IN THE SUPREME COURT OF MISSOURI

No. SC97200

STATE OF MISSOURI ex rel. HEPLERBROOM, LLC, and GLENN E. DAVIS,

Relators,

v.

HON. JOAN L. MORIARTY, CIRCUIT JUDGE, CITY OF ST. LOUIS CIRCUIT COURT,

Respondent.

RELATORS' BRIEF ON PETITION FOR WRIT OF PROHIBITION

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JURISDICTIONAL STATEMENT

This is an original proceeding in prohibition under this Court's supervisory powers pursuant to Article V, § 4.1 of the Missouri Constitution. This Court accepted jurisdiction by entering a Preliminary Writ of Prohibition on August 21, 2018 directed to respondent's order denying relators' motion to transfer this case from the Circuit Court of St. Louis City to the Circuit Court of St. Charles County. It is well-established "that this Court accepts the use of an extraordinary writ to correct improper venue decisions of the circuit court before trial and judgment." *State ex rel. Kansas City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. banc 2009). A writ of prohibition prevents an "exercise of extra-jurisdictional power" by barring a court "from taking any further action, except to transfer the case to a proper venue." *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. banc 2002) (citations omitted).

STATEMENT OF FACTS

The Parties

Plaintiffs Donald and Dolores Twillman are husband and wife, and plaintiff Michael Twillman is their son. Ex. A, Petition, ¶¶ 2, 3.[1] The Twillmans reside in St. Charles County, Missouri. *Id*. Plaintiff American Hydraulic Services, LLC ("AHS"), was a Missouri corporation owned and operated by the Twillmans during the relevant time period, with its principal place of business located in St. Charles County, Missouri. *Id*., ¶¶ 1, 7.

Relator HeplerBroom, LLC, is a law firm alleged to be a Missouri corporation with its principal place of business in the City of St. Louis, Missouri. *Id*., ¶ 4. Relator Glenn E. Davis, a partner with HeplerBroom, LLC, was retained to represent plaintiffs in certain matters. Ex. B, Answer, ¶ 4.

Respondent Joan L. Moriarty is a circuit judge sitting in Division 20 of the Circuit Court of the City of St. Louis, Missouri.

Allegations of the Petition

On August 24, 2017, the Twillmans and AHS (collectively "plaintiffs") filed a legal malpractice action against HeplerBroom, LLC and Davis (collectively "HeplerBroom") in the Circuit Court of the City of St. Louis. Ex. A. In February 2016, the Twillmans signed a franchise agreement with a Florida company, Pirtek USA ("Pirtek"). *Id.*, ¶ 12. The purpose of the agreement was to establish a local Pirtek

[1] Unless otherwise stated, all citations are to the exhibits to Relators' Petition for Writ of Prohibition (6/4/18).

franchise in St. Charles County that would sell and service hydraulic equipment. *Id*., ¶¶ 9, 13. Soon after signing the agreement, the Twillmans decided they no longer wanted to establish a Pirtek franchise. *Id.*, ¶ 17. They retained HeplerBroom to advise them on cancelling the franchise agreement. *Id*., ¶¶ 18, 19. Pirtek then agreed to cancel the franchise agreement and refund the Twillmans' deposit. *Id.*, ¶¶ 21-23.

Shortly after the agreement was cancelled, the Twillmans formed AHS, a business in St. Charles County that offered hydraulic products and services. *Id*., ¶¶ 1, 24. Several months later, Pirtek sued the Twillmans in federal district court in Florida. *Id*., ¶ 30. Pirtek alleged that, despite the cancellation, the confidentiality and non-compete provisions of the franchise agreement remained in effect, and that the Twillmans violated those provisions by operating AHS. *Id*. The federal district court entered a preliminary injunction requiring the Twillmans to cease operations in St. Charles County and to refrain from using Pirtek's confidential information in those operations. *Id.*, ¶¶ 30, 33 (citing *Pirtek, USA v. Twillman, et al.,* No. 6:16-CV-01302-Orl-37TBS (M.D. Fla. October 6, 2016) (Doc. No. 56)). The court subsequently compelled arbitration and the suit was ultimately resolved by settlement. *Id*., ¶ 35.

In their petition, plaintiffs allege that HeplerBroom was negligent in advising the Twillmans with respect to cancellation of the franchise agreement. *Id*., ¶¶ 36, 37. Plaintiffs claim to have suffered nearly four million dollars in damages, which they attribute to being forced to cease operations of AHS in St. Charles County. *Id.*, ¶¶ 1, 33, 38. The alleged damages include AHS's start-up costs ("inventory, vehicles, services, supplies, maintenance and equipment") and projected "lost profits, wages and income"

associated with operation of AHS over a four-year period. *Id*., ¶¶ 28, 38. The petition asserts that venue is proper in the Circuit Court of the City of St. Louis because this case concerns "legal services rendered from [HeplerBroom's] office located in the City of St. Louis, Missouri." *Id*., ¶¶ 5, 6.

Procedural History in the Circuit Court

On October 6, 2017, pursuant to Missouri Supreme Court Rule 51.045, HeplerBroom timely filed and served a motion to transfer for improper venue. Ex. C, Motion to Transfer. In their motion, HeplerBroom asserted that, under *State ex rel. Selimanovic v. Dierker,* 246 S.W.3d 931 (Mo. banc 2008), venue for a legal malpractice action is proper in the county where the plaintiff was allegedly subject to financial loss. *Id*., ¶¶ 3-5. Because the Twillmans and AHS sought as damages financial losses suffered in St. Charles County, HeplerBroom argued that St. Charles County was the only proper venue. *Id*., ¶ 10. In their petition, plaintiffs did not allege that they conducted any business operations in Florida, or that venue was proper in the City of St. Louis by virtue of a suit being filed in Florida.

Under Rule 51.045(b), plaintiffs had 30 days, or until November 6, 2017, to file their reply or request from respondent additional time to do so. They did not file a reply or seek an extension before the 30-day deadline expired. Instead, plaintiffs filed an untimely reply on November 22, 2017, which was captioned "Plaintiffs' Response to Both Defendants' Motion to Transfer Venue." Ex. D. In this untimely reply, plaintiffs made a new venue allegation and asserted that the City of St. Louis was the proper venue because they were first injured outside the state of Missouri. Plaintiffs now claimed that

their injury first occurred in Florida, where the Twillmans were sued by Pirtek. *Id*., ¶¶ 2, 8. They therefore argued they were first injured outside the state of Missouri and the City of St. Louis was the proper venue under § 508.010.5(1) RSMo. because HeplerBroom's registered agent is located there. *Id*., ¶¶ 6-8.

On November 27, 2017, HeplerBroom filed a response to this argument, pointing out that their motion to transfer should be granted for two reasons. Ex. E, HeplerBroom's Reply. First, pursuant to Rule 51.045(c), respondent was required to grant HeplerBroom's motion to transfer the case to St. Charles County because plaintiffs failed to file a timely reply or seek an extension within the 30-day period. *Id*., ¶ 3. Second, even had the reply been timely, plaintiffs did not (and could not) identify any financial loss they suffered in Florida and the petition only alleged financial losses in St. Charles County. *Id*., ¶ 5. Thus, St. Charles County was where plaintiffs were first injured and the only proper venue under § 508.010.4 RSMo.

On November 28, 2017, respondent called HeplerBroom's motion for hearing. During argument, plaintiffs' counsel made an oral motion for leave to file plaintiffs' reply out of time. Respondent took both plaintiffs' motion for leave and HeplerBroom's motion to transfer under advisement. On November 30, plaintiffs filed a "written, supplemental" motion for leave to file their reply out of time. Ex. F, Supplemental Motion. In that pleading, plaintiffs offered only that their failure to file a timely reply "was inadvertent and an oversight." *Id*., ¶ 3.

On May 10, 2018, seven months after HeplerBroom filed its motion to transfer, respondent entered an Order denying the motion. Ex. G, Venue Order. Respondent

accepted plaintiffs' contention that they were first injured outside the state of Missouri because of the legal proceedings in Florida. *Id*., p. 2. As a consequence, respondent analyzed venue under the out-of-state tort venue provision, § 508.010.5, and found venue proper in the City of St. Louis because that is where HeplerBroom's registered agent is located. *Id*., p. 3. Respondent did not rule on plaintiffs' motion for leave to file their reply out of time, or on HeplerBroom's argument that transfer was mandatory because plaintiffs neither filed a reply nor obtained an extension of time "[f]or good cause shown" within the original 30-day reply period.

Writ Proceedings

On May 24, 2018, HeplerBroom filed a petition for writ of prohibition in the Eastern District of the Missouri Court of Appeals. The petition was denied without comment on May 25, 2018. *See* Writ Summary (6/4/18).

HeplerBroom filed a petition for writ of prohibition in this Court on June 4, 2018. On August 21, 2018, this Court issued a Preliminary Writ of Prohibition. The Preliminary Writ commanded respondent to file a written return to the petition and to show cause why a writ should not issue. It prohibited respondent "from doing anything other than vacating your order of May 10, 2018, denying transfer of the case to St. Charles County Circuit Court, and entering an order transferring the case to St. Charles County Circuit Court." Plaintiffs' counsel filed an Answer to the Preliminary Writ on behalf of respondent on September 20, 2018.

POINTS RELIED ON

I. HEPLERBROOM IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ACTION OTHER THAN TRANSFERRING THIS LEGAL MALPRACTICE CASE TO ST. CHARLES COUNTY BECAUSE RESPONDENT ERRONEOUSLY DENIED TRANSFER FOR IMPROPER VENUE IN THAT PLAINTIFFS WERE "FIRST INJURED" UNDER SECTION 508.010 RSMO IN ST. CHARLES COUNTY WHERE THEY WERE FIRST SUBJECTED TO FINANCIAL LOSS AS A CONSEQUENCE OF THE ALLEGED MALPRACTICE

State ex rel. Selimanovic v. Dierker, 246 S.W.3d 931 (Mo. banc 2008)

Klemme v. Best, 941 S.W.2d 493 (Mo. banc 1997)

Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. banc 2009)

Dimmitt & Owens Financial, Inc. v. Deloitte & Touche (ISC), LLC, 752 N.W.2d 37 (Mich. 2008)

Section 508.010.4 RSMo.

II. HEPLERBOOM IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ACTION OTHER THAN TRANSFERRING THIS CASE TO ST. CHARLES COUNTY BECAUSE PLAINTIFFS FAILED TO FILE A TIMELY REPLY TO HEPLERBROOM'S MOTION TO TRANSFER FOR IMPROPER VENUE AND MISSOURI SUPREME COURT RULE 51.045(C) THEREFORE REQUIRED TRANSFER TO THE COUNTY SPECIFIED IN HEPLERBROOM'S MOTION

State ex rel. Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470 (Mo. banc 2002)

Igoe v. Dept. of Labor and Indus. Relations, 152 S.W.3d 284 (Mo. banc 2005)

State ex rel. Grand River Health System Corp. v. Williamson, 240 S.W.3d 172 (Mo.App. W.D. 2007)

Missouri Supreme Court Rule 51.045

III. HEPLERBROOM IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ACTION OTHER THAN TRANSFERRING THIS CASE TO ST. CHARLES COUNTY BECAUSE RESPONDENT DID NOT DENY HEPLERBROOM'S MOTION TO TRANSFER FOR IMPROPER VENUE WITHIN 90 DAYS OF ITS FILING, WHICH TIME PERIOD WAS NOT WAIVED IN WRITING BY THE PARTIES, AND THEREFORE SECTION 508.010.10 RSMO REQUIRED THAT THE MOTION "BE DEEMED GRANTED"

City of Normandy v. Greitens, 518 S.W.3d 183 (Mo. banc 2017)

State ex rel. State Highway Commission v. Morganstein, 588 S.W.2d 472 (Mo. banc 1979)

Gardner v. Mercantile Bank of Memphis, 764 S.W.2d 166 (Mo.App. E.D. 1989)

Section 508.010.10 RSMo.

Missouri Supreme Court Rule 51.045

ARGUMENT

Introduction

As this Court recognized by issuing its Preliminary Writ of Prohibition, the Court's intervention is required to ensure that this legal malpractice action against HeplerBroom is litigated in the correct venue. This writ proceeding presents three important and independent issues of statutory and rule construction that require guidance from this Court:

(1) Whether the filing of an out-of-state lawsuit constitutes "first injury" for venue purposes under § 508.010 RSMo. and this Court's opinion in *State ex rel. Selimanovic v. Dierker,* 246 S.W.3d 931 (Mo. banc 2008), when any resulting financial loss occurred in Missouri?

(2) Whether Missouri Supreme Court Rule 51.045(c) requires that venue be transferred if a reply to a motion to transfer is not filed or an extension granted for good cause within 30 days?

(3) Whether § 508.010.10 RSMo. means what it says when it requires that motions to transfer for improper venue "shall be deemed granted if not denied within ninety days" of filing unless the parties waive that time period in writing?

This Court held in *Selimanovic* that a plaintiff in a legal malpractice action is first injured for venue purposes where the plaintiff is first subject to financial loss. In that case, the injury was the loss of a monetary judgment in either St. Louis City or St. Louis County, the two venues in which the lawsuit barred by the statute of limitations could have been filed. Here, respondent erroneously concluded that plaintiffs were first injured

outside the state of Missouri by virtue of being sued in another state. However, plaintiffs' petition establishes that they were first injured in their home county of St. Charles, Missouri, where the Twillmans ceased operation of AHS, which precipitated the financial loss alleged in the petition.

Moreover, plaintiffs failed to file a timely reply to the motion to transfer or to obtain an extension within the 30-day response period. Plaintiffs' inaction left respondent with no discretion under Rule 51.045 but to grant HeplerBroom's motion. *See* Rule 51.045(c) ("If no reply is filed, the court shall order transfer to one of the counties specified in the motion").

Finally, under the plain language of § 508.010.10, the absence of a ruling on HeplerBroom's motion within 90 days of filing, or of a written waiver of that time period by the parties, also left respondent with no discretion but to grant the requested transfer. There was no written waiver and respondent denied the transfer motion more than seven months after it was filed.

Missouri's venue statutes and the procedural rules governing venue transfer motions are designed to provide defendants with predictability regarding where they may be expected to defend against a lawsuit. *See State ex rel. Lebanon School District R-III v. Winfrey,* 183 S.W.3d 232, 237 (Mo. banc 2006) (venue statutes are intended to provide a "convenient, logical and orderly forum for litigation") (internal quotation omitted). They are also intended to ensure that venue determinations are made early in the case so that the litigation can proceed, without undue delay, in the appropriate forum. The interpretation of the statutes and rules governing venue is a recurring issue in the circuit

courts that has generally evaded review. As a result, there has been no guidance from this Court on the issues relevant to this petition in the decade since *Selimanovic*, creating uncertainty for the courts and litigants.

A permanent writ from this Court affirming that the venue analysis in legal malpractice cases must focus on where the plaintiff was subject to financial loss as a result of the alleged malpractice, and enforcing the procedural deadlines applicable to transfer motions, would promote predictability in venue analyses in the circuit courts and protect courts and parties from unnecessary and wasteful litigation in the wrong venue.

I. HEPLERBROOM IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ACTION OTHER THAN TRANSFERRING THIS LEGAL MALPRACTICE CASE TO ST. CHARLES COUNTY BECAUSE RESPONDENT ERRONEOUSLY DENIED TRANSFER FOR IMPROPER VENUE IN THAT PLAINTIFFS WERE "FIRST INJURED" UNDER SECTION 508.010 RSMO IN ST. CHARLES COUNTY WHERE THEY WERE FIRST SUBJECTED TO FINANCIAL LOSS AS A CONSEQUENCE OF THE ALLEGED MALPRACTICE

A. Standard of Review

When a petition for prohibition requires the interpretation of a statute, this Court reviews the statute's meaning *de novo*. *State ex rel. White Family Partnership v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008). "Venue is determined solely by statute." *Selimanovic*, 246 S.W.3d at 932. The "primary rule" in interpreting a statute "is to give effect to legislative intent as reflected in the plain language of the statute." *Id.* (citations omitted).

B. A Legal Malpractice Plaintiff Is Deemed "First Injured" For Venue Purposes Where The Plaintiff Was First Subject To Economic Loss.

Legal malpractice is a tort claim. *Klemme v. Best*, 941 S.W.2d 493, 495-96 (Mo. banc 1997). Venue for tort claims is governed by Missouri's general venue statute, § 508.010 RSMo. *Selimanovic*, 246 S.W.3d at 931. The venue statute, as amended in

2005,[2] distinguishes tort actions in which a plaintiff was first injured in Missouri from those in which a plaintiff was first injured outside of the state. In all actions in which the plaintiff was first injured in the state of Missouri, "venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action." § 508.010.4 RSMo. If the first injury occurred out of state, venue lies where the corporate defendant's registered agent is located or where plaintiff resides. § 508.010.5 RSMo.

In an action alleging the tort of legal malpractice, this Court has held that the location of first injury is where a plaintiff suffered "exposure," which the Court defined to be "the condition of being subject to financial loss" as a result of the attorney's allegedly negligent conduct. *Selimanovic*, 246 S.W.3d at 933. When a plaintiff, as here, alleges an attorney's negligent conduct caused financial loss in Missouri, venue lies solely in the county where the loss first occurred. *See* § 508.010.4 RSMo.

C. Since Plaintiffs' Financial Loss Was First Suffered In St. Charles County, Respondent Erroneously Concluded Plaintiffs Were First Injured in Florida.

Respondent concluded in the Order denying transfer that plaintiffs were first subject to financial loss by virtue of being sued in Florida "as a result of Defendants'

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[2] "As part of its reforms, the new [Tort Reform] Act extensively revised Missouri's existing venue statute. Goals of the reforms consisted of limiting forum shopping and creating consistency in venue determination." Shreves, *Counselor, Stop Everything — Missouri's Venue Statutes Receive an Expansive Interpretation,* 75 MO.L.REV. 1067, 1079 (Summer 2010); *see also McCoy v. The Hershewe Law Firm, P.C.,* 366 S.W.3d 586, 592 (Mo.App. W.D. 2012) (passage of 2005 Tort Reform Act "significantly restricted venue options so as to reduce forum-shopping by plaintiffs") (citing H.B. 393, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005)).

negligent legal advice." Ex. G, Venue Order, p. 2 (internal quotation omitted). By erroneously finding that plaintiffs were first injured outside of Missouri, respondent found that venue was proper where HeplerBroom's registered agent is located, in the City of St. Louis. *Id.*, p. 3 (citing § 508.010.5 RSMo.).

Respondent's Order is a departure from the language and logic of *Selimanovic.* The underlying allegations of negligence were different in that case—they involved an attorney's failure to timely file a lawsuit—whereas here, plaintiffs allege HeplerBroom failed to properly advise them regarding business issues involving the cancellation of a franchise agreement and the consequences of starting a competing business. However, *Selimanovic*'s definition of "first injury" is easily applied here. In their petition, plaintiffs seek to recover financial losses related to their thwarted efforts to establish and operate a competing business, AHS, in St. Charles County. Plaintiffs' itemization of damages includes AHS' operating expenses; the cost they incurred for lines of credit; and lost profits, wages, and income projected over a four-year period had AHS continued to operate. Ex. A, Petition, ¶ 38. The Twillmans, St. Charles County residents, were compelled to suspend operations of AHS, their St. Charles County business, and forego the anticipated salaries and profits from that business. The only place those losses could have been incurred is St. Charles County. Because that is the county where plaintiffs were first injured, St. Charles County is the only proper venue for this litigation.

In *Selimanovic,* this Court made clear that venue is determined by "the injury sought to be redressed by the malpractice action." 246 S.W.3d at 933. Here, plaintiffs seek redress for the financial loss of their business opportunity in St. Charles County.

That alleged injury did not occur in Florida. The filing of a lawsuit by the franchisor and the entry of an interlocutory order—a preliminary injunction—were causally related to the alleged loss, but they do not constitute the loss for which plaintiffs seek redress.[3] That plaintiffs later settled the dispute with Pirtek after the court compelled arbitration not only did not constitute financial loss in Florida, but occurred after AHS ceased operations in Missouri. Ex. A, ¶¶ 30, 33, 35.

The Michigan Supreme Court, in an accounting malpractice case, reached the same conclusion in interpreting similar language in its venue statute. *See Dimmitt & Owens Financial, Inc. v. Deloitte & Touche (ISC), LLC*, 752 N.W.2d 37 (Mich. 2008). In *Dimmitt & Owens*, the applicable Michigan venue statute laid venue in the county were the "original injury" occurred. *Id.* at 38. The Michigan Supreme Court construed "original injury" as the location of the first "*actual injury*" to the plaintiff resulting from the defendant's negligence. *Id*. (emphasis in original). The corporate plaintiffs alleged in *Dimmitt & Owens* that the defendant accounting firm provided negligent auditing services that caused plaintiffs to make faulty investment decisions, resulting in plaintiffs not being able to satisfy their financial obligations and liquidating their assets. *Id.* at 44. Plaintiffs argued that venue was proper in the county where defendant's offices were located because the negligent audit reports were issued there. *Id.* at 38. The Michigan

[3] Respondent's Answer to Preliminary Writ erroneously refer to the preliminary injunction as a "judgment" when it is in fact an interlocutory order. *See Pirtek, USA v. Twillman, et al.*, No. 6:16-CV-01302-Orl-37TBS (M.D. Fla. October 6, 2016) (Doc. No. 56); *see also, e.g., State ex rel. Director of Revenue v. Gabbert,* 925 S.W.2d 838, 839 (Mo. banc 1996) (preliminary injunction is an interlocutory matter); *Robbins v. Becker,* 715 F.3d 691, 694 n.2 (8th Cir. 2013) (same).

Supreme Court disagreed, holding that plaintiffs were actually injured in the county where they had their principal places of business. *Id.* at 44-45:

> The Court of Appeals incorrectly focused its inquiry on where plaintiffs relied on defendants' work product, rather than where plaintiffs suffered the original, actual injury. Nevertheless, it reached the correct result in concluding that venue was proper in Oakland County. Both plaintiffs' alleged injuries occurred when Dimmitt was unable to satisfy its financial obligations and was forced to liquidate its assets. That injury occurred in Oakland County, the location of both plaintiffs' principal places of business.

See also Garland v. Advanced Medical Fund, L.P. II, 86 F.Supp.2d 1195, 1205 (N.D. Ga. 2000) (for choice of law purposes, economic loss occurred where plaintiffs resided and bore economic impact of alleged torts); *Markarian v. Garoogian,* 767 F.Supp. 173, 177 (N.D. Ill. 1991) (for purposes of establishing personal jurisdiction in case involving economic loss, place of injury was plaintiff's place of residence). Likewise, here, plaintiffs were first injured in the county where they had to cease operation of their competing business, AHS, and lost the anticipated income associated with that business.

When they originally filed their petition, plaintiffs alleged that venue was proper in the City of St. Louis because "legal services [were] rendered from Defendants' office located in the City of St. Louis, Missouri." Ex. A, ¶¶5, 6 (citing *Selimanovic*). It was only after HeplerBroom filed their transfer motion demonstrating that venue was proper in St. Charles County that plaintiffs changed their venue theory to claim their injury occurred out of state. That argument appeared for the first time in an untimely reply that respondent never granted leave to file. This Court has cautioned that the venue statutes are construed to "prevent venue from being manipulated" by a party away from the place

designated in the appropriate venue statute. *See Lawrence v. Beverly Manor,* 273 S.W.3d 525, 528 (Mo. banc 2009).

Plaintiffs should not be allowed to manipulate the allegations of their own petition, which clearly demonstrate that plaintiffs were first injured in St. Charles County, in an attempt to maintain venue in the City of St. Louis. Therefore, this Court should make its preliminary writ permanent and prohibit respondent from taking any action other than to transfer this case to St. Charles County.

II. HEPLERBROOM IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ACTION OTHER THAN TRANSFERRING THIS CASE TO ST. CHARLES COUNTY BECAUSE PLAINTIFFS FAILED TO FILE A TIMELY REPLY TO HEPLERBROOM'S MOTION TO TRANSFER FOR IMPROPER VENUE AND MISSOURI SUPREME COURT RULE 51.045(C) THEREFORE REQUIRED TRANSFER TO THE COUNTY SPECIFIED IN HEPLERBROOM'S MOTION

A. Standard of Review

Prohibition is proper "when a circuit court has erroneously denied transfer." *State ex rel. Missouri Public Service Com'n v. Joyce*, 258 S.W.3d 58, 60 (Mo. banc 2008). This Court reviews the denial of a motion to transfer venue pursuant to Rule 51.045 for an abuse of discretion. *State ex rel. Trans World Airlines, Inc. v. David*, 158 S.W.3d 232, 233 (Mo. banc 2005). An abuse of discretion occurs where the circuit court fails to follow applicable statutes and Supreme Court Rules. *Id*. at 235; *see also State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007).

B. Respondent was Required to Grant HeplerBroom's Motion to Transfer Venue After Plaintiffs Failed to File a Timely Reply.

Pursuant to Missouri Supreme Court Rule 51.045(b), plaintiffs were required to reply to HeplerBroom's timely motion to transfer venue, or seek an extension of time "[f]or good cause shown," within 30 days. Rather than complying with the Rule's deadline, plaintiffs filed a reply after the 30-day period without having obtained an

extension from respondent. HeplerBroom argued that as a result, under Rule 51.045(c) "the court shall order transfer to [the County] specified in the motion," *i.e.*, St. Charles County. Respondent later entered an Order denying HeplerBroom's motion without addressing plaintiffs' failure to comply with the deadline imposed by Rule 51.045(b).

Rule 51.045 details the procedure to be followed in motions to transfer for improper venue. The Rule requires a party seeking transfer to file a motion "alleging improper venue" within 60 days of service. Such a motion must specify the county "in which the movant contends venue is proper" and "[s]tate the basis for venue" in that county. Rule 51.045(a). Within 30 days of a timely-filed motion to transfer, an opposing party "may file a reply." Rule 51.045(b). In the absence of a timely reply, the circuit court is required to transfer the case to the county specified in the motion. Rule 51.045(c). As this Court stated in interpreting similar language in a prior version of Rule 51.045, "[t]he plain and ordinary meaning of Rule 51.045 mandates a transfer of venue when no reply is filed by the opposing party." *State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470, 472 (Mo. banc 2002). Such a result "is but an application of the general rule that failure to file a required answer admits the allegations of the preceding pleading." *Id*.; *see also State ex rel. Grand River Health System Corp. v. Williamson,* 240 S.W.3d 172, 174-75 (Mo.App. W.D. 2007) (court properly ordered transfer of venue without considering reply filed after 30 days specified in rule).

Under the current version of Rule 51.045, if a reply to a venue motion is not filed within 30 days, the circuit court has no discretion under the Rule to take any action other than to transfer the case to the county specified by the movant. This is evident by

comparing the current Rule with the language of the prior version of Rule 51.045. Rule 51.045(a) previously provided that "[a]n action brought *in a court where venue is improper* shall be transferred *to a court where venue is proper* if a motion for such transfer is timely filed." (emphasis added). The prior version of Rule 51.045(c) also provided "if no reply is filed, the court shall order a transfer of venue to *a court where venue is proper*." (emphasis added). In *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630 (Mo. banc 2007), the relator contended that the circuit court abused its discretion when it denied relator's motion to transfer after the plaintiff failed to file a timely reply. This Court, relying on the language of the prior version of Rule 51.045(a), held that the Rule's procedural deadlines "[had] no application because the threshold showing required in Rule 51.045(a) that the action was 'brought in a court where venue is improper' was not met" by the relator. *Id*. at 632. Therefore, despite the absence of a timely reply, this Court quashed its preliminary writ and upheld the circuit court's denial of the relator's transfer motion. *Id*.

The language in the prior version of Rule 51.045(a) relied on in *City of Jennings* was eliminated by this Court in 2012 when the rule was amended to allow "[a]ny motion to transfer venue *alleging* improper venue" to be filed. Rule 51.045(a) (emphasis added). Moreover, in the absence of a timely reply, Rule 51.045(c) now provides that "the court *shall* order transfer to *one of the counties specified in the motion*." (emphasis added).

"The same principles used to interpret statutes apply when interpreting this Court's rules, with the difference being that this Court is attempting to give effect to its own intent." *In re Hess*, 406 S.W.3d 37, 43 (Mo. banc 2013). "This Court's intent is

determined by considering the plain and ordinary meaning of the words in the Rule." *Vee-Jay*, 89 S.W.3d at 472. It is presumed "that the enacting body (here the Supreme Court) acted with full awareness and complete knowledge of the present state of the law (or the present state of its rules)" when it amended Rule 51.045. *State ex rel. Ott v Bonacker*, 791 S.W.2d 494, 496 (Mo.App. S.D. 1990) (citing *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. banc 1984)).

Applying these principles, the amended language in Rule 51.045 was clearly intended to supersede *City of Jennings* and eliminate the movant's burden to make a "threshold showing" that venue is improper where the action has been brought. This is consistent with the traditional allocation of the burden of proof in a venue dispute. "[T]he burden of showing that venue is proper always has been with the plaintiff when venue is challenged." *Igoe v. Dept. of Labor and Indus. Relations*, 152 S.W.3d 284, 288 (Mo. banc 2005); *see also State ex rel. Bank of America v. Kanatzar,* 413 S.W.3d 22, 26 (Mo.App. W.D. 2013) (when defendant moves to transfer, plaintiff has burden of showing venue is proper). Rule 51.045(b) codifies this allocation of the burden. Once venue has been challenged, the plaintiff's reply "shall state the basis for venue in the forum or state reasons why venue is not proper" in the county specified by the movant.

Absent a timely reply to a motion to transfer, the plaintiff cannot meet its burden.[4] In these situations, Rule 51.045(c) mandates that the trial court transfer venue "to one of the counties specified in the motion."

HeplerBroom filed a timely motion alleging that venue was improper in the City of St. Louis and specifying St. Charles County as the proper venue. Plaintiffs failed to file a timely reply. As a result, plaintiffs failed to satisfy their burden under Rule 51.045(b) and respondent was required to transfer the case to St. Charles County. Respondent's failure to do so was therefore an abuse of discretion.

C. The Untimeliness of Plaintiffs' Reply Was Never Cured Because Respondent Did Not Extend the 30-Day Period or Grant Plaintiffs Leave to File Out of Time.

A court may only extend Rule 51.045's filing periods if it finds that there is good cause to do so before the filing deadline expires. The requirement to show good cause applies when either the movant or opposing party seeks an extension. *See* Rule 51.045(a) ("For good cause shown, the court may extend the time to file a motion to transfer venue") *and* Rule 51.045(b) ("For good cause shown, the court may extend the time to file the reply").

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[4] Because plaintiffs' reply was untimely filed and therefore a nullity, it was improper for respondent to adopt and rely on plaintiffs' new venue argument in denying the motion to transfer. Under Rule 51.045(b), "[t]he reply shall state the basis for venue in the forum" and "[t]he court shall not consider any basis not stated in the reply." It necessarily follows that a reply filed out of time, and without the benefit of an extension of time granted "[f]or good cause shown," cannot be considered in determining the basis for venue. Rule 51.045(b); *see also State ex rel. Trans World Airlines, Inc. v. David,* 158 S.W.3d 232, 234 (Mo. banc 2005) (under prior version of 51.045, where motion for transfer asserted facts showing that chosen venue was improper and reply "did not dispute or even address" those facts, court deemed the facts undisputed).

Here, respondent did not extend the period in which Rule 51.045(b) required plaintiffs to file their reply. In fact, plaintiffs never sought an extension within the 30 days to file a reply. Absent an extension, "the court shall order transfer" if the plaintiff fails to reply within 30 days. Rule 51.045(c). "Generally, the use of the word 'shall' connotes a mandatory duty." *St. Louis Police Officers' Ass'n v. Board of Police Com'rs of City of St. Louis,* 259 S.W.3d 526, 528 (Mo. banc 2008).

At the hearing on HeplerBroom's venue motion, plaintiffs made an oral motion for an extension and argued that respondent had the authority under Rule 51.045 to grant them leave to file their reply out of time even though they had not requested an extension during the 30-day reply period. In support of their contention, plaintiffs cited Rule 51.045(b)'s "good cause" provision. Ex. F, Supplemental Motion, ¶ 3. But because the request for an extension was untimely, the respondent no longer had the authority to determine if there was good cause for an extension. *See Austin v. Schiro,* 466 S.W.3d 694, 698 (Mo.App. W.D. 2015) (affirming dismissal of a medical malpractice petition when prior to the expiration of the filing deadline "the circuit court was never given an opportunity to determine whether plaintiff had shown good cause to extend the time" for filing a mandatory health care affidavit). Rule 51.045(b) does not give a court the authority to grant an extension *after* the reply period has expired. If it did, the 30-day reply deadline would essentially be meaningless.

Respondent's Answer to the Writ Petition cites the recent court of appeals' decision in *State ex rel. Mylan Bertek Pharmaceuticals, Inc. v. Vincent*, 2018 WL 4326473, --- S.W.3d --- (Mo.App. E.D. Sept. 11, 2018), as support for respondent's

authority to grant plaintiffs leave to file a reply out of time. This reliance is misplaced. In *Mylan Bertek*, the relator filed a single motion in the trial court seeking various forms of relief—that venue be transferred, that the plaintiff file a more definite statement, or that the petition be dismissed. The plaintiff responded to all issues in the relator's combined motion more than 30 days later. The relator argued that because the plaintiff failed to reply to the motion to transfer within 30 days, Rule 51.045(c) left the circuit court with no discretion but to transfer the case. The plaintiff in *Mylan Bertek* moved under Missouri Supreme Court Rule 44.01(b) to file her reply out of time, contending that the untimely reply was due to excusable neglect. In doing so, the plaintiff admitted that her reply was untimely, but explained that she "accidentally and inadvertently failed to file" the reply in time because the motion to transfer was part of a larger motion to dismiss or for more definite statement which did not require a response within a specified time period. *Id*. at *2. The court of appeals determined on a writ petition that pursuant to Rule 44.01(b), the circuit court acted within its discretion in allowing the reply to be filed out of time and "was not, therefore, subject to the mandate in Rule 51.045(c) requiring that the motion to transfer be granted if no reply is filed." *Id*. at *2.

Here, in contrast, the respondent was subject to the mandate in Rule 51.045(c). Rule 44.01(b) addresses enlargement of time under the Supreme Court Rules. It states:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged *if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order*. . . .

(emphasis added). Even if Rule 44.01 is applicable to venue motions, this language confirms that the respondent had no authority under Rule 51.045 to consider a reply that was not filed within 30 days or within an extension of time requested before the 30 days expired.

Rule 44.01(b) provides that a court can only grant an extension requested after the time specified in a Supreme Court Rule if (a) a written motion is filed under Rule 44.01(b)(2), (b) notice of hearing is provided at least five days in advance, and (c) there is a showing that "the failure to act was the result of excusable neglect." The Rule contemplates that this showing may be supported by affidavits. Rule 44.01(d).

Plaintiffs in this case did not file a motion under Rule 44.01(b). No such motion was heard, let alone on five days' notice, and plaintiffs' belated assertion after the motion hearing that their failure to file was "inadvertent and an oversight" included no explanation. *See Flowers v. City of Campbell*, 384 S.W.3d 305, 314 (Mo.App. S.D. 2012) (trial court properly found counsel's failure to exercise due diligence in preparing response did not satisfy "excusable neglect" requirement). Thus, even if the respondent could consider an untimely reply to a venue motion pursuant to Rule 44.01(b)(2), plaintiffs did not file a motion under that Rule or otherwise comply with it. Nor did respondent address the timeliness issue in the Order, much less find that plaintiff's failure to file a timely reply was the result of excusable neglect.

Consistent with Rule 51.045's manifest purpose to resolve venue disputes early and efficiently, the Rule's filing deadlines should be enforced as written. In the absence of a timely reply to a motion to transfer venue—by filing within 30 days or obtaining an

extension during that period—the circuit court "*shall order transfer*" to a county specified in the motion. Rule 51.045(c) (emphasis added). Respondent's failure to enforce the time limitations of Rule 51.045(c), therefore, was an abuse of discretion.

III. HEPLERBROOM IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ACTION OTHER THAN TRANSFERRING THIS CASE TO ST. CHARLES COUNTY BECAUSE RESPONDENT DID NOT DENY HEPLERBROOM'S MOTION TO TRANSFER FOR IMPROPER VENUE WITHIN 90 DAYS OF ITS FILING, WHICH TIME PERIOD WAS NOT WAIVED IN WRITING BY THE PARTIES, AND THEREFORE SECTION 508.010.10 RSMO REQUIRED THAT THE MOTION "BE DEEMED GRANTED"

A. Standard of Review

This Court reviews writ petitions that involve orders on motions to transfer venue for abuse of discretion, "and an abuse of discretion occurs where the circuit court fails to follow applicable statutes." *City of Jennings*, 236 S.W.3d at 631.

B. Respondent Did Not Deny HeplerBroom's Motion to Transfer Within 90 Days of Filing and Was Therefore Required to Grant It.

Respondent was required to grant HeplerBroom's motion to transfer because it was not denied within 90 days after it was filed. Section 508.010.10 RSMo. provides:

> All motions to dismiss or to transfer based upon a claim of improper venue shall be deemed granted if not denied within ninety days of filing of the motion unless such time period is waived in writing by all parties.

HeplerBroom filed their motion on October 6, 2017. Pursuant to the statute, respondent had 90 days, or until January 4, 2018, to rule on relators' motion absent written waiver of this period by the parties. Respondent did not do so. Instead, respondent entered an

Order denying HeplerBroom's motion on May 10, 2018, well past the 90-day deadline. Because the parties did not waive the 90-day time period, respondent had no discretion other than to grant the transfer motion.

In an attempt to circumvent mandatory transfer under § 508.010.10, plaintiffs' counsel now contends on behalf of respondent that the statute's 90-day deadline is inconsistent with Rule 51.045, which imposes no deadline for a trial court to rule on a transfer motion. Respondent's Answer to Preliminary Writ, p. 8. Citing Rule 41.02's provision that Supreme Court Rules supersede all inconsistent statutes with respect to procedural matters, respondent's Answer contends that Rule 51.045 supersedes § 508.010.10 due to this alleged inconsistency. *Id*., p.7-8. But there is no inconsistency between the *deadlines to file and reply to* a transfer motion found in Rule 51.045 and the *deadline to rule* on that motion found in § 508.010.10. The former requirement is imposed on the parties litigating the issue of improper venue, while the latter is directed to the court tasked with ruling on the matter.

The ability of the Rule and statute to operate concurrently without conflict is evident in this case. The statute affords the court sixty days after a timely reply to rule on the venue motion. In this case, the 90-day period did not expire until January 4, 2018. Moreover, the respondent can request a written waiver of the 90-day period from the parties. A circuit court can therefore ensure that the Rule's filing and reply deadlines are followed and still decide the motion within the statutory time period. *See City of Normandy v. Greitens*, 518 S.W.3d 183, 201 (Mo. banc 2017) (statute setting time limits for arrestee appearances before municipal courts did not conflict with court rule

providing only that court appearances should be held "as soon as practicable" because municipalities "can comply with both the rule and the statute").

The Supreme Court Rules do not specify the time period in which the court must rule on the venue motion. As this Court recognized in *City of Normandy*, "additional deadlines are not in conflict when existing rules do not contain time limits." *Id*.; *see also* Rule 41.04 ("If no procedure is specially provided by rule, the court having jurisdiction shall proceed in a manner consistent with the applicable statute," if not inconsistent with the rules generally).

Missouri courts of appeals have also held, like this Court did in *City of Normandy*, that a statute imposing a procedural requirement is not superseded by a rule adopted by this Court that does not impose an inconsistent requirement. For example, in *Gardner v. Mercantile Bank of Memphis*, 764 S.W.2d 166 (Mo.App. E.D. 1989), the court compared provisions of a rule and statute pertaining to the procedural requirements for substitution for a deceased party to pending litigation. The statute at issue in *Gardner* required that the deceased party's claims be dismissed unless the proceedings for substitution were initiated within nine months after the first publication of notice of letters testamentary or administration. The rule on substitution for a deceased party did not include a corresponding time limitation. *Gardner*, 764 S.W.2d at 168. Because the statute's nine-month deadline for initiating a substitution proceeding was "not in any manner inconsistent" with the rule, the *Gardner* court enforced the deadline. *Id*. at 169; *see also State ex rel. Heilmann v. Clark*, 857 S.W.2d 399, 401 (Mo.App. W.D. 1993) (holding a rule and statute related to procedures for resolving third-party claims to property seized

by creditors were not inconsistent because they did not address identical issues). As *Gardner* emphasized, "[w]here the legislature has enacted a statute pertaining to a procedural matter not addressed nor inconsistent with any Supreme Court rule, the statute must be enforced."[5] 764 S.W.2d at 168 (cited *in State v. Teer*, 275 S.W.3d 258, 264 (Mo. banc 2009)).

Like the limitation provisions at issue in *City of Normandy* and *Gardner*, the filing deadlines of Rule 51.045 for motions and replies are "obviously intended to shorten the time period" to resolve a dispute as to proper venue. *Gardner,* 764 S.W.2d at 168-69. Section 508.010.10 furthers that purpose by requiring that a trial court rule on a transfer motion within 90 days absent a written waiver. Without § 508.010.10 in place, a transfer motion could remain pending for an indefinite amount of time and defeat Rule 51.045's goal for a prompt ruling on venue. The two procedural deadlines work to promote the same objective—avoiding unnecessary delay and consequent wasteful litigation in the wrong venue.

This Court should hold the 90-day deadline for ruling on a transfer motion in § 508.010 RSMo means what it says. Respondent had no discretion to deny HeplerBroom's motion to transfer venue after the motion remained pending well beyond the statutory deadline. This is an additional reason why the respondent's Order denying

[5] The *Gardner* court also noted this Court's enforcement of the nine-month statutory deadline for substitution in *State ex rel. State Highway Commission v. Morganstein,* 588 S.W.2d 472 (Mo. banc 1979) (finding error in permitting substitution of a party after the statutory period expired). *Gardner,* 764 S.W.2d at 169. "Clearly, the Supreme Court would not predicate its decision upon a statute the court considered to be superseded by its own rule." *Id.*

transfer was an abuse of discretion and this Court's preliminary writ should be made absolute.

CONCLUSION

For the foregoing reasons, relators HeplerBroom, LLC, and Glenn E. Davis respectfully request the following relief:

A. That this Court make the preliminary writ of prohibition absolute and order respondent to take no further action other than to transfer this cause to St. Charles County, Eleventh Judicial Circuit for the State of Missouri; and

B. For such other and further relief as this Court may deem just and appropriate.

Dated: October 22, 2018

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that: (1) Relators' Brief on Petition for Writ of Prohibition contains the information required in Rule 55.03; (2) Relators' Brief complies with the limitations contained in Rule 84.06(b); and (3) Relators' Brief, excluding the cover page, signature block, certificate of service, this certificate, and appendix contains 8,462 words, as determined by the word count tool contained in Microsoft Word 2013.

October 22, 2018 /s/ Robert T. Haar

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of October, 2018, Relators' Brief on Petition for Writ of Prohibition was filed electronically with the Clerk of the Court to be served by operation of the Missouri eFiling System upon the following:

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