IN THE SUPREME COURT OF MISSOURI

No. SC97200

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

Relators,

vs.

HON. JOAN L. MORIARTY
Circuit Judge, City of St. Louis
Circuit Court

Respondent.

RESPONDENT'S 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.

STATEMENT OF FACTS

The Petition for Damages at issue is attached to Relators' Writ as "Exhibit A" (WRIT 01 to WRIT 08). From that Petition, are the following controlling facts:

A. Where the Injury or Trauma Occurred

- Plaintiffs traveled to the State of Florida to attend a franchise seminar sponsored by PIRTEK, USA, at their corporate headquarters in Rockledge, Florida. (Petition, par. 12).
- Plaintiffs signed the franchise agreement in the State of Florida. (Petition, par. 12).
- Plaintiffs hired Defendants for the specific purpose of canceling the franchise agreement in the State of Florida. (Petition, par. 15).
- Defendants drafted the correspondence for Plaintiffs to send to the State of Florida to cancel the franchise agreement. (Petition, par. 19, 20).
- In July 2016, Plaintiffs were sued in the State of Florida by PIRTEK, USA because they had not effectively canceled their franchise agreement. (Petition, par. 30).
- Defendants were hired to represent Plaintiffs in the State of Florida lawsuit. (Petition, par. 32).

- On October 26, 2016, judgment was entered against Plaintiffs for violating the franchise agreement, and arbitration was compelled by the U.S. District Court in the State of Florida. (Petition, par. 33, 34).
- During the pendency of the arbitration, Plaintiffs were forced to enter into a settlement agreement to end the litigation, and as a compromise to the judgment that had been entered against them in the State of Florida. (Petition, par. 35).
- The allegations of negligence committed by Defendants refer to the injuries they suffered in the State of Florida. (Petition, par. 37).

B. Defendant HeplerBroom, LLC is a Corporation

Paragraph 4 of the Petition for Damages alleges: " Defendant HeplerBroom, LLC, is a duly organized and registered Missouri corporation with its principal place business in St. Louis City, Missouri, and is engaged in the practice of law. Defendant Glenn E. Davis is a principal with the law firm of HeplerBroom, LLC, and was personally responsible for the representation of Plaintiffs as more fully set forth herein."

Defendant HeplerBroom, LLC has its registered agent, Theodore J. MacDonald, Jr., located at 211 North Broadway, Suite 2700, St. Louis, Missouri 63102. (WRIT 31, 32). Defendant HeplerBroom, LLC is in the City of St. Louis.

C. Procedural History of the Motion to Transfer in the Circuit Court

On October 6, 2017, Relators filed their Motion to Transfer Venue for Improper Venue. (Exhibit C to WRIT).

On November 22, 2017, Plaintiffs filed a Response opposing Defendants' Motion to Transfer Venue. (Exhibit D to WRIT).

On November 27, 2017, Relators filed a Reply to the Response on the Motion to Transfer Venue. (Exhibit E to WRIT).

On November 28, 2017, Respondent heard arguments on the Motion to Transfer Venue. During hearing on the argument, Plaintiffs' counsel made an oral Motion for Leave to File Response Out of Time and supplemented that oral Motion for Leave to File Out of Time on November 30, 2017, in writing. (Exhibit F to WRIT).

On May 10, 2018, Respondent entered the Order denying Change of Venue. (Exhibit G to WRIT).

POINTS RELIED ON

I. RESPONDENT CORRECTLY DETERMINED THAT VENUE IS PROPER IN ST. LOUIS CITY BECAUSE RELATOR HEPLERBROOM, LLC IS A CORPORATION WITH ITS REGISTERED AGENT IN ST. LOUIS CITY AND A JUDGMENT AGAINST PLAINTIFFS RENDERED OUT OF STATE CONSTITUTED THE "FIRST INJURY" FOR VENUE PURPOSES UNDER SECTION 508.010.5(1) RSMO.

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)

Section 508.010.5(1) RSMo.

II. HEPLERBROOM, LLC IS NOT ENTITLED TO A TRANSFER OF VENUE BASED UPON SUPREME COURT RULE 51.045(C) "UNTIMELY REPLY" BECAUSE ITS OWN MOTION FAILED TO SATISFY THE "THRESHOLD SHOWING THAT THE ACTION WAS BROUGHT IN A COURT WHERE VENUE IS IMPROPER" UNDER RSMo. § 508.010.5(1) AND THIS COURT'S DECISION IN *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630 (Mo.banc 2007), AND BECAUSE RULE 51.045 DOES NOT REQUIRE AN EXPLICIT FINDING BY THE TRIAL COURT OF GRANTING LEAVE TO RESPOND OUT OF TIME

State ex rel. City of Jennings v. Riley, 236 S.W.3d 630 (Mo.banc 2007)

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)

Section 508.010.5(1) RSMo.

Missouri Supreme Court Rule 51.045

III. HEPLERBROOM, LLC IS NOT ENTITLED TO A TRANSFER OF VENUE BASED UPON A NINETY (90) DAY LIMITATION TO RULE UPON A MOTION TO TRANSFER CONTAINED IN SECTION 508.010.10 RSMo., BECAUSE THAT STATUTE IS INCONSISTENT WITH SUPREME COURT RULE 51.045, WHICH CONTAINS NO TIME LIMITATION FOR THE TRIAL COURT TO RULE.

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

Respondent correctly denied a transfer of venue. Plaintiffs were injured in this case in the State of Florida where a U.S. District Court entered a judgment against them imposing an injunction against their business, and compelling arbitration under that state's laws due to a franchise contract controlled by Florida law. Relators were hired by Plaintiffs to terminate the franchise agreement pursuant to Florida law so that what eventually happened would not happen. Plaintiffs were inescapably injured in the State of Florida.

Relator HeplerBroom, LLC is a corporation with its registered agent located in St. Louis City. RSMo. § 508.010.5(1) therefore controls venue.

Relators make three (3) arguments before this Court. Each fails for the following reasons.

First, Relators contend that Plaintiffs were injured in Missouri because that is where they reside. Respondent correctly rejected that argument. But for the federal litigation in the State of Florida, Plaintiffs would have suffered no injury at all. Despite the obviousness of the litigation imposed injury, Relators contend that Plaintiffs' business located in St. Charles County, as well as their residence there, is the locus of the injury. Putting this metaphorical cart in front of the horse does not change the simple reality. If there was no litigation in Florida, and no judgment there, there would be no injury. Florida imposed the injury.

Second, Relators contend that Rule 51.045(C) allows them a default entitlement to a transfer of venue. Their argument is that an untimely reply to a motion to transfer divests the trial court to consider whether the motion is proper to begin with under the venue statute, and also, that the trial court cannot grant leave out of time to file a response to the motion. Neither is true. This Court's decision in *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630 (Mo.banc 2007) requires that the movants' motion to transfer meet a threshold of proving that venue is improper. Relators' motion here failed to demonstrate that to Respondent. Because of that, Rule 51.045 does not even become a consideration or applied under the decision in *City of Jennings*. That case remains good law. Equally, there is no prohibition for the trial court to grant leave to file a response out of time. Respondent did so here.

Third and finally, Relators contend that a ninety (90) day limitation to rule upon a motion to transfer venue contained in RSMo. § 508.010.10 also entitles them to a default, again, divesting the trial court to consider whether the motion is proper to begin with. No case law has ever held that. Moreover, Rule 51.045 supersedes all conflicting statutes. That Rule contains no limitation for the trial court to rule. It also provides for the parties to conduct discovery before the court determines the venue motion. The statute does not. Rule 51.045 therefore controls and Respondent was not required to rule on the Relators' motion within ninety (90)

days.

For each of these reasons, the preliminary writ of prohibition issued by this Court should now be quashed.

I. RESPONDENT CORRECTLY DETERMINED THAT VENUE IS PROPER IN ST. LOUIS CITY BECAUSE RELATOR HEPLERBROOM, LLC IS A CORPORATION WITH ITS REGISTERED AGENT IN ST. LOUIS CITY AND A JUDGMENT AGAINST PLAINTIFFS RENDERED OUT OF STATE CONSTITUTED THE "FIRST INJURY" FOR VENUE PURPOSES UNDER SECTION 508.010.5(1) RSMO.

A. Standard of Review

To the extent that a court bases its venue ruling on factual matters and inferences, this court reviews the trial court's ruling under an abuse of discretion standard. *State ex rel. Trans World Airlines, Inc. v. David*, 158 S.W.3d 232, 233 (Mo.banc 2005). To the extent to which the venue decision is governed by the interpretation of a statute, the ruling is a question of law, and accordingly this court reviews the ruling to determine whether the trial court misinterpreted or misapplied the law. *Cook v. Newman*, 142 S.W.3d 880, 886 (Mo.App. W.D. 2004); *McCoy v. Hershewe Law Firm, P.C.*, 366 S.W.3d 586 (Mo. App. W.D. 2012).

B. Out of State Injury, Corporate Defendant

Venue is determined solely by statute, Section 508.010 RSMo., *State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 932-33 (Mo. banc 2008). Section 508.010.14 provides the standard of locating venue: "A plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first

manifested." Applied here, there are undeniable facts. A judgment was entered against the Plaintiffs in the state of Florida. Defendants' legal advice was directed towards the activity of cancelling a franchise agreement in the state of Florida, and governed by Florida law. All the litigation occurred in a U.S. District Court located in the state of Florida. Arbitration was ordered to be conducted in the state of Florida. Florida, and only Florida, is the state where Plaintiffs were exposed to their injury, and further, caused by the negligent conduct of Defendants. Missouri played no role whatsoever to the Plaintiffs' injury.

Section 508.010.5(1) explicitly governs where venue lies against a corporation when the injury occurs outside the State of Missouri. That section states:

> *"5. Notwithstanding any other provision of law, in all actions in which there is any count* ***alleging a tort and in which the plaintiff was first injured outside the state of Missouri****, venue shall be determined as follows:*
>
> *(1)* ***If the defendant is a corporation, then venue shall be in any county where a defendant corporation's registered agent is located*** *or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiff's principal place of residence on the date the plaintiff was first injured…"*

This case falls squarely within this statute. Legal malpractice claims are indeed a tort. *Klemme v. Best*, 941 S.W.2d 493, 495-96 (Mo. banc 1997). Plaintiffs'

injuries occurred most definitely, and most undeniably, in the state of Florida. And Defendant HeplerBroom, LLC and its registered agent are located in St. Louis City.

Notwithstanding, Relators contend that venue would be proper in St. Charles County because that is where Plaintiffs reside, and it is from their residence where they will have to pay the Florida judgment. The location of Plaintiffs' checkbook is absolutely irrelevant to a foreign state judgment under Section 508.010.5(1).

II. HEPLERBROOM, LLC IS NOT ENTITLED TO A TRANSFER OF VENUE BASED UPON SUPREME COURT RULE 51.045(C) "UNTIMELY REPLY" BECAUSE ITS OWN MOTION FAILED TO SATISFY THE "THRESHOLD SHOWING THAT THE ACTION WAS BROUGHT IN A COURT WHERE VENUE IS IMPROPER" UNDER RSMo. § 508.010.5(1) AND THIS COURT'S DECISION IN *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630 (Mo.banc 2007), AND BECAUSE RULE 51.045 DOES NOT REQUIRE AN EXPLICIT FINDING BY THE TRIAL COURT OF GRANTING LEAVE TO RESPOND OUT OF TIME

A. Standard of Review

To the extent that a court bases its venue ruling on factual matters and inferences, this court reviews the trial court's ruling under an abuse of discretion standard. *State ex rel. Trans World Airlines, Inc. v. David*, 158 S.W.3d 232, 233 (Mo.banc 2005). To the extent to which the venue decision is governed by the interpretation of a statute, the ruling is a question of law, and accordingly this court reviews the ruling to determine whether the trial court misinterpreted or misapplied the law. *Cook v. Newman*, 142 S.W.3d 880, 886 (Mo.App. W.D. 2004); *McCoy v. Hershewe Law Firm, P.C.*, 366 S.W.3d 586 (Mo. App. W.D. 2012).

B. This Court's Decision in *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630 (Mo.banc 2007) Makes Rule 51.045 Inapplicable

Relators' second argument is premised entirely upon Rule 51.045. Their claim is that they are entitled to a transfer of venue by mere default based upon a response filed after thirty (30) days opposing their motion. As their argument goes, the trial court has no authority to determine whether the motion to transfer has any merit under the very statute that controls venue if no response is filed, or out of time. This Court's controlling authority holds otherwise.

In *City of Jennings*, the defendant had sought a transfer of venue in which the plaintiff filed no reply in opposition. It is the same argument made by Relators here. This Court rejected that argument. Referring to the language of Rule 51.045 at the time, this Court held:

> "Under Rule 51.045(a), "[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." Rule 51.045(b) adds that "within thirty days after the filing of a motion to transfer for improper venue, an opposing party may file a reply," but Rule 51.045(c) then provides that "if no reply is filed, the court shall order a transfer of venue to a court where venue is proper." In this case, however, *these rules have 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*." *State ex. rel. City of Jennings v. Riley*, 236 S.W.3d 630 (Mo., 2007)(emphasis added).

Admittedly, the language of Rule 51.045(a) changed in calendar year 2012. That section now reads:

> "**(a)** Any motion to transfer venue alleging improper venue shall be filed within 60 days of service on the party seeking transfer. For good cause shown, the court may extend the time to file a motion to transfer venue or allow the party to amend it. Any motion to transfer venue shall:
>
> **(1)** Specify one or more counties in which the movant contends venue is proper, and
>
> **(2)** State the basis for venue in each such county."

As now written, the change to paragraph (a) is in the language, "…brought in a court where venue is improper". The current language, "…alleging improper venue" however does nothing to remove the trial court's independent authority, as in *City of Jennings*, to determine whether the motion indeed has any merit. In both editions of the Rule, old and new, no reply was even required to be filed to oppose the motion to transfer. The trial court would still have to decide if the motion had any merit by analyzing the pleadings and applying RSMo. § 508.010 et seq. That was the explicit holding in *City of Jennings*. Were it otherwise, as Relators would have it, any case could request a transfer of venue to the county of Timbuktu, Missouri, and having no connection to the facts of the case.

Relators' other au thorities relied upon are of no help. In *State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470 (Mo.banc 2002), the plaintiff had filed no reply on a motion to transfer venue, and during an apparent hearing on the motion, presented no evidence to justify venue where it had been filed. This Court held that the trial court had a duty to transfer the case to a proper venue because

plaintiff had not demonstrated it existed where filed. Explicitly, the opinion requires the trial court to determine if the transfer is "to a proper venue." *Id.* at 472.

Similarly, in *State ex rel. Grand River Health System Corp. v. Williamson*, 240 S.W.3d 172 (Mo.App. W.D. 2007), the issue was whether an order to transfer venue could be recalled by the trial court after entered, and where, the plaintiff had filed an opposition out of time without requesting leave to do so. That is not the issue here.

C. Rule 51.045(c) Does Not Require an Explicit Finding of "Good Cause Shown" to File a Reply Out of Time

Relators are contending that after the expiration of thirty (30) days to file a reply, the trial court had to make an explicit finding of "good cause shown" to file the reply out of time. The Rule does not say that. Relators cite no cases which say that.

Procedurally, Relators filed their Motion to Transfer Venue on October 6, 2017. (WRIT 23 to WRIT 26). Plaintiffs filed their Response to the Motion on November 22, 2017. (WRIT 27 to WRIT 32). Relators filed their Reply on November 27, 2017. (WRIT 33 to WRIT 36). On November 30, 2017, Plaintiffs filed a written, supplemental Motion for Leave to File Their Response Out of Time. (WRIT 37 to WRIT 39). The written, supplemental response made clear that Plaintiffs had made an oral motion to accept the response out of time on November 28, 2017, when the motion to transfer venue was heard by the Court. (WRIT 37, par.

2). The motion further stated that Plaintiffs' miscalculation of the response date was inadvertent and an oversight. (WRIT 38, par. 3).

Rule 51.045(c) provides that the Court, "For good cause shown, the court may extend the time to file the reply or allow the party to amend it." The Rule does not say the court must make an explicit finding. A trial court may allow a reply to be filed out of time on a motion to transfer venue based upon excusable neglect, and allowing such leave out of time is reviewed as an abuse of discretion. *State ex rel. Mylan Bertek Pharmaceuticals, Inc. v. Hon. David Lee Vincent, III*, (Mo.App. E.D., Opinion No. ED106945, filed September 11, 2018). "Excusable neglect is an action attributable to mishap and not the result of indifference or deliberate disregard." *State ex rel. Mylan Bertek Pharmaceuticals, Inc.* at p. 4, citing *Inman v. St. Paul Fire & Marine Insurance Company*, 347 S.W.3d 569, 576 (Mo.App. S.D. 2011). The trial court was not therefore required to order transfer after the lapse of thirty (30) days by default as Relators are contending. *State ex rel. Mylan Bertek Pharmaceuticals, Inc.* at pp. 3-5, (holding, "*The trial court 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.*").

III. HEPLERBROOM, LLC IS NOT ENTITLED TO A TRANSFER OF VENUE BASED UPON A NINETY (90) DAY LIMITATION TO RULE UPON A MOTION TO TRANSFER CONTAINED IN SECTION 508.010.10 RSMo., BECAUSE THAT STATUTE IS INCONSISTENT WITH SUPREME COURT RULE 51.045, WHICH CONTAINS NO TIME LIMITATION FOR THE TRIAL COURT TO RULE.

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B. Supreme Court Rules 41.02 and 51.045 "Supersede All Statutes" Which are Inconsistent With Them, and Section 508.010.10 is Inconsistent by Imposing a Ninety (90) Day Time Limit to Rule on a Motion to Transfer Venue

Relators argue that Section 508.010.10 creates a timeframe default, specifically, that if a motion to transfer venue is not denied within ninety (90) days of its filing, then it is deemed granted.

Problematic to the Relators' argument is Supreme Court Rule 41.02. This Rule provides:

> "Rules 41 to 101, inclusive, are promulgated pursuant to authority granted this Court by Section 5 of Article V of the Constitution of Missouri and supersede all statutes and existing court rules inconsistent therewith."

Rule 51.045 imposes no deadline for a trial court to rule on a motion to transfer venue. Section 508.010 is therefore inconsistent with the rule, and the rule controls.

Noticeably and significantly different, Rule 51.045 contemplates that the Court could allow discovery on issues related to venue. The statute does not. The Rule in sub-section (b) states, "If a reply is filed, the court may allow discovery on the issue of venue and shall determine the issue." Discovery, which would then naturally involve additional briefing, would be time consuming to the parties. This is understandably a reason not to impose strict deadlines under Rule 51.045. Relators' reliance upon the statute as a default is therefore misplaced.

Relators' analogies to *City of Normandy v. Greitens*, 518 S.W.3d 183 (Mo.banc 2017), and *State ex rel. Heilmann v. Clark*, 857 S.W.2d 399 (Mo.App. W.D. 1993), fails because of the substantive discovery provision in Rule 51.045. In *City of Normandy*, this Court found there was no inconsistency in imposing a time limit contained within the statute where the Supreme Court Rule contained no time limit for those arrested. The statute was found to not be in conflict because it did not impose a new requirement conflicting with the Rule. *Id.* at 201. Likewise, in *State ex rel. Heilmann*, the statute merely allowed additional parties to intervene and bring claims where execution upon personal property has been made. Allowing the additional parties identified in the statute, again, did not frustrate the

purpose of the Supreme Court Rule. *Id.* at 401.

CONCLUSION

For the foregoing reasons, Respondent correctly denied the Motion to Transfer Venue and the Preliminary Writ issued by this Court should be quashed.

Dated: November 16, 2018

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06 AND LOCAL RULES

The undersigned attorney hereby certifies, pursuant to Rule 84.06(c), that:

1. This reply brief includes the information required by Rule 55.03, including the undersigned's address, Missouri bar number, telephone number, fax number, and electronic mail address;

2. This reply brief complies with the limitations contained in Rule 84.06(b);

3. This reply brief, excluding the certificate of service, this certificate, and the signature block contains 4,350 words according to the word-processing system used to prepare the brief; and

4. This reply brief contains 512 lines of type according to the line count of the word-processing system used to prepare the brief.

5. Microsoft Word was used to prepare Respondent's reply brief.

6. This reply brief has been scanned viruses and is virus free.

7. One (1) copy of the printed reply brief was emailed to Relators' counsel.

CERTIFICATE OF SERVICE

The undersigned certifies that one (1) true and accurate copy of Respondent's Reply Brief was emailed on the 16th day of November, 2018, to:

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