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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

REPLY BRIEF OF RELATOR ABBOTT LABORATORIES INC.

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INTRODUCTION

Respondent's brief evidences Plaintiffs' attempt to explain away the applicability of nearly every Missouri rule or statute that applies to the joinder and venue issues in this writ. They assert that this Court's Rule 51.01—which instructs that joinder cannot expand venue—"does not apply" to this case (Resp. Br. at 29), yet offer no authority or discussion of the Rule beyond this naked assertion. They likewise claim that section 508.010.5 does not apply, although Lopez indisputably was injured outside Missouri. And, through what can only be described as a tortured reading of the statute, they claim that, notwithstanding the *Schmidt* concurrence, section 508.012 is inapplicable, too.

The Tort Reform Act of 2005 was enacted to significantly *restrict* allowable venues and curb forum-shopping by plaintiffs. As Plaintiffs acknowledge, prior to 2005, plaintiffs engaged in a procedural "two-step": (1) file a petition with just one defendant to obtain a favorable venue, and (2) then amend that petition to add other defendants who would have rendered that venue improper if they had been named in the petition. (*See* Resp. Br. at 18). The Tort Reform Act eliminated that "two-step," but the new "two-step" is even worse. They first join a plaintiff from the City of St. Louis in their petition solely to act as a "hook" for venue in the City for any plaintiff in the country, then next disavow that joinder for trial, judgment, and appeal. Venue without restriction was not the intent of Missouri Tort Reform.

Plaintiffs ask this Court to turn a blind eye to the stated purpose of Missouri Tort Reform and this Court's own rules in favor of claimed efficiencies in dumping all cases into the City of St. Louis Circuit Court. But the choice here is not between following the

law and the efficient administration of justice. This Court's concurring opinion in *Schmidt* set forth a logical framework that does not force a decision between efficiencies or the law, but rather allows for efficiencies *within the parameters* of Missouri's venue and joinder law. That law requires that the preliminary writ be made permanent.

ARGUMENT

I. Severance and Transfer of Lopez's Case is Required Pursuant to This Court's *Schmidt* Opinion

Plaintiffs do not dispute that the *Schmidt* concurrence sets forth a logical and orderly framework that allows for efficiencies while still ensuring that cases are tried in proper venues. Instead, they incredibly claim that it does not apply here—ignoring the obvious reality that the *Schmidt* opinion involved precisely the same underlying case at issue in this writ.

A. The Trial Court Determined That Lopez's Case Will Be Tried Separately

Plaintiffs first claim that the *Schmidt* concurrence does not apply because the trial court has not determined that every single one of the twenty-four plaintiffs' cases will be tried separately, which they claim is a prerequisite to severing *any* plaintiff's case—even if the court has determined that plaintiff's case will be tried separately. By Plaintiffs' reading of the concurrence, a court could order a separate trial of one plaintiff, then another, then another, and so on—and as long as there remained a possibility that the last two plaintiffs could be tried together, all plaintiffs could remain joined even as they proceeded to separate trials and appeals in a venue with which they have no connection.

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The *Schmidt* concurrence announced no such rule, and Plaintiffs' invention of such a rule grossly distorts the concurring opinion's pronouncements on this issue in the same underlying case. The concurring opinion decided—and the principal opinion was "willing to agree"—that in this case, it was error not to sever a plaintiff's claims upon renewed motion after the trial court had determined that the plaintiff's case would proceed to separate trial. *See Schmidt v. Abbott Labs. Inc.*, 529 S.W.3d 795, 804 (Mo. banc 2018) (Wilson, J., concurring). Another separate trial has now been set, and Abbott filed its renewed motion. Thus, it was error for the court not to sever Lopez's claims.

Plaintiffs acknowledge that the court "initially decided to try two of the twenty-four cases separately" (Resp. Br. at 11), but then surmise that severance of Lopez's case is not required because joint trials of *other* plaintiffs could theoretically occur at some undefined later date. Even if the prospect of future joint trials was of any import, the history of the underlying case and the documents in the record evidence no intention to conduct joint trials of unrelated plaintiffs. In 2014, the circuit court (Judge Garvey) ordered each party to select the cases of two plaintiffs, then Plaintiffs were ordered "to rank their 2 selected plaintiffs, with number one being the first case to be returned to Div. 1 for trial." (A479-A482). The court likewise ordered "Defendant to rank its 2 selected plaintiffs, with number one being the second case to be returned to Div. 1 to be tried." *Id.* This procedure was designed to select individual plaintiffs' cases for separate discovery workup and trial. After Abbott chose the case of a plaintiff from the City of St. Louis (Abreonna Johnson; *see* A483), Plaintiffs voluntarily dismissed that case. Abbott's next

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selection was the case of Mariah Lopez. (*Id.*). There has never been any order or indication that the trial court intends to try unrelated plaintiffs' claims together.[1]

Finally, Plaintiffs' speculation regarding future trials makes it easy to lose sight of the issue presented in this writ—whether Mariah Lopez's case should be severed and transferred. There is no dispute that Lopez's case was selected for a separate trial and that her case will proceed to trial (and likely appeal) on its own. Once the determination was made that Mariah Lopez's case would proceed to trial separately, her case was severed for all practical purposes and should have been formally severed as well.

B. The *Schmidt* Concurrence Framework Allows for Efficiencies Within the Parameters of Missouri Law While Ensuring Individual Trials in Proper Venues.

Plaintiffs next argue that severance is not required under the *Schmidt* concurrence because there are still efficiencies to be gained from keeping Lopez's case joined with the cases of the other plaintiffs, despite the fact that it will proceed to a separate trial and, if history is any guide, separate appeal.

As an initial matter, Plaintiffs again ignore that the *Schmidt* appeal involved another plaintiff from the same underlying case as this writ. Severance is just as

[1] The history of other Depakote cases also does not demonstrate that joint trials are likely as Plaintiffs contend. To date, eight Depakote trials have occurred in jurisdictions throughout the country. All eight have been single-plaintiff trials. As discussed in Abbott's opening brief, the factual and legal differences among the plaintiffs' claims would make it impossible to conduct a fair trial involving multiple plaintiffs. A joint trial would also present both a practical and logistical nightmare, given that the plaintiffs claim vastly different injuries ranging from headaches to spina bifida; their mothers took Depakote for different conditions; and they were born over a three-decade period where the Depakote warning label changed significantly—not to mention that they hail from thirteen different states, each of which has different applicable laws and jury instructions. *See* Opening Br. at 21-22.

appropriate for the *Lopez* Plaintiff as it was for the *Schmidt* Plaintiff. The concurring opinion in *Schmidt* properly determined that any efficiencies to be gained had been exhausted and that severance and transfer to St. Louis County prior to separate trials was required in this same case. *See Schmidt*, 529 S.W.3d at 803. In so doing, the concurrence established a framework that allows for efficiencies while still holding individual trials in proper venues.

Continued joinder of unrelated plaintiffs in the City of St. Louis is not required to complete an established "bellwether" process, as Plaintiffs assert. It is no surprise that Respondent's brief offers no citation for the claim that the trial court "design[ed] a bellwether system" with the hopes of "trying common issues in a single trial across the remaining cases" (Resp. Br. at 13-14)—because it is not true. Plaintiffs simply made that up. The trial court never provided any indication that it contemplated a bellwether process or that trials on "common issues" would follow. Indeed, despite Plaintiffs' assertion to the contrary, no court overseeing any Depakote litigation has ever held a so-called "issues" trial. [2]

If a trial court *were* to decide that bellwether trials were appropriate, the bellwethers can take place after severance and transfer to the appropriate venue. And in this case, a bellwether trial would be much better suited to occur in St. Louis County, where venue is undisputed. The result of a trial in an indisputably proper venue is

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[2] The federal orders cited in footnote 2 of Respondent's brief (p. 14) did *not* order "common issues" trials. Throughout the six-year history of the Depakote litigation, no trials on "common issues" have been held, nor have any been ordered or scheduled.

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certainly more representative than the result of a trial in a disputed venue arising out of blatant forum-shopping that will only lead to additional procedural wrangling.

Plaintiffs also claim that Lopez's case should not be severed and transferred to St. Louis County because it would "be placed at the end of the line in [St. Louis County Circuit Court] and await trial on a crowded docket." (Resp. Br. at 15). Plaintiffs again offer no support for this bald and inaccurate claim. The most recent data from the annual Missouri Judicial Report disproves this assertion and demonstrates that the City of St. Louis—not St. Louis County—is the more crowded docket in which cases wait endlessly for trial.

At the end of 2017, more than 22,000 circuit civil cases were pending in the City of St. Louis, compared with just 5,109 in St. Louis County. *See* 2017 Missouri Annual Statistical Report Profiles for Circuits 21 and 22.[3] Thus, despite having less than one-third as many residents as St. Louis County, the City of St. Louis Circuit Court has more than *four times* as many circuit civil lawsuits pending. The difference in caseloads is even more stark when one considers that many of cases in the City of St. Louis contain dozens of individual plaintiffs who have filed under one case number in an effort to obtain venue.[4]

[3] Circuit 21 (St. Louis County) profile available online at https://www.courts.mo.gov/file.jsp?id=122313; Circuit 22 (City of St. Louis) profile available online at https://www.courts.mo.gov/file.jsp?id=122314.

[4] According to our most recent analysis of Case.net records conducted this year, there are more than 140 multi-plaintiff mass tort cases pending in the City of St. Louis, containing more than 9,500 plaintiffs (an average of more than 65 plaintiffs per case), including more than 8,900 out-of-state plaintiffs (an average of more than 60 out-of-state plaintiffs per case).

Moreover, although it had four times as many circuit civil cases on its docket, the City of St. Louis Circuit Court conducted 25 *fewer* civil jury trials than were conducted in St. Louis County Circuit Court in 2017. *See id.* (45 civil jury trials in the City versus 70 civil jury trials in the County). This data belies Plaintiffs' assertion about the "crowded docket" in St. Louis County. And, under the present posture, City of St. Louis plaintiffs are either "placed at the end of the line" to maintain venue under the new "two-step" or dismissed for other tactical reasons as was Abreonna Johnson's case. If there is any doubt, upon transfer of Lopez's case, Abbott will work with Plaintiff and the court to obtain a reasonable trial setting in St. Louis County in light of the advanced posture of the case.

Finally, Plaintiffs' efficiency arguments ring hollow where any inefficiencies are of their own making. If Plaintiffs desired an MDL-type procedure or more efficient resolution of their cases, they could have avoided this protracted venue dispute by filing in St. Louis County, where venue is undisputed. Having not done so, they cannot now be heard to complain that it is too late in the game to transfer to the proper venue.

C. Section 508.012 Applies When a Plaintiff's Case Is Severed.

The *Schmidt* concurrence properly determined that "[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 action resulting from that severance." 529 S.W.3d at 803. Perhaps sensing that this analysis is the end of their new "two-step," Plaintiffs argue that the analysis of section 508.012 in the *Schmidt* concurrence was

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wrong. They claim that even if Mariah Lopez's case is severed, she can proceed to trial in the City of St. Louis. One must wonder why Lopez continues to so stridently oppose severance, if it would have no impact on her case? The answer is apparent: Lopez and the other plaintiffs recognize that section 508.012 requires that venue be re-determined for the severed action upon application, and they know that re-determination of venue would result in transfer of their cases.

Therefore, Plaintiffs have come up with a brand new interpretation of section 508.012 that, they now say, renders it inapplicable here. They argue that the statutory provision applies only when either a plaintiff *or* a defendant is removed from an action, but does not apply when a plaintiff *and* a defendant are removed. This argument is legally and factually wanting. If Mariah Lopez's case is severed from the cases of the other plaintiffs in the underlying case, Abbott would remain a defendant in the underlying case. Abbott would not, as Plaintiffs suggest, be "removed" from the *Barron* case.

Plaintiffs also dispute the *Schmidt* concurrence's analysis that severance of a plaintiff's case "removes" the plaintiff for purposes of section 508.012. They claim that a party is only "removed" for purposes of the statute where an amended petition is filed or where the party is voluntarily dismissed from an action. (Resp. Br. at 17). Plaintiffs' strained interpretation of section 508.012 again finds no support in the law. Plaintiffs admit that voluntary dismissal of a party would constitute "removal" from the petition so as to invoke the statute. *Id.* Severance is no different. Under either voluntary dismissal or severance, the plaintiff is no longer a party to the case. And when a Plaintiff's case is severed, it is removed and assigned a new cause number.

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D. Severance Is the Proper Procedural Device Under These Circumstances.

Abbott agrees with Plaintiffs that severance and separate trials are "distinct procedural devices serving distinct purposes." (Resp. Br. at 24). But it is Plaintiffs—not Abbott—who "confuse" the two procedural devices here. *Id.*

Indeed, the authority cited by Plaintiffs is perhaps the best evidence that severance—not separate trials—is the appropriate procedural device under these circumstances, where a plaintiff's case is proceeding entirely separately for all further purposes. As Plaintiffs note, the key difference between the two procedural devices is that "[s]eparate trials will usually result in one judgment, but severed claims become entirely independent actions to be tried, and judgment entered thereon, independently." (Resp. Br. at 25) (quoting 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2387 (1971) (emphasis added)).[5]

Independent trials, judgments, and appeals are precisely what is happening here. The separate trial, judgment, and appeal of Maddison Schmidt's case demonstrates that her case was not simply separated out for trial, but rather became an entirely independent action for trial, final judgment, and appeal. Mariah Lopez is no different. Her case is now proceeding separately to a separate trial and, if the *Schmidt* history is any guide, separate judgment and appeal if necessary. It is an entirely independent action, and therefore severance—not separate trial—is the correct procedural device.

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[5] *See also* 9A Fed. Prac. & Proc. Civ. § 2387 (3d ed.) (2017) ("The difference between the two is stated easily. Separate trials of claims originally sued upon together usually will result in the entry of one judgment, but severed claims become entirely independent actions to be tried, and judgment entered thereon, independently.").

Plaintiffs' request for a Rule 74.01(b) judgment of the *Schmidt* case demonstrates the inconsistency of their position. Plaintiffs protested severance at the beginning of the case, then advocated for it to obtain a separate judgment. This maneuver is the procedural converse of the "two-step" this Court denounced in *Linthicum. See State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo banc. 2001). There, plaintiffs engaged in a procedural "two-step" whereby they would file a petition with just one defendant to obtain a favorable venue, then later add other defendants who would have rendered that venue improper if they had been named in the petition. (*See* Resp. Br. at 18). Here, Plaintiffs have come up with a new "two-step": (1) multiple plaintiffs join in one petition to obtain a favorable venue, then (2) they proceed to separate trials, separate judgments, and separate appeals of individual plaintiffs for which venue would not have been proper if they had filed separately. Neither "two-step" is permissible.

Finally, Plaintiffs' argument that the determination of joinder is fixed at the beginning of the case, and that parties cannot be severed later, simply ignores this Court's own rule that says the very opposite. *See* Mo. Sup. Ct. R. 52.06 ("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) (granting amended motion to sever during pendency of case); *Ballentine v. Town of Coats*, No. 5:11-CV-524-FL, 2012 WL 4471605, at *4 (E.D. N.C. Sept. 26, 2012) (same). Plaintiffs have no response to Rule 52.06. Their quotation of the *Linthicum* dissent in an effort to support this point

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is a blatant mischaracterization. The quoted text pertains to venue—not joinder, as the bracketed text implies. Moreover, the quoted text, which contemplates a single, fixed determination of venue at the beginning of an action, was written *prior to* the Tort Reform Act of 2005, which changed the law to require a re-determination of venue after severance. *See* Section 508.012, RSMo.

II. Rule 51.01 Cannot Be Ignored.

A. The Tort Reform Act of 2005 Did Not Paradoxically Expand Venue as Plaintiffs Suggest.

Plaintiffs contend that section 508.010 unambiguously prescribes multiple proper venues in a multi-plaintiff case, and plaintiffs can simply have their pick among them. Under this theory, plaintiffs here could have sued in St. Louis County (the location of Abbott's registered agent) or in the any other Missouri county where any plaintiff was injured: Audrain County (plaintiff Judy Brown), Webster County (plaintiff Jayda Maggard), or the City of St. Louis (twin plaintiffs Jerricka and Jerrinee Marshall).

It is no wonder that Plaintiffs ask this Court to ignore the legislative history underlying section 508.010. (Resp. Br. at 33). The history plainly and definitively discredits their interpretation and their claim that the statute allows plaintiffs to sue anywhere they want. In fact, the enactment of section 508.010 was intended to "significantly restrict[] venue locales in order to reduce forum-shopping by plaintiffs." *State ex rel. Kinsey v. Wilkins*, 394 S.W.3d 446, 448 n.1 (Mo. App. 2013)(emphasis added). *See also 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) (Act was designed "to disallow venue-shopping, especially in suits against corporations."); Matt Blunt, Commentary, *How Missouri Cut Junk Lawsuits*, WALL ST. J., Sept. 22, 2009 (former governor of Missouri, who signed the bill into law, describing the purpose of the Act to "counteract ... 'venue-shopping,' a tactic that involves shifting a case to a friendly court regardless of where the injury occurred.").

Under Plaintiffs' interpretation of the statute, *any* plaintiff from *any*where in the country could sue in *any* county in Missouri so long as he or she can find one person in that county to join in the petition. Such an interpretation simply cannot be squared with the stated purpose of the Act. In fact, it is a gross perversion of the intent of the Act.[6]

B. Rule 51.01 Does Not Permit Joinder to Extend Venue.

Plaintiffs claim that Rule 51.01 "does not apply" to this case (Resp. Br. at 29), yet offer no authority or discussion of the Rule beyond this assertion.[7] This writ can be decided without reference to Rule 51.01, because Lopez's case should be severed and transferred pursuant to the *Schmidt* concurrence and section 508.012. But Rule 51.01 certainly applies and provides yet another reason venue in the City of St. Louis for Lopez's claim is improper.

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[6] Plaintiffs' claim that venue is not at issue in this writ is wrong. Abbott's renewed motion prior to the separate trial of Lopez's case asked the court to sever Lopez's case and also asked the court to transfer the case to St. Louis County. *See, e.g.* Renewed Motion at 5 (A589) ("The case of Georgia plaintiff Mariah Lopez has been separately set for trial on October 30, 2017. As such, her case should be severed upon this renewed Motion. Her case should also be transferred to St. Louis County."). As the trial court knows well, for more than five years Abbott has repeatedly and steadfastly challenged venue of the cases of the non-City plaintiffs.

[7] The fact that the *Schmidt* opinion does not mention Rule 51.01 does not indicate that it is inapplicable here. This Court simply did not reach the issue.

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Rule 51.01 contains no exceptions, no conditions that must be met before it applies. It is a straightforward rule that applies to every action filed in Missouri courts: "These Rules shall not be construed to extend or limit the jurisdiction of the courts of Missouri, or the venue of civil actions thereon." Mo. Sup. Ct. R. 51.01 (emphasis added). Permissive joinder is one of those rules—Rule 52.05(a). Therefore, permissive joinder shall not be construed to extend the venue of civil actions.

Mariah Lopez's case has been separated from the cases of the other plaintiffs and will proceed to a separate trial. If Lopez had filed her case separately, St. Louis County would have been the only proper venue in Missouri for that case, pursuant to section 508.010.5. That should end the analysis. But even if section 508.010 allows plaintiffs to choose among multiple venues in multi-plaintiff cases as Plaintiffs suggest, the *only* way Lopez can expand her venue options is by joining her claims with the claims of a Missouri resident and filing in the county where that Missouri resident was first injured. In other words, even under Plaintiffs' interpretation of section 508.010, joinder is the mechanism that extends the venue over Lopez's case. Rule 51.01 expressly prohibits exactly that.

CONCLUSION

It is time to enforce Missouri joinder and venue law and clean up the mess that the docket of the City of St. Louis has become. The Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California., San Francisco County*, 137 S. Ct. 1773 (2017), was a step in the right direction, but it is far from resolving the issue, having now devolved into ceaseless discovery by many plaintiffs on real or perceived

connections of jurisdictional significance. Nor has it slowed the continuous filings by out-of-state plaintiffs in the City of St. Louis. Even now, thousands of mass tort plaintiffs from across the country still wait in line for their golden ticket from the Circuit Court of the City of St. Louis. Enforcement of Rule 51.01 would put an end to the new "two-step" used by these plaintiffs and thousands of others to improperly obtain venue through joinder. At a minimum, this Court should correct the "improper and easily avoidable outcome" presented here by adopting the solution proffered by the *Schmidt* concurrence. The sound administration of justice counsels in favor of the efficient solution proffered by the *Schmidt* concurrence. Missouri's venue and joinder law requires it.

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Respectfully submitted,

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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 4,137 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.

/s/ Dan H. Ball

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 20, 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