IN THE SUPREME COURT OF MISSOURI

No. SC 84306

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.

In Opposition to a Petition for a Writ of Prohibition

BRIEF OF RESPONDENT PATRICK DIVEN

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INTRODUCTION

Venue properly lies in the City of St. Louis. The rulings of Respondent The Honorable Margaret M. Neill, Circuit Judge, are neither erroneous nor contrary to Missouri law. Rather, respondent correctly ruled that relators failed to timely carry their dual burdens of proof and persuasion that all bases of venue were not proper in the City of St. Louis.

Relators had the dual burdens of proof and persuasion. Proof was necessary because the impropriety of venue was not readily ascertainable from the petitions alone. Because plaintiff did not plead a basis of venue, it was relators= burdens of proof and persuasion to rebut all bases of venue. *Cuba=s United Ready Mix, Inc. v. Bock Concrete Foundations, Inc.*, 785 S.W.2d 649, 650 (Mo.App. S.D. 1990). Relators did not provide any evidence opposing the possible bases of venue in the City of St. Louis. The trial court properly denied relators three venue motions. Further, the trial court was not obligated to allow relators supplementation and reconsideration of the record in a subsequent venue hearing.

For these reasons and the reasons stated below, relators= *Petition for Writ of Prohibition* should be denied.

JURISDICTIONAL STATEMENT

This case does not involve the validity of a treaty or statute of the United States, the validity of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office, or the imposition of the death penalty. Pursuant to Article V, Section 4.1, of the Missouri Constitution, the Missouri Supreme Court has jurisdiction of this appeal. The Circuit Court of the City of St. Louis is within the territorial jurisdiction of this honorable court.

STATEMENT OF FACTS

Respondent adopts and incorporates the Statement of Facts of relators, except as to underlined portion of the following paragraph from relators= Statement of Facts:

> On June 1, 2001, Defendants Chida and UBH filed a timely motion to dismiss and/or transfer venue. (A8-10; Ex. 3)[1]. (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. Sec 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 Sec 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.)

(Brief of Relators, Statement of Facts, p. 11). (Underlying supplied). This misstatement is also made in relators= Introduction. (Brief of Relators, Introduction, pp. 6-7).

In fact, nowhere in relators= motions to transfer (A8-10, and 31 - 51; Exs. 3, and 10) or in relators motion to reconsider (A52 - 86; Ex. 11) did relators allege that under RSMo Sec. 508.010(6) venue was not proper Abecause Plaintiff=s cause of action accrued in St. Louis County in that all of the medical care

[1] All exhibits referenced by respondent herein are attached to relators= *Petition for Writ of Prohibition* and are also included in the appendix to relators= brief.

at issue was provided there.@ (Brief of Relators, pp. 6-7, and 11).

Relators misstate this material fact and continue to rely upon this misstatement of material fact throughout their brief. The motions referenced by relators (A8-10, 31 - 51, 52 - 86; Exs. 3, 10 and 11) do not contain allegations that venue was not proper Abecause Plaintiff=s cause of action accrued in St. Louis County in that all of the medical care at issue was provided there.@ (Brief of Relators, p. 11). No where in those motions do relators allege by allegation or by affidavit any evidence as to the place the cause of action accrued.

On January 3, 2002, relators first make this allegation to the trial court **B** that all the care at issue for Gary Diven was performed at UBH=s facilities in St. Louis County. The first time that relators make this allegation is in their second (2^{nd}) motion to reconsider respondent=s orders denying their venue motions. (A97 - 99; Ex. 13). At the time this allegation is made, it is made in the context of a motion to reconsider, not a motion for re-hearing. (A97 - 99; Ex. 13). It is also the fourth (4^{th}) motion concerning venue brought by the relators. This fourth (4^{th}) motion, along with the previous three motions, was denied.

This writ, relators= third (3^{rd}), now follows.

POINTS RELIED ON

POINT I

Respondent did not error in her orders denying relators= motions to transfer venue and motions to reconsider because relators failed to carry their burdens of proof and persuasion to rebut all of the bases for venue in the City of St. Louis.

Cuba=s United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., 785 S.W.2d 649 (Mo.App. S.D. 1990).

State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28,31 (Mo. App. E.D. 2002).

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

ARGUMENT

POINT I

Respondent did not error in her orders denying relators= motions to transfer venue and motions to reconsider because relators failed to carry their burdens of proof and persuasion to rebut all of the bases for venue in the City of St. Louis.

The issue before this court is not an academic exercise to now determine where venue lies. The issue before this court is not to review all the newly discovered facts and apply the recently handed down venue decisions in order to decide in retrospect where venue properly lies. Rather, the issue before this court is to decide whether the trial court erred. The trial court did not error by denying the relators= motions to transfer and motions to reconsider venue. The trial court did not err because the relators failed to present any evidence to the trial court concerning the place of accrual of the cause of action and plaintiff had made no such allegations in this regard in their petitions. Since relators failed to demonstrate to the trial court that all bases of venue were improper and relators had the burdens of proof and persuasion, the trial court=s denial to transfer venue should be affirmed.

A. Relators bear the burdens of proof and persuasion that venue was improper.

AIt is true that the party challenging venue bears the burden of persuasion and proof, if proof is necessary, that venue is improper.@ *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28, 31 (Mo.App. E.D. 2002). AThe party attacking improper venue has the burden of persuasion and proof that venue is

improper. *Coale v. Grady Bros. Siding and Remodeling, Inc.*, 865 S.W.2d 887, 889 (Mo.App. S.D. 1993). AThe party attacking venue has the burden of persuasion and proof, if proof is necessary, that venue is improper.@ *Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc.*, 785 S.W.2d 649, 650 (Mo.App. S.D. 1990). Further, the rule states that relators have the burden of persuasion and proof, Aif proof is necessary,@ that venue is improper. *Cuba's United*, 785 S.W.2d at 650. In the present case, Aproof,@ or some evidence or allegation, is necessary, because venue is not ascertainably improper from the four corners of plaintiff=s petitions.

Clearly, in the present case, based upon case law, relators had the dual burdens of proof and persuasion. Further, relators had the burden to come forward with Aproof,@ or some evidence, demonstrating to the trial court that venue was improper, because the impropriety of venue cannot be ascertained from the four corners of the plaintiff=s petitions. Yet, in the present case, relators came forward with no proof concerning the impropriety of venue for all possible bases of venue.

B. Plaintiff=s petitions did not allege a basis for venue; therefore, relators were required to offer evidence to the trial court satisfying their dual burdens of proof and persuasion that all bases for venue in the City of St. Louis were improper.

Neither the original petition nor the first amended petition contains any allegations pleading a basis for venue. (A1 - 7; Exs. 1 and 2). Clearly, no basis for venue is alleged in either petition. Since no basis for venue was pleaded, relators were required to carry their dual burdens of proof and persuasion, and come forward with some evidence because proof was necessary, to disprove all bases for venue.

A case instructive on the need for a party challenging venue to disprove all bases for venue when

none has been pleaded is *Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc.*, 785 S.W.2d 649, 650 (Mo.App. S.D. 1990). There, the Southern District stated that in order to prevail on a motion challenging venue, defendant must offer testimony disproving all possible bases of venue, or that venue motion fails.

In *Cuba=s United*, no basis for venue was pleaded. At the trial court level, the defendant challenged venue by providing testimony from the defendant=s president. The defendant=s president testified concerning the counties in which defendant maintained an office, a principal place of business, and a general place of business. But the defendant=s president never offered any testimony concerning the county where the cause of action accrued, regardless of the residence of the parties. The *Cuba=s United* Court concluded that without such testimony, defendant=s motion to transfer necessarily failed because the record could not disprove all bases of venue:

> The testimony of Ben Bock was offered by defendant in support of its motion. Bock testified that he resided in Gasconade County and was president of defendant Bock Concrete Foundations, Inc. Its office and principal place of business was also in Gasconade County. He was served in Crawford County and defendant corporation did not >maintain a general place of business in Crawford County, Missouri.=
>
> This does not establish that venue was improper in Crawford County where the statements may have been made and where plaintiff apparently was located. Venue could be proper under ' 508.010(1) or ' 508.010(6), RSMo 1986. As the record does not show that venue was

> improper, we necessarily conclude that the court dismissed the petition for failure to state a claim on which relief can be granted.

Cuba's United, 785 S.W.2d at 650. The *Cuba=s United* Court could not conclude that the trial court dismissed for improper venue because the defendant did not come forward with evidence as to where the cause of action accrued. The court was constrained to conclude that the cause was dismissed on other grounds.

In the present case, relators= challenges to venue similarly fail. Relators never offered evidence -- any evidence -- in their motions challenging venue (A8-10, and 31 - 51; Exs. 3 and 10) or their motion to reconsider (A52 - 86; Ex. 11) as to where the cause of action accrued. In fact, on December 13, 2001, the trial court issued an Order specifically finding that the relators failed to offer such evidence as to where the cause of action accrued:

> While Dr. Bierman had indicated that Plaintiff was >obviously aware= that the cause of action accrued in St. Louis County and that >[e]ven the most cursory view of the medical records or the slightest discussion would have revealed this,= there is no allegation to that effect in the petition and defendants have presented no such evidence in their venue motions challenging venue as to the amended petition, to substantiate this conclusion.

(A89 - 90). As in *Cuba=s United*, AVenue could be proper under ' 508.010(1) or ' 508.010(6), RSMo 1986. As the record does not show that venue was improper, we necessarily conclude that the [trial] court...@ did not dismiss/transfer the cause for improper venue. *Cuba's United*, 785 S.W.2d at 650.

Plaintiff=s petitions did not allege a basis for venue. Since no basis for venue was pleaded and since the propriety of venue could not be determined from the four corners of the petitions, relators were required to offer Aproof,@ or some evidence, to satisfy their dual burden of proof and persuasion to disprove all of the possible bases of venue, or their venue challenges fail. *Cuba's United*, 785 S.W.2d at 650. At the trial court level, the trial court specifically found that relators failed to offer any such evidence to substantiate the conclusion that the cause of action did not accrue in the City of St. Louis. (A89 - 90). As such, for the reasons set forth in *Cuba=s United*, relators= challenges to venue fail.

In support of their position, relators rely abundantly upon *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28 (Mo.App. E.D. 2002). In their TABLE OF AUTHORITIES, this case is cited as Apassim.@ The *Etter* case, however, is not Aapposite@ and it does not Aindicate that prohibition is warranted in the present case.@ (Brief of Relators, p. 24). It is a misreading or misunderstanding of *Etter* to say: AUnder 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 Plaintiff=s cause of action did not accrue in the City of St. Louis on the unpleaded basis of Sec. 508.010(6).@ (Brief of Relators, p. 8). In fact, the *Etter* case is factually distinguishable and legally unsupporting of relators= positions.

In *Etter*, unlike the present case, the plaintiff there pleaded a basis for venue. The *Etter* Court specifically found: AClearly such rules anticipate that a basis for venue will be pleaded, as indeed it [a basis for venue] was [pleaded] here.@ *Etter*, 70 S.W.3d at 31. In *Etter*, the appellate court stated that the pleaded basis for venue was the residence of a defendant ad litem. *Etter*, 70 S.W.3d at 30.

The *Etter* Court further held that when a basis for venue has been pleaded, the party challenging venue does not need to disprove all other possible bases for venue; rather, when a basis for venue has been

pleaded, the party challenging venue need only disprove the pleaded basis: AWhen a basis for venue is pleaded, we can hardly fault relator for adducing evidence in opposition to the pleaded basis. ... 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.@ *Etter*, 70 S.W.3d at 31.

The present case differs factually from *Etter*. In the present case, neither the original petition nor the first amended petition contains any allegations pleading a basis for venue. (A1 - 7; Exs. 1 and 2). No basis for venue was pleaded. For this reason alone, *Etter* does not apply to the facts of the present case.

Further, in the present case, plaintiff=s petitions allow for two possible bases for venue (neither of which were pleaded) in the City of St. Louis. And unlike *Etter*, relators here have chosen in their motions to transfer venue and their motion to reconsider venue (A8-10, 31 - 51, 52 - 86; Exs. 3, 10 and 11) to disprove only one of the two bases of venue: residences of the parties. Under these facts, the more appropriate law is set forth in *Cuba=s United*, not *Etter*.

C. Respondent was not required to allow relators to supplement the record to show 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.

A[T]he 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. These dual burdens have real meaning and import. These dual burdens placed upon a litigant challenging venue an obligation. Even on playgrounds, school children do not readily accept Ado-overs@ after an unsatisfying effort. Even less countenance should be given to a second, third and fourth request for a Ado-over@ for a litigant in a court of law who failed on his first three

attempts to properly present the facts necessary to contest venue. If the burdens of proof and persuasion are to have meaning, a party must not be granted countless bites at the venue transfer apple.

Again, relators rely upon *Etter* in support of their claim that the trial court erred. The *Etter* Court specifically found supplementation of the record was allowable when the trial court sought to uphold venue on a basis that was never pleaded: ANor 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*, S.W.3d at 32. This is the only legal precedent for supplementation of the record; and it is factually inapplicable in the present case.

Etter stands for the proposition that if a basis for venue has been pleaded, the defendant need only adduce evidence in opposition to the pleaded basis. *Etter*, 70 S.W.3d at 31. But here, no basis for venue was pleaded. *Etter* also stands for the proposition that supplementation of the record is to be allowed when the trial court seeks to uphold venue on a basis that was never pleaded: ANor 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*, S.W.3d at 32. But again, no basis for venue has been pleaded in this case, and therefore supplementation under *Etter* is not allowed.

Relators= *Petition for a Writ of Prohibition* seeks not to correct trial court error, but to correct the errors and omissions of relators= counsel. Relators here cannot rely upon *Etter* or prohibition to absolve them of their own failure to meet the legally imposed burdens of proof and persuasion to disprove the possible bases of venue. Prohibition lies to correct jurisdictional errors by trial courts, not evidentiary failings of by trial counsels.

D. Respondent was not required to allow relators to re-hear relators= motions

challenging venue to show 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.

On January 3, 2002, relators filed with the trial court a second motion to reconsider the trial court=s previous orders denying relators= venue motions. (A91 - 99; Ex. 13). That motion (A91 - 99) was the fourth (4th) motion concerning venue filed by relators. Attached to that motion was **B** for the first time submitted before the trial court **B** affidavits stating that all of the care at issue for Gary Diven, deceased, occurred in St. Louis County. (A97 - 99; Exs. D and E to Ex. 13). Relators never included these affidavits, or any other evidence concerning where the cause of action accrued, for the trial court for consideration with the three previous motions on venue.

Relators= fourth (4th) motion was for reconsideration. (A91 - 99; Ex. 13). The trial court only erred if the fourth (4th) motion is viewed as a new hearing on the merits. It, however, is not a new hearing, but a motion to reconsider. The previous three motions were correctly ruled upon by the trial court because the relators failed to offer any evidence as to where the cause of action accrued. What relators actually wanted was another bite at the venue apple. What relators asked for was reconsideration of the previous denials. The trial court ruled that the previous motions were correctly denied, for the reasons stated above.

Clearly, *Etter* does not stand for the proposition that every party challenging venue can do so piecemeal until he gets it right. This would invite multiple hearings and thwart judicial economy. *Etter* also does stand for the proposition that the trial court must re-hear a venue motion when a defendant failed to present all the available evidence. Again, this would invite piecemeal venue motions and thwart judicial economy.

In their brief, relators recognize that their venue challenges failed because their motions (Exs. 3, 10,

and 11) never contained an allegation or any evidence concerning where the cause of action accrued. Relators recognize that at the trial court level, relators never defeated all bases of venue, and therefore their motions to transfer should have failed. In their brief, relators tellingly pray: ADefendants should not be penalized for not submitting their affidavits earlier.@ (Brief of Relators, p. 31). Relators should be penalized for not submitting their affidavits earlier. Relators bore the burdens of proof and persuasion. Courts penalize litigants all the time for not being timely.

In their brief, relators also tellingly claim that A... Defendants had the right to assume that Sec 508.010(6) was no longer in issue and that proof as to where Plaintiff=s cause of action accrued was not necessary.@ (Brief of Relators, p. 31). Relators have no such right to Aassume@ in a venue motion that a basis for venue was not at issue. There can be no assumption of venue facts in a venue motion before a court of law. Again, relators bore the burdens of proof and persuasion.

Relators further plea: AIf Plaintiff had asserted that venue was proper under Sec. 508.010(6), Defendants could have (and would have) immediately filed affidavits to demonstrate the opposite.@ (Brief of Respondent, p. 31). Well, plaintiff did not plead a basis for venue. Relators are trying to shift the burdens of proof and persuasion to the respondent or to the plaintiff. This is not trial court error. This is the error of a party-defendant.

Prohibition is an independent proceeding to prevent judicial proceedings that lack jurisdiction. AA basic purpose of prohibition is to confine an inferior court to its proper jurisdiction.@ *State ex rel. McCulloch v. Schiff*, 852 S.W.2d 392, 394 (Mo.App. E.D. 1993).

Here, as in *Cuba=s United*, evidence of residences alone with evidence of the place the cause of action accrued A...does not establish that venue was improper in Crawford County...@ or the City of St.

Louis. AVenue could be proper under ' 508.010(1) or ' 508.010(6), RSMo 1986. As the record does not show that venue was improper, we necessarily conclude that the [trial] court...@ could not dismiss/transfer the cause for improper venue. *Cuba's United*, 785 S.W.2d at 650. So too in the present case, as the record does not establish that venue was improper, this court should necessarily conclude that the trial court=s denial to transfer venue was proper.

Relators had the dual burdens of proof and persuasion. Proof was necessary because the impropriety of venue was not readily ascertainable from the petitions alone. Because plaintiff did not plead a basis of venue, it was relators= burdens of proof and persuasion to rebut all bases of venue. *Cuba's United*, 785 S.W.2d at 650. Relators did not provide any evidence opposing all possible bases of venue in the City of St. Louis. The trial court properly denied relators three venue motions. Further, the trial court was not obligated to allow relators supplementation of the record.

In the Alternative,

In the alternative, *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28 (Mo.App. E.D. 2002), and *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo.banc 2001) should be overturned, for the reasons eloquently stated in the separate opinions of Judges Stith and White.

CONCLUSION

Relators had the dual burdens of proof and persuasion. Proof was necessary because the impropriety of venue was not readily ascertainable from the petitions alone. Because plaintiff did not plead a basis of venue, it was relators= burdens of proof and persuasion to rebut all bases of venue. *Cuba's United*, 785 S.W.2d at 650. Relators did not provide any evidence opposing the possible bases of venue

in the City of St. Louis. The trial court properly denied relators three venue motions. Further, the trial court was not obligation to allow relators supplementation and reconsideration of the record. This court should similarly rule. For these reasons and the reasons stated above, relators= *Petition for Writ of Prohibition* should be denied.

Respectfully submitted,

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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 August _____, 2002 to:

The Honorable Margaret M. Neill
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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 _____ 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