

FILED
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MOLLY LIVINGSTON
Clerk of Clinton Co. Circuit Court

WILLIAM KEMPER, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 PRIME TANNING CORP., et al.,)
)
 Defendants.)

Case No. 09CN-CV00333

**PLAINTIFFS' SUGGESTIONS IN RESPONSE TO
PRIME TANNING CORP.'S APPLICATION
FOR CHANGE OF JUDGE AND CHANGE OF VENUE**

Introduction

Plaintiffs do not oppose Prime Tanning Corp.'s (Prime) application for change of judge as a matter of right. Plaintiffs also acknowledge that Prime is entitled to an application for change of venue as of right pursuant to Mo. Ct. Rule 51.03 – however there is nothing convenient about Livingston County that would warrant sending this case to that venue. There will likely be 100 or more of these claims filed against Prime and co-defendants. Jackson County is best equipped to handle such volume. Prime's alternative application for change of venue for cause pursuant to Mo. Ct. Rule 51.04 is moot and premature – the judge in the county to whom this case is sent should decide whether there is enough prejudice to warrant transfer of the case.

Application for Change of Judge

Plaintiffs acknowledge that Prime has timely applied for change of judge pursuant to Mo. Ct. Rule 51.05 and that Prime is entitled to change of judge as a matter of right.

Application for Change of Venue Pursuant to Mo. Ct. Rule 51.03

A case venued in a county with less than 75,000 residents can be transferred to another county under Mo. Ct. Rule 51.03 even though the first injury or exposure did not occur in the other county. State ex rel. Audrain Healthcare, Inc. v. Sutherland, 233 S.W.3d 217 (Mo. 2007). The case is to be transferred to another county that is “convenient to the parties.” Prime has in no way demonstrated that Livingston County is convenient to the parties in this case – in fact Livingston County has absolutely no connection to this case whatsoever.

This is a mass tort case in which 100 or more similar claims are likely to be filed against Prime and co-defendants. The case was originally filed in Clinton County because tort reform venue rules mandate that this case and others be filed where the plaintiffs are exposed to toxins. It is unlikely that a rural circuit court, like Livingston County, can handle the expected case load – Livingston County and its taxpayers would simply be overwhelmed by this litigation. In all likelihood a separate docket will have to be established to handle this number of cases. Jackson County is best equipped to handle the case load involved in this litigation – and there are no potential class members in Jackson County that would create problems for the separate class actions filed against Prime and co-defendants.

Jackson County has experience in mass tort matters. For example, a separate docket was created to handle the Hyatt skywalk disaster cases to successful resolution. Further, many of the attorneys are headquartered in Jackson County -- including lead plaintiff attorneys and attorneys for Prime and co-defendants National Beef Leathers and Rick Ream. In addition, Jackson County has a large number of judges and a large jury pool that will mitigate Prime’s concerns about pretrial bias. This case and the other similar cases will be expert intensive and such

experts will likely be located throughout the United States. It would be far more convenient for such experts and the parties if the case were tried in Jackson County with easy airport access and hotel accommodations. Further, plaintiff decedent Karen Kemper (like most of the claimants in this litigation) received her principal medical treatment in the Kansas City metropolitan area (KU Hospital), so Jackson County provides much easier access to treating physician witnesses.

There is nothing convenient about transferring this case to Livingston County or any other rural county for that matter. This is a mass tort case that will require a circuit equipped to handle a large number of cases and a large jury pool to ameliorate any concerns of jury bias or prejudice. Jackson County is the most convenient venue to which this case should be transferred – it has the size, experience, and convenience to parties, counsel and witnesses that can accommodate this litigation.

Application for Change of Venue for Cause

Prime's application for change of venue for cause under Mo. Ct. Rule 51.04(a) is moot and premature. Under Mo. Ct. Rule 51.04(a) Prime must show that "the inhabitants of the county are prejudiced against the applicant." No such showing can be made until the case is first transferred to another county. Only at that time can Prime attempt to make a showing that the inhabitants of the county to which this case is transferred are so prejudiced that Prime can not receive a fair trial.

Prime attempts to confuse this Court by blending issues of convenience and prejudice. The only proper inquiry under the Mo. Ct. Rule 51.03 transfer as of right is convenience – and Jackson County is the most convenient venue to which this case should be sent. There is nothing convenient about trying this case in Livingston County. This Court should not consider

issues of alleged prejudice in deciding which Circuit is best equipped to handle this mass tort litigation – that is a question best addressed by the Circuit to which this case is transferred.

WHEREFORE, plaintiffs respectfully request that this Court transfer this case to the presiding judge of the Circuit Court of Jackson County, Missouri for further proceedings.

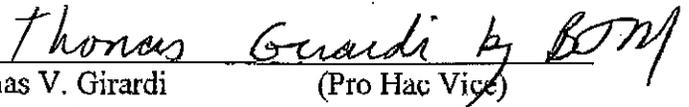
Respectfully submitted,

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