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JURISDICTIONAL STATEMENT

This appeal arises from Respondent's challenge to this Court's decision to issue a preliminary writ of prohibition in response to Relator Trans World Airlines' ("TWA") Petition for Writ of Prohibition. (Appendix ("A") 99-A106). The ultimate issue is whether the Respondent improperly denied Relator's Motion to Transfer Venue from the City of St. Louis, where it is undisputed that venue is improper.

Relator TWA brings this appeal pursuant to the procedure specified in Rule 97, and Rules 84.22-24 of the Missouri Rules of Civil Procedure (hereinafter all references to rules shall be to the Missouri Rules of Civil Procedure). On March 9, 2004, the trial court entered an Order denying defendants' Motions to Transfer Venue. (A48-A53). On March 19, 2004, TWA filed its motion requesting the trial court reconsider its denial of the venue transfer motions. (A54-A62). The trial court denied the Motion to Reconsider. (A63-A66). TWA then filed a Petition for Writ of Prohibition in the Missouri Court of Appeals, Eastern District requesting that the court order Respondent to take no further action other than to transfer venue to St. Louis County. (A67-A86). On June 30, 2004, the Court of Appeals, Eastern District denied TWA's Petition for Writ of Prohibition. (A87). TWA then filed its Petition for Writ of Prohibition with this Court on July 23, 2004. (A88-97). On August 24, 2004, this Court granted TWA's Petition for Writ of Prohibition and issued a preliminary writ of prohibition. (A98). Acting on behalf of Respondent, plaintiff filed her answer, mandating a full briefing on the

issue of venue. (A99-A106). Pursuant to Rule 84.24(i), Relator TWA submits its Relator's Brief herein.

STATEMENT OF FACTS

Plaintiff's personal injury action seeks damages for injuries she allegedly sustained while she was being transported by wheelchair at Lambert-St. Louis International Airport in St. Louis County, Missouri. (A7-A11). According to plaintiff's Petition, Relator TWA allegedly provided its passengers with wheelchair service, and International Total Services, Inc. ("ITS"), Defendant, operated the wheelchair service as a purported agent of TWA. (A8).

On November 26, 2001, plaintiff filed her Petition in the underlying personal injury action.¹ At the time of filing of plaintiff's First Amended Petition, TWA and ITS were not permitted to file any responsive pleading because they were operating under Chapter 11 of the United States Code ("Bankruptcy Code") and all actions against them were automatically stayed in accordance with Section 362(a) of the Bankruptcy Code. Pursuant to plaintiff's request, on June 30, 2003, the trial court lifted the automatic stays and ordered defendants TWA and ITS to "answer, otherwise respond, or raise any applicable venue motions to Plaintiff's First Amended Petition." (A12).

There was no basis for venue in the City of St. Louis at the time plaintiff filed her lawsuit, and venue was predicated solely on conclusory and factually incorrect allegations against TWA and ITS. (A7-A11). Moreover, plaintiff has

¹ On or about January 23, 2002, plaintiff was granted leave to file her First Amended Petition, dismissing TWA, LLC and adding TWA as a defendant.

never set forth any legitimate basis for venue in the City of St. Louis in any of her subsequent pleadings. Plaintiff's petition alleges that TWA currently keeps an office for the transaction of its usual and customary business within the City of St. Louis. (A7). Not only is there no factual basis in the record to support this allegation, there is evidence directly contradicting it. (A13-A17). TWA was served through the CT Corporation in St. Louis County. (A1-A6). Plaintiff alleges no St. Louis City address for TWA in her Petition, and she did not request service on TWA in the city. (A1-A6). Plaintiff's sole basis for venue against ITS is that Lambert-St. Louis International Airport is located in St. Louis City. (A10). It has been proven that this is also a false assertion. (A15, A21).

On July 7 and July 11, 2003, respectively, TWA and ITS filed Motions to Transfer Venue. (A13-A25). In their motions, both TWA and ITS asserted plaintiff's cause of action accrued in St. Louis County and that neither had offices or agents for the transaction of their usual or customary business in the City of St. Louis. (Id.). In support of its motion, TWA attached an affidavit from TWA representative Michael J. Lichty. (A18-A19). Upon plaintiff's request, the trial court granted additional time for plaintiff to respond to the venue motions in order to conduct discovery on the issue of whether TWA maintained an office or agent in the City of St. Louis. (A26-A27). Plaintiff was granted until October 17, 2003 to depose a corporate representative of TWA and conduct written discovery, and until October 24, 2003 to respond to the venue motions. (Id.). Despite requesting

additional time, plaintiff did not conduct any formal discovery and waited until October 23, 2003 to file her responses to the venue motions. (A28-A41). In her responses, plaintiff never actually contested TWA or ITS' assertion that venue was improper; she alleged only that TWA and ITS waived their right to challenge venue by filing Notices of Bankruptcy. (A28-A36).

On March 9, 2004, the trial court entered an Order denying TWA and ITS' Motions to Transfer Venue. (A48-A53). Although the trial court found that the venue motions were timely filed and that TWA and ITS did not waive venue, it held that TWA did not meet its burden of proof to demonstrate that venue was improper in the City of St. Louis because the affidavit of its representative, Michael Lichty, was signed by Mr. Lichty but was not notarized. (A52).

On or about March 19, 2004, TWA filed its motion requesting the trial court reconsider its denial of the venue transfer motions. (A54-A62). The trial court once again denied the venue transfer motions, refusing to allow TWA to supplement its motion with an identical, notarized copy of the affidavit of Mr. Lichty. The trial court essentially contended that TWA waived its right to present evidence in support of its timely filed venue motion. (A63-A66).

POINTS RELIED ON

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE VENUE IS IMPROPER IN THE CITY OF ST. LOUIS PURSUANT TO RSMO 508.040, IN THAT NEITHER TWA NOR ITS MAINTAIN AN OFFICE OR AGENT IN THE CITY OF ST. LOUIS AND THE CAUSE OF ACTION ACCRUED IN ST. LOUIS COUNTY.

Chassaing v. Mummert, 87 S.W.2d 573 (Mo. banc 1994)

Corbett v. Sullivan, 202 F.Supp.2d 972 (E.D. Mo. 2002)

Shell Oil Co. v. Director of Revenue, 732 S.W.2d 178 (Mo. 1989)

State ex rel. Elson v. Koehr, 856 S.W.2d 57 (Mo. 1993)

Rule 51.045 (a (West 2004)

RSMo § 508.040 (2001)

II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE TWA AND ITS SATISFIED THEIR BURDEN OF DEMONSTRATING IMPROPER VENUE, IN THAT PLAINTIFF FAILED TO DENY OR OTHERWISE REPLY TO SUBSTANTIVE ALLEGATIONS THAT VENUE WAS IMPROPER AND ADDITIONAL PROOF BY WAY OF AFFIDAVIT WAS UNNECESSARY.

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

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

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

Chassaing v. Mummert, 87 S.W.2d 573 (Mo. banc 1994)

Rule 51.045 (West 2004)

Rule 55.09 (West 2004)

III. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TWA AND ITS' MOTIONS TO RECONSIDER, IN THAT THE TRIAL COURT IMPROPERLY REFUSED TO CONSIDER TWA'S SUPPLEMENTAL AFFIDAVIT.

Wheeohan v. Dueker, 996 S.W.2d 780, 782 (Mo.App. 1999)

Wallingford v. State, 131 S.W.3d 781 (Mo. banc 2004)

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 859 (Mo. banc 2001)

Chassaing v. Mummert, 87 S.W.2d 573 (Mo. banc 1994)

Rule 55.33 (West 2004)

ARGUMENT

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE VENUE IS IMPROPER IN THE CITY OF ST. LOUIS PURSUANT TO RSMO 508.040, IN THAT NEITHER TWA NOR ITS MAINTAIN AN OFFICE OR AGENT IN THE CITY OF ST. LOUIS AND THE CAUSE OF ACTION ACCRUED IN ST. LOUIS COUNTY.

A. Standard of Review

A writ of prohibition “will issue to remedy a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated.” Chassaing v. Mummert, 87 S.W.2d 573, 577 (Mo. banc 1994). Prohibition is appropriate “when there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision.” Id.

Pursuant to Rule 51.045(a) of the Missouri Rules of Civil Procedure, Relator TWA is entitled to demonstrate to the Court that this action has been brought where venue is improper, and therefore must be transferred to a court where venue is proper. Pursuant to Section 476.410 RSMo, if venue is improper where a petition is filed, a circuit judge must transfer the case to a circuit court in which venue is proper. State ex. rel. Elson v. Koehr, 856 S.W.2d 57, 59 (Mo.

banc 1993). The trial court's refusal to transfer venue in this case was a clear excess of its jurisdiction, and constituted an abuse of discretion.

B. Argument

In Missouri, proper venue for an action is determined by statute. Elson, 856 S.W.2d at 59. Section 508.040 RSMo governs in this action because ITS and TWA are corporations. That section provides, in pertinent part, that "suits against corporations shall be commenced either in the county where the cause of action accrued . . . or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business." Id.

There is no dispute plaintiff's cause of action accrued at the place of her injury, Lambert-St. Louis International Airport. (A7-A11). Venue is not proper in the City of St. Louis because Lambert-St. Louis International Airport is not located in the City of St. Louis; it is located in St. Louis County. See, e.g., Corbett v. Sullivan, 202 F.Supp.2d 972, 987 (E.D. Mo. 2002); Elson, 856 S.W.2d at 59; Shell Oil Co. v. Director of Revenue, 732 S.W.2d 178, 180 (Mo. banc 1989). In her Petition, plaintiff incorrectly states that Lambert-St. Louis International Airport is located in the City of St. Louis in an attempt to obtain venue there. (A10).

It is equally undisputed that TWA does not maintain offices or agents in the City of St. Louis. From the date of plaintiff's original Petition, November 26, 2001, through the present, no agents, servants, employees or independent contractors of TWA have been located in the City of St. Louis, and TWA has

generated no revenue from operations in the City of St. Louis. (A18-A19, A61-A62). From the date of plaintiff's original Petition through the date of its dissolution, TWA kept an office and agents for the transaction of its usual and customary business in St. Louis County, located at 11495 Natural Bridge Road, Room 212, Bridgeton, Missouri, 63044. (Id.) Likewise, ITS does not maintain any offices or agents in the City of St. Louis. (A23). It is notable that, despite being granted additional time to conduct discovery, plaintiff has never identified any offices or agents of TWA or ITS in the City of St. Louis.

As a result, because plaintiff's cause of action accrued in St. Louis County, and because the defendants did not have or usually keep an office or agent for the transaction of their usual and customary business in the City of St. Louis at the time of the filing of plaintiff's Petition, venue is improper in the City of St. Louis. At no time has plaintiff presented any evidence contesting this fact.

II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE TWA AND ITS SATISFIED THEIR BURDEN OF DEMONSTRATING IMPROPER VENUE, IN THAT PLAINTIFF FAILED TO DENY OR OTHERWISE REPLY TO SUBSTANTIVE ALLEGATIONS THAT VENUE WAS IMPROPER AND ADDITIONAL PROOF BY WAY OF AFFIDAVIT WAS UNNECESSARY.

A. Standard of Review

A writ of prohibition “will issue to remedy a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated.” Chassaing 87 S.W.2d at 577. Prohibition is appropriate “when there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision.” Id.

According to Rule 51.045(a) of the Missouri Rules of Civil Procedure, “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.” Rule 51.045(a). The party challenging venue as improper bears the burden of proof and persuasion. In State ex rel. Etter v. Neill, however, the Missouri Court of

Appeals, Eastern District specifically noted that the party bears that burden “*if proof is necessary.*” 70 S.W.3d 28, 31 (Mo. App. 2002) (emphasis added).

The Court’s ruling in Etter is further supported by the plain language of Rule 51.045, which allows a party to file a reply “*denying the allegations in the motion to transfer.*” Rule 51.045 (emphasis added). Rule 51.045 further provides that “*if no reply is filed, a transfer of venue shall be ordered to a court where venue is proper.*” Id. (emphasis added). In applying that Rule, Missouri courts have held that, where plaintiff fails to reply to a motion to transfer for improper venue, the trial court does not have the discretion to deny the motion, and the duty to grant the motion is “purely ministerial.” See, State ex rel. Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470, 471-72 (Mo. banc 2002); State ex rel. USAA Casualty Insurance Company v. David, 114 S.W.3d 447, 448 (Mo. App. 2003). The Rule is a direct application of the general rule of pleading that failing to file an answer to a pleading admits the allegations of the pleading. Vee-Jay Contracting Co., 89 S.W.3d at 472 (*citing* Rule 55.09). Under Rule 55.09, “specific averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleadings.”

B. Argument

In this instance, TWA and ITS satisfied their burden to demonstrate improper venue. Despite the fact that the affidavit of TWA’s representative, Michael Lichty, was not notarized, ***plaintiff never disputed defendants’ allegation that venue was improper in the City of St. Louis.*** In essence, by only claiming

TWA and ITS waived venue because they filed Notices of Bankruptcy and failing to even contest the factual representations of the venue transfer motions, plaintiff effectively failed to file a substantive reply to the motions as required under Rule 51.045. As a result, pursuant to both 51.045 and Rule 55.09, the effect of plaintiff's failure to deny TWA's allegation it had no offices or agents in the City of St. Louis (whether supported by affidavit or not) is that TWA's allegation must be deemed admitted. Further, because of plaintiff's failure to deny the substantive allegations of the venue transfer motions, proof by way of affidavit or other evidence was unnecessary and the allegations of TWA and ITS' motions alone were sufficient to support a finding of improper venue. See, State ex rel. Bierman v. Neill, 90 S.W.3d 464, 465 (Mo. banc 2002) (reply to venue transfer motion that fails to respond to defendants' specific assertion venue was improper constitutes waiver of requirement that defendants prove venue was improper). At that point, the Respondent should have transferred this case to St. Louis County, and his failure to do so constitutes an improper, extra-jurisdictional act.

In her Answer to TWA's Petition for Writ of Prohibition, plaintiff argued that she did, in fact, reply to the motions filed by TWA and ITS.² (A104-A105). Plaintiff never contested TWA's or ITS' assertions that venue was improper; her

² Plaintiff also argues, alternatively, that she was not required to reply to the venue motion. This assertion directly contradicts the clear, plain language of Rule 51.045, which requires transfer when no reply is filed.

“reply” merely alleged that TWA and ITS had waived their right to challenge venue by filing Notices of Bankruptcy. (A28-A31). In entering its Order on the venue motions, the trial court ruled that the motions were timely filed and explicitly rejected plaintiff’s only challenge to the venue transfer. (A51). In this instance, therefore, by only claiming TWA and ITS waived venue by filing Notices of Bankruptcy and by failing to deny or even contest the factual allegations of the venue transfer motions or supporting affidavits, it cannot be reasonably argued that plaintiff “replied” to the substantive allegations of the venue transfer motions.

While plaintiff tried to distinguish it in her Answer to TWA’s Petition for Writ of Prohibition, this Court’s decision in Bierman 90 S.W.3d at 464, is applicable to this precise situation. In Bierman, the Supreme Court held that plaintiff’s reply to a venue transfer motion (which failed to respond to the defendants’ specific assertion venue was improper) constituted a waiver of the requirement that defendants actually prove venue was improper. Id. at 465. In her Answer to TWA’s Petition for Writ of Prohibition, plaintiff argued the decision is not persuasive for three reasons: (1) it is not clear whether the plaintiff pleaded venue in his Petition; (2) there is no issue regarding affidavits that are not notarized; and (3) because the plaintiff conceded that certain sections of the venue statute did not apply. (A104). Plaintiff’s attempts to distinguish Bierman, however, are misplaced.

First, the issue of whether the Bierman plaintiff pleaded venue in the Petition is irrelevant. Although the decision does not address this point, logic dictates that the trial court would simply have transferred the case if plaintiff had not pleaded venue. Second, while there may have been no issue regarding affidavits in Bierman, by only claiming that TWA and ITS waived venue, plaintiff did not make this an issue in her “reply” in this case. In addition, whether the affidavits were notarized in Bierman does not change the Court’s holding that plaintiff’s failure to challenge the defendants’ allegations or affidavits resulted in a waiver of any requirement that defendant submit proof that venue was improper. Third and finally, the plaintiff’s concession in Bierman that certain sections of the venue statute did not apply is identical to the plaintiff’s concession here. Whether expressly stated or not, the plaintiff in the case at bar failed to challenge TWA or ITS’ allegations that they had no offices or agents in the City of St. Louis or even that venue was improper. Thus, at that point, plaintiff’s basis for venue was predicated solely on her argument that defendants waived venue (an argument that the trial court rejected).

Based on this Court’s holding in Bierman, once the trial court determined that TWA and ITS had not waived venue, the Respondent erred in failing to find that plaintiff waived any requirement that TWA or ITS provide additional support for their allegation that venue was improper. In addition, under this Court’s application of Rule 55.09 in Vee-Jay Contracting Co., plaintiff’s failure to reply to TWA and ITS’ motions (whether supported by affidavit or not) should have

operated as an admission TWA and ITS had no offices or agents in the City of St. Louis and that venue was, accordingly, improper. 89 S.W.3d at 472. In short, because of plaintiff's failure to deny the substantive allegations of the venue transfer motions, proof by way of affidavit or other evidence was unnecessary and the allegations of TWA and ITS' motions alone were sufficient to support a finding of improper venue.

Even if additional proof that venue was improper was necessary, TWA provided sufficient evidence to support its venue motion. Plaintiff incorrectly argued in her Answer to TWA's Petition for Writ of Prohibition that "at both the hearing on the motion to transfer venue and the motion for reconsideration, TWA could not and cannot point to any competent evidence to support its contention that venue is not proper in the City of St. Louis." (A103). Actually, TWA provided the court with the allegations contained in its original venue motion (to which plaintiff failed to reply) along with an affidavit signed by its representative. (A13-A19). Then, at the time of filing of its Motion to Reconsider, TWA provided the Court with a notarized copy of the same affidavit. (A61-62). Although TWA contends that this evidence was not necessary, it is clear that TWA provided plaintiff and the trial court with competent evidence that venue was improper.

Plaintiff also cited to Rule 55.28 in her Answer to TWA's Petition for Writ of Prohibition, implying that an affidavit, oral testimony or deposition must be offered in support of a venue motion. (A103). The venue rules, however, do not

specifically state that such evidence must be submitted in every case. See, Rule 51.045. To the contrary, as stated above, the rules envision a scenario identical to this case where no evidence is necessary to support a venue transfer motion: where a plaintiff fails to reply to the defendant’s allegation venue is improper. Id. Consistent with the application of those rules, where improper venue is *uncontested*, judicial economy mandates that a defendant should not be obligated to submit proof by way of affidavit or testimony to support a venue transfer motion.

III. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN TO TRANSFER VENUE, BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TWA AND ITS’ MOTIONS TO RECONSIDER, IN THAT THE TRIAL COURT IMPROPERLY REFUSED TO CONSIDER TWA’S SUPPLEMENTAL AFFIDAVIT.

A. Standard of Review

A writ of prohibition “will issue to remedy a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated.” Chassaing, 87 S.W.2d at 577. Prohibition is appropriate “when there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision.” Id.

Under the Missouri Rules of Civil Procedure, the trial court had the discretion to permit service of an amended or supplemental pleading, and courts are directed to freely grant parties leave to amend when justice so requires. Rule 55.33; Wheeohan v. Dueker, 996 S.W.2d 780, 782 (Mo.App. 1999). When determining whether leave to amend should be granted, courts should evaluate three different criteria: (1) reasons for the moving party's failure to include the matter in the original proceedings; (2) any prejudice to the non-moving party; and (3) hardship to the party requesting amendment of the request is denied. Wheeohan, 996 S.W.2d at 782. See also, Green v. City of St. Louis, 870 S.W.2d 794, 797 (Mo. banc 1994). An examination of these criteria reveals that the trial court abused its discretion in refusing to consider TWA's supplemental affidavit.

B. Argument

In an effort to ensure its venue transfer motion was timely filed, counsel for TWA filed its original venue transfer motion with an affidavit that was not notarized, intending to later supplement its motion with a notarized version. (A13-A19). Due to an inadvertent mistake on the part of its counsel, TWA failed to supplement its original venue transfer motion with a notarized version of Mr. Lichty's affidavit. Counsel for TWA did not realize a notarized copy of the affidavit had not been filed until the Court entered its Order denying its venue transfer motion on March 9, 2004. Although TWA and its counsel were unable to locate the original affidavit, a second affidavit was executed by Michael Lichty, notarized and filed with the trial court in conjunction with TWA's Motion to

Reconsider. (A61-62). The notarized copy of the affidavit attached to the Motion to Reconsider is identical in substance to the originally filed affidavit. (Id.). In its Order denying TWA's Motion to Reconsider, the trial court noted that the supplemental affidavit was filed "over eight months after the . . . deadline for venue motions had passed and three months after TWA submitted its Motion to Transfer for a ruling," and refused to allow TWA to submit the affidavit. (A66).

Although the decision to allow TWA to submit the notarized affidavit was within the discretion of the trial court, a careful examination of the factors outlined in Wheelean demonstrates that the trial court's refusal to consider the affidavit constituted a clear and palpable abuse of that discretion. First, as previously discussed, TWA's failure to file a notarized affidavit with its venue transfer motion was due to its need to submit the motion and affidavit in a timely manner, and was not intended to cause any delay or prejudice to the other parties. TWA's failure to amend or supplement its motion with a notarized copy of the affidavit was due to an inadvertent mistake of its counsel in failing to ensure the notarized affidavit was submitted to the court.

Second, plaintiff did not suffer any unfair prejudice by TWA's supplemental submission of the notarized affidavit because venue was never proper in the City of St. Louis. In denying the venue transfer motions, the trial court expressly held that the motions were timely filed, and rejected plaintiff's only challenge to the motions. The defendants raised the issue of venue immediately after the bankruptcy stays were lifted, and the underlying case is still

in the earliest stages of litigation; no formal discovery or depositions have been conducted. Further, the trial court gave plaintiff sufficient opportunity to evaluate the venue issues by granting an extension of time to conduct formal discovery, and plaintiff elected not to do so. Finally, the information contained in the notarized affidavit is substantively identical to the original affidavit. The trial court's refusal to consider the supplemental affidavit allowed plaintiff to gain venue in the City of St. Louis as a result of a hypertechnicality with respect to TWA's affidavit, rather than as a result of any waiver under Rule 51.045 or any factual deficiencies with the affidavit or motion. Under these circumstances, it cannot be credibly argued that plaintiff suffered any unfair prejudice by TWA's submission of the notarized affidavit.

Third and finally, TWA will suffer substantial hardship if not allowed to submit the notarized affidavit. It has been noted that the "preponderance of anecdotal evidence is that jurors in the City of St. Louis are far more favorably disposed towards injured plaintiffs' claims than are their counterparts in suburban St. Louis County or in most other counties in the state." State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 859 (Mo. banc 2001) (Wolff, J., concurring in part and dissenting part). If TWA is made to defend the underlying case in the improper venue of St. Louis City instead of the proper venue of St. Louis County, it is more likely it will be presented with a jury pool that is more favorably disposed towards plaintiff.

Although it is not a factor to be considered when determining whether leave to amend should be granted, it is clear from the Order of April 29, 2004 that the trial court was persuaded by the passage of time from the filing of TWA's venue motion until the notarized affidavit was filed. (A66). As indicated above, however, counsel for TWA did not realize the notarized affidavit had inadvertently not been submitted until the Court's Order was entered on March 9, some eight months after the deadline for venue motions and three months after the hearing. Under the Missouri Rules, plaintiff had ten days to respond to TWA and ITS' venue transfer motions, until July 17, 2003. Plaintiff requested and was granted an extension of 30 days to respond to the motions, until August 23, 2003. (A26). Then, over the objection of defendants, plaintiff requested and was granted an extension until October 17, 2003 to conduct discovery on the issue of venue, including the deposition of TWA's representative, Michael Lichty. (A27). Despite requesting this additional time, plaintiff did not conduct any formal discovery and waited to file her responses to the venue motions on October 23, 2003. (A28-A47). Then, based on information and belief, a hearing on the motions was set on the next available date, December 8, 2003. The trial court did not enter its Order denying the motions until March 9, 2004.

Under the Missouri Rules of Civil Procedure, the trial court had the discretion to permit service of an amended or supplemental pleading, and leave to amend "shall be freely given when justice so requires." Rule 55.33; Wheehehan, 996 S.W.2d at 782. Although the decision to allow it to submit the notarized

affidavit was within the discretion of the trial court, TWA urges that a careful examination of these facts and circumstances demonstrates the trial court's refusal to consider the affidavit was an abuse of that discretion. See also, Rule 55.03(a); Wallingford v. State, 131 S.W.3d 781 (Mo. banc 2004) (reversing trial court's decision to strike unsigned pleading where omission of signature was promptly corrected under Rule 55.03). Further, under these circumstances, where venue is admittedly improper, Relator TWA contends that "justice so requires" that it should have been allowed to submit its supplemental affidavit for consideration by the trial court

CONCLUSION

For the reasons stated herein, Relator respectfully requests that this Court make its preliminary writ of prohibition absolute, and enter an Order prohibiting Respondent from taking any further action other than to order transfer of venue to the Circuit Court of St. Louis County.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was filed and served via U.S. Mail this 29th day of October, 2004, to following counsel of record:

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CERTIFICATION OF COMPLIANCE WITH RULE 84.06(c)

Todd C. Stanton, attorney of record for Relator, certifies pursuant to Supreme Court Rule 84.06(c) that:

1. The Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and Local Rule 360;
2. The Brief, excluding the cover page, signature block, Certificate of Service, this Certificate, and the Appendix contains **5536** words, according to the word count total contained in the MS Word 2000 software with which it was prepared; and
3. The disk accompanying this Brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

Todd C. Stanton