

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,

v.

Honorable William C. Seay,

Respondent.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§

No. SC88473

---

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

---

Respondents' Brief

---

**FRIEND & ASSOCIATES, L.L.P.**

**Gail N. Friend\*, # 58048**

**Staci R. Bouthillette\*, # 58463**

**1001 Fannin, Suite 750**

**Houston, Texas 77002**

**Telephone: 888-862-6161**

**Fax: 713-650-7100**

**gfriend@friendassoc.com**

**sbouthillette@friendassoc.com**

**LAW OFFICES OF GARY GREEN**

**\*of counsel**

**Gary Green, # 46417**

**909 E. Republic Road B F-200**

**Springfield, Missouri 65807**

**Telephone: (417) 886-2229**

**Fax: (417) 886-0606**

**Attorneys for Plaintiffs, Frank O'Neil and Peggy Szerzenski as  
personal representative of the estate of Christopher O'Neil**

## **TABLE OF CONTENTS**

Table of Authorities 3

Statement of Facts 4

Reply to Points Relied On 9

Argument 11

Conclusion 26

Certificate of Compliance 28

Certificate of Service 29

## TABLE OF AUTHORITIES

### Cases

<i>State ex rel. Lebanon School District v. Winfrey</i> , 183 S.W.3d 232, 237 (Mo. 2006)	10, 24
<i>Cook v. Newman</i> , 142 S.W.3d 880 (Mo. App. W.D. 2004)	9, 15
<i>State ex rel. Linthicum v. Calvin</i> , 57 S.W.3d 855 (Mo. banc 2001)	10, 18, 23
<i>Bowen v. Missouri Dept. of Conservation</i> , 46 S.W.3d 1 (Mo. App. W.D. 2001)	9, 15
<i>State ex rel DePaul Health Center v. Mummert</i> , 870 S.W.2d 820 (Mo. 1994)	10, 23
<i>Hadlock v. Dir. of Revenue</i> , 860 S.W.2d 335 (Mo. banc 1993)	9, 15
<i>Jones v. Chrysler Corp.</i> , 731 S.W.2d 422 (Mo. App. S.D. 1987)	10, 25
<i>Maxey v. Wenner</i> , 686 S.W.2d 862 (Mo. App. E.D. 1985)	9, 12, 15
<i>State ex rel. Smith v. Journey</i> , 533 S.W.2d 589 (Mo. 1976)	19

### Statutes

Section 508.080, RSMo 2000	9, 12
----------------------------	-------

### Rules

Mo. S. Ct. R. 51.02	9, 11, 12, 21, 26
Mo. S. Ct. R. 51.03	5, 9, 10, 13, 14, 16, 18, 26
Mo. S. Ct. R. 51.05	7, 20
Mo. S. Ct. R. 51.06	7, 10, 16, 18, 19, 20
Mo. S. Ct. R. 55.25	17
Rule 6.2.3 of the Thirty Second Judicial Circuit Court	7, 20

## STATEMENT OF FACTS

The underlying cause is a medical negligence action in which Plaintiffs are asserting claims against Relators and other healthcare provider defendants for wrongful death and lost chance of survival relating to the death of the decedent, Christopher O'Neil. *Exhibit 2, A-33*. Plaintiffs originally filed suit on or about April 7, 2005, in the Circuit Court of Butler County, as the cause of action accrued in Poplar Bluff, Butler County, Missouri. *Exhibit 1, A-1; Exhibit 18, A-156*.

On or about May 31, 2005, Defendants, Poplar Bluff Regional Medical Center and Pat Darnell, R.N., timely filed a motion for change of venue pursuant to Missouri Rule of Civil Procedure 51.03. *Exhibit 3, A-77*. Honorable Mark Richardson granted the motion and transferred the case to Cape Girardeau County on July 11, 2005, Honorable William L. Syler presiding. *Exhibit 4, A-78*.

Relators' falsely claim that Plaintiffs entered a stipulation agreeing to change venue from Butler County to Cape Girardeau County pursuant to Rule 51.02. Plaintiffs did not agree to change venue. Plaintiffs did not join in the defendants' motion and did not file any stipulation to change venue. *See Exhibit 3, A-77*. Thus, Relators claim that Plaintiffs memorialized a stipulation by signing the court's order transferring venue "as to form." This is false. Plaintiffs did not sign the order to memorialize any alleged stipulation. Accordingly, the order does not reference any stipulation by the parties pursuant to Rule 51.02. *Id.* Instead, the order specifically states that it sustains *Defendants'* motion for change of venue ***pursuant to Rule 51.03***.

Rule 51.03 provides that the court shall order case transferred to another county ***after*** giving all parties the opportunity to make suggestions as to where the case should be sent. Mo. S. Ct. R. 51.03(c). The order reflected Defendants' suggestion to transfer the case to Cape Girardeau County. *Exhibit 4, A-78*. The order was signed as to form to satisfy the provision that all parties had the opportunity to suggest the new venue

pursuant to Rule 51.03(c). Signing as to “form,” and not in “substance,” further reflected that there was nothing erroneous in this language, but that Plaintiffs did not stipulate to the venue change. There was no hearing on Defendants’ motion because the transfer of venue was mandatory. Mo. S. Ct. R. 51.03(a),(c). The trial court did not have discretion to deny the timely motion, and Plaintiffs did not have any authority to object to the motion. *Id.*

At the time Plaintiffs filed suit, several defendants were named as John Does and additional defendants named in the first amended petition. *Exhibits 18, A-156.* The petition continued to be amended and defendants served with process as the identities of the defendants were learned. *See e.g. Exs 1, A-12; Exhibit 19, A-170; 20, A-187.* Defendant, Poplar Bluff No. 1, Inc., a nursing home that operates under the name “The Manor,” was such a defendant. It was identified in Plaintiffs seventh amended petition filed with leave on March 27, 2006. *Ex. 1, A-12; 20, A-187.* On April 10, 2006, motion for leave to file the eighth amended petition was filed. *Exhibits 1, A-14; 21, A-233.* The Manor was served with the seventh amended petition on April 17, 2006, and due to the pending motion for leave, was given an extension of the due date to file any answer until June 7, 2006. *Exhibits. 1, A-12; 21, A-16.* Leave was granted and the eight amended petition was filed on May 22, 2006. *Exhibit 1, A-19; 5, A-79.* The Manor timely filed its answer on June 7, 2006. *Exhibit 1, A-20.*

On June 8, 2006, The Manor filed an application for change of judge as a matter of right pursuant to Rule 51.05, in order to manipulate Defendants’ prior change of venue and ensure that Defendants received Honorable Benjamin Lewis. *Exhibit 22, A-239.* The Manor’s change of judge was improper and should not have been granted because Defendants had previously obtained the change of venue, and on June 9, 2006, Plaintiffs filed a motion to dismiss The Manor without prejudice to prevent Defendants’ gamesmanship. *Exhibit 7, A-94.* The same day, Judge Syler granted The Manor’s application for change of judge without notice or hearing and signed an order transferring

the case to Judge Lewis. *Exhibit 1, A-21*. Plaintiffs withdrew the motion to dismiss. *Exhibit 8, A-96*. The time frame Defendants relied upon for filing The Manor's change of judge was the date of The Manor's answer. *Exhibit 22, A-239*. On June 15, 2006, Plaintiffs filed a Joint Application for Change of Judge and Change of Venue pursuant to Rules 51.06, Rule 51.05, and Rule 51.03. *Exhibit 9, A-99*.

On July 3, 2006, a hearing was conducted wherein Judge Lewis considered Plaintiffs' motion for change of judge and Defendants' objections. *Exhibit 1, A-23*. Judge Lewis granted the application for change of judge on July 6, 2006. *Exhibit 12, A-130*. Because presiding Judge Syler had already been disqualified by Defendants, the Missouri Supreme Court appointed Respondent, Honorable William C. Seay to the case. *Exhibit 13, A-132*; see MO. S. CT. R. 51.05(e); Rule 6.2.3 of the Rules for the Thirty Second Judicial Circuit Court.

Hearing was conducted on December 14, 2006, before Judge Seay to consider Plaintiffs' motion to transfer venue and Defendants' objections. *Exhibit 1, A-27*. Judge Seay granted the change of venue and transferred the case to Crawford County. *Exhibit 15, A-152*. Because Cape Girardeau County is within the same circuit as Crawford County, Judge Seay remained over the case. MO. S. CT. R. 51.06(c). If venue in Crawford County is denied, Judge Seay will continue to preside over the case in Cape Girardeau County. *Id.*

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. *Exhibit 1, A-32*. On or about April 4, 2007, Respondents Answer to Petition for Writ of Prohibition or in the Alternative for Writ of Mandamus and Suggestions in Opposition to Issuance of Writ of Prohibition or in the Alternative for Writ of Mandamus was timely filed in the Missouri Court of Appeals for the Southern District. *Id.* The Southern District denied Relators' petition on April 9, 2007. *Exhibit 16, A-154*.

Relators filed a Petition for Writ of Prohibition or in the Alternative for Writ of

Mandamus and Suggestions in Support of Petition for Writ of Prohibition or in the Alternative Writ of Mandamus in this Court on April 20, 2007. On May 25, 2007, Respondents filed a Motion for Leave to File Out of Time Respondents' Answer to Petition for Writ of Prohibition or in the Alternative for Writ of Mandamus and Suggestions in Opposition to Issuance of Writ of Prohibition or in the Alternative for Writ of Mandamus, along with an Answer to Petition for Writ of Prohibition or in the Alternative for Writ of Mandamus and Suggestions in Opposition to Issuance of Writ of Prohibition or in the Alternative for Writ of Mandamus. *Exhibit 23, A-242*. On May 29, 2007, this Court sustained the motion for leave in part, and Respondents' suggestions in opposition were ordered filed by leave of Court, and the answer was not filed as being premature. *Exhibits 23, A-242; 24, A-244*. On May 29, 2007, the Court also issued a Preliminary Writ of Prohibition, commanding Respondents to file a written return to the Petition on or before June 28, 2007. *Exhibit 17, A-155*. Respondents filed their Answer and Return on June 25, 2007. *Exhibit 23, A-242*. Relators filed their Opening Brief and Appendix, and Respondents timely file this Respondents' Brief and Appendix.

## **RESPONSE TO POINTS RELIED ON**

**I. Relators are not entitled to an order prohibiting Respondent, Honorable William C. Seay, from granting Plaintiffs' application for change of venue and transferring this case from Cape Girardeau County to Crawford County because Plaintiffs were not barred by Rule 51.02 from seeking a change of venue as they had not stipulated to a previous change of venue from Butler County to Cape Girardeau County.**

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

*Bowen v. Missouri Dept. of Conservation*, 46 S.W.3d 1 (Mo. App. W.D. 2001).

*Hadlock v. Dir. of Revenue*, 860 S.W.2d 335 (Mo. banc 1993).

*Cook v. Newman*, 142 S.W.3d 880 (Mo. App. W.D. 2004, transfer denied).

Mo. S. CT. R. 51.02.

Mo. S. CT. R. 51.03.

Section 508.080, RSMo 2000.

**II. Relators are not entitled to an order prohibiting Honorable William C. Seay 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 not untimely in that (1) it was not filed later than 10 days after the defendants' original answers were due to be filed; (2) it could be timely based on the answer due date of the most recently served defendant, The Manor; and (3) Plaintiffs did not file their application more than 10 days after The Manor's answer due date.**

*State ex rel. Lebanon School District v. Winfrey*, 183 S.W.3d 232 (Mo. 2006).

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

*State ex rel DePaul Health Center v. Mummert*, 870 S.W.2d 820, 821-823 (Mo. 1994).

*Jones v. Chrysler Corp.*, 731 S.W.2d 422 (Mo. App. S.D. 1987).

Mo. S. CT. R. 51.03.

Mo. S. Ct. R. 51.06.

## **ARGUMENT**

**I. Relators are not entitled to an order prohibiting Respondent, Honorable William C. Seay, from granting Plaintiffs' application for change of venue and transferring this case from Cape Girardeau County to Crawford County because Plaintiffs were not barred by Rule 51.02 from seeking a change of venue as they did not stipulate to a previous change of venue from Butler County to Cape Girardeau County.**

Plaintiffs did not stipulate to a previous change of venue from Butler County to Cape Girardeau County pursuant to Rule 51.02, and Respondent did not exceed his jurisdiction in granting Plaintiffs' application for change of venue.

Plaintiffs filed suit in the Circuit Court of Butler County as the cause of action accrued in Poplar Bluff, Butler County, Missouri. *Exhibit 1, A-1; Exhibit 18, A-156.* Defendants, Poplar Bluff Regional Medical Center and Pat Darnell, R.N., filed a motion to change venue as a matter of right pursuant to Missouri Rule of Civil Procedure 51.03. *Exhibit 3, A-77.* Honorable Mark Richardson granted Defendants' motion and transferred the case to Cape Girardeau County on July 11, 2005. *Exhibit 4, A-78.*

Relators falsely claim that Plaintiffs agreed to the change of venue from Butler County to Cape Girardeau County. Relators then argue that a change of venue can not be granted to a party that previously stipulated to a change of venue, citing Missouri Rule of Civil Procedure 51.02. Rule 51.02 provides that a change of venue can be obtained by agreement if the parties file a stipulation to change venue. MO. S. CT. R. 51.02. A court may only order a change of venue based on stipulation if all parties file a signed written agreement for change of venue. MO. S. CT. R. 51.02; *see* RS. Mo. 508.080; *Maxey v. Wenner*, 686 S.W.2d 862, 864 (Mo. App. E.D. 1985). Plaintiffs did not stipulate to the change of venue, and no such writing was filed by all of the parties in this case.

Thus, Relators fabricate that the trial court's order transferring venue to Cape Girardeau County amounts to a stipulation because Gail Friend, counsel for Plaintiffs,

signed the order “as to form.” Relators argue that Defendant’s Rule 51.03 motion to transfer venue and the court’s order combine to create a stipulation of venue under Rule 51.02. Relators’ contention is wholly without merit. First, the order specifically states that it grants *Defendants’* motion for change of venue *pursuant to Rule 51.03*. *Exhibit 4, A-78*. The order does not reference any stipulation by the parties pursuant to Rule 51.02 because there was no such stipulation. *Id.*

Relators cites cases for the proposition that a stipulation should be interpreted in view of what the parties were trying to accomplish. However, Relators have no personal knowledge of what “the parties” were trying to accomplish. Relators did not file the motion for change of venue, another Defendant did. Plaintiffs’ counsel did not have even one conversation with Relators’ counsel regarding transfer of venue. Any contention by Relators that Plaintiffs agreed to transfer venue or signed the order to stipulate to venue is absolute speculation and has no merit.

Counsel for another Defendant told Plaintiffs’ counsel that the court required her to sign the order as agreed. Plaintiffs’ counsel refused because she did not want to transfer venue from Butler County. He said it was a mandatory transfer, but the order must reflect that the parties had the chance to suggest the new venue. Rule 51.03(c) provides that the court shall order case transferred to another county *after* giving all parties the opportunity to make suggestions as to where the case should be sent. Mo. S. Ct. R. 51.03(c). Defendants’ counsel suggested that the case be transferred to Cape Girardeau County, and Plaintiffs did not suggest an alternative. Thus, the order reflected Cape Girardeau County, and was signed to form to satisfy the provision that all parties had the opportunity to suggest the new venue. *Exhibit 4, A-78*. It was signed to “form,” and not “substance,” to affirmatively reflect that Plaintiffs did *not* stipulate to the venue change, but there was nothing erroneous in this language.

Relators state that it was “nonsense” for Plaintiffs’ counsel to sign the order because the trial court did not need Plaintiffs “approval” that the language of its order

was correct. Again, however, Relators have no knowledge of what the intentions were in that order as they had no part in it, and their surmise is meaningless. The form signature lets the court know that all parties had an opportunity to suggest the new venue, such that all requirements of Rule 51.03 were complete.

Relators also erroneously argue that there was a stipulation because there was not a contested hearing on Defendants' motion to transfer venue. There was no contested hearing on Defendants' motion because the transfer of venue was mandatory. Mo. S. Ct. R. 51.03(a),(c). Rule 51.03 gives a party the absolute right to change venue from a county of less than 75,000 inhabitants. *Id.* As it was Defendants' first request, the trial court had no discretion to deny Defendants' timely motion, and Plaintiffs had not authority to object to the venue change. *Id.* Accordingly, there was no need to incur the expense of a hearing. Lack of a hearing did not make it a stipulation, it simply made it economical.

Realtors also contend that because Rule 51.03 gives "opposing" counsel the opportunity to suggest a new county, and Plaintiffs suggested Cape Girardeau County, this became a stipulation to transfer venue. Again, this is wrong. "*Opposing*" counsel is necessarily the counsel that does *not* agree with the pending motion. Moreover, Plaintiffs never suggested Cape Girardeau County. Defendants did. Plaintiffs counsel was new to the Missouri bar and did not have knowledge of any convenient county. Nevertheless, even if Plaintiffs had made a suggestion for the county of transfer, it would not have been a "stipulation" to transfer venue under Rule 51.02.

Rule 51.03 specifically provides that the court shall immediately order the case transferred to another county that is convenient to the parties *after* giving all parties the opportunity to suggest where the case should be sent. MO. S. CT. R. 51.03(c). Accordingly, once Defendants filed the Rule 51.03 motion, venue change was mandatory, and the suggested new venue was part of the Rule 51.03 motion. *Id.* Suggesting the venue, by all parties, is required by section (c); it does not convert a Rule

51.03 motion into a stipulation under Rule 51.02. *Id.* If it did, all Rule 51.03 motions would be a Rule 51.02 stipulation, rendering the Rules redundant and without effect. *See Bowen v. Missouri Dept. of Conservation*, 46 S.W.3d 1, 10 (Mo. App. W.D. 2001), citing *Hadlock v. Dir. of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993)( “We should not interpret statutes in a way which will render some of their phrases to be mere surplusage. We must presume that every word of a statute was included for a purpose and has meaning”); *Cook v. Newman*, 142 S.W.3d 880 (Mo. App. W.D. 2004, transfer denied)(rule of statutory construction is that the provisions of a statute are not read in isolation but construed together and harmonized to give effect to each). Instead, the purpose of section (c) is to prevent the moving party from unilaterally choosing venue and working an inconvenience the non-moving parties. *See Maxey v. Wenner*, 686 S.W.2d 862, 864 (Mo. App. E.D. 1985).

In sum, Plaintiffs did not agree to Defendants’ change of venue. The order transferring venue is not a stipulation by Plaintiffs. The order was signed as to “form,” not the substance or content, to reflect that Plaintiffs did *not* agree to the motion to transfer venue, but pursuant to Rule 51.03(c) the form of the order was correct in reflecting Cape Girardeau County. It is part and parcel of Defendants’ Rule 51.03 motion. To ensure no misunderstanding, the order was even made specific to state that it was *Defendants’ Rule 51.03* motion, not a Rule 51.02 stipulation. *Exhibit4, A-78*. Plaintiffs’ joint application for change of judge and change of venue is Plaintiffs’ first request. Accordingly, Respondent, Honorable William C. Seay, did not exceed his jurisdiction in granting Plaintiffs application for change of venue.

**II. Relators are not entitled to an order prohibiting Honorable William C. Seay 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 not untimely in that (1) it was not filed later than 10 days after the defendants’ original answers were due to be filed; (2) it could**

**be timely based on the answer due date of the most recently served defendant, The Manor; and (3) Plaintiffs did not file their application more than 10 days after The Manor's answer due date.**

Plaintiffs' application for change of venue was timely. Plaintiffs filed a Joint Application for Change of Judge and Change of Venue on June 15, 2006, pursuant to Rule 51.06 (designating procedure for filing a request for change of judge and change of venue at the same time). *Exhibit 9, A-99*. Rule 51.06 sets out the procedural order in which a joint application for change of judge and change of venue must be addressed by the court. MO. S. CT. R. 51.06. The Rule does not specify the time frame for seeking a change of venue, which is governed by the specific Rule addressing venue. *See* MO. S. CT. R. 51.06, 51.03.

Plaintiffs sought change of venue as a matter of right in counties of seventy-five thousand or less inhabitants, governed by Rule 51.03. *Exhibit 9, A-99*. Rule 51.03 provides that the application for change of venue be filed "not later than ten days after answer is due to be filed." MO. S. CT. R. 51.03(a). Plaintiffs timely filed their application for change of venue.

**A. Plaintiffs' Application for Change of Venue Was Due Not Later than Ten Days After the Due Date of Any Defendant's Original Answer.**

Relators assert that a plaintiff's application for change of venue must be filed within ten days from the due dates of the "original" defendants' original answers, not a newly added defendant's original answer. Rule 51.03 does not make any mention of "original" defendants, and Relators do not cite any authority in support of their position. So, they argue that this is the only reasonable interpretation of the Rule as any other interpretation would allow plaintiffs to manipulate the system in seeking change of venue. Basing the due date for a venue change on each defendant's original answer does not manipulate the system and is provided for in Missouri case precedent. It is Relators'

interpretation of the Rule that is unreasonable.

Relators' quote the language "after answer is due to be filed," emphasizing the singular nature of this word, and conclude that it means the motion to transfer venue must be filed within ten days of any of the "original defendants original answers," plural. This is nonsensical. The defendants identified in the original petition may all receive service of summons on different dates, resulting in different answer dates for each defendant. MO. S. CT. R. 55.25(a). Yet, Relators concede that a motion to transfer venue may be filed based on any of these answer dates. Just as Rule 51.03 does not restrict the deadline for filing a change of venue to the first-served original defendant or any other original defendant's answer due date, it does not distinguish between original defendant's answer dates stemming from the original petition versus the original answer dates of a newly served defendants in an amended petition. MO. S. CT. R. 51.03. It merely states that the motion to transfer venue must be filed not later than ten days after answer is due. *Id.*

This Missouri Supreme Court has also provided that venue can be determined with each new defendant that is added in an amended petition. *See State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001)(venue may be reviewed whenever an amended petition adds a defendant to the lawsuit). Accordingly, when a defendant is named in an amended petition, there are ten days from its answer due date in which to seek a transfer of venue.<sup>1</sup> MO. S. CT. R. 51.03.

Contrary to Relators' example, Respondents do not assert, and never have asserted, that each amended petition, to which existing defendants must file an additional answer, starts new venue deadlines. However, even if venue deadlines did run from each answer to an amended petition, the same opportunity to transfer venue would apply

---

<sup>1</sup> Subject only to the limitation that the class of parties (plaintiffs or defendants) seeking the venue change can not have previously sought a venue change as a matter of right. MO. S. CT. R. 51.06.

equally to defendants as plaintiffs. Thus, it does not afford a plaintiff any advantage for “manipulation” over a defendant.

Moreover, it is Defendants that have engaged in manipulation of this case. Defendants filed for and obtained a change of venue to Cape Girardeau County. *Exhibits 3, A-77; 4, A-78*. The case was assigned to Honorable William L. Syler. *Id.* Defendants were unhappy with this case assignment, and when Plaintiffs learned the identity of and served The Manor, Defendants saw their opportunity. Immediately after The Manor filed its answer, it filed a motion for change of judge as a matter of right.<sup>2</sup> *Exhibits 5, A-79; 22, A-239*. Defendants knew that the case would be transferred to the only other judge in Cape Girardeau County, Honorable Benjamin F. Lewis. Without notice of a hearing to Plaintiffs, the change of judge was granted and the case transferred to Honorable Lewis. *Exhibit 1, A-21*. However, Defendant’s application for change of judge was prohibited and should not have been granted because Defendants previously requested and received a change of venue. *See State ex rel. Smith v. Journey*, 533 S.W.2d 589 (Mo. 1976)(where a member of the class of defendants has obtained either a change of venue or change of judge, he has exhausted the right of all members of the class to a change, and thereafter, none of its members may be granted a change of venue or change of judge); MO. S. CT. R. 51.06(a)(if a party requests and obtains either a change of venue or a change of judge, the party shall not be granted any additional change thereafter except for cause; a party who desires both a change of venue and change of judge must join and present both in a single application).

Defendants’ also assert that changing venue a year after the case was filed is “an

---

<sup>2</sup> Note that under Relators’ argument that deadlines are to be calculated from the “original” defendants’ original answers, Defendants’ motion to change judge was untimely. Nevertheless, Defendants happily calculated the deadline for The Manor’s motion to change judge from its answer due date. Relators argue now, however, that The Manors’ answer due date does not apply to Plaintiffs.

incredible waste of judicial resources” because a new judge would need to learn the case. Defendants’ feigned concern is not applicable. Respondent, Judge Seay, will continue to preside over the case regardless of whether this case remains in Crawford County or is transferred back to Cape Girardeau County. *See* MO. S. CT. R. 51.05(e)(disqualified judge shall notify the presiding judge, and if the presiding judge is also disqualified, a judge shall be assigned by local court rules so long as those rules do not allow the disqualified judge to make the assignment, or the presiding judge shall request the Missouri Supreme Court to transfer a judge); Rule 6.2.3 for the Thirty Second Judicial Circuit Court (Assignment Upon Disqualification of Both Circuit Judges: If both circuit judges have been disqualified from hearing a case, an assignment shall be requested from the Supreme Court); MO. S. CT. R. 51.06(c)(“The newly assigned judge shall determine the request for change of venue. If the change of venue is denied, the newly assigned judge shall continue to be the judge in the civil action). Thus, a new judge will not spend his time familiarizing himself with the case due to Plaintiffs’ change of venue.

Defendants concern for judicial economy is disingenuous. It is Defendant’s improper motion to change judge, a year after the case was filed, opportunistically taken upon service of The Manor, that actually brought a new judge (Respondent Judge Seay) into this case. Judge Seay was required to learn this case at that time. If Defendants were really concerned about judicial economy, and not manipulating the system, they would not have filed the improper motion to change judge. At this point, Judge Seay already has the case and will not expend any additional effort to learn the case just because it is in the new venue. No judicial economy concerns are present.

In the same vein, Relators assert that changing venue as a matter of right one year into the case is contrary to the purpose of the Missouri Rules of Civil Procedure, because they are designed to limit the time for change of venue to the early stages of the case for judicial economy purposes. It is not the changing of venue per se, however, that effects judicial resources, it is changing judges. As set out above, changing venue in this case

does not change the judge, such that this policy argument is immaterial. Nevertheless, it is of interest that the Missouri Rules of Civil Procedure specifically provide that the parties can change venue as a matter of right up to thirty (30) days prior to trial, simply because the parties agree to do so. MO. S. CT. R. 51.02. Given the length of time that it generally takes for a case to reach trial, a transfer thirty days prior would almost always occur at least one year into the case.

In sum, Relators' arguments are not supported by equity or precedent, and it is Defendants who have engaged in manipulation and wasting of judicial economy. The deadline to file a motion to change venue pursuant to Rule 51.03 was no later than ten days after any defendant's original answer was due to be filed. Plaintiffs timely filed their application for change of venue less than ten days after The Manor's answer was due. Accordingly, Respondent, Honorable William C. Seay, did not exceed his jurisdiction in granting Plaintiffs application to change venue.

**B. The Manor's Answer Due Date is the Proper Measure of Plaintiffs' Application for Change of Venue.**

The Manor was identified in Plaintiffs seventh amended petition filed with leave on March 27, 2006. *Ex. 1, A-12; 20, A-187.* On April 10, 2006, motion for leave to file the eighth amended petition was filed. *Exhibits 1, A-14; 21, A-233.* The Manor was served with the seventh amended petition on April 17, 2006, and due to the pending motion for leave, was given an extension of the due date to file any answer until June 7, 2006. *Exhibits. 1, A-12; 21, A-16.* Leave was granted and Plaintiffs' eight amended petition was filed on May 22, 2006. *Exhibit 1, A-19; 5, A-79.* The Manor timely filed its answer on June 7, 2006. *Exhibit 1, A-20.*

**1. Dismissal of The Manor is Irrelevant to Plaintiffs' Application for Change of Venue.**

Relators contend that The Manor's answer date does not apply to Plaintiffs' application for change of venue because The Manor was dismissed before venue was

changed. They do not cite any authority in support. Relators also suggest that Plaintiffs added and dismissed The Manor specifically to change venue. Contrary to Relators' unfounded assertions, The Manor was not added or dismissed in this case to effect venue. The Manor was identified and served via amended petition after its identity was learned. *Exhibit 19, A-170; 20, A-187*. After The Manor filed its answer, it wrongfully filed an application for change of judge in order to manipulate *Defendants'* prior change of venue. *Exhibit 22, A-239*. A motion to dismiss The Manor without prejudice was filed to preclude the gamesmanship by Defendants. *Exhibit 7, A-94*. Nevertheless, Judge Syler granted Defendants' application for change of judge without notice or hearing. *Exhibit 1, A-21*. Plaintiffs withdrew the motion to dismiss. *Exhibit 8, A-96*. The time frame Defendants relied upon for filing the change of judge was the date of The Manor's answer. It was the change of judge obtained by The Manor that necessitated Plaintiffs' filing the joint motion for change of judge and change of venue. Bluff Manor's answer was the basis for both defendants' and plaintiffs' motions and must apply uniformly to both.

Even if withdrawal of the motion to dismiss was ineffective, Relators' dismissal argument is without merit. The Missouri Supreme Court has held that dismissal of a defendant does not effect venue. *See State ex rel Linthicum v. Calvin*, 57 S.W.3d 855, 857-858 (Mo. 2001), citing with approval *State ex rel DePaul Health Center v. Mummert*, 870 S.W.2d 820, 821-823 (Mo. 1994). Venue is determined because of the petition adding the defendant. *Id.; Id.* This is so even when the defendant was added by an amended petition and dismissed prior to a hearing on venue. *DePaul*, 870 S.W.2d at 821-823.

The deadline to file a motion to change venue pursuant to Rule 51.03 was no later than ten days after The Manors' answer was due to be filed. Bluff Manor's answer due date was June 7, 2006, and Plaintiffs timely filed their application for change of venue on June 15, 2006. Accordingly, Respondent, Honorable William C. Seay, did not

exceed his jurisdiction in granting Plaintiffs application to change venue.

**2. The Extension of the Due Date for Poplar Bluff No. 1's Answer is the Proper Measure of When Plaintiffs' Application for Change of Venue Was Due.**

The 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. *State ex rel. Lebanon School District v. Winfrey*, 183 S.W.3d 232, 237 (Mo. 2006). It is *not* the date that the answer *originally* would have been due *absent any agreements for extensions of time* or motions to dismiss. *Id.* at 237 ("The [defendant] also argues in its brief 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*.").

The Manor sought an extension of the due date to file its answer, and Plaintiffs agreed, making the new answer date June 7, 2006. *Exhibit 5 at p. 10, Defs' Answer*. Plaintiffs' request for change of venue was filed on June 15, 2006, less than ten days from the date that The Manor's answer was due. *Exhibit 8, Pls' Appl Chng Venue*. Thus, Plaintiffs' application for change of venue was timely filed, and Respondent did not exceed his jurisdiction in transferring venue.

Relators argue that because the Missouri Rules of Civil Procedure provide that a trial court can extend a due date by order of the court, the parties cannot do so by agreement. In support, Relators' cite to a federal case out of Nebraska, and conclude that "it is clear that in Missouri" the due date for answer can only be changed by the court. However, agreements among counsel to extend an answer due date have been considered in Missouri case precedent. In *Jones v. Chrysler Corp.*, a default judgment was entered

against the defendant for failure to timely file an answer. 731 S.W.2d 422 (Mo. App. S.D. 1987). The defendant filed a motion to vacate the judgment and file responsive pleadings. *Id.* at 424. As part of the basis for the motion to vacate, evidence was presented at the hearing regarding whether the parties had agreed to extend the answer due date. *Id.* at 424-426. The trial court denied the motion to vacate because it determined from the evidence that there was not an agreement between the plaintiffs and defendants to extend the answer deadline. *Id.* at 426. On appeal, at no time did the court of appeals state that only a court order is effective to extend an answer due date, thereby rendering the evidence regarding an agreement between the parties immaterial. *See Id.* Instead, the court of appeals discussed that the trial court was correct in determining whether the parties had an agreement to extend the answer deadline and affirmed the trial court. *Id.*

There is no dispute that Plaintiffs granted The Manor an extension of its answer due date to June 7, 2006. Accordingly, Plaintiffs timely filed their motion to change venue on June 15, 2006, not more than ten days after The Manor's answer was due. Respondent, Honorable William C. Seay, did not exceed his jurisdiction in granting Plaintiffs' application to change venue.

### **Conclusion**

Respondent, Honorable William C. Seay, did not exceed his jurisdiction in granting Plaintiffs' application for change of venue because it is clear under every possible scenario that Plaintiffs were entitled to a change of venue:

1. Plaintiffs were not barred by Rule 51.02 from seeking a change of venue because they did not previously stipulate to a change of venue from Butler County to Cape Girardeau County;
2. Plaintiffs application for change of venue was timely filed under Rule 51.03, which does not limit changes of venue to "original" defendants. Under Rule

51.03, an application for change of venue must be filed no more than ten days from when the original answer of any defendant is due;

3. Plaintiffs application for change of venue was timely regardless of whether The Manor was dismissed;

4. Plaintiffs application for change of venue was timely filed within ten days of The Manor's answer due date.

Accordingly, Respondent had jurisdiction and did not exceed his jurisdiction in granting Plaintiffs' application for change of venue and transferring the case to Crawford County. This Court should not make its preliminary writ of prohibition absolute, and should not require Respondent to vacate the December 14, 2006 order and not transfer the case back to Cape Girardeau County.

Respectfully Submitted,

FRIEND & ASSOCIATES, L.L.P.

By: \_\_\_\_\_

Gail N. Friend,\* #58048  
Staci R. Bouthillette,\* #58463  
1001 Fannin, Suite 750  
Houston, Texas 77001  
Telephone: 888-862-6161  
Fax: 713-650-7100  
gfriend@friendassoc.com  
sbouthillette@friendassoc.com

LAW OFFICES OF GARY GREEN

\*of counsel  
Gary Green, # 46417  
909 E. Republic Road B F-200  
Springfield, Missouri 65807  
Telephone: (417) 886-2229  
Fax: (417) 886-0606

*Attorneys for Plaintiffs, Frank O'Neil and Peggy Szerzenski as personal representative of the*

*estate of Christopher O'Neil*

## **CERTIFICATE OF COMPLIANCE**

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

1. The brief filed herein on behalf of Respondents 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 \_\_\_\_\_ 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.

---

Gail Friend

**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, the \_\_\_\_ day of \_\_\_\_\_, 2007.

Honorable William C. Seay  
Crawford County Circuit Courthouse  
302 East Main St.  
Steelville, MO 65565  
573-729-6816  
*Respondent*

Mr. Ted R. Osburn  
Mr. Mark J. Lanzotti  
Mr. Michael E. Gardner, #56786  
Osburn, Hine, Kuntze, Yates & Murphy, L.L.C  
3266 Lexington Ave.  
Gape Girardeau, MO 63701  
573-651-9000  
*Attorneys for Relators/Defendants, Chul Kim, M.D.,  
Angela Patterson, M.D. and Westwood Medical Clinic, Inc.*

Mr. Kevin O'Malley  
Mr. James L. Smith  
Greensfelder, Hemker and Gale, P.C.  
10 S. Broadway, Suite 2000  
St. Louis, MO 63102  
314-241-9090  
*Attorneys for Defendants, Robert Hall, M.D.  
and Richard E. Musser, M.D.*

Mr. Joseph C. Blanton, Jr.  
Blanton, Rice, Sidwell, Nickell, Cozean & Collins, L.L.C.  
219 South Kingshighway  
P.O. Box 805  
Sikeston, MO 63801  
573-471-1000  
*Attorneys for Defendants, Poplar Bluff Regional Medical Center,  
Poplar Bluff Regional Medical Center North, and Pat Hendrick, R.N.*

Mr. James A. Cochrane, III  
Bradshaw, Steele, Cochrane & Berens, L.C.  
3113 Independence, P.O. Box 1300  
Cape Girardeau, MO 63702  
573-334-0555  
*Attorneys for Defendant, Advanced Healthcare Management Services, L.L.C.*

---

Gail Friend

