IN THE SUPREME COURT OF MISSOURI

| | | |
|---|---|---|
| THE STATE OF MISSOURI ex rel. JOHNSON & JOHNSON and JOHNSON & JOHNSON CONSUMER INC., | ) | |
| Relators, | ) | |
| | ) | No. SC96704 |
| vs. | ) | |
| THE HONORABLE REX M. BURLISON, | ) | |
| Respondent. | ) | |

---

# REPLY BRIEF OF RELATORS JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER INC.

---

Thomas B. Weaver #29176
William Ray Price, Jr. #29142
Jeffery T. McPherson #42825
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314.621.5070
314.621.5065 (facsimile)

Thomas J. Magee #32871
HeplerBroom LLC
211 North Broadway, Suite 2700
St. Louis, Missouri 63102
314.241.6160
314.241.6116 (facsimile)

Beth A. Bauer #49981
HeplerBroom LLC
130 N. Main Street
P.O. Box 510
Edwardsville, Illinois 62025
618.307.1200

Gene M. Williams
Kathleen A. Frazier
Scott A. James
Shook, Hardy & Bacon, L.L.P.
600 Travis Street, Suite 3400
Houston, Texas 77002-2926
713.227.8008

Mark C. Hegarty #40995
Shook, Hardy & Bacon, L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108-2613
816.474.6550

ATTORNEYS FOR RELATORS
JOHNSON & JOHNSON AND
JOHNSON & JOHNSON CONSUMER
INC.

TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**



**Statutes**



**Other Authorities**

**Rules**

## ARGUMENT

The brief submitted by Plaintiff Michael Blaes in support of Respondent does nothing to refute that the proper venue for the Blaes claims has always been St. Louis County, where Mrs. Blaes was allegedly first injured and where Mr. Blaes filed his first petition for damages more than four years ago. Exhibits at 273.

Nor does Plaintiff attempt to dispute that the Legislature enacted tort reform legislation in 2005 precisely to put a stop to venue manipulation by plaintiffs. Indeed, Plaintiff partially documents these abuses in his brief. Respondent's Brief at 20-21.

Plaintiff nevertheless contends that, although the General Assembly limited venue to the place where a resident tort plaintiff is first injured, this rule is meaningless whenever a plaintiff who does not like the venue law joins his or her claim with another plaintiff whose claim arose in a more favorable venue.

Plaintiff's arguments are wrong. ***First***, even if joinder of unrelated personal injury claims could ever be proper, the lack of venue in St. Louis City should have barred Plaintiff from joining the underlying *Swann* case. Plaintiff is mistaken in declaring that the General Assembly was silent as to venue in cases involving joined plaintiffs and that this supposed silence means that multiple venues are proper in such cases. This argument misreads the statute, which expressly provides that its provisions are ***exclusive of one another***, precluding Plaintiff's interpretation that would ***add them together*** to create multiple proper venues. Plaintiff's argument also ignores Rule 51.01 (providing that joinder cannot expand venue) and plain legislative intent. Plaintiff's joinder in the *Swann* action did not create venue over his claim in St. Louis City.

***Second***, even if joinder were permissible and proper venue could be ignored for pretrial purposes, Respondent was required to sever and reconsider venue of Plaintiff's claims once Respondent decided to try those claims separately. This is the unmistakable conclusion of the concurring opinion in *Barron v. Abbott Laboratories, Inc.*, 529 S.W.3d 795 (Mo. banc 2017). Plaintiff responds that the *Barron* concurrence's sever-for-trial rule applies only where a circuit court determines to try "each" plaintiff's claims separately. But that is not what the *Barron* concurrence says, and none of the grounds cited by Plaintiff – i.e., the language of the joinder rule or the ostensible needs of bellwether trials – justifies allowing a circuit court to try the claims of a plaintiff who has admitted that his or her claims are properly venued elsewhere.

***Third***, the *Barron* concurrence also makes clear that, upon reconsidering venue once a separate trial is ordered and the claims are severed, Respondent had to transfer Plaintiff's claims to the proper venue – St. Louis County. Plaintiff asserts that a circuit court is powerless to sever a claim for trial because of a distinction between severance and separate trials, arguing that severance is not permissible if claims have been properly joined. But the rules on severance and separate trials do permit reconsideration of joinder once a court determines that a separate trial is appropriate, and section 508.012 compels transfer to a proper venue.

For all of these reasons, as detailed further below, the Court should make the writ permanent.

## I. Joinder cannot create venue in contravention of section 508.010.

As shown in Relators' opening brief, individual personal injury claims of plaintiffs from different states, with different medical histories, who used a product at different times and under different circumstances, do not satisfy the requirements for permissive joinder under Rule 52.05. But even if such joinder were ever appropriate, joinder with other plaintiffs' claims would not change the proper venue for the Blaes claims.

In response, Plaintiff makes the preliminary argument that this Court may not consider whether joinder or venue was appropriate at the time that his claims were joined to the other plaintiffs' claims because that issue falls outside the scope of the present writ petition. *See* Respondent's Brief at 8. But the writ petition implicates the questions of whether venue existed at the time at the time that Plaintiff's claims were joined with the other plaintiffs' claims, and, if so, whether it continues to exist now that Plaintiff's claims have been separated from those other claims. The answer to both questions is "no."

Plaintiff's substantive responses to Relators' joinder and venue arguments are also meritless. Plaintiff effectively argues that, notwithstanding the legislature's clear intent to "disallow venue-shopping" as part of the 2005 Tort Reform Act, that law was intended to allow plaintiffs, no matter where they were first injured, to file claims in any Missouri venue as long as they join their individual claims with a plaintiff who was injured in that venue. *See* Respondent's Brief at 35-43. In so arguing, Plaintiff contends that: (1) Sections 508.010.4 & 5 are silent as to venue when multiple plaintiffs are properly joined; and (2) Relators have no basis for complaining about venue since they are properly there anyway. *Id.* As set forth below, neither position has merit.

***First***, sections 508.010.4 & .5 are not silent as to venue when multiple plaintiffs are properly joined.[1] Those two provisions of Missouri's venue statute provide two mutually exclusive rules, depending on where the plaintiff was first injured.

Under section 508.010.4, "[n]otwithstanding any other provision of law," in cases "in which the plaintiff was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured."

Under section 508.010.5(1), in cases "in which the plaintiff was first injured outside the state of Missouri, venue shall be," when corporate defendants are sued, "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 plaintiff's principal place of residence on the date the plaintiff was first injured."

Plaintiff was "first injured in the state of Missouri;" thus, venue for his claims against these defendants is only proper under 508.010.4, in St. Louis County.

The legislature made this requirement even clearer by noting that both subsections are to be applied "[n]otwithstanding any other provision of law." § 508.010.4 & .5.

Plaintiff mistakenly declares that subsection .4 venue lies in the City of St. Louis as long as ***any*** plaintiff joined in the action was first injured in the City of St. Louis. But this interpretation would require two changes to the text of the statute. First, it would

[1] Plaintiff repeatedly discusses section 508.010 and Rule 52.05 in the context of a case involving multiple plaintiffs suing a single defendant. Respondent's Brief at 36-38. Of course, that is not the case here, where Plaintiff has sued Johnson & Johnson, JJCI, and Imerys, and the proper venue for all three is St. Louis County.

require changing the phrase "the plaintiff was injured" to "any plaintiff was injured." According to Plaintiff, as long as "any plaintiff" in the action was first injured in the City of St. Louis, subsection .4 applies to the claims of all plaintiffs joined in the action even if they were first injured in St. Louis County (or outside the state of Missouri). A statutory interpretation that requires the Court to add to or modify the written text of the statute is presumptively wrong. *See Macon Cty. Emergency Svcs. Bd. v. Macon Cty. Comm'n*, 485 S.W.3d 353, 355-356 (Mo. banc 2016). Second, Plaintiff's interpretation would require deleting "notwithstanding any other provision of law," which requires the subsections to be applied to each plaintiff independently of any other.

The word "action" in section 508.010 does not cure the flaw in Plaintiff's argument. Under the statute, "the plaintiff" in the "action" here was first injured in St. Louis County, and section 508.010.4 places venue there. Plaintiff's argument that the word "action" means venue is proper for all plaintiffs if it is proper for any plaintiff finds no support in the text or legislative history of section 508.010 or in the case law preceding the 2005 Act. *See State ex rel. Jinkerson v. Koehr*, 826 S.W.2d 346, 348 (Mo. banc 1992) ("Simply joining the two separate causes of action in a single petition does not create venue over both actions"). In short, because the decedent is alleged to have first purchased and applied the products in St. Louis County, venue for Plaintiff's claims lies there, not in St. Louis City.

When this Court enacted Rule 51.01's prohibition that rules "shall not be construed to extend . . . the venue of civil actions," the Court did not create an exception

for Rule 52.05 on joinder. Yet, that is exactly how Plaintiff contends section 508.010 should be interpreted.

There is no difference between what Plaintiff seeks to accomplish here and what this Court rejected in *State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290 (Mo. banc 1979). In both cases, multiple claims were joined under Rule 52.05(a). In both cases, the plaintiff asserted that venue was proper for multiple claims because it was proper for one. And in both cases, plaintiffs relied on Rule 52.05 in an attempt to extend the venue of the circuit court over all claims in the action.

The result here should be the same as in *Turnbough*, in which the Court rejected the plaintiffs' attempt to establish venue as to multiple claims through joinder under 52.05: "To hold otherwise would mean that, contrary to the express provisions of Rule 51.01, venue as to [a claim] would be established by means of Rule 52.05 (a) when it would not have existed without such joinder." *Id.* at 292.

Plaintiff argues that *Turnbough* is "no longer valid law" in light of the 2005 Tort Reform Act, but this argument is unpersuasive. While *Turnbough* was decided before tort reform in 2005, Rules 51.01 and 52.05 (upon which *Turnbough* was based) have not changed. Civil rules still cannot expand venue.

Even Plaintiff's cited authority is in accord, recognizing that "simply joining two separate causes of action in a single petition does not create venue over both actions," and that "Rule 51.01 forbids interpreting a civil rule to expand venue." *See State ex rel.*

*Kinsey v. Wilkins*, 394 S.W.3d 446, 450 (Mo. App. 2013).[2] Applying this principle, the *Kinsey* court explained that "Section 508.010.4 requires that venue l[ies] only in the county where *the plaintiff* was 'first injured,' notwithstanding any other provision of law, which includes the Permissive Joinder Rule, Rule 52.05(a)." *Id.* at 453. In other words, venue is proper over two defendants who both injured a single plaintiff based on the location where one defendant first injured the plaintiff. *See id.* ("Section 508.010.4 confers venue for separate, yet successive automobile accidents occurring in different counties, in the county of first injury").

For multiple plaintiffs, the location of the first injury for "the plaintiff" is necessarily a separate question specific to each plaintiff. That is the only logical construction of section 508.010.4, which (as Plaintiff's own cited authority makes clear) sets venue in the county "in which the plaintiff was first injured." *Kinsey*, 394 S.W.3d at 453. This also is the only construction that comports with this Court's recognition that venue must be analyzed on a claim-by-claim basis. *See State ex rel. Heartland Title Servs., Inc. v. Harrell*, 500 S.W.3d 239, 242 n.4 (Mo. banc 2016).

In sum, under the clear holdings of *Turnbough* and its progeny, Rule 51.01 cannot be used to extend venue. *See, e.g., State ex rel. Nixon v. Dally*, 248 S.W.3d 615, 617 (Mo. banc 2008) (Rule 52.05(a) authorizes joinder of claims "where venue is proper as to both defendants").

[2] Of course, even if it were inconsistent with *Turnbough*, *Kinsey* is a decision of the Court of Appeals and could not overrule this Court's holding in *Turnbough*.

***Second***, Plaintiff is also mistaken in asserting that permitting more than one venue in properly joined cases furthers the purpose of the venue statutes to provide a convenient, logical, and orderly forum for litigation. Respondent's Brief at 42-43. According to Plaintiff, because Relators are properly in the City of St. Louis as to one plaintiff who allegedly was first injured there, they have no basis for complaining about venue with respect to any other claim filed against them.

The problem with Plaintiff's argument is that the legislature (by way of section 508.010.4) has already determined that when a plaintiff is first injured in St. Louis County, then St. Louis County is the only convenient, logical, and orderly forum in Missouri. Indeed, and consistent with section 508.010.4, St. Louis County is where Plaintiff first filed his claim.

Plaintiff's convenience argument also ignores the clear purpose of the 2005 Act "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). The 2005 Act, as noted in Relators' opening brief, points only one way – it was intended to restrict forum shopping and curtail the number of lawsuits filed in St. Louis City. The legislature accomplished this objective by limiting venue for disputes involving in-state injuries to the location where the plaintiff was first injured. Accordingly, the venue statutes are designed "to provide a convenient, logical and orderly forum for the resolution of disputes," *State ex rel. Ford Motor Co. v. Manners*, 161 S.W.3d 373, 375 (Mo. banc 2005), and those factors weigh in favor of Relators' position, not Plaintiff's.

## II. Severance and transfer of Plaintiff's claims is warranted under *Barron*.

Even if Plaintiff were permitted to create venue for pretrial purposes by joining his claims to those of others, Respondent's decision to set the Blaes claims for a separate trial made it necessary to formally sever those claims, reconsider venue, and transfer the claims to St. Louis County.

As explained in Relators' opening brief, the concurring opinion in *Barron v. Abbott Laboratories, Inc.*, 529 S.W.3d 795 (Mo. banc 2017), makes clear that joinder becomes improper when an individual plaintiff's claims are set for a separate trial: "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 or 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." *Id.* at 803 (Wilson, J., concurring).

Plaintiff does not attempt to argue that the circumstances of his claims and Respondent's severance ruling are rare. Nor does Plaintiff deny that the analysis of the *Barron* concurrence would further any claimed goals of efficiency and expeditiousness under Rule 52.05(a) joinder while protecting a defendant's rights under the venue statute and avoiding a prejudice requirement that cannot be met.

As Judge Wilson explained, section 508.012 requires venue to be reconsidered when a plaintiff is either added or removed from a petition. *Id.* Because, in a multi-plaintiff case, severing a plaintiff's claims after they have been set for a separate trial

"removes" a plaintiff for purposes of section 508.012, "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." *Id*. "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." *Id.* Thus, Judge Wilson concluded that once the trial court in *Barron* determined that the plaintiff's claims should be tried separately, "it was error not to sever them and transfer those for which venue was no longer proper under sections 508.012 and 508.010." *Id.* at 804.

The *Barron* concurrence also explains how a defendant may obtain relief where improperly venued claims are separated from properly venued ones for trial purposes. Specifically, the defendant should renew its motion to sever after the trial court announces its intention to try the claims separately, and the trial court should then (1) sever each plaintiff's claims into separate actions, (2) reassess venue for each of the newly severed actions under section 508.012, and (3) transfer those actions for which venue in St. Louis City is not proper under section 508.010 to their proper venue. *Id.* at 803-804. This is exactly what Relators asked Respondent to do as to Plaintiff.

Plaintiff's brief attempts to distort this clear analysis, and impose on Relators a burden they did not have, by arguing that severance is required under the *Barron* concurrence only if (1) the trial court decides to try "***each***" of the multiple joined plaintiffs' claims separately and (2) the trial court expressly finds that "goals of efficiency and expeditiousness" are exhausted. Respondent's Brief at 10, 15. Both of these arguments are meritless.

***First***, under the *Barron* concurrence, severance is not limited to situations when a defendant can prove that "every one" of the joined plaintiffs' cases "would be tried separately." *Id.* at 14-15. The question in this proceeding is whether ***Plaintiff's claims*** should be severed and transferred in light of Respondent's decision that they are to be tried separately. Whether any of the ***other*** multiple plaintiffs to whom Plaintiff's claims were previously joined will continue to proceed together has no bearing on that inquiry. Nowhere in the *Barron* concurrence does Judge Wilson suggest that this is the case, and Plaintiff is unable to cite any authority to that effect.

Indeed, under Plaintiff's mischaracterization of *Barron*, Respondent could hold separate trials for every one of the plaintiffs' claims without ever having to reassess venue under section 508.012, as long he never announced his intention to do so with every claim. The *Barron* concurrence is unwilling to countenance a trial court's determination to continue "to try each of the [improperly venued] claims separately in the City of St. Louis." *Barron*, 529 S.W.3d at 804 (Wilson, J., concurring).

Plaintiff cites selected pages from a May 2016 hearing in which Respondent expressed a desire, at some point, to try more than one plaintiff's claims at a time. The entire transcript of that hearing, however, confirms that separate trials would continue to be the standard in the talc litigation going forward because (even after two separate trials) the plaintiffs were unable to demonstrate sufficient commonality among the claims to support a trial involving more than one plaintiff. *See* Exhibit T, 402-419. Three more single-plaintiff talc trials – one under the *Hogans* cause number (Circuit Court No. 1422-CC09012-01) and two under the *Swann* cause number (Circuit Court No. 1422-CC09326-

01) – were held ***after*** the May 2016 hearing. Thus, although Respondent may have expressed a desire to attempt to try more than one plaintiff's claim at a time, he had established a process whereby individual claims were being separately worked up, tried, and appealed.

Ultimately, any plan Respondent might have for trying the claims of plaintiffs other than Plaintiff is irrelevant to the severance inquiry. A trial of more than one but less than all the joined claims would still require severance and reassessment of venue.

***Second***, Plaintiff's argument that the "goals of efficiency and expeditiousness" may not have been exhausted because a future "bellwether" trial might address issues relevant to Plaintiff's claims is also meritless. According to Plaintiff, even though his claims have been set for a separate trial, they remain part of the underlying action and theoretically may be affected by future trials of "bellwether" cases, which Plaintiff suggests may inform Respondent's general view of the litigation. Respondent's Brief at 16. Without any citation, Plaintiff goes so far as to state that, "by designing a bellwether system, the trial court necessarily believed that a refusal to sever this case was a decision in keeping" with the possibility of a potential "joint trial" of "liability issues and fact issues" purportedly common to multiple cases. Respondent's Brief at 16. There simply is no support in the record for any of these assertions.

There is nothing to indicate that Respondent had designed a bellwether system. Thus far, the claims of five plaintiffs in two different talc cause numbers have been tried to verdict before Respondent, with a separate judgment being entered in each. All were single-plaintiff trials and none was identified as a "bellwether" or "test" case. Neither

Respondent nor any of the plaintiffs in the underlying action has ever suggested that the single-plaintiff talc trials held to date have been "bellwether" trials, the outcomes of which might have some broader application beyond simply resolving the claims of the specific plaintiffs at issue.[3] Nor has there ever been any suggestion that Respondent would orchestrate – much less that Plaintiff's claims would be part of – any effort to resolve purportedly "common" issues across multiple cases.

Further, nothing in the record suggests that the separate trial of Plaintiff's claims is intended to promote any efficiencies purportedly arising from joinder, much less how severance and transfer of the Blaes claims would hinder those purported gains. Instead, just like all of the other trials held to date, it is to be a single-plaintiff trial that would resolve only Plaintiff's claims.

Nor were Relators required to make a separate showing that Respondent had decided that there were no further gains in efficiency or expeditiousness to be had from joinder of the Blaes claims with those of the remaining plaintiffs. As the *Barron* concurrence recognized, by setting the Blaes claims for a separate trial Respondent "necessarily has decided there are no further gains in efficiency or expeditiousness to be

---

[3] Indeed, a proposal to try multiple cases (or issues relevant to multiple cases) jointly would invoke Relators' right to remove the action to federal court under the Class Action Fairness Act ("CAFA"). *See* 28 U.S.C. § 1332(d)(11); *Atwell v. Boston Sci. Corp.*, 740 F.3d 1160, 1162-63 (8th Cir. 2013) (holding that four product liability actions involving less than 100 plaintiffs each were properly removed to federal court under CAFA after the plaintiffs' counsel sought transfer to a single judge and suggested a bellwether process to resolve common issues); *see also In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012) (finding that ten personal injury actions against Abbott Labs were properly removed under CAFA where a "bellwether" procedure to resolve common

had" by joinder of those claims with the other plaintiffs' claims. 529 S.W.3d at 803 (Wilson, J., concurring).

Finally, it is particularly disingenuous for Plaintiff to complain that transfer to St. Louis County would mean "significant additional delay" in resolving his claim. Respondent's Brief at 10. Had he not voluntarily dismissed his case in federal court as the trial approached in 2016, his claims would likely have been resolved by now. Plaintiff's forum shopping has been the cause of any delay.

In sum, Plaintiff's claims have been effectively separated from all of the other claims to which they were previously joined and which purportedly provided a basis for finding venue appropriate in St. Louis City. Accordingly, as the concurrence in *Barron* makes clear, the appropriate course is to sever the case and transfer venue to St. Louis County.

## III. Section 508.012 requires transfer to St. Louis County.

There also is no merit to Plaintiff's argument that transfer is inappropriate under section 508.012. As Relators explained in their opening brief, section 508.012 provides that if a plaintiff or defendant is either added or removed such that the determination of venue under section 508.010 would be altered, then transfer is required upon application of any party. *See* § 508.012. The concurrence in *Barron* expressly finds that, in a multi-plaintiff case, severance after setting the claims of a particular plaintiff for a separate trial

---

issues was proposed). The plaintiffs' counsel have been careful never to utter the word "bellwether" in the underlying action.

"removes" that plaintiff from the action for purposes of invoking section 508.012. *Barron*, 529 S.W.3d at 803 (Wilson, J., concurring).

Plaintiff appears to assert that Judge Wilson is simply wrong on this point, arguing that, contrary to the concurrence in *Barron*, "removal of a defendant" for purposes of invoking section 508.012 "requires a voluntary dismissal or an amended petition ***by the plaintiff***," rather than an action by the trial court. Respondent's Brief at 19 (emphasis added). Plaintiff's declaration is not supported by citation to authority because it is not the law. "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." Rule 52.06. A plaintiff does not have the sole power to determine whether parties are added or removed.

Even more senseless is Plaintiff's argument that section 508.012 requires reassessment of venue only when ***either*** a plaintiff ***or*** defendant is removed, but not when both are. The use of "or" plainly means that the statute applies whether the removed party or parties are plaintiffs or defendants, because the determination of venue obviously could be altered by the removal of either or both.[4]

Plaintiff is also wrong that the Missouri Supreme Court Rules do not "permit a reassessment of the propriety of joinder if the joinder was proper when the action was filed." Respondent's Brief at 21. Plaintiff cites *State ex rel. Blond v. Stubbs*, 485 S.W.2d 152, 157 (Mo. App. 1972), for the proposition that Rule 52.06 "does not authorize the

dropping of any party who has been properly joined under the provisions of Rule 52.05." *Id.* at 157. *Blond*, however, is inapposite.

*Blond* addressed whether a plaintiff could proceed against four defendants in a single action for injuries allegedly caused by one tortfeasor and aggravated by three subsequent treating physicians. Unlike the present case, *Blond* did not involve the propriety of severing one plaintiff's claims from the independent claims of other plaintiffs after a separate trial was ordered. There was no issue of venue in *Blond*. Nor did *Blond* involve the application of section 508.012, which had not even been enacted in 1972, when *Blond* was decided.

No reported Missouri decision appears to have adopted the view of Rule 52.06 expressed in *Blond*. This is likely because the notion that Rule 52.06 does not permit severance unless joinder was improper at the outset of the case is plainly wrong.

Rule 52.06 is modeled after and almost identical to Rule 21 of the Federal Rules of Civil Procedure. While both rules reference misjoinder, they also authorize adding, dropping, or severing claims or parties for a host of reasons, even where joinder is appropriate. Indeed, a federal district court recently considered this precise issue and found that the analogous federal Rule 21 authorizes severance even where claims are properly joined. *See Longlois v. Stratasys, Inc.*, No. 13-CV-3345 JNE/SER, 2014 WL 2766111, at *3 (D. Minn. June 18, 2014) (citing a "number of circuit courts that have

[4] Even if Plaintiff's interpretation of the statute were correct, it would still apply here, because the only party removed would be Plaintiff. Relators both remain defendants in the joined claims from which Plaintiff has been separated.

similarly determined that a court may act under Rule 21 even where the parties are properly joined under the Rule 20 standard").

Plaintiff's assertion that Rule 52.05 only permits ordering a separate trial, not severance, is also incorrect. Rule 52.05(b) reads: "The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a person as a party against whom the party asserts no claim and the person asserts no claim against the party and may order separate trials or make other orders to prevent delay or prejudice." While this rule does not contain the word "severance," it permits a court to make "other orders" to prevent prejudice. This is plainly broad enough to include ordering severance.

Rule 52.05(b) is based on Rule 20 of the Federal Rules of Civil Procedure, under which courts have severed claims for reasons of fairness. In *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296-1297 (9th Cir. 2000), for example, the Ninth Circuit affirmed the trial court's decision to sever the claims of several plaintiffs under Rule 20(b) (the analog to 52.05(b)) because prejudice to the defendant outweighed gains in efficiency. Although the court referred to "severance of trial," the case clearly involved traditional severance because the trial court sent the out-of-state plaintiffs' claims to the states where those plaintiffs were employed. *Id.* at 1280.

Plaintiff's assertions about severance and separate trials ignore the applicable law and the context of this writ proceeding. The issue before the Court is whether venue is proper as to a separate trial of the Blaes claims in the Circuit Court of the City of St.

Louis. The simple answer to that question is "no," and none of Plaintiff's cited authorities support denial of a writ in this context.[5]

## CONCLUSION

For the foregoing reasons, the Court should make permanent its writ directing Respondent to take no further actions with regard to the claims of plaintiff Michael Blaes except to sever the claims of Mr. Blaes and transfer those claims to St. Louis County Circuit Court.

[5] Even if Plaintiff were correct that the Missouri Rules do not permit a court to reevaluate the propriety of joinder later in the case if the parties are properly joined at the outset, severance would still be appropriate here. As addressed in Relators' opening brief and noted above, Plaintiff's claims were improperly joined to those of the other plaintiffs in the underlying action, with no intention that the claims all be tried together. Indeed, the only purpose for the joinder was to manipulate the applicable jurisdictional and venue rules. Accordingly, neither joinder nor venue was ever appropriate.

Respectfully submitted,

ARMSTRONG TEASDALE LLP

By:*/s/ Thomas B. Weaver*
Thomas B. Weaver #29176
William Ray Price, Jr. #29142
Jeffery T. McPherson #42825
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314.621.5070
314.621.5065 (facsimile)
tweaver@armstrongteasdale.com
wprice@armstrongteasdale.com
jmcpherson@armstrongteasdale.com

Thomas J. Magee #32871
HeplerBroom LLC
211 North Broadway, Suite 2700
St. Louis, Missouri 63102
314.241.6160
314.241.6116 (facsimile)
tjm@heplerbroom.com

Beth A. Bauer #49981
HeplerBroom LLC
130 N. Main Street
P.O. Box 510
Edwardsville, Illinois 62025
618.307.1200
bab@heplerbroom.com

Gene M. Williams
Kathleen A. Frazier
Scott A. James
Shook, Hardy & Bacon, L.L.P.
600 Travis Street, Suite 3400
Houston, Texas 77002-2926
713.227.8008
gmwilliams@shb.com
kfrazier@shb.com
sjames@shb.com

Mark C. Hegarty #40995
Shook, Hardy & Bacon, L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108-2613
816.474.6550
mhegarty@shb.com

ATTORNEYS FOR RELATORS
JOHNSON & JOHNSON AND
JOHNSON & JOHNSON CONSUMER INC.

## CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document, along with the accompanying Appendix, was served on counsel of record through the Court's electronic notice system on February 20, 2018.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 5,216 excluding the cover, signature block, appendix, and this certificate.

The electronic copies of this brief were canned for viruses and found virus-free through the Symantec anti-virus program.

*/s/ Thomas B. Weaver*