11, A-112.* This is nonsense. The only reason a plaintiff would ever sign a proposed order transferring venue is if the plaintiff agreed to the change of venue. The court certainly did not need Plaintiffs’ approval that there were no grammatical errors in the order.

After Relators filed their writ petition, Plaintiffs came up with a new rationale for why they had their attorney sign the proposed order: Now Plaintiffs claim their attorney signed the order because Rule 51.03 (the rule allowing changes of venue as a matter of right) gives opposing counsel the opportunity “to make suggestions as to where the case should be sent.” *Plaintiffs’ Answer and Return, at ¶ 17.2.* Under Plaintiffs’ new theory, they were merely *suggesting* to Judge Richardson that the case be sent to Cape Girardeau County.

But the circumstances surrounding the signing of the order show that Plaintiffs indeed intended to stipulate to a change of venue. It is well-settled that “[t]he rules of contracts apply to stipulations, and as in the construction of contracts, so stipulations are construed in terms of the surrounding circumstances and the intent of the parties.” *Ezenwa v. Director of Revenue*, 791 S.W.2d 854, 859 (Mo. App. W.D. 1990). As this Court has emphasized, “A stipulation should

be interpreted in view of the result which the parties were trying to accomplish.”
Pierson v. Allen, 409 S.W.2d 127, 130 (Mo. 1966).

Here, the surrounding circumstances show that the result that both Plaintiffs and Defendants were trying to accomplish was to have the case sent to Cape Girardeau County. It is undisputed that there was no contested hearing in Butler County on the venue issue either before or after Plaintiffs signed off on the order. Plaintiffs’ counsel did not even appear in Poplar Bluff on the hearing date.

Plaintiffs did not merely make a suggestion as to where the case should be sent. Their attorney did not merely provide input as to what venues would be convenient, as is commonly done verbally at the hearing or through correspondence or conference calls. Rather, Plaintiffs signed a proposed order that transferred the case to a specific county. *Ex. 4, A-78*. By doing so, Plaintiffs expressed their intent that the case to be sent there. If that is not a stipulation, then what is?

The larger issue is whether Plaintiffs, after having stipulated in advance to the change of venue to Cape Girardeau County, should be given a chance to seek yet another change of venue. This Court’s venue rules are designed to limit the number of times a party can seek a change of venue so that cases do not bounce around the state as has happened here. In short, Plaintiffs have already gotten a chance to move the case to another venue. They should not get another.

It is true that the Eastern District stated in *Maxey v. Wenner*, 686 S.W.2d 862, 865 (Mo. App. E.D. 1985) that “the filing of a court memorandum signed by

only one party which refers to an oral agreement does not meet the statutory requirements of an agreement for change of venue to be in writing.” But that case is distinguishable on its facts. In *Maxey*, the *plaintiff* filed a memorandum stating that the parties had orally agreed to a change of venue and *only the plaintiff's* counsel signed the memorandum. *Id.* at 863. Here, one of the *Defendants* filed a motion for change of venue (which Defendant’s counsel signed), and *Plaintiffs’* counsel signed the proposed order that had been prepared by the Defendants. *Ex. 3-4, A-77-78*. Because both sides signed writings agreeing to the change of venue to Cape Girardeau County, the requirements of Rule 51.02 and section 508.080 were satisfied.

In sum, because Plaintiffs stipulated to the previous change of venue, they were barred by Rule 51.02 from seeking a subsequent change of venue. Accordingly, Respondent exceeded his jurisdiction in granting their application for change of venue.

II. Relators are entitled to an order prohibiting Respondent from granting Plaintiffs' application for change of venue and transferring this case from Cape Girardeau County to Crawford County because Plaintiffs' application for change of venue was untimely in that (1) it was filed later than 10 days after the original defendants' original answers were due to be filed; (2) it could not be timely based on the answer due date of the most-recently added defendant, The Manor, since Plaintiffs dismissed The Manor before they filed their application; and (3) even if The Manor's due date was relevant, Plaintiffs filed their application more than 10 days after that due date.

The Court should also make the writ absolute because Respondent exceeded his jurisdiction in granting Plaintiffs' application for change of venue in that it was untimely. Rule 51.03 provides that “[a] change of venue shall be ordered in a civil action triable by jury that is pending in a county having seventy-five thousand or less inhabitants upon the filing of a written application therefor *not later than ten days after answer is due to be filed.*” (emphasis added). There is no doubt that Plaintiffs failed to file their application for change of venue in a timely manner. Missouri courts have previously issued writs of prohibition in situations where trial courts exceeded their jurisdiction by granting untimely motions for change of venue. *See, e.g., State ex rel. East Carter County R-II School Dist. v. Heller*, 977 S.W.2d 958, 959 (Mo. App. S.D. 1998).

A. Plaintiffs' application for change of venue was due within 10 days of the due dates of the original defendants' original answers.

It is important to remember that this case involves a request for change of venue as a matter of right, not a change of venue for cause. Plaintiffs argued to the trial court that Rule 51.03 “provides that an application for change of venue must be filed not later than ten (10) days after *an answer* is due to be filed.” *Ex. 11, A-110* (emphasis added). But the rule itself does not include the word “an”; it states “not later than ten days after *answer* is due to be filed.” (emphasis added). Apparently, Plaintiffs are under the misconception that the rule permits a plaintiff to seek a change of venue within 10 days after *any* answer is due. Plaintiffs claim the relevant time period is measured by the answer “due date” of the most-recently added defendant, The Manor, which was added in 2006. *Plaintiffs' Answer and Return at ¶ 24 ; Ex. 1, A-16.*

To the contrary, although there are no cases addressing this issue, it is clear that the rule contemplates that a plaintiff seeking a change of venue must do so within 10 days of when the *original defendants' original answers* were due. In the present case, that would have been way back in 2005 when the case was still venued in Butler County. *Ex. 1, A-1.* But Plaintiffs did not file the application until June 15, 2006. *Ex. 1, A-22.* Therefore, their application was untimely, and Respondent exceeded his jurisdiction in granting their application.

This is the only reasonable interpretation of the rule. Otherwise, plaintiffs could easily manipulate the system to extend their own deadlines for filing

applications for change of venue. For example, under Plaintiffs' interpretation, a plaintiff could get a second chance at a change of venue by simply amending his petition to make a minor change. After the defendant files his answer to the amended petition, the plaintiff could then seek a change of venue no matter how old the case is. Another way to manipulate the system under Plaintiffs' interpretation would be for a plaintiff to simply add a new defendant (as Plaintiffs did here), file an application for change of venue within 10 days of the due date of the new defendant's answer, and then dismiss that defendant after getting a change of venue.

Consider the absurdity of Plaintiffs' proposal in this case: When they filed their application for change of venue in June 2006, this case was already more than a year old. Plaintiffs were already on their eighth amended petition—*their eighth amended petition!* Allowing a plaintiff to change venue at such a time is an incredible waste of judicial resources and is contrary to the purposes of the Missouri Rules of Civil Procedure, which are designed to limit the time for a change of venue as a matter of right to the early stage of the case.

In sum, Rule 51.03 does not permit plaintiffs to manipulate the system in order to extend their own deadlines. The only reasonable interpretation of the rule is that a plaintiff must file an application for change of venue within 10 days of the due date of the *original defendants' original answers*. Because Plaintiffs failed to meet this deadline, their application was untimely, and Respondent exceeded his jurisdiction in granting their application.

B. The due date of The Manor's answer does not save Plaintiffs' application for change of venue.

As noted, Plaintiffs claim their application was timely because they filed it within 10 days of when the most-recently added defendant, The Manor, filed its answer. *Plaintiffs' Answer and Return*, at ¶ 20. Under Plaintiffs' theory, since they added The Manor as a defendant in 2006, they could use the due date of The Manor's answer to the 8th Amended Petition to re-start the time period for the filing of Plaintiffs' application for change of venue. But the due date of The Manor's answer does not save Plaintiffs' application for change of venue.

First, The Manor's due date cannot be used as the measure because Plaintiffs dismissed The Manor before Plaintiffs ever filed their application for change of venue. Second, even if the due date of The Manor's answer is used as the measure, Plaintiffs' application was still untimely because they filed it more than 10 days after that due date. Accordingly, even under Plaintiffs' own strained interpretation of the rule, they were not entitled to a change of venue.

1. The due date of The Manor's answer is irrelevant because Plaintiffs dismissed The Manor before they ever filed their application for change of venue.

Plaintiffs dismissed The Manor before they filed their application for change of venue. *Ex. 1, A-21; Ex. 7, A-94; Ex. 9, A-99*. Therefore, the due date of The Manor's answer is irrelevant to the determination of when Plaintiffs' application for change of venue was due.

This conclusion is not affected by the fact that after Plaintiffs dismissed The Manor, they attempted to withdraw their dismissal. *Ex. 8, A-96*. Missouri law is clear that a dismissal is effective upon filing and divests the trial court of jurisdiction of the case. *See Golden Valley Disposal, LLC v. Jenkins Diesel Power, Inc.*, 183 S.W.3d 635, 639 (Mo. App. S.D. 2006); *Richman v. Coughlin*, 75 S.W.3d 334, 338 (Mo. App. W.D. 2002); *Freeman v. Leader Nat. Ins. Co.*, 58 S.W.3d 590, 595 (Mo. App. E.D. 2001). Because Plaintiffs' dismissal of The Manor was effective upon filing, the due date of The Manor's answer cannot be used to determine the deadline for Plaintiffs' application for change of venue.

2. Even if the due date of The Manor's answer can be used as the measure of when Plaintiffs' application was due, Plaintiffs' application was still untimely because it was filed more than 10 days after that due date.

Even if this Court concludes that the due date of The Manor's answer is relevant to determining when Plaintiffs' application for change of judge was due, it is clear that Plaintiffs missed that deadline.

At the outset, it is necessary to reiterate that Rule 51.03 requires that an application for change of venue must be filed "*not later than ten days after answer is due to be filed.*" (emphasis added). The standard is the "due date" of the answer, not the date on which the answer was actually filed.

Plaintiffs filed their 8th Amended Petition on May 22, 2006. *Ex. 1, A-19*. Therefore, the "due date" of The Manor's answer was June 1, 2006. The Manor

did not seek leave of court to file its answer out of time. Even under this scenario, Rule 51.03 would have required Plaintiffs to file their application for change of venue by June 12, 2006 (since the tenth day fell on a Sunday). Plaintiffs failed to meet this deadline; they did not file their application until June 15, 2006. *Ex. 1, A-22; Ex. 9, A-99*. Accordingly, Respondent exceeded his jurisdiction in granting their application.

i. Plaintiffs' informal agreement with The Manor did not push back the "due date" of its answer; it merely waived enforcement of it.

Plaintiffs argue that their application was timely because Plaintiffs gave The Manor an informal extension of time to file its answer. According to Plaintiffs, this informal agreement pushed back the "due date" of The Manor's answer from June 1 to June 7. *Plaintiffs' Answer and Return, at ¶ 20*. In support of this view, Plaintiffs cite *State ex rel. Lebanon School District R-III v. Winfrey*, 183 S.W.3d 232, 237 (Mo. banc 2006), where the court stated:

The [defendant] also argues in its briefs that plaintiffs' motion for change of venue was untimely because it was not filed within 10 days of when [defendant's] answer originally was due. But, Rule 51.03 does not require that a motion for change of venue be filed within 10 days of when an answer hypothetically would have been due if *no motions to dismiss had been filed or extensions of time sought*...Under Rule 55.25(c), if a defendant files a motion to

dismiss or other motion provided for in Rule 55.27, this “alters the time fixed for filing any required responsive pleadings.” (emphasis added).

Plaintiffs argue that this case stands for the proposition that “[t]he date by which a request for change of venue must be filed is the date that the defendant’s answer is due to be filed, taking into account *any agreements to extend the answer due date* and any motions to dismiss which extend the answer deadline.” *Plaintiffs’ Answer and Return*, at ¶ 21 (emphasis added). According to Plaintiffs, extensions of time include both court-ordered extensions and informal agreements between the parties.

At first blush, Plaintiffs’ argument might seem plausible. But when the *Lebanon School District* case—and the rules upon which it relied—are closely examined, it becomes clear that Plaintiffs’ argument is untenable. The *Lebanon School District* court was referring *only* to extensions of time ***granted by the trial court***, not informal agreements between the parties to allow the defendant to file its answer past the due date. This is evident from the fact that the *Lebanon School District* court based its reasoning on Rule 55.25(c), which states, “The filing of any motion provided for in Rule 55.27 alters the time fixed for filing any required responsive pleadings as follows, ***unless a different time is fixed by order of the court.***” (emphasis added). Therefore, it is clear that when the *Lebanon School District* court mentioned “extensions of time sought,” it was merely referring to situations where parties seek extensions “by order of the court.”

In fact, the Missouri Rules of Civil Procedure provide that *only* a trial court can extend a due date. The due date for The Manor’s answer was governed by Rule 55.33(a), which provides, “A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.” (emphasis added). Additionally, Rule 44.01(b), the general rule governing extensions of due dates, provides that when “an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion...order the period enlarged.” Thus, a “due date” can only be changed by a trial court, not by an informal stipulation of the parties.

This Court has recognized that where “the Missouri and federal rules are essentially the same, federal precedents constitute persuasive, although not binding, authority.” *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 533 (Mo. banc 2002). Federal courts have held that under Federal Rule of Civil Procedure 6(b)—which is almost identical to Rule 44.01(b)—only a court can change the “due date” of a filing, regardless of whether the parties have reached an informal agreement. For example, in *Gray v. Lewis & Clark Expeditions, Inc.*, 12 F. Supp. 2d 993, 995 (D. Neb. 1998), the court held that under Federal Rule 6(b), “approval of the court is necessary to make effective a stipulation extending the time in which to answer or otherwise move in response to a complaint.”

Thus, it is clear that in Missouri, the “due date” for an answer can only be changed by the court; any informal agreements between the parties do not change the “due date,” they merely waive enforcement of it. In the present case, it is irrelevant that Plaintiffs informally agreed with The Manor that they would not enforce the due date of The Manor’s answer until June 7, 2006.

In sum, because Plaintiffs filed their 8th Amended Petition on May 22, 2006, the “due date” of The Manor’s answer was June 1, 2006. Even under this scenario, Rule 51.03 would have required Plaintiffs to file their application for change of venue by June 12, 2006. Plaintiffs failed to meet this deadline; they did not file their application until June 15, 2006. *Ex. 1, A-22*. Accordingly, Respondent exceeded his jurisdiction in granting their application.¹

¹ Plaintiffs had previously argued that the due date of The Manor’s answer was extended because The Manor filed a motion to dismiss. As Relators explained in their writ petition, this argument fails because The Manor filed its answer and motion to dismiss on the same day. *See Relators’ Writ Petition, at ¶¶ 29-30*. Plaintiffs now concede that this argument has no merit as they state in their Answer and Return, “[Plaintiffs] do not proceed on any argument regarding motions to dismiss.” *Plaintiffs’ Answer and Return, at ¶ 29*.

Conclusion

Respondent exceeded his jurisdiction in granting Plaintiffs' application for change of venue because it is clear under every possible scenario that Plaintiffs were not entitled to a change of venue:

1. Plaintiffs were barred by Rule 51.02 from seeking a change of venue because they had stipulated to the previous change of venue from Butler County to Cape Girardeau County.

2. Even if this Court concludes that Plaintiffs were not barred by Rule 51.02 from seeking a change of venue, Respondent still exceeded his jurisdiction because Plaintiffs' application was untimely. Under Rule 51.03, Plaintiffs' application for change of venue was due within 10 days of when the *original defendants' original answers* were due way back in 2005.

3. Plaintiffs' application cannot be considered timely based on the answer due date of the most-recently added defendant, The Manor, since Plaintiffs dismissed The Manor before they filed their application.

4. And even if this Court disregards the fact that Plaintiffs dismissed The Manor, Plaintiffs' application was still untimely because it was not filed within 10 days of the "due date" of The Manor's answer.

Accordingly, Respondent exceeded his jurisdiction in granting Plaintiffs' application for change of venue. This Court should make its preliminary writ of prohibition absolute to prohibit Respondent from doing anything but vacating his

December 14, 2006 order and transferring this case back to Cape Girardeau County.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Relators, pursuant to Rule 84.06(c), hereby certifies to this Court that:

1. The brief filed herein on behalf of Relators contains the information required by Rule 55.03.
2. The brief complies with the format requirements of 84.06(b).
3. The number of words in this brief, according to the word processing system used to prepare this brief, is 4,955 exclusive of the cover, certificate of service, this certificate, the signature block, and the appendix.
4. In compliance with Rule 84.06(g), a floppy disk is filed with the brief that complies with Rule 84.06(g), and said disk has been scanned for viruses and, according to the program used to scan the disk for viruses, the disk is virus-free.

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing, along with a floppy disk as required by Rule 84.06(g), were served on the following attorneys of record via United States mail, postage prepaid, this _____ day of July, 2007.

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