IN THE SUPREME COURT OF MISSOURI

No. SC84306

STATE OF MISSOURI ex rel.
REBECCA BIERMAN, THOMAS CHIDA, and
UNITED BEHAVIORAL HEALTH, INC.,

Relators,

v.

THE HONORABLE MARGARET M. NEILL,
Judge, Division 1, Circuit Court of the City of St. Louis,

Respondent.

On a Petition for a Writ of Prohibition

# BRIEF OF RELATORS REBECCA BIERMAN, THOMAS CHIDA, and UNITED BEHAVIORAL HEALTH, INC.

THOMPSON COBURN LLP
Allen D. Allred, #26367
Jeffrey R. Fink, #44963
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000

Attorneys for Relators-Defendants
Rebecca Bierman, Thomas Chida, and
United Behavioral Health, Inc.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## CASES

## STATUTES AND RULES

## INTRODUCTION

Relators-Defendants Rebecca Bierman, Thomas Chida, and United Behavioral Health, Inc. ("UBH") (collectively, "Defendants") respectfully request that this Court issue a writ of prohibition barring Respondent the Honorable Margaret M. Neill, Circuit Judge of the Circuit Court of the City of St. Louis, from taking any further action except to transfer this case to the Circuit Court of St. Louis County on the ground that venue is improper in the City of St. Louis and lies only in St. Louis County. Defendants are entitled to such a writ under this Court's decision in State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001), the decision of the Missouri Court of Appeals for the Eastern District in State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28 (Mo. App. 2002), and Missouri Rule of Civil Procedure 51.045.

Plaintiff, who resides in St. Louis County, has brought a medical negligence action in the City of St. Louis against Defendant Bierman, who now resides in California, and Defendants Chida and UBH, who reside in St. Louis County, resulting from medical care performed solely in St. Louis County. Plaintiff sought to establish venue in the City of St. Louis under RSMo § 508.010(4) through "the plaintiff's two-step." He originally brought suit solely against the nonresident defendant (Bierman) and then, five days later, added the two St. Louis County defendants (Chida and UBH) in a first amended petition. Neither Plaintiff's original petition nor his first amended petition alleges any basis for venue in the City of St. Louis.

Defendants filed timely motions challenging venue. They asserted that venue lies only in St. Louis County: (a) under RSMo § 508.010(3) because, as Plaintiff's first

amended petition alleges, the resident defendants (Chida and UBH) reside in St. Louis County; or (b) under RSMo § 508.010(6) because Plaintiff's cause of action accrued in St. Louis County in that all of the medical care at issue was provided there.

In response, Plaintiff argued that venue is determined when suit is brought, not when defendants are added; that § 508.010(4) is the applicable venue statute because the original petition named only a nonresident as a defendant; and that § 508.010(3) and § 508.010(6) do not apply. On July 9, 2001, Respondent agreed with Plaintiff's argument and denied Defendants' venue motion, ruling that venue is proper in the City of St. Louis under § 508.010(4).

On October 23, 2001, this Court issued its decision in Linthicum, which held that venue is to be redetermined when an amended petition adds defendants. Linthicum defeated Plaintiff's venue argument and rendered Respondent's order of July 9, 2001 denying Defendants' venue motion in error.

Based on Linthicum, Defendants asked Respondent to reconsider the venue issue. Linthicum should have been dispositive and should have required that Respondent transfer the present case to the Circuit Court of St. Louis County. Plaintiff recognized this as he filed no opposition to Defendants' motion to reconsider.

Nevertheless, on December 13, 2001, Respondent denied Defendants' motion to reconsider venue. Respondent ruled that Defendants had not submitted any evidence to prove that Plaintiff's cause of action did not accrue in the City of St. Louis and, in turn, that venue does not lie in the City of St. Louis under § 508.010(6). Respondent so concluded even though Plaintiff has never pleaded § 508.010(6) as a basis for venue in

the City of St. Louis, has previously stated that § 508.010(6) does not apply, and has never contended at any time that his cause of action accrued in the City of St. Louis.

Defendants asked Respondent to reconsider her ruling. They submitted unrebutted affidavits establishing that Plaintiff's cause of action accrued in St. Louis County in that all of the care at issue was provided there. Plaintiff made no attempt to show that his cause of action accrued in the City of St. Louis or that venue is proper in the City of St. Louis under § 508.010(6). Nevertheless, on January 24, 2002, Respondent again denied Defendants' motion to reconsider venue, adhering to her order of December 13, 2001 that Defendants had failed to prove that venue does not lie in the City of St. Louis under § 508.010(6).

On February 5, 2002, Defendants petitioned the Missouri Court of Appeals for the Eastern District for a writ of prohibition as to Respondent's orders of July 9, 2001, December 13, 2001, and January 24, 2002 concerning venue. On February 21, 2002, the Court of Appeals denied Defendants' petition without opinion.

Respondent's venue rulings are clearly erroneous under Etter and contrary to Rule 51.045. Etter makes clear that Defendants were not required to prove that venue is improper in the City of St. Louis under § 508.010(6) because Plaintiff never pleaded § 508.010(6) as a basis for venue, either in his petition, his first amended petition, or in his opposition to Defendants' motions to dismiss and/or transfer venue. 70 S.W.3d at 32. Moreover, under Rule 51.045, Defendants were not required to prove that venue is improper in the City of St. Louis under § 508.010(6) because Plaintiff conceded in his reply to Defendants' motions to dismiss and/or transfer venue that venue is not proper in

the City of St. Louis under § 508.010(6) and Plaintiff has never contended at any time that his cause of action accrued in the City of St. Louis.

To the extent Plaintiff's concessions did not resolve the venue issue, Defendants submitted unrebutted affidavits establishing that all of the care at issue was performed in St. Louis County, thereby proving that Plaintiff's cause of action accrued in St. Louis County and that venue in the City of St. Louis cannot be based on § 508.010(6). Under Etter, Respondent was required to allow Defendants' supplementation of the record showing that all of the care at issue was provided in St. Louis County and that Plaintiffs' cause of action did not accrue in the City of St. Louis after Respondent sought to uphold venue in the City of St. Louis on the unpleaded basis of § 508.010(6). 70 S.W.3d at 32.

There is no basis for venue in the City of St. Louis. Venue lies exclusively in St. Louis County. Defendants did not waive their challenge to venue. Accordingly, this Court should issue a writ of prohibition barring Respondent from taking any further action except to transfer this case to the Circuit Court of St. Louis County.

## JURISDICTIONAL STATEMENT

This is a proceeding for the issuance of a petition for a writ of prohibition. The Court has jurisdiction to decide this case pursuant to Article V, Section 4.1 of the Missouri Constitution, which provides in pertinent part: "The supreme court shall have general superintending control over all courts and tribunals.… The supreme court … may issue and determine original remedial writs."

## STATEMENT OF FACTS

On April 13, 2001, Plaintiff Patrick W. Diven, by and through his mother and next friend, Connie Diven, commenced the present action. (A1-3; Ex. 1.)[1] Plaintiff resides in St. Louis County. (A1; Ex. 1, ¶ 1; A5; Ex. 2, ¶ 1.)

Plaintiff's original petition named only Rebecca Bierman as a defendant. (Ex. 1.) Defendant Bierman resides in California. (A1; Ex. 1, ¶ 2; A5; Ex. 2, ¶ 2.)

On April 18, 2001, five days after filing his original petition, Plaintiff filed his first amended petition. (A4-7; Ex. 2.) Plaintiff's first amended petition added Thomas Chida and United Behavioral Health, Inc. ("UBH") as defendants. (A4-7; Ex. 2.) As Plaintiff alleges in his first amended petition, Defendant Chida resides in St. Louis County. (A5; Ex. 2, ¶ 5.) For purposes of the Missouri venue statute, RSMo § 508.010, Defendant UBH is deemed to reside in St. Louis County because, as Plaintiff alleges in his first amended petition, its registered agent is located in St. Louis County. (A4; Ex. 2.) See State ex rel. Malone v. Mummert, 889 S.W.2d 822, 824 (Mo. banc 1994).

Both the original petition and the first amended petition allege negligent medical care that allegedly caused or contributed to the suicide of Gary Diven, the father of Plaintiff Patrick Diven. (A1-7; Exs. 1-2.) It is undisputed that all of the medical care at issue was provided in St. Louis County. (A97-99; Exs. D and E to Ex. 13.) Neither the

[1] All exhibits referenced herein are attached to the Petition for Writ of Prohibition and are included in the appendix to this brief.

original petition nor the first amended petition contains any allegations as to where Plaintiff's cause of action accrued.

On June 1, 2001, Defendants Chida and UBH filed a timely motion to dismiss and/or transfer venue. (A8-10; Ex. 3.) (Defendant Bierman was not served with a summons until September 7, 2001. (A88; Ex. 12, p. 2.)) Defendants asserted that venue lies only in St. Louis County: (a) under RSMo § 508.010(3) because, as Plaintiff's first amended petition alleges, the resident defendants (Chida and UBH) reside in St. Louis County; or (b) under RSMo § 508.010(6) because Plaintiff's cause of action accrued in St. Louis County in that all of the medical care at issue was provided there. (A8-10; Ex. 3.)

In response, Plaintiff relied solely on RSMo § 508.010(4) to support his claim that venue is proper in the City of St. Louis. (A11-14; Ex. 4.) He argued that venue must be determined by reference to the original petition, which only named a nonresident (Bierman) as a defendant, and cannot be redetermined when Plaintiff added the two St. Louis County resident defendants (Chida and UBH) in his first amended petition. (A11-14; Ex. 4.) Plaintiff argued that § 508.010(3) and § 508.010(6) "do not apply in the present case because when this case was brought, there were no resident defendants." (A13; Ex. 4, p. 3.) Plaintiff made no allegation that his cause of action accrued in the City of St. Louis. He did not deny Defendants' assertion that venue does not lie in the City of St. Louis under § 508.010(6).

On July 9, 2001, Respondent denied Defendants Chida and UBH's motion to dismiss and/or transfer venue. (A15-17; Ex. 5.) In her order, Respondent noted that

"Plaintiffs brought the present case in the City of St. Louis under § 508.010(4)." (A16; Ex. 5, p. 2.) Respondent concluded that venue must be determined at the time suit was brought and that "[t]he applicable venue statute at the time suit was brought was § 508.010(4)" because only Bierman, a nonresident, was a defendant in the original petition. (A17; Ex. 5, p. 3.)

On July 26, 2001, Defendants Chida and UBH filed a petition for writ of prohibition with the Missouri Court of Appeals for the Eastern District with respect to Respondent's order of July 9, 2001. In his opposition, Plaintiff repeated the same arguments he made before Respondent. (A18-21; Ex. 6.) He made no allegation that his cause of action accrued in the City of St. Louis or that venue is proper in the City of St. Louis under § 508.010(6). On July 30, 2001, the Court of Appeals denied the petition for writ of prohibition without opinion. (A22; Ex. 7.)

On September 4, 2001, Defendants Chida and UBH filed their answers to the first amended petition. (A23-30; Exs. 8-9.) They asserted that venue is improper in the City of St. Louis and that proper venue is in St. Louis County. (A25, 29; Exs. 8-9, p. 3.)

On October 9, 2001, Defendant Bierman filed a timely motion to dismiss and/or transfer venue. (A31-51; Ex. 10). Plaintiff filed no response to Defendant Bierman's motion.

On October 23, 2001, this Court issued its decision in State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001), which held that venue is to be redetermined when an amended petition adds defendants. Under Linthicum, Respondent's order of

July 9, 2001 denying Defendants Chida and UBH's motion to dismiss and/or transfer venue was erroneous.

Based on Linthicum, on November 1, 2001, Defendants Chida and UBH filed a motion to reconsider Respondent's order of July 9, 2001. (A52-86; Ex. 11.) Plaintiff filed no response.

On December 13, 2001, Respondent denied Defendants Chida and UBH's motion to reconsider and Defendant Bierman's motion to dismiss and/or transfer venue. (A87-90; Ex. 12.) Respondent noted that "[t]here was no allegation in the amended petition as to where the cause of action accrued, and UBH and Dr. Chida provided no evidence indicating where the cause of action accrued." (A88; Ex. 12, p. 2.) Citing Coale v. Grady Bros. Siding and Remodeling, Inc., 865 S.W.2d 887, 889 (Mo. App. 1993), Respondent concluded that "Defendants bear the burdens of persuasion and proof, to show that venue is in fact improper." (A89; Ex. 12, p. 3). Respondent then concluded that "Defendants had failed in their burden of proof" to demonstrate that Plaintiff's cause of action did not accrue in the City of St. Louis. (A90; Ex. 12, p. 4.) Respondent also concluded that Defendant Bierman's motion to dismiss and/or transfer venue was untimely. (A90; Ex. 12, p. 4.)

On January 3, 2002, Defendants filed a second motion to reconsider Respondent's orders denying their venue motions. (A91-99; Ex. 13.) Defendants Bierman and Chida submitted affidavits stating that all of the care at issue for Gary Diven was performed at UBH's facilities in St. Louis County. (A97-99; Exs. D and E to Ex. 13.) In turn,

Defendants argued that Plaintiff's cause of action accrued in St. Louis County, not the City of St. Louis, and, therefore, venue does not lie in the City of St. Louis under § 508.010(6).

In response, Plaintiff submitted no affidavits or other evidence to refute Defendants Bierman's and Chida's affidavits. Plaintiff did not assert that his cause of action accrued in the City of St. Louis or that venue is proper under § 508.010(6). Instead, Plaintiff argued (erroneously) that Defendants' motion to reconsider was procedurally deficient. (A100-112; Ex. 14.)

On January 24, 2002, Respondent denied Defendants' motion to reconsider her order of December 13, 2001. (A113-116; Ex. 15.) Respondent noted: "The basis of the Court's ruling was that the defendants had failed in their burden of proof and persuasion in that they had presented no competent evidence in support of their assertion regarding the place of accrual of the cause of action and plaintiff had made no allegations in this regard in the petitions." (A114-115; Ex. 15, pp. 2-3.) Respondent adhered to her previous ruling, although she did conclude that Defendant Bierman's motion to dismiss and/or transfer venue had been timely filed. (A115-116; Ex. 15, pp. 3-4.)

On February 5, 2002, the Missouri Court of Appeals for the Eastern District issued a writ of prohibition directing Respondent to transfer venue in another case involving similar circumstances as the present case. See State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28 (Mo. App. 2002). In Etter, the court held that a defendant is not required to disprove possible bases for venue that the plaintiff does not plead and that when a trial court seeks

to uphold venue on a basis that was never pleaded, the defendant should be allowed to supplement the record to disprove that basis for venue.

On February 5, 2002, Defendants petitioned the Missouri Court of Appeals for the Eastern District for a writ of prohibition as to Respondent's orders of July 9, 2001, December 13, 2001, and January 24, 2002 concerning venue. On February 21, 2002, the Court of Appeals denied Defendants' petition without opinion. (A122; Ex. 17.)

Defendants petitioned this Court for a writ of prohibition as to Respondent's orders of July 9, 2001, December 13, 2001, and January 24, 2002 concerning venue. In his suggestions in opposition, Plaintiff did not assert that his cause of action accrued in the City of St. Louis or that venue is proper under § 508.010(6). Instead, he argued that venue is proper under § 508.010(4) (contrary to Linthicum) and that Defendants waived their challenge to venue (contrary to Etter).

On April 23, 2002, this Court issued its preliminary writ of prohibition commanding Respondent to vacate her venue orders and to take no further action in this case until the further order of this Court. In his Reply to Petition for a Writ of Prohibition, Plaintiff does not assert that his cause of action accrued in the City of St. Louis or that venue is proper under § 508.010(6). Instead, he argues (p. 2) that Defendants waived their challenge to venue because they "failed to timely carry their dual burdens of proof and persuasion in that they had presented no competent evidence in support of their assertion regarding the place of accrual of the cause of action and plaintiff had made no allegations in this regard in the petitions." Plaintiff further asserts (pp. 4-5) that this Court should overrule Linthicum and Etter.

## POINT RELIED ON

**I. Respondent erroneously denied Defendants' motions to dismiss and/or transfer venue and motions to reconsider venue because there is no basis for venue in the City of St. Louis, venue lies exclusively in St. Louis County, and Respondent incorrectly ruled that Defendants failed to prove that venue is improper in the City of St. Louis under § 508.010(6) in that: (a) Defendants were not required to prove that venue is improper in the City of St. Louis under § 508.010(6) because Plaintiff has never pleaded § 508.010(6) as a basis for venue, Plaintiff conceded in his reply to Defendants' motions to dismiss and/or transfer venue that § 508.010(6) does not apply, and Plaintiff has never contended that his cause of action accrued in the City of St. Louis; and (b) Respondent was required to allow Defendants' supplementation of the record showing that all of the care at issue was provided in St. Louis County and that Plaintiff's cause of action did not accrue in the City of St. Louis after Respondent unexpectedly sought to uphold venue in the City of St. Louis on the unpleaded basis of § 508.010(6).**

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

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

Missouri Rule of Civil Procedure 51.045

## ARGUMENT

**I. Respondent erroneously denied Defendants' motions to dismiss and/or transfer venue and motions to reconsider venue because there is no basis for venue in the City of St. Louis, venue lies exclusively in St. Louis County, and Respondent incorrectly ruled that Defendants failed to prove that venue is improper in the City of St. Louis under § 508.010(6) in that: (a) Defendants were not required to prove that venue is improper in the City of St. Louis under § 508.010(6) because Plaintiff has never pleaded § 508.010(6) as a basis for venue, Plaintiff conceded in his reply to Defendants' motions to dismiss and/or transfer venue that § 508.010(6) does not apply, and Plaintiff has never contended that his cause of action accrued in the City of St. Louis; and (b) Respondent was required to allow Defendants' supplementation of the record showing that all of the care at issue was provided in St. Louis County and that Plaintiff's cause of action did not accrue in the City of St. Louis after Respondent unexpectedly sought to uphold venue in the City of St. Louis on the unpleaded basis of § 508.010(6).**

### A. Prohibition lies when venue is improper in the court in which the action is brought and the trial court fails to grant a timely motion to transfer the action to a court of proper venue.

"If venue is improper in the court in which the action is brought, the trial court has a ministerial duty to transfer the case to a court of proper venue." State ex rel. Missouri Property and Cas. Ins. Guar. Ass'n v. Brown, 900 S.W.2d 268, 271 (Mo. App. 1995). "If

venue is improper where an action is brought, prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue." State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28, 32 (Mo. App. 2002); see also State ex rel. SSM Health Care St. Louis v. Neill, --- S.W.3d ---, 2002 WL 1364121, *2 (Mo. banc June 25, 2002) (same).

**B. Venue is not proper in the City of St. Louis and lies only in St. Louis County.**

"Venue in Missouri is determined by statute." State ex rel. Ford Motor Co. v. Bacon, 63 S.W.3d 641, 642 (Mo. banc 2002). The present action involves an alleged tort. There are individual and corporate defendants. Two defendants reside in Missouri. One defendant is a nonresident. Thus, the relevant venue statutes are § 508.010(3) and § 508.010(6), which provide:

* * *

> (3) When there are several defendants, some residents and other nonresidents of the state, suit may be brought in any county in this state in which any defendant resides.
>
> * * *
>
> (6) In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties …

Under § 508.010(3), venue is proper only in St. Louis County because, as Plaintiff alleges in his first amended petition, each of the resident defendants resides there. (A4-5; Ex. 2.) Likewise, under § 508.010(6), venue is proper only in St. Louis County because it is undisputed that Plaintiff's cause of action accrued there in that all of the care at issue was provided there. (A97-99; Exs. D and E to Ex. 13.)

The sole basis for venue in the City of St. Louis upon which Plaintiff has relied is § 508.010(4), which provides: "When all the defendants are nonresidents of the state, suit may be brought in any county in this state." (A11-14; Ex. 4.) Plaintiff asserted that venue must be determined by reference to the original petition, which named a nonresident (Bierman) as the sole defendant, and cannot be redetermined based on Plaintiff's addition of the two resident defendants (Chida and UBH) in the first amended petition. (A11-14; Ex. 4.) Consequently, Plaintiff has argued, venue is proper in the City of St. Louis under § 508.010(4) because only the nonresident defendant can be considered in the venue analysis.

In State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001), this Court rejected Plaintiff's position and held that venue is to be redetermined when an amended petition adds defendants. Section 508.010(4) applies only when all of the defendants are nonresidents of Missouri.[2] Because two of the defendants in Plaintiff's first amended

[2] In his suggestions in opposition to Defendants' writ petition (p. 5), Plaintiff incorrectly asserts: "Venue is proper in the City of St. Louis pursuant to § 508.010(4) RSMo, which

petition are residents of Missouri, § 508.010(4) does not apply. Instead, § 508.010(3) and § 508.010(6) apply and both provide that venue is proper only in St. Louis County.

### C. Defendants were not required to prove that venue is improper in the City of St. Louis under § 508.010(6) because Plaintiff has never pleaded § 508.010(6) as a basis for venue, Plaintiff conceded in his reply to Defendants' motions to dismiss and/or transfer venue that § 508.010(6) does not apply, and Plaintiff has never contended that his cause of action accrued in the City of St. Louis.

When Respondent first denied Defendants' motion to dismiss and/or transfer venue on July 9, 2001, she noted that "Plaintiffs brought the present case in the City of St. Louis under § 508.010(4)," concluded that venue must be determined at the time suit was brought, and ruled that "[t]he applicable venue statute at the time suit was brought was § 508.010(4)" because only Bierman, a nonresident, was a defendant in the original petition. (A16-17; Ex. 5, pp. 2-3.) This Court's decision in Linthicum rendered

---

provides that where a defendant is a non-resident, venue is proper in any county in any county in the state." (emphasis added). Section 508.010(4) provides: "When all the defendants are nonresidents of the state, suit may be brought in any county in this state." (emphasis added). Section 508.010(3) applies "[w]hen there are several defendants, some residents and other nonresidents of the state" and provides in such circumstances that "suit may be brought in any county in this state in which any defendant resides."

Respondent's ruling of July 9, 2001 in error. Under Linthicum, § 508.010(4) does not apply because Plaintiffs' first amended petition added the two resident defendants, Chida and UBH. Based on Linthicum, Respondent should have transferred the present case to St. Louis County when Defendants promptly asked her to reconsider her venue ruling. Indeed, Plaintiff made no argument to the contrary.

Nevertheless, on December 13, 2001, Respondent again denied Defendants' venue motions. This time, Respondent implicitly conceded that there was no basis for venue in the City of St. Louis, but held that Defendants had failed to offer evidence proving that Plaintiff's cause of action did not accrue in the City of St. Louis and that venue is not proper in the City of St. Louis under § 508.010(6). (A87-90; Ex. 12.)

Respondent's ruling is incorrect. Defendants were not required to prove that venue is improper in the City of St. Louis under § 508.010(6) because Plaintiff has never pleaded § 508.010(6) as a basis for venue, Plaintiff conceded in his reply to Defendants' motions to dismiss and/or transfer venue that § 508.010(6) does not apply, and Plaintiff has never contended that his cause of action accrued in the City of St. Louis. See State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28, 31-32 (Mo. App. 2002); Mo. R. Civ. P. 51.045.

In Etter, the Missouri Court of Appeals for the Eastern District held that a defendant is not required to disprove possible bases for venue that the plaintiff does not plead and issued a writ of prohibition against Respondent in circumstances identical in all relevant aspects to the circumstances in the present case. In Etter, the plaintiffs brought a dram-shop action against two corporations, one of which had been administratively dissolved. The plaintiffs petitioned the trial court to appoint a St. Louis City resident as a

defendant ad litem. The plaintiffs' petition made no claim that their cause of action accrued in St. Louis City or that either corporation ever maintained an office or agent in St. Louis City for transaction of their usual and customary business as would suffice to establish venue in St. Louis City under RSMo § 508.040. Instead, the sole allegation in the petition that provided any nexus to St. Louis City was that the defendant ad litem was a resident of St. Louis City.

The defendants moved to transfer venue from St. Louis City, claiming that the residence of the defendant ad litem provided no basis for city venue. Respondent denied the transfer, ruling that the defendants had failed to adduce evidence that the dissolved defendant corporation had ceased doing business or that it did not maintain an office or agent in the city for its usual and customary business.

The defendants then asked for reconsideration and provided Respondent with an affidavit that demonstrated that the dissolved defendant corporation had ceased doing business and had never maintained an office or agent in St. Louis City for the transaction of its business. Respondent again denied transfer. She did not find that a basis for city venue existed, but, instead, ruled that there was no basis for a motion to reconsider her prior ruling and that the defendants had waived the venue issue by failing to adduce the evidence at the earlier hearing. The defendants sought a writ of prohibition compelling transfer of venue.

The Court of Appeals granted the defendants' petition. The court ruled that venue cannot be based on the residence of a defendant ad litem, but more significantly for the

present case, also held that the defendants had not waived their challenge to venue and had satisfied their burden of proof:

> Nor can we find any fault with relator's challenge to venue. It is true that the party challenging venue bears the burden of persuasion and proof, if proof is necessary, that venue is improper. Coale v. Grady Brothers Siding and Remodeling, Inc., 865 S.W.2d 887, 889 (Mo. App. S.D. 1993); Pierce v. Pierce, 621 S.W.2d 530, 531 (Mo. App. 1981). There is some authority in Missouri that the plaintiff is not required to plead venue. Wood v. Wood, 716 S.W.2d 491, 494 (Mo. App. S.D. 1986). In that case, our colleagues in the Southern District held a petition was not defective despite the failure to plead venue. As their sole authority, they cited J. Devine, Missouri Civil Pleading and Practice, sections 11-14 (1986). However, it is also true that Rule 51.045 requires a motion to transfer venue be filed within the time allowed for a responsive pleading or venue is waived by operation of that rule and Rule 55.27(g). Clearly such rules anticipate that a basis for venue will be pleaded, as indeed it was here. When a basis for venue is pleaded, we can hardly fault relator for adducing evidence in opposition to the pleaded basis. Relator correctly, and timely, challenged venue predicated on the basis of the defendant ad litem's residence. Respondent would fault relator for not disproving all possible bases for venue, whether pleaded or not. While relator bore the burden of persuasion and proof, it does not need to disprove bases for venue that were never

> pleaded to meet those burdens. Nor do we find any reason to disallow relator's supplementation of the record where respondent seeks to uphold venue on a basis that was never pleaded.

Etter, 70 S.W.3d at 31-32.

Etter is directly apposite and indicates that prohibition is warranted in the present case. Under Etter, Respondent's venue ruling of December 13, 2001 was incorrect. Plaintiff never pleaded § 508.010(6) as a basis for venue, specifically stated that § 508.010(6) does not apply, and never contended that his cause of action accrued in the City of St. Louis. Consequently, Defendants were not required to prove that venue is improper in the City of St. Louis under § 508.010(6). Etter, 70 S.W.3d at 32 ("While relator bore the burden of persuasion and proof, it does not need to disprove bases for venue that were never pleaded to meet those burdens.").

In his Reply to Petition for a Writ of Prohibition (pp. 3-4), Plaintiff argues that "Etter is not dispositive" because: (a) the plaintiff in Etter pleaded a basis for venue whereas Plaintiff here did not plead any basis for venue; and (b) the court in Etter stated that "[t]here is some authority in Missouri that the plaintiff is not required to plead venue." 70 S.W.3d at 31. Yet, Etter plainly holds that Missouri Rules of Civil Procedure 51.045 and 55.27(g) "anticipate that a basis for venue will be pleaded" and that a defendant "does not need to disprove bases for venue that were never pleaded." 70 S.W.3d at 32. Plaintiff offers no reason why a defendant should be required to disprove possible bases for venue that were never pleaded when a plaintiff does not plead any basis for venue but is not required to do so when a plaintiff does plead a basis for venue.

Rule 51.045 supports the holding in Etter and further refutes Plaintiff's argument. Rule 51.045 governs when venue is challenged as improper and provides in pertinent part:

> (a) 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. Any motion to transfer venue shall be filed:
>
> (1) Within the time allowed for responding to an adverse party's pleading, or
>
> (2) If no responsive pleading is permitted, within thirty days after service of the last pleading.
>
> If a motion to transfer venue is not timely filed, the issue of improper venue is waived.
>
> (b) Within ten days after the filing of a motion to transfer for improper venue, an opposing party may file a reply denying the allegations in the motion to transfer. If a reply is filed, the court shall determine the issue.
>
> If the issue is determined in favor of the movant or if no reply is filed, a transfer of venue shall be ordered to a court where venue is proper….
>
> * * *

Plaintiff predicated venue solely on the basis of § 508.010(4) and the fact that his original petition named only a nonresident (Bierman) as a defendant. (A11-14; Ex. 4.)

Defendants correctly and timely challenged Plaintiff's basis of venue in accordance with Rule 51.045(a). (A8-10, 31-51; Exs. 3 and 10.) Defendants alleged that venue is proper only in St. Louis County under either § 508.010(3) or § 508.010(6). (A8-10, 31-51; Exs. 3 and 10.)

Under Rule 51.045(b), Plaintiff was required to file a reply denying those allegations in Defendants' motion with which he disagreed. In his response, Plaintiffs stated: "Defendant's reliance upon Section 508.010(3) and (6) RSMo. is misplaced. These sub-paragraphs of Missouri's General Venue Statute do not apply in the present case . . . ." (A13; Ex. 4, p. 3.) Plaintiff made no allegation that his cause of action accrued in the City of St. Louis. Instead, Plaintiff relied solely on § 508.010(4) to support his claim that venue is proper in the City of St. Louis. (A11-14; Ex. 4.) Indeed, Respondent acknowledged in her order of July 9, 2001 that "Plaintiffs brought the present case in the City of St. Louis under § 508.010(4)." (A16; Ex. 5, p. 2.) As discussed above, Linthicum refuted Plaintiff's attempt to base venue in the City of St. Louis under § 508.010(4) and indicates that there is no basis for venue in the City of St. Louis.

Rule 51.045 is similar to the rules governing pleadings and, therefore, should be construed similarly. Rule 51.045(a) requires a defendant to assert allegations that venue is improper. Rule 51.045(b) requires the plaintiff to deny those allegations in the defendant's motion with which he disagrees (much like Rule 55.07 requires the defendant to deny those allegations in the plaintiff's petition with which he disagrees). 51.045(b) further requires the trial court to transfer venue if a plaintiff does not file a reply to the

defendant's motion challenging venue (much like Rule 74.05(a) provides for judgment by default if a defendant does not answer the plaintiff's petition).

Under the rules governing pleadings, "[a]llegations in a petition which are admitted in an answer constitute a judicial admission. A judicial admission waives or dispenses with the production of evidence and concedes for the purpose of the litigation that a certain proposition is true." Bachman v. City of St. Louis, 868 S.W.2d 199, 201 (Mo. App. 1994) (citations and quotations omitted) (admission in defendants' answers that ordinance was codified in city's revised code, a copy of which was set forth in plaintiffs' petition, constituted judicial admission). Parties "are bound by their pleadings." Webb v. Finley, 806 S.W.2d 501, 503 (Mo. App. 1991).

Just as a defendant is bound by his answer to a plaintiff's petition, a plaintiff should be bound by his reply to a defendant's motion challenging venue and should be deemed to have admitted those allegations in the motion that he does not deny. This is what is intended under the procedure set forth in Rule 51.045. Because Rule 51.045 requires a trial court to transfer venue if the plaintiff files no reply at all to a motion challenging venue, the rule surely also contemplates that the plaintiff will be bound by his reply and the admissions contained therein.

Defendants alleged in their motions to dismiss and/or transfer venue that venue is not proper in the City of St. Louis under § 508.010(6). (A8-10, 31-51; Exs. 3 and 10.) Plaintiff did not deny that allegation, but specifically stated that § 508.010(6) does not apply. (A13; Ex. 4, p. 3.) Plaintiff's reply contains judicial admissions that § 508.010(6) does not provide a basis for venue in the City of St. Louis. Those judicial admissions

waived and dispensed with any need for Defendants to produce evidence proving that Plaintiff's cause of action did not accrue in the City of St. Louis.

In denying Defendants' venue motions on December 13, 2001, Respondent relied on Coale v. Grady Bros. Siding and Remodeling, Inc., 865 S.W.2d 887, 889 (Mo. App. 1993), for the proposition that "Defendants bear the burdens of persuasion and proof, to show that venue is in fact improper." (A89; Ex. 12, p. 3). Respondent's reliance on Coale, however, is misplaced. The correct rule in Missouri is that "the party challenging venue bears the burden of persuasion and proof, if proof is necessary, that venue is improper." Etter, 70 S.W.3d at 31 (emphasis added); see also Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., 785 S.W.2d 649, 650 (Mo. App. 1990) ("The party attacking venue has the burden of persuasion and proof, if proof is necessary, that venue is improper.") (emphasis added); Pierce v. Pierce, 621 S.W.2d 530, 531 (Mo. App. 1981) ("A party attacking venue has the burden of persuasion and proof, if proof is necessary.") (emphasis added); Glick v. Ballentine Produce Inc., 396 S.W.2d 609, 612 (Mo. 1965). In the present case, Plaintiff's reply to Defendants' motions to dismiss and/or transfer venue under Rule 51.045 contains judicial admissions that § 508.010(6) does not provide a basis for venue in the City of St. Louis. Those judicial admissions waived and dispensed with any need for Defendants to produce evidence proving that Plaintiff's cause of action did not accrue in the City of St. Louis.

Coale predates Rule 51.045 and is distinguishable from the present case. In Coale, the plaintiff's petition specifically alleged that the cause of action accrued in the county where the action was brought. The court noted that "[s]uch an allegation is sufficient to

establish proper venue in the absence of a contrary showing" and that the "[d]efendant presented nothing to the trial court to indicate that this allegation was incorrect." 865 S.W.2d at 889. Accordingly, the court held that the trial court properly denied the defendant's venue motion.

In the present case, neither Plaintiff's original petition, nor his first amended petition, nor any other paper submitted by him alleges that his cause of action accrued in the City of St. Louis. Thus, unlike in Coale, there was no allegation by Plaintiff sufficient to establish venue in the City of St. Louis under § 508.010(6) absent a contrary showing by Defendants. (Moreover, unlike the defendant in Coale, Defendants here presented unrebutted affidavits to Respondent conclusively demonstrating that Plaintiff's cause of action accrued in St. Louis County. (A97-99; Exs. D and E to Ex. 13.)) Coale, therefore, is inapposite.

If Plaintiff intended to rely on § 508.010(6) as a basis for venue in the City of St. Louis, it was incumbent upon him to so state in his reply to Defendants' motions to dismiss and/or transfer venue. Plaintiff, however, disclaimed reliance on § 508.010(6) and has never contended at any time that his cause of action accrued in the City of St. Louis. (A11-14; Ex. 4.) Indeed, if Plaintiff thought that venue lies in the City of St. Louis under § 508.010(6), there would have been no reason for Plaintiff to perform the "two-step" of filing his amended petition, which added the two resident defendants, five days after filing his original petition, which named only the nonresident defendant. (A1-7; Exs. 1-2.)

Respondent clearly erred by ruling that Defendants failed to prove that venue is improper in the City of St. Louis under § 508.010(6). This Court should issue a writ of prohibition directing Respondent to transfer this case to the Circuit Court of St. Louis County.

**D. Respondent was required to allow Defendants' supplementation of the record showing that all of the care at issue was provided in St. Louis County and that Plaintiff's cause of action did not accrue in the City of St. Louis after Respondent unexpectedly sought to uphold venue in the City of St. Louis on the unpleaded basis of § 508.010(6).**

After Respondent unexpectedly sought to uphold venue under § 508.010(6), a basis that Plaintiff never pleaded or raised, Defendants asked for reconsideration and provided Respondent with unrebutted affidavits establishing that all of the care at issue was performed in St. Louis County, which proves that Plaintiff's cause of action accrued outside of the City of St. Louis. See Ray v. Lake Chevrolet Oldsmobile, Inc., 714 S.W.2d 928, 931 (Mo. App. 1986) ("[S]ince the affidavit accompanying defendant's [venue] motion was undenied, it constituted competent evidence as the facts stated therein, and this court has the authority to find that the trial court's denial of defendant's motion is against the weight of the evidence, so long as this court does so with caution and with a firm belief that the decree or judgment is wrong.") (citations and quotations omitted). Nevertheless, on January 24, 2002, Respondent again denied transfer. Without explicitly stating so, Respondent apparently refused to consider Defendants' affidavits as

untimely. Respondent's failure to consider Defendants' affidavits was erroneous. Etter holds that when a trial court seeks to uphold venue on a basis that was never pleaded, the defendant should be allowed to supplement the record to disprove that basis for venue. 70 S.W.3d at 32 ("Nor do we find any reason to disallow relator's supplementation of the record where respondent seeks to uphold venue on a basis that was never pleaded.").

Defendants should not be penalized for not submitting their affidavits earlier. When Defendants Chida and UBH filed their first motion to reconsider and Defendant Bierman filed her initial motion to dismiss and/or transfer venue, the venue dispute centered on whether § 508.010(3) or § 508.010(4) applied. Plaintiff had specifically stated in his reply to Defendants' motions to dismiss and/or transfer venue that § 508.010(3) and 508.010(6) do not apply. (A13; Ex. 4, p. 3.) Respondent held in her order of July 9, 2001 that venue was proper under § 508.010(4). (A15-17; Ex. 5.) Accordingly, Defendants had the right to assume that § 508.010(6) was no longer in issue and that proof as to where Plaintiff's cause of action accrued was not necessary. If Plaintiff had asserted that venue was proper under § 508.010(6), Defendants could have (and would have) immediately filed affidavits to demonstrate the opposite.

Promptly after Respondent denied Defendants' venue motions on December 13, 2001 and raised the issue of § 508.010(6), Defendants filed a second motion to reconsider venue on January 3, 2002. (A91-99; Ex. 13.) Defendants submitted unrebutted affidavits conclusively establishing that all of the care at issue was performed in St. Louis County. (A97-99; Exs. D and E to Ex. 13.) Respondent should have considered those affidavits,

concluded that Plaintiff's cause of action accrued in St. Louis County, and transferred this case there. See Etter, 70 S.W.3d at 32.

In his suggestions in opposition to Defendants' writ petition (pp. 3-4), Plaintiff argues, without citation to any pertinent authority, that Defendants were required to present their evidence that Plaintiff's cause of action accrued in St. Louis County before Respondent issued her order of December 13, 2001 and that Defendants' presentation of this undisputed evidence to Respondent after December 13, 2002 was untimely. As Etter makes clear, however, Defendants had no obligation to submit this evidence before Respondent issued her order of December 13, 2001 because Plaintiff has never pleaded § 508.010(6) as a basis for venue and Respondent did not seek to uphold venue on the unpleaded basis of § 508.010(6) until she issued her order of December 13, 2001. Once Respondent unexpectedly sought to uphold venue on the unpleaded basis of § 508.010(6), Defendants had the right to supplement the record with their undisputed affidavits demonstrating that Plaintiff's cause of action accrued in St. Louis County and, consequently, that venue is not proper in the City of St. Louis under § 508.010(6). Etter, 70 S.W.3d at 32.

**E. Plaintiffs' waiver arguments are without merit.**

In response to Defendants' motion to reconsider before the trial court, Plaintiff did not argue that his cause of action accrued in the City of St. Louis, that any of the Missouri resident defendants resides in the City of St. Louis, or that venue is otherwise proper in the City of St. Louis. (A100-112; Ex. 14.) Instead, Plaintiff erroneously argued that

Defendants' motion to reconsider filed on January 3, 2002 was procedurally deficient. (A100-112; Ex. 14.)

First, Plaintiff argued that Respondent could not reconsider her venue ruling. Etter makes clear that a trial court can reconsider its ruling on venue. Indeed, a ruling on a motion to dismiss or transfer for improper venue "is not final until the jurisdiction of the trial court is extinguished by the judgment becoming final and appealable. Until the judgment becomes final, the motion is subject to reconsideration." Pataky v. Missouri Hwy. and Transp. Comm'n, 891 S.W.2d 457, 461 (Mo. App. 1994). Respondent's order denying Defendants' venue motions is interlocutory and subject to change any time before final judgment. (Indeed, Respondent previously reconsidered her order denying transfer after this Court issued its decision in Linthicum.)

Second, Plaintiff argued that Defendants' motion to reconsider was untimely because it was not filed within ten days after Respondent last denied Defendants' venue motions on December 13, 2001. There is no rule providing for such a ten-day limit, however. A party may request that a trial court reconsider an interlocutory ruling, such as an order denying a venue motion, at any time before final judgment.

Defendants' initial motions to transfer venue were timely under Rule 51.045(a). As a result, Defendants could seek reconsideration of Respondent's ruling on their venue motions at any time.

Although Defendants' venue motions are pre-judgment motions and, therefore, subject to reconsideration at any time through final judgment, even post-judgment motions to reconsider that are treated as authorized motions for new trial or to amend the

judgment have a thirty-day time limit. Mo. R. Civ. P. 78.04. Defendants filed their motion to reconsider on January 3, 2002, twenty-one days after Respondent entered her order of December 13, 2001 denying Defendants' venue motions. Rule 78.04 further supports the conclusion that Defendants' motion to reconsider was timely.

Plaintiff invokes Rule 55.25(c), which generally provides that a responsive pleading must be filed within ten days after a trial court denies a Rule 55.27 motion. Rule 55.25(c) only applies to responsive pleadings, not motions. A "pleading" is a paper that asserts a claim or answers a claim. Mo. R. Civ. P. 55.01. Under the Missouri rules, the "pleadings" in a case are the petition, the answer, a reply to any counterclaim, an answer to any cross-claim, any third-party petition, a third-party answer to any third-party petition, and any defense consisting of an affirmative avoidance of a defense alleged in a preceding pleading. Id. A motion to transfer for improper venue (or any Rule 55.27 motion) is not a "pleading" within the meaning of Rule 55.25(c). See Moss v. Home Depot, Inc., 988 S.W.2d 627, 631 n.3 (Mo. App. 1999) ("a motion is not a 'responsive pleading.'"); State ex rel. Meek v. Smith, 974 S.W.2d 656, 657 (Mo. App. 1998) ("[T]he defense of improper venue may be made in a party's responsive pleading or by motion filed within the time allowed for responding to the opposing party's pleading.") (emphasis added) (predating new Rule 51.045); Mo. R. Civ. P. 55.25(c) ("The filing of any motion provided for in Rule 55.27 alters the time fixed for filing any required responsive pleading…"); Mo. R. Civ. P. 55.27(g)(1) (distinguishing between Rule 55.27 motion and responsive pleading). Defendants' motion to reconsider is not a pleading responsive to Plaintiff's first amended petition.

Defendants Chida and UBH filed their answers to Plaintiff's first amended petition on September 4, 2001, over two months before Respondent denied Defendants' venue motions on December 13, 2001. Having already served their answers, Rule 55.25(c) did not require Defendants Chida and UBH to serve another responsive pleading after Respondent denied their venue motions on December 13, 2001.

Plaintiff implicitly concedes this point, but asserts that all of the defendants have waived venue because one of the defendants (Bierman) had not yet filed her answer to Plaintiff's first amended petition when Defendants filed their motion to reconsider on January 3, 2002. (Defendant Bierman filed her answer shortly thereafter and asserted improper venue as a defense.) The problem with Plaintiff's argument, however, is that even if Defendant Bierman had waived her challenge to venue, which she has not because she filed a timely motion to dismiss and/or transfer venue, that would not affect the venue challenges of Defendants Chida and UBH. Because venue is a personal privilege, one defendant's waiver of her challenge to venue does not prejudice another defendant's right to challenge improper venue. Washington Univ. v. ASD Communications, Inc., 821 S.W.2d 895, 896 (Mo. App. 1992) ("OIS could waive venue as to itself, but because venue is a personal privilege, OIS's waiver could not make venue proper as to ASD."); Woodside v. Rizzo, 772 S.W.2d 20, 21 (Mo. App. 1989); State ex rel. Bowden v. Jensen, 359 S.W.2d 343, 345 (Mo. banc 1962).

Third, Plaintiff argued that Defendants waived venue because Defendants filed deposition notices for Plaintiff and one of their attorneys withdrew his appearance after Defendants filed their venue motions and Respondent denied those motions on December

13, 2001. In State ex rel. Steinhorn v. Forder, 792 S.W.2d 51, 53 (Mo. App. 1990), the court rejected this very argument and held that a defendant does not waive his challenge to improper venue by defending the case on the merits by conducting discovery after a trial court denies his challenge to venue.

Defendants filed a challenge to venue and obtained Respondent's ruling on that challenge before filing their notices of deposition and before one of their attorneys filed his withdrawal of appearance. Consequently, Defendants have not waived their challenge to venue.

### F. Linthicum and Etter should not be overruled.

In his Reply to Petition for a Writ of Prohibition (pp. 4-5), Plaintiff asserts that Linthicum and Etter "should be overturned, for the reasons eloquently stated in the separate opinions of Judges Stith and White." However, Linthicum was correctly decided and should be followed. Moreover, since Linthicum was decided, two of the three dissenting judges in Linthicum (Judges Wolff and Stith) have joined in subsequent decisions of this Court issuing peremptory writs of mandamus and directing trial courts to determine venue in accord with Linthicum. See State ex rel. Landstar Ranger, Inc. v. Dean, 62 S.W.3d 405 (Mo. banc 2001); State ex rel. Miracle Recreation Equipment Co. v. O'Malley, 62 S.W.3d 407 (Mo. banc 2001).

Nor is there any reason to overrule Etter.[3] Etter is based on a plain reading of Missouri Rules of Civil Procedure 51.045 and 55.27(g) and reflects sound policy. By requiring plaintiffs to plead the basis for venue and not requiring defendants to disprove possible bases of venue that were not pleaded, Etter provides clear rules for resolving venue disputes and prevents such venue disputes from becoming a game of cat and mouse, as happened in the present case.

[3] Not surprisingly, the dissenting opinions in Linthicum did not address the issues in Etter given that Linthicum was decided over three months before Etter was decided.

## CONCLUSION

"If venue is improper in the county where the action is brought, prohibition lies to bar the trial court from taking any further action, except to transfer the case to the county of proper venue." State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28, 32 (Mo. App. 2002); see also State ex rel. SSM Health Care St. Louis v. Neill, --- S.W.3d ---, 2002 WL 1364121, *2 (Mo. banc June 25, 2002) (same). In the present case, there is no basis for venue in the City of St. Louis, venue lies exclusively in St. Louis County, and Defendants did not waive their challenge to venue. Accordingly, this Court should issue a writ of prohibition barring Respondent from taking any further action except to transfer this case to the Circuit Court of St. Louis County.

Respectfully submitted,

THOMPSON COBURN LLP

By_____

Allen D. Allred, #26367
Jeffrey R. Fink, #44963
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
Fax: 314-552-7000

Attorneys for Relators-Defendants
Rebecca Bierman, Thomas Chida, and
United Behavioral Health, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing brief in paper form and one copy of the foregoing brief on disk have been mailed, United States postage prepaid, on July 24, 2002 to:

The Honorable Margaret M. Neill
Presiding Judge
Circuit Court of the City of St. Louis, Division 1
Civil Courts Building
10 N. Tucker, Fourth Floor
St. Louis, MO 63101

Gregory T. Mueller
Attorney for Plaintiff
308 North 21st Street, Suite 401
St. Louis, MO 63103-1600

_____

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rules 55.03 and 84.06, is proportionately spaced, using Times New Roman, 13 point type, and contains 9,317 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), signature block, and appendix.

I also certify that the computer diskettes that I am providing have been scanned for viruses and have been found to be virus-free.