IN THE
SUPREME COURT OF MISSOURI

No. SC96718

STATE ex rel. ABBOTT LABORATORIES INC.

Relator,

v.

THE HONORABLE STEVEN R. OHMER,

Respondent.

Writ of Prohibition

BRIEF OF RELATOR ABBOTT LABORATORIES INC.

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JURISDICTIONAL STATEMENT

Upon application of Relator Abbott Laboratories Inc. ("Abbott"), this Court issued a Preliminary Writ of Prohibition on October 26, 2017. This Court has jurisdiction to hear this Writ pursuant to Article V § 4.1 of the Missouri Constitution. Abbott seeks a Permanent Order of Prohibition to prevent the Honorable Steven R. Ohmer from enforcing his Order denying Abbott's motion to sever the claims of plaintiff Mariah Lopez from the underlying action and transfer it to St. Louis County for improper venue, and directing Respondent to take no action with respect to plaintiff Mariah Lopez's claims other than to sever them from the underlying action and transfer them to St. Louis County.

INTRODUCTION

This writ petition picks up where *Schmidt v. Abbott Labs. Inc.*, No. SC96151 (Mo. Sept. 12, 2017), left off and gives the Court an opportunity to definitively address the joinder and venue practices raised in that appeal.

Like the plaintiff in *Schmidt*, Plaintiff Mariah Lopez has no connection to Missouri. She is a Georgia citizen allegedly born with birth defects in Georgia after her mother took anti-seizure medication in Georgia prescribed by a Georgia doctor and sold by Abbott, a company headquartered in Illinois. Despite the absence of any connection to the City of St. Louis, Plaintiff joined with the plaintiff in *Schmidt*, eighteen other out-of-state plaintiffs, and four Missouri plaintiffs to file a single case in the Circuit Court for the City of St. Louis. In the same orders at issue in *Schmidt*, the trial court denied motions to sever and transfer for improper venue, and then ordered the parties to select individual plaintiffs for discovery and trial. After the *Schmidt* trial, Lopez's case was scheduled for the second separate trial. In all practical respects, Lopez's case has been severed from the cases of the other 23 plaintiffs. Yet, the trial court—contrary to the clear guidance provided by the concurring opinion in *Schmidt*—refused to sever Lopez's case.

This case thus gives the Court the chance to resolve the joinder and venue issues in a writ context without the post-trial overhang of the requirement of prejudice the majority held applicable in *Schmidt*. As indicated in *Schmidt*, these issues are "better raised in the pretrial writ context." Here, there has been no trial yet and no final judgment; the Rule 84.13 analysis dispositive in the *Schmidt* decision is inapplicable.

The Court should make the preliminary writ permanent. Lopez's claims have no connection to the City of St. Louis. Joinder and venue were improper at the commencement of the case, and now that Lopez's claims have been separated for discovery and trial, maintaining joinder at this stage serves no purpose whatsoever. There are no efficiencies or conveniences to be gained from joinder where Lopez's case is now proceeding entirely separately from the cases of the other plaintiffs. Her case has been effectively severed so that a re-determination of venue and transfer of her case is plainly required under Section 508.012. Even if it were deemed to still be joined, transfer is also required pursuant to Section 508.010.5 and Rule 51.01's admonition that joinder cannot be used to extend venue for the same reasons argued, but not decided, in *Schmidt*.

STATEMENT OF FACTS

A. Plaintiffs' Petition Joined the Claims of 24 Sets of Plaintiffs from 13 States.

The underlying lawsuit was filed in the Circuit Court of the City of St. Louis on May 21, 2012. (Appendix ("A") 1). In the initial action, 43 individuals, consisting of 24 children ("Child Plaintiffs") and 19 parents ("Parent Plaintiffs"), from 13 different states, brought claims against Abbott.[1] The Petition alleges that the Child Plaintiffs—who were conceived and born over a period spanning three decades—suffered physical and economic injuries as a result of their mothers' ingestion during pregnancy of Depakote, an FDA-approved prescription drug manufactured and marketed by Abbott. (A3-10). Abbott is an Illinois corporation with a registered agent in St. Louis County. (A10-11, 84).

First approved by the FDA more than 35 years ago, Depakote is a life-saving drug used to treat serious health conditions, including certain types of epilepsy and bipolar disorder. (A13, 15). The injuries alleged to stem from Depakote involve a variety of body systems. (A13-14). Plaintiffs' Petition sounds in multiple claims—strict products liability, negligence, gross negligence, breach of implied warranty, breach of express warranty, misrepresentation by omission, fraud and misrepresentation, and negligent and intentional infliction of emotional distress. (A18-27).

[1] The 43 Plaintiffs identified in the Petition comprise 24 "sets" of plaintiffs. Abbott regards a set of plaintiffs as (1) a Plaintiff with an alleged Depakote-related birth defect, who may be a minor or may have reached the age of majority, *i.e.*, the persons to whom the Petition refers as "Injured Children" (A10) and who are described in this Motion as "Child Plaintiffs," and (2) any adult Plaintiff asserting representative, derivative, and/or individual claims in connection with such an "Injured Child" ("Parent Plaintiffs").

Only one family, consisting of twin Child Plaintiffs Jerricka and Jerrinee Marshall, reside in the City of St. Louis. (A7-8). Two other sets of plaintiffs live in Missouri, but not in the City of St. Louis. (A4, 7). The non-Missouri plaintiffs reside in Texas, Oklahoma, Georgia, Montana, New York, Florida, Pennsylvania, North Carolina, Louisiana, Illinois, Tennessee, and Minnesota. (A3-10).

B. Plaintiff Mariah Lopez's Claims Have No Connection to the City of St. Louis or the State of Missouri.

With respect to Mariah Lopez, it is undisputed that she was not injured in Missouri, has never resided in Missouri, and has never received treatment or other medical care in Missouri. (A300-305; *see also* A6). Moreover, her mother (Kathy Muller), who took Depakote, has never been treated for her seizure disorder in Missouri and has never been prescribed Depakote in Missouri. (*Id.*) There is no dispute that neither Lopez nor her mother has any relevant connection to the City of St. Louis or state of Missouri.

C. Abbott's Initial Motion to Sever and Transfer Was Denied.

On December 14, 2012, Abbott moved the trial court to sever plaintiffs' claims and dismiss the claims of all out-of-state plaintiffs on *forum non conveniens* grounds, or to transfer plaintiffs' claims for improper venue. (A30-46). After engaging in venue and *forum non conveniens* discovery, Judge Heagney denied Abbott's venue challenge in an Order dated August 27, 2013. (A429-438). On November 8, 2013, and January 22, 2014, Abbott sought writs in the Missouri Court of Appeals, Eastern District, and this Court. (A439-456, 459-476). Both petitions were denied. (A457-458, 477-478).

D. The Trial Court Subsequently Determined that Plaintiffs' Cases Would Be Tried Separately, and the Case of Minnesota Plaintiff Maddison Schmidt Was Tried and Appealed Separately.

On May 22, 2014, the trial court entered its Scheduling Order, including ordering the parties to nominate individual plaintiffs for discovery, and setting forth deadlines for the separate trial of the first plaintiff. (A479-482). In its pleading selecting cases for further discovery, Abbott continued to object to venue in the City of St. Louis for any plaintiff who resides outside the City and whose injury did not occur in the City of St. Louis. (A483-485).

On December 31, 2014, the parties selected their plaintiffs for the first two trials as required by the Court, despite Abbott's continued objection to venue in the City of St. Louis for any plaintiff who resides outside the City and whose injury did not occur there. (A490-492). Plaintiffs selected Schmidt's case as the first pick for a separate trial. Abbott selected the Lopez case as the second separate trial pick. (*Id.*).[2]

On March 30, 2015, Abbott filed its renewed motion to transfer Schmidt's case for improper venue or dismiss it on grounds of *forum non conveniens*, which was denied on May 1, 2015. (A493-501, 541). In June 2015, Schmidt's case was tried separately to verdict. On June 23, 2015, Abbott filed its opposition to Plaintiff's motion to enter judgment and again renewed its motion to sever and transfer. (A548-558). On June 30, 2015, the trial court entered final judgment on Schmidt's claim. (A559-560). It also

[2] The trial setting for Lopez was continued several times while the *Schmidt* case was proceeding at the appellate level. (A562-567). Moreover, Abbott repeatedly objected to, and reserved its right to challenge, the venue and forum for Lopez's case. (*Id.*). The Lopez trial is presently set to commence on March 20, 2018 (A595), but the parties have agreed to vacate that trial setting in light of this writ proceeding.

denied Abbott's renewed motion on that date. (A561). The Missouri Court of Appeals, Eastern District, affirmed the judgment but subsequently ordered the case transferred to this Court.

E. This Court's Unchallenged Concurring Opinion Gave Clear Direction to Respondent that Mariah Lopez's Case Should Be Severed Prior to a Separate Trial.

On September 12, 2017, this Court issued its opinion in Abbott's appeal following the separate trial of plaintiff Maddison Schmidt's claims. (A568-584). The majority did not address and decide the issues of joinder and venue, holding instead that a reversal was not warranted because the Court determined that Abbott did not demonstrate case-specific prejudice because the trial occurred in the City of St. Louis. Three judges concurred in the result, but provided direct guidance as to the procedure to be followed where, as here, the trial court has decided to hold separate trials in a multi-plaintiff case. The concurrence stated that once a decision has been made to try a plaintiff's claims separately, the trial court should sever the plaintiff, determine the appropriate venue, and transfer the case to a proper venue if venue is not proper in the City of St. Louis.

Following this guidance, on September 14, 2017, Abbott filed a renewed motion to sever and transfer Lopez's claims. (A585). On October 4, 2017, the trial court denied Abbott's motion. (A592). After denial of its writ petition in the Missouri Court of Appeals, Eastern District (A594), Abbott filed its writ petition in this Court, and this Court issued a preliminary writ of prohibition on October 26, 2017.

POINTS RELIED ON

I. ABBOTT IS ENTITLED TO A PERMANENT ORDER OF PROHIBITION BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SEVER THE CLAIMS OF PLAINTIFF MARIAH LOPEZ AFTER DETERMINING THAT HER CLAIMS SHOULD BE TRIED SEPARATELY.

- Rule 52.05, Missouri Rules of Civil Procedure
- *Schmidt v. Abbott Laboratories Inc.*, 529 S.W.3d 795 (Mo. banc. 2017)

II. ABBOTT IS ENTITLED TO A PERMANENT ORDER OF PROHIBITION BECAUSE THE CITY OF ST. LOUIS IS NOT A PROPER VENUE FOR PLAINTIFF MARIAH LOPEZ'S CLAIMS PURSUANT TO SECTION 508.010 IN THAT RULE 51.01 PROHIBITS JOINDER FROM ALTERING THE VENUE ANALYSIS.

- Section 508.010, RSMo (2013)
- Section 508.012, RSMo (2005)
- Rule 51.01, Missouri Rules of Civil Procedure

STANDARD OF REVIEW

"The standard of review for writs of mandamus and prohibition, including those pertaining to motions to transfer venue, is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes." *State ex rel. Hollins v. Pritchett*, 395 S.W.3d 600, 602 (Mo. App. 2013) (quoting *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007)).

Writs of mandamus and prohibition are appropriate "to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *State ex rel. Bannister v. Goldman*, 265 S.W.3d 280, 283 (Mo. App. 2008). The Missouri Supreme Court "has repeatedly held that 'prohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.'" *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 860 (Mo. banc 2008) (citation omitted).

Thus, this Court has recognized previously that an extraordinary writ is the most appropriate way to correct a trial court's improper venue ruling. *State ex rel. Kansas City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. banc 2009); *State ex rel. Kinsey v. Wilkins*, 394 S.W.3d 446, 448 (Mo. App. E.D. 2013). This Court reiterated that sentiment earlier this year in *Schmidt*, when it noted that the venue and joinder issues raised by Abbott in this very case are "better raised in the pretrial writ context." *Schmidt v. Abbott Laboratories Inc.*, 529 S.W.3d 795, 799 n. 6 (Mo banc. 2017) (A573).

ARGUMENT

I. ABBOTT IS ENTITLED TO A PERMANENT ORDER OF PROHIBITION BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SEVER THE CLAIMS OF PLAINTIFF MARIAH LOPEZ AFTER DETERMINING THAT HER CLAIMS SHOULD BE TRIED SEPARATELY.

A. *Schmidt* Requires Severance.

On September 12, 2017, this Court issued its opinion in the appeal following the separate trial of one plaintiff in the underlying action—Minnesota plaintiff Maddison Schmidt—which resulted in a jury verdict in June 2015. The majority opinion did ***not*** decide the issue of whether Schmidt's case was properly joined or whether venue was appropriate in the City of St. Louis, however. Rather, the majority held that even if the circuit court erred by failing to sever her claim or transfer venue, reversal was not warranted because Abbott did not demonstrate case-specific prejudice from the trial occurring in the City of St. Louis. The majority noted that a showing of prejudice was not required in a pre-trial writ proceeding where these issues were "better raised." *Schmidt*, 529 S.W.3d at 799 n. 6 (A573).

Three judges concurred in the result, but also went a step further. They ***did*** address the issue of whether the case should have been severed. The concurring opinion provided direct instruction on severance where, as here, a decision has been made to hold separate trials in a multi-plaintiff case:

> Once the trial court has determined that each plaintiff's claims are to be tried separately, however, the trial court necessarily has decided there are

> no further gains in efficiency of expeditiousness to be had from the joinder authorized by Rule 52.05(a). Once that decision has been made, therefore, **the trial court has discretion to deny a subsequent or renewed motion to sever only in the rarest of circumstances**. Moreover, an abuse of discretion in denying such a motion will be patently prejudicial under section 508.012, RSMo 2005.[3]

Id. at 803 (A581-582) (emphasis added). No such rare circumstances exist here, and Respondent's Order did not articulate any.

The trial court's Order denying Abbott's motion to sever the Lopez case concluded that joinder and venue were proper "[u]nder all of the circumstances of this case" and "in accordance with the Missouri Supreme Court's [*Schmidt*] decision." (A593). This conclusory statement is unsupported. The majority opinion did not hold that joinder and venue were proper, and the concurrence explicitly stated that joinder and venue were not appropriate at this stage of the case where the trial court has determined that each plaintiff's claims are to be tried separately. Moreover, the trial court's Order provides no justification or "rare circumstance" as contemplated by the concurring opinion of this Court.

Indeed, the concurring opinion in *Schmidt* explicitly addressed the proper procedure for future motions to sever in this precise case. It stated, in no uncertain terms, that ***in this case***, "once the trial court determined that each Plaintiff's claims should be tried separately . . . ***it was error not to sever them and transfer those for which venue***

[3] Section 508.012 states: "At any time prior to the commencement of a trial, if a plaintiff or defendant, including a third-party plaintiff or defendant, is either added or removed from a petition filed in any court in the state of Missouri which would have, if originally added or removed to the initial petition, altered the determination of venue under section 508.010, then the judge shall upon application of any party transfer the case to a proper forum under section 476.410, RSMo." (A599).

was no longer proper under sections 508.012 and 508.010." *Schmidt*, 529 S.W.3d at 804 (A583) (emphasis added). The majority did not disagree with this conclusion.

Despite this compelling logic and clear direction, Respondent denied Abbott's motion to sever Mariah Lopez's case, although her claims will be tried separately in a separate trial. (A592-593). This denial was an abuse of discretion and requires that the writ be made permanent.

B. Maintaining Joinder at This Stage Does Not Promote Efficiency and Runs Counter to the Purpose of the Joinder Rules.

Issuance of the writ here does not require a determination that joinder was improper at the initiation of the case (although Abbott maintains it was for all the reasons argued in *Schmidt*). Rather, the Order under review in this writ is one denying severance of Lopez's case ***after*** the trial court determined that her case should proceed separately in discovery and trial. At that point, Lopez's case was proceeding in all practical respects as an entirely separate case. The initial joinder in a petition does not automatically and reflexively govern the case until the end, no matter the circumstances or change in procedural posture or efficiencies. Indeed, Rule 52.06 expressly contemplates severance "at any stage of the action." Mo. Sup. Ct. R. 52.06 (A602) ("Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."). *See also Barner v. City of Harvey*, No. 95 C 3316, 2003 WL 1720027, at *2-4 (N.D. Ill. March 31, 2003) ("look[ing] anew" at joinder and granting amended motion to sever during pendency of case because, "[w]hile plaintiffs[']

claims involve similar legal issues and rest upon the same legal theories, they turn on distinct facts unique to each of the Plaintiffs."); *Ballentine v. Town of Coats*, No. 5:11-CV-524-FL, 2012 WL 4471605, at *4 (E.D. N.C. Sept. 26, 2012) (granting renewed motion to sever during pendency of action because "any benefits of joinder have given way now.").

It is clear that the plaintiffs here consider their cases to be separate. That is why they are being tried separately and appealed separately. Indeed, the factual and legal differences between the twenty-four plaintiffs' claims make it impossible to conduct a fair trial with multiple plaintiffs. *See In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, No. 11-3045, 2012 WL 1118780, at *5 (D.N.J. Apr. 3, 2012) (severing plaintiffs in multi-plaintiff complaint and noting, "the factual, temporal, and geographic diversity among Plaintiffs' claims wholly disregards the purposes of permissive joinder because these are claims that no reasonable person would normally expect to be tried together"). For example, because the plaintiffs came from thirteen different states, a single trial would "create a nightmare of jury confusion which would be prejudicial to [all parties]." *In re Consolidated Parlodel Litig.*, 182 F.R.D. 441, 447 (D.N.J. 1998) (denying motion to conduct single trial with plaintiffs from eleven different states).

Moreover, because the Depakote Label underwent numerous changes during the three decade period in which the twenty-four plaintiffs were born, and a drug label that post-dates a plaintiff's injury is inadmissible as both irrelevant and unduly prejudicial, a joint trial would be an evidentiary impossibility. The twenty-four plaintiffs also did not all allege they suffered the same or even similar injuries, with claimed injuries ranging

from headaches (plaintiff Kennedi Ferdig) to spina bifida (plaintiff Maddison Schmidt). No jury could be expected to digest the mountains of individualized scientific and medical evidence relevant to each of the plaintiffs and their various alleged injuries and render a reliable verdict. *See Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 48 (Miss. 2004) (holding that trial court erred in conducting 10-plaintiff pharmaceutical product liability trial where plaintiffs "presented ten unique medical histories" and alleged "myriad of injuries as a result of this drug").

Plaintiffs also argued for separate treatment in seeking a Rule 74.01(b) judgment for appeal on the verdict for Schmidt's separate claim because, according to Plaintiffs, "[a] final disposition of those claims brought by Plaintiff Maddison Schmidt against Defendant Abbott Laboratories, Inc. does not otherwise impact the pending claims brought by other plaintiffs in" this lawsuit.[4] Having recognized that the separate trials require separate judgments and separate appeals, Plaintiffs cannot now have it both ways.

More than five years after this multi-plaintiff case was filed, it is now clear that Lopez's case should no longer be joined with the others and that any efficiencies to be gained from joinder have long since disappeared. It is for that very reason that the trial court determined that her case should proceed separately. Plaintiffs agreed, never challenging and instead advocating for and agreeing to the "separate trials" approach. Once that "separate trials" approach was ordered, Mariah Lopez's case should have been severed.

[4] Mot. for Entry of Judg., ¶¶ 1, 4, at 1-2 (A542-543).

The purpose of the joinder rules "is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits." *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. Mo. 1974) (discussing federal counterpart to Rule 52.05).[5] Here, maintaining joinder of Lopez's claims with the claims of the other 22 remaining sets of plaintiffs will not serve to promote efficient or convenient resolution of these claims. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, No. Civ.A. 98-20478, 1203, 1999 WL 554584, at *3 (E.D. Pa. July 16, 1999) ("The joinder of several plaintiffs who have no connection to each other in no way promotes trial convenience or expedites the adjudication of the asserted claims. Rather, the joinder of such unconnected, geographically diverse plaintiffs that present individual circumstances material to the final outcome of their respective claims would obstruct and delay the adjudication process."); *Ulysse v. Waste Mgmt., Inc. of Florida*, 645 Fed. Appx. 838, 839 (11th Cir. 2016) ("The central purpose of Rule 20 is to promote trial convenience and expedite the resolution of disputes, thereby eliminating unnecessary lawsuits. However, these considerations can also cut in favor of severance.") (internal citations and quotation marks omitted).

Mariah Lopez's case is separate in all practical respects. The trial court determined that her case should be tried separately. Once that determination was made, joinder was no longer proper, efficient, or convenient. The trial court's determination that Lopez's

[5] "Rule 52.05(a) is derived from the federal rule, and this Court has held that the interpretation of a Missouri rule generally should be in accord with the interpretation of the federal rule from which it came." *State ex rel. Nixon v. Dally*, 248 S.W.3d 615, 617 (Mo. banc 2008) (internal citations omitted).

case should proceed separately, and the trial court's prior entry of final judgment on the claim of another plaintiff in this case, cannot be squared with the denial of Abbott's motion to sever Lopez's case.

The real reason why Lopez's claims continue to be joined with the claims of other, unrelated plaintiffs is not a mystery. Plaintiffs' attorneys from across the country and the state are bringing their plaintiffs to the City of St. Louis for trial because, to date and contrary to law, the Circuit Court has not told them no. So long as non-City plaintiffs join their claims with one City plaintiff from the outset in their petition, the Circuit Court has permitted the individual cases of the non-City plaintiffs to proceed to trial separately in the City of St. Louis, allowing them to avoid their home venues without any discernible connection to this venue.

The magnitude of this practice in the City of St. Louis has been well-documented. The recent personal jurisdiction decisions issued by this Court and the United States Supreme Court will not resolve this issue for cases involving multiple plaintiffs from different counties in Missouri, corporate defendants headquartered in Missouri, or those for whom personal jurisdiction is otherwise proper, as evidenced by the continued filing of these multi-plaintiff cases in the City of St. Louis against corporations that have their headquarters or registered agents elsewhere in Missouri. A permanent order from this Court is necessary to provide much-needed resolution of this issue.

Allowing Lopez's case to remain joined with the others and proceed to trial in the City of St. Louis—despite being a separate case in all practical respects—would encourage plaintiffs to engage in the joinder of cases that have no business being tried

together solely to obtain the favorable venue and the "generous juries" of the City of St. Louis—only to disavow that joinder once venue is secure and proceeding to separate trials, separate judgments, and separate appeals. That is not the purpose of the joinder rules. It takes no great leap of logic to appreciate that Lopez opposes severance of her claims because she wants to reap the benefit of this more favorable venue. In other words, she wants to use joinder at this stage for the sole purpose of expanding venue. As discussed further in Section II., *infra*, venue is not just a matter of convenience; it is a matter of having a jury in the locus of the dispute decide that dispute. This venue-by-joinder two step is prohibited by Rule 51.01 and contravenes the very essence of the joinder rules.

II. ABBOTT IS ENTITLED TO A PERMANENT ORDER OF PROHIBITION BECAUSE THE CITY OF ST. LOUIS IS NOT A PROPER VENUE FOR PLAINTIFF MARIAH LOPEZ'S CLAIMS PURSUANT TO SECTION 508.010 IN THAT RULE 51.01 PROHIBITS JOINDER FROM ALTERING THE VENUE ANALYSIS.

A. The City of St. Louis is Not a Proper Venue for Mariah Lopez's Trial Because Joinder Cannot Be Used to Extend Venue.

Although severance of Lopez's case clearly is required, even without severance, this Court has the opportunity to address the issue left undecided by a majority of the Court in *Schmidt*: namely, whether venue over this case in the City of St. Louis is improper because joinder cannot extend venue.

i. Section 508.010.5 Governs Venue of Plaintiff Mariah Lopez's Case Because She Was First Injured Outside the State of Missouri.

There is no dispute that, if filed separately, Lopez's case would not be properly venued in the City of St. Louis because she was not injured in Missouri and Abbott's registered agent is located in St. Louis County. *See* § 508.010.5, RSMo (2013) (A597). Joinder of her claims with those of other plaintiffs under Rule 52.05 cannot extend venue where it otherwise does not lie. Rule 51.01 is, in the words of this Court, both clear and explicit: "These Rules shall not be construed to extend or limit the jurisdiction of the courts of Missouri, or the venue of civil actions therein." *See State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290, 292 (Mo. banc 1979) (quoting Rule 51.01 (A600)). Thus, Rule 52.05 **shall not** be construed to extend the venue of civil actions.

This Court's majority opinion in Schmidt did not address Rule 51.01's admonition that joinder under Rule 52.05(a) cannot be construed to extend venue. The concurring opinion posited that joinder could serve to extend venue, without discussing or reconciling those statements with Rule 51.01. *See Schmidt*, 529 S.W.3d at 802 ("because joinder of Plaintiffs' claims in a single petition was proper under Rule 52.05(a), venue for this action in St. Louis City also was proper"). *See also id.* at 803 ("any one of the joined counts may create venue for the entire action…"). Such a holding would allow a plaintiff to use permissive joinder under Rule 52.05 to piggyback on the venue of another plaintiff with whom she is joined—a practice expressly prohibited by Rule 51.01.[6]

[6] The principle recently articulated by this Court in *State ex rel. Bayer, et al. v. Hon. Joan L. Moriarty*, SC96189 (Mo. Dec. 19, 2017) at 10, that a plaintiff cannot establish

Respectfully, Rule 51.01 cannot be overlooked. For the last thirty-eight years, this Court has steadfastly enforced Rule 51.01 and rejected the notion that joinder can be used to expand venue. In *Turnbough*, the plaintiff brought suit against two defendants in the City of St. Louis. Looking at each defendant separately, venue was proper in St. Louis as to one defendant, but not the other. Plaintiff contended that "venue as to all is created in any county wherein any one of the several defendants resides even though there would not have been venue as to one (or more) of the counts if filed separately in that county." 589 S.W.2d at 291-292. The Supreme Court "reject[ed] this contention, holding that venue could not "be established by means of Rule 52.05(a) when it would not have existed without such joinder." *Id.* at 292.

> [Plaintiff's] argument ignores the language of Rule 51.01 which clearly and explicitly states that the Rules of Civil Procedure, of which Rule 52.05(a) is a part, "shall not be construed to extend or limit the jurisdiction of the Courts of Missouri or the venue of civil actions therein." This limitation is underscored by the Committee Note to Rule 51.01, promulgated when the rule was first adopted. It observes that even though venue may be procedural rather than substantive within the meaning of Mo. Const. art. V, s 5, which grants rule making authority to the Supreme Court, and even though establishment of venue by procedural rule may be permissible, such a determination was avoided by the Court by the disclaimer contained in Rule 51 that venue was not to be established or limited on the basis of the Rules of Civil Procedure. Therefore, assuming, but not deciding, that joinder of Counts I and II was authorized by Rule 52.05(a), that fact would not establish venue as to Count II under the provisions of s 508.010(2). To hold otherwise would mean that, contrary to the express provisions of Rule 51.01, venue as to Count II would be established by means of Rule 52.05(a) when it would not have existed without such joinder.

Id. at 292.

"piggyback" jurisdiction through joinder, is equally compelling in cases where plaintiffs attempt to establish "piggyback" venue through joinder.

This core holding that joinder cannot be used to expand venue for additional parties has been reaffirmed in one decision after another since that time. *State ex rel. Jinkerson v. Koehr*, 826 S.W.2d 346, 348 (Mo. banc 1992) (affirming *Turnbough* and holding, "Simply joining the two separate causes of action in a single petition does not create venue over both actions"); *State ex rel. Sims v. Sanders*, 886 S.W.2d 718, 720 (Mo. App. 1994) (following *Turnbough* and *Jinkerson*); *State ex rel. Nixon v. Dally*, 248 S.W.3d 615, 619 (Mo. banc 2008) ("permissive joinder provision of Rule 52.05(a) authorizes joinder of claims ... [i]n cases where venue is proper as to both defendants"); *State ex rel. Kinsey v. Wilkins*, 394 S.W.3d 446, 453 (Mo. App. 2013) ("Because Rule 51.01 forbids interpreting a civil rule to expand venue, joinder under Rule 52.05(a) could not serve as a vehicle to expand venue to Greene County.").

This Court should continue its decades-long enforcement of Rule 51.01. Because Rule 51.01 does not permit Rule 52.05 to expand the venue of the Circuit Court, transfer of Lopez's claims to St. Louis County is required.

ii. The History of Missouri's Venue Statutes and the 2005 Tort Reform Act Confirm that Joinder Cannot Be Used To Alter the VenueAnalysis.

The history of Missouri's venue statutes, and particularly the Tort Reform Act of 2005, demonstrates that section 508.010.5 was intended to prevent the type of forum shopping so obviously at work in these cases.

Throughout its early history, Missouri allowed venue for actions in counties where the defendant was an inhabitant or could be found. Digest of the Laws of the Missouri Territory § 16, p. 248 (1818) ("in the county in which [defendant] is an inhabitant" or, if

the defendant can be found there, "the county in which the plaintiff resides at the time of serving such process"); RSMo ch.2, § 3, p. 622 (1825) (in the county in which the defendant "is an inhabitant" or in the country "in which the plaintiff resides" if the defendant can be "found in the county in which the plaintiff resides at the time of serving such process"). The first Missouri statute to specify venue for suits against corporations also focused on the presence of the defendant, rather than the defendant's registered agent. RSMo ch. 34, art. II., § 4, p. 238 (1845).

In 1855, the venue provision in Article II §4 was revised to state that "[s]uits against corporations shall be commenced, either in the county where the cause of action accrued, or in any county where such corporation shall have, or usually keep, an office or agent for the transaction of their usual and customary business." RSMo ch. 34, art. II, § 4, p. 377 (1855). Apart from minor revisions, this version of the statute "provided the basis" for the corporate venue statute for more than 100 years. *See* Edward D. Robertson III, *Missouri Venue and House Bill 1304: Misguided 'Deforms' Demonstrate the Necessity of Judicial Districts*, 73 UMKC L. Rev. 887, 891 (2005). The net result of the corporate venue statutes was that venue was not limited to where the corporation's registered agent was located, but rather where essentially any agent of the corporation could be found. *See State ex rel. Pagliara v. Stussie*, 549 S.W.2d 900, 903 (Mo. App. 1977) (broadly defining agent under § 508.040 as "a person authorized by another to act for him, one intrusted with another's business" and refusing to restrict the definition to that used in service of process cases).

By 2005, forum shopping had become a substantial problem and one the venue statutes, with their liberal definition of corporate presence, were ill equipped to handle. *See* Craig A. Adoor & Joseph J. Simeone, *The Law of Venue in Missouri*, 32 St. Louis U. L. J. 639, 640 (1988) ("the rules of venue have failed to serve their purpose and have become instead tools for forum shopping"); Darin P. Shreves, *Counselor, Stop Everything! Missouri's Venue Statutes Receive an Expansive Interpretation*, 75 Mo. L. Rev. 1067, 1067 (2010) ("[A]ttorneys regularly used creative statutory readings and questionable procedural techniques to exploit the state's venue statute and maneuver their lawsuits into favorable forums.").

It is no secret that plaintiffs' attorneys sought venue in the City of St. Louis due to that forum's "generous juries." *See State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 821 (Mo. banc 1994) ("This original action in mandamus is another in a seemingly unending series of extraordinary writ actions in which civil tort plaintiffs and defendants enter protracted procedural plotting to embrace or avoid the generous juries of the City of St. Louis."); Robertson, 73 UMKC L. Rev. at 894 ("[P]laintiffs' attorneys are believed to seek venue vigorously in St. Louis Circuit Court because juries comprised of city residents are typically more sympathetic to plaintiffs and have a reputation for rendering larger verdicts than other jurisdictions."). While the anecdotal evidence of the "generous juries" of the City of St. Louis is strong, the evidence is not anecdotal only: "the statistics show that the City of St. Louis Circuit Court is the place to be for top verdicts and high settlement figures." *Id.* at 894 (summarizing data between 1994 and 2003).

It is against that background that the Tort Reform Act of 2005 was proposed and eventually passed. The Act worked a drastic change on Missouri's venue statute designed to change the venue laws "to disallow venue-shopping, especially in suits against corporations." *Summary of the Committee Version of the Bill: Hearing on HCS HB 1304 Before the H. Comm. on Judiciary*, 92nd Gen. Assemb., 2nd Regular Sess. (Mo. 2004).[7] It was intended to bring "rational guidelines to venue shopping, where a lawyer will choose to try a case in a court for no other reason than the court has a history of awarding the highest settlements." Chad Garrison, *Scott Led Tort Reform Measures Backed By Physicians*, ST. LOUIS BUS. J., Aug. 20, 2003. "The proposed reforms seek to block perceived venue shopping, whereby plaintiffs' attorneys employ statutory venue provisions to file lawsuits in plaintiff-friendly forums." Robertson, 73 UMKC L. Rev. at 887.

As then-Governor Blunt, who signed the bill into law, later described it, the Act was designed to "counteract ... 'venue-shopping,' a tactic that involves shifting a case to a friendly court regardless of where the injury occurred." Matt Blunt, Commentary, *How Missouri Cut Junk Lawsuits*, WALL ST. J., Sept. 22, 2009. As described in *Kinsey*, the enactment of § 508.010.5 was intended to "significantly restrict[] venue locales in order to reduce forum shopping by plaintiffs." 394 S.W.3d at 448 n.1. It is not consistent with this legislative intent to interpret the reform of § 508.010.5 to *expand* venue in contradiction of Rule 51.05.

[7] http://www.house.mo.gov/content.aspx?info=/bills041/bilsum/commit/sHB1304C.htm.

Instead of relying on the traditional venue factors described above (such as a corporation's presence), the Act grounds venue primarily based on the location of the plaintiff's first injury. If the plaintiff's first injury occurred in a foreign jurisdiction, the statute further differentiates between corporate and individual defendants. Unlike prior corporate venue statutes, venue is linked exclusively to the location of the corporate defendant's registered agent. As a result, venue for a corporation was intended to be either the place of injury or the location of the corporate defendant's registered agent. *See generally* David Jacks Achtenberg, *Venue in Missouri After Tort Reform*, 75 UMKC L. Rev. 593 (2007). Unlike the prior venue statute, merely having any agent in the venue is no longer enough; for injuries outside of Missouri, the location of the corporate defendant's registered agent is paramount.

Interpreting the venue statute to grant out-of-state plaintiffs venue in the City of St. Louis solely because those plaintiffs strategically collaborate with a City of St. Louis plaintiff to include in their petition does not advance the legislative intent of reducing forum shopping; it does exactly the opposite. *See Am. Eagle Waste Indus. LLC v. St. Louis Cnty.*, 379 S.W.3d 813, 832 (Mo. banc 2010) ("When interpreting statutory law, the court must ascertain the intent of the legislature and give effect to that intent if possible."). It also ignores the significant change in the venue statute from the presence of any corporate agent prior to 2005 to the location of the corporation's registered agent after 2005.

Courts should not interpret statutes in ways that would lead to absurd results. *See, e.g., Aquila Foreign Qualif. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012)

("construction of a statute should avoid unreasonable or absurd results"). The trial court's "joinder creates venue" interpretation of the statute leads to such a result. This case, involving a Georgia resident injured in Georgia suing an Illinois corporation in the City of St. Louis, is but one example. There are currently many other examples of non-City plaintiffs suing defendants in the City of St. Louis for injuries that did not occur there and have no connection there. Such a result is both unreasonable and absurd.

iii. Alternatively, the "Earliest Injury" Analysis Would Require Transfer.

Alternatively, as argued in *Schmidt*, Professor Achtenberg's "earliest injury" analysis should be considered. That is, where a multi-plaintiff petition alleges that some plaintiffs were injured in Missouri and some plaintiffs were injured outside Missouri, the earliest injury alleged in the petition should control the venue analysis.

> [T]he Missouri legislature has mandated[FN] that singular terms in its statutes should be construed as including their plural forms "unless there be something in the subject or context repugnant to such construction."[FN] Under this canon, the two sections must be construed as if they read respectively "in all actions . . . in which the plaintiff [or plaintiffs were] first injured in the state of Missouri" and "in all actions . . . in which the plaintiff [or plaintiffs were] first injured outside the state of Missouri." Construed in this way, the criterion for selecting between the two sections is reasonably clear. Plaintiffs collectively were first injured where the first plaintiff was injured. The court should identify the first injury suffered by any of the plaintiffs and utilize [section] 508.010.4 if that injury occurred in Missouri and [section] 508.010.5 if it occurred outside the state.

Achtenberg, 75 UMKC L. Rev. at 621-22 (first footnote citing § 1.030(2), RSMo (2007)[8]; second footnote citing *State ex rel. BJC Health Sys. V. Neill*, 121 S.W.3d 528, 530 (Mo banc. 2003); remaining footnotes omitted).

The Court need not reach this analysis because Rule 51.01 restricts the use of joinder to extend venue. But if Professor Achtenberg's analysis were applied, St. Louis County would be the proper venue for this case because the earliest injury alleged in the petition occurred outside of Missouri. Indeed, while the four Missouri plaintiffs in the petition alleged injuries that occurred in 2007 and 2008, the 20 non-Missouri plaintiffs in the petition included plaintiffs alleging injuries that occurred in 1992, 1994, 1995, 1996, 1997, 2000, 2002, 2003, 2004, 2005, and 2006. (A108-120).

This Court's concurring opinion in *Schmidt* acknowledged that section 508.010.5 "arguably" compels transfer to St. Louis County "because there is at least one count in Plaintiff's petition that both alleges a tort and alleges the plaintiff for that count was first injured outside the state." 529 S.W.3d at 802, n. 1. But the concurring opinion went on to say that the two provisions (508.010.4 and 508.010.5) could not be reconciled in a multi-plaintiff case and therefore plaintiffs can arbitrarily choose which one applies. As stated above, the two provisions need not be reconciled because Rule 51.01 governs. If Rule 51.01 is nonetheless ignored, the two provisions can be reconciled in a multi-plaintiff

[8] § 1.030(2), RSMo (2007) states: "When any subject matter, party or person is described or referred to by words importing the singular number or masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, are included." (A596).

case based on where the first injury occurred. Here, the first injury occurred outside the state of Missouri and Section 508.010.5 applies.

Moreover, allowing plaintiffs to pick which section applies only furthers gamesmanship and impedes the purpose of the Tort Reform Act of 2005. This case proves the point. It makes little sense to apply Section 508.010.4 (which would apply only to the four Missouri plaintiffs) to the whole case, rather than Section 508.010.5 (which would apply to the twenty non-Missouri plaintiffs, including the first-injured plaintiff). Because this is a case in which "the plaintiffs" were first injured outside of Missouri, the only potentially proper Missouri venue was St. Louis County.

B. Transfer is Also Required if Mariah Lopez's Claims are Severed.

Whether or not they are severed, Mariah Lopez's claims are not properly venued in the City of St. Louis in accordance with Section 508.010 and Rule 51.01's mandate that joinder cannot extend venue. If her claims are severed, Section 508.012 also mandates transfer.

i. Once Severed, Rule 508.012 Requires a Re-Determination of Venue Upon Application of a Party.

Once Mariah Lopez's claims are severed from the claims of the other plaintiffs, the trial court is required to re-evaluate and re-determine venue. If venue is no longer proper over the new case, the trial court is required to transfer it for improper venue. *See* § 508.012, RSMo (2005) (A599). The concurring opinion in *Schmidt* explained:

> A decision to sever each plaintiff's claims in a multi-plaintiff case 'removes' a plaintiff for purposes of section 508.012 and, therefore, doing so will require the trial court (on application of a party) to determine the proper venue for the various actions resulting from that severance. Where

> those venues are different from the original venue, section 508.012 requires the trial court to transfer those actions to their proper venues for trial.

529 S.W.3d at 803 (A582). *See also State ex rel. Kan. City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 366 (Mo. banc 2009) (Missouri Revised Statute § 508.012 "mandates re-determination of venue in cases where the addition or removal of a party renders venue improper and provides for transfer to a proper venue"); *Cf. State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857-58 (Mo banc. 2001) (venue must be re-determined where defendants are added to lawsuit in amended petition).

Application of the venue statute to Lopez's claim requires transfer to St. Louis County. It is undisputed that Lopez was first injured outside the state of Missouri. (A6, 300-305). She alleges that her *in utero* exposure to Depakote, which occurred in Georgia, caused her to suffer birth defects. (*Id.*). It is also undisputed that Lopez is not a Missouri resident. The evidence has confirmed that she was not injured in Missouri, has never resided in Missouri, and has never received treatment or other medical care in Missouri. (*Id.*). Moreover, her mother (Kathy Muller) who took Depakote has never been treated for her seizure disorder in Missouri nor has she ever been prescribed Depakote in Missouri. (*Id.*). There is no dispute that neither Lopez nor her mother has any connection to the state of Missouri.

Section 508.010.5 sets forth the applicable venue provision where a plaintiff injured outside the state of Missouri brings suit against a corporation. The statute states:

> 5. Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured outside the state of Missouri, venue **shall be** determined as follows:

> (1) If the defendant is a corporation, then venue **shall be** in any county where a defendant corporation's registered agent is located or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiffs principal place of residence on the date the plaintiff was first injured;

§ 508.010.5, RSMo (2013) (A597) (emphasis added).

Because Abbott is a corporation with its registered agent located in St. Louis County Section 508.010.5 dictates that venue shall be in St. Louis County for this case. Therefore, a re-determination of venue under Section 508.012 requires that Lopez's case be transferred to St. Louis County.

ii. Application of 508.012 at this Stage Promotes Judicial Economy and Allows for the Efficient Disposition of Mass Tort Cases.

While Abbott maintains that joinder and venue were improper from the start of this litigation and that perceived convenience is not a basis for venue, it understands the approach set forth by the concurring opinion in *Schmidt*. When plaintiffs are severed after the determination of separate trials has been made, the concurrence approach would allow for some efficiency from pretrial joinder, while still allowing for separate trial and disposition of mass tort cases in proper venues as prescribed by the Missouri statutes.

Federal multi-district litigation has long utilized a statutory process for case resolution without regard to joinder and venue. There, claims of plaintiffs from around the country involving some common questions of fact are consolidated before one judge for discovery and other pre-trial purposes only. *See, e.g.*, 28 U.S.C. § 1407. Once the efficiencies of consolidated pre-trial have been realized and exhausted, the individual plaintiffs' cases are sent back to their home venues for trial. *Id. See also In re Activated*

Carbon-Based Hunting Clothing Mktg. & Sales Practice Litig., 840 F.Supp.2d 1193, 1198 (D. Minn. 2012) (returning MDL cases to original venues where they had "passed the point where they will continue to benefit from coordinated proceedings;" recognizing that coordinated discovery was the "primary purpose" of consolidation); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, --- F.Supp.3d ---, MDL No. 6:11-md-2299, 2017 WL 3033134, at *23 (W.D. La. July 17, 2017) (in MDL, "each claim retains its own independent procedural vehicle, and identity, as well as its own home venue for *resolution*—the location and venue of the MDL court being only temporary in time, and limited in scope.") (emphasis in original). This procedure allows for coordinated discovery, without sacrificing the parties' rights to have their disputes tried in proper venues. *See In re Phenylpropanolamine Prods. Liab. Litig.*, MDL No. 1407, 2004 WL 2034587, at *2 (W.D. Wash. Sept. 3, 2004) (noting that "MDL seeks to promote judicial economy and litigant efficiency by allowing the transferee court to preside over matters common among all cases," but "case-specific analysis [is] not appropriate for an MDL court.").

Here, the trial court has realized and exhausted the efficiencies to be gained from coordinated pretrial proceedings. Now that the determination has been made to try Mariah Lopez's case separately, the proper course is to sever her case from the others so that it may proceed separately to disposition in a proper venue under Missouri statute.

CONCLUSION

Because the trial court abused its discretion in refusing to sever Mariah Lopez's claims after determining that her claims should be tried separately, and because the City

of St. Louis is not a proper venue for Mariah Lopez's claims under the venue rules and statutes, this Court should make the preliminary writ permanent.

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CERTIFICATE OF COMPLIANCE

The undersigned herby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this brief complies with Rule 55.03 and the length limitations contained in Rule 84.06(b) in that there are 9,211 words in the brief (except the cover, signature block, certificate of service, and certificate of compliance) according to the word count of the Microsoft Word word-processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 3, 2018, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the court's electronic filing system on all counsel of record.

/ Dan H. Ball