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' REPLY BRIEF ON PETITION FOR WRIT OF PROHIBITION

Robert T. Haar, #30044
Lisa A. Pake, #39397
Matthew A. Martin, #64000
HAAR & WOODS, LLP
1010 Market Street, Suite 1620
St. Louis, Missouri 63101
(314) 241-2224
(314) 241-2227 (facsimile)
roberthaar@haar-woods.com
lpake@haar-woods.com
mmartin@haar-woods.com

Attorneys for Relators

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ARGUMENT

In the Respondent's Brief, plaintiffs ignore not only the plain language of the Supreme Court Rules and the applicable venue statute, but the allegations of their own Petition. Specifically, plaintiffs fail to acknowledge their damage allegations. The reason for this omission is evident. As respondent acknowledged in the Order denying transfer, "Plaintiffs brought this legal malpractice action against Defendants, alleging that they suffered damages of nearly four million dollars after being forced to stop operations as a result of Defendants' professional negligence." Ex. G, p. 1 (A1). St. Charles County is the only venue where a St. Charles County company, and the St. Charles County residents who owned and operated that company, could have been first injured by the financial loss alleged in the Petition. A conclusion in this case that venue is nevertheless proper in St. Louis City would cut venue determinations loose from the "first injury" moorings of § 508.010.4, and revive the uncertainty, arbitrariness, and forum shopping the Missouri General Assembly sought to correct in amending the statute in 2005.

But that is not the only uncertainty promoted in the Respondent's Brief. Respondent was also required to transfer this matter to St. Charles County because: (1) plaintiffs did not file a timely reply to the venue motion under Supreme Court Rule 51.045; and (2) respondent did not rule within 90 days of the motion as required by § 508.010.10 RSMo. The plaintiffs' response is that this Court's rules and the statute do not mean what they say, another conclusion that would undermine the efficiency and predictability these provisions were designed to achieve.

I. PLAINTIFFS FAIL TO SUPPORT THEIR CONTENTION THEY WERE FIRST INJURED OUT OF STATE GIVEN THAT THEIR PETITION ALLEGES FINANCIAL LOSS ONLY IN ST. CHARLES COUNTY.

This Court made clear in *State ex rel. Selimanovic v. Dierker* that venue is determined by "the injury sought to be redressed by the malpractice action." 246 S.W.3d 931, 933 (Mo. banc 2008). The injury plaintiffs seek to redress here is their loss of a business opportunity in St. Charles County. HeplerBroom's allegedly negligent advice, the franchisor's suit in Florida, and the preliminary injunction, were all merely links in the causal chain that resulted in the injury in St. Charles County. They were not the injury.

This is evident from the allegations in the petition. The Twillmans are St. Charles County residents who entered into an agreement to open a franchise of a Florida hydraulics business in St. Charles County. Ex. A (Petition), ¶¶ 1-3, 10, 13. They solicited advice from HeplerBroom, a Missouri law firm, with respect to their decision to cancel the franchise agreement. *Id.*, ¶ 23. Once the Twillmans cancelled the agreement, they created AHS, a new business in St. Charles County offering hydraulics services. *Id.*, ¶¶ 1, 24. When the Florida franchisor obtained a preliminary injunction enjoining that activity, *id.*, ¶¶ 30, 33, plaintiffs were damaged in St. Charles County because that is where they lost the business opportunity and the associated jobs and profits they anticipated being generated in that county over the next several years. *Id.*, ¶ 38. As alleged in the petition, "[a]s a direct and proximate result of Defendants' negligent acts and omissions," plaintiffs incurred as damages "lost profits, wages and income projected annually for the next four (4) years," as well as "expenses for inventory, vehicles,

services, supplies, maintenance and equipment." *Id.* Notably, plaintiffs do not identify either in their Petition or in their Brief any financial loss they suffered in Florida. Plaintiffs were therefore first injured in the State of Missouri, not in Florida.

That result is not changed by plaintiffs' recent insistence that the preliminary injunction was a "judgment," a characterization that does not appear in the petition.[1] By definition, preliminary injunctions are interlocutory orders. The preliminary injunction did not award monetary relief or require plaintiffs to take any action in Florida. What it did do was prohibit plaintiffs from using the franchisor's confidential materials or otherwise operate a competing business in a limited territory *in Missouri*. The consequent loss of the start-up business in St. Charles County was the first injury.[2]

As this Court has recognized, the venue statute and rules are designed to bring logic, predictability and efficiency to venue determinations. *See State ex rel. Lebanon School District R-III v. Winfrey*, 183 S.W.3d 232, 237 (Mo. banc 2006). In economic damage cases alleging business or income losses, the first injury will normally occur where the plaintiff is located. This permits a sensible, predictable venue determination that is not dependent on the vagaries of where the alleged negligence occurred or the

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[1] In Respondent's Answer and Brief, plaintiffs repeatedly refer to the preliminary injunction as having been entered on "October 26, 2016." *See* Respondent's Answer to Preliminary Writ, p. 3; Respondent's Brief, p. 8. However, as the petition alleges, the preliminary injunction was entered on October 6, 2016. Ex. A, ¶ 33.

[2] Throughout Respondent's Brief, plaintiffs conflate the location of events that caused the injury with the location of the injury. Respondent's Brief at 12 ("But for the federal litigation in the State of Florida, Plaintiffs would have suffered no injury at all."); *id*. ("If there was no litigation in Florida, and no judgment there, there would be no injury. Florida imposed the injury.")

location of each event that could be characterized as part of the causal chain. It yields a venue analysis that is consistent with this Court's construction of first injury in *Selimanovic* as the location where a plaintiff is first subject to financial loss. 246 S.W.3d at 933; *see also State ex rel. Mylan Bertek Pharmaceuticals, Inc. v. Vincent,* 2018 WL 4326473, *3 (Mo.App. E.D. Sept. 11, 2018) (legislative intent of current venue statute "makes the injury—not the conduct—the focus of the venue inquiry"). It is also consistent with how courts determine the place of injury in a variety of analogous contexts. *See, e.g., Kansas City Star Company v. Gunn,* 627 S.W.2d 332, 334-35 (Mo.App. W.D. 1982) (in suit by newspaper distributor alleging wrongful termination of contract by Missouri newspaper company, injury occurred in Kansas for choice of law purposes because plaintiff "sustained all of his damage in Kansas where he lived and conducted his business and where his route and customers were situated"); *Zafer Chiropractic & Sports Injuries, P.A. v. Hermann,* 501 S.W.3d 545, 550 (Mo.App. E.D. 2016) (applying Restatement (Second) of Conflict of Laws factors in analyzing choice of law applicable to tort claim and holding injury occurred in Kansas, the location where plaintiff sole proprietor "lost business opportunities and profits" as a result of defendant's conduct); *Great Plains Trust Co. v. Union Pac. R. Co.,* 492 F.3d 986, 993 (8th Cir. 2007) (in construing Missouri borrowing statute, "for cases involving a purely economic injury, as opposed to a physical accident with economic consequences, a cause of action originates where the plaintiff is financially damaged").

II. THE CLEAR LANGUAGE OF RULE 51.045 PROVIDING THAT TRANSFER SHALL BE ORDERED IF PLAINTIFF DOES NOT FILE A TIMELY REPLY IS CONSISTENT WITH THE PLAINTIFF HAVING THE BURDEN OF ESTABLISHING VENUE AND SHOULD BE ENFORCED.

Even if plaintiffs' contention that they were first injured outside of the State of Missouri were well-taken, which it is not, the argument should not have been considered by respondent since it was not included in a timely reply. Rule 51.045 does not permit a court to rely on venue arguments that are not properly before it. *See* Rule 51.045(b) ("The court shall not consider any basis not stated in the reply"); *Mylan Bertek*, 2018 WL 4326473 at *4 (plaintiff's failure to assert a particular ground for why venue in St. Charles County was improper in her reply to motion to transfer "means that it was not a reason that can be considered"). The lack of a timely reply is an independent reason why plaintiffs failed to meet their burden to establish venue was proper in the City of St. Louis. *See Igoe v. Dept. of Labor and Indus. Relations,* 152 S.W.3d 284, 288 (Mo. banc 2005) (when venue is challenged, burden of showing proper venue is on plaintiff).

Plaintiffs argue that respondent had the authority to deny HeplerBroom's motion to transfer even though plaintiffs failed to file a reply or seek an extension to do so within the prescribed 30-day time limit. In making this argument, they rely solely on *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630 (Mo. banc 2007). However, plaintiffs acknowledge that this Court amended Rule 51.045 in 2012, several years after *City of Jennings.* Respondent's Brief, p. 17. As pointed out in the opening brief, the prior version of Rule 51.045(a) 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." *City of Jennings* interpreted that language as requiring the movant to make a "threshold showing" that venue was improper before the court could order transfer. 236 S.W.3d at 632. The circuit court in *Jennings* found that threshold showing had not been made. For that reason, this Court held that the circuit court had the authority to deny the transfer motion even though plaintiff had not filed a timely reply. *Id.*

The specific language in Rule 51.045(a) relied on by *City of Jennings* to support this holding was amended by the Court as of January 1, 2012. That section of the Rule now reads, "[a]ny motion to transfer venue alleging improper venue shall be filed within 60 days of service on the party seeking transfer." Despite plaintiffs' argument to the contrary, it is presumed that the amendment was intended to effect a change in the Rule. *See State ex rel. R-1 School District of Putnam County v. Ewing*, 404 S.W.2d 433, 439 (Mo.App. K.C. 1966) ("It is to be presumed that the Supreme Court by superseding this former rule and this statute and substituting Civil Rule 41.02 dealing with the same subject intended to effect some change . . . ."). This Court was aware of the status of the law and its construction of the prior version of the Rule in *City of Jennings* at the time of the amendment. *Id.* Clearly, the Court amended section (a) of Rule 51.045 to simplify and streamline the transfer process.

All that is required of the movant under the amended rule is that the transfer motion (1) *allege* improper venue and (2) state a basis for venue in the counties the movant *contends* are proper. The movant no longer must show that venue is improper before a transfer motion may be granted. If no reply is filed, "the court *shall* order

transfer to one of the counties specified in the motion." Rule 51.045(c) (amended as of 1/1/12) (emphasis added). Thus, respondent had no discretion to deny HeplerBroom's venue motion after plaintiffs failed to timely reply. Not only is a timely reply required, but the court is not to consider any basis for determining venue is proper in the plaintiff's chosen forum that is not specified in the reply. Rule 51.045(b); *Mylan Bertek*, 2018 WL 4326473 at *4. Respondent was therefore prohibited from considering the out-of-state injury argument first raised in plaintiffs' untimely reply. This prohibition is consistent with the plaintiff having the burden to show proper venue. *See Igoe*, 152 S.W.3d at 288.

Plaintiffs further contend that their reply was in fact timely and therefore properly considered by respondent. Plaintiffs argue that respondent had the authority under Rule 51.045 to grant their request for an extension after the 30-day reply period expired and did so *sub silentio*. They also contend that respondent was not required to make an explicit finding of "good cause."

These arguments are not only without support in Rule 51.045, but they are directly contradicted by Rule 44.01—a rule plaintiffs relied on heavily in their Answer to the Preliminary Writ, yet do not even cite in Respondent's Brief. Rule 44.01(b)(1) specifies that a circuit court may enlarge a period of time specified in a Supreme Court Rule "if request therefor is made *before* the expiration of the period originally prescribed or as extended by a previous order." (Emphasis added). If, like here, the originally prescribed period has lapsed, an extension may only be obtained by a written motion demonstrating excusable neglect and complying with the notice requirements of Rule 44.01(b)(2) and (d), which plaintiffs tacitly concede did not happen here. And the bald assertion that a

deadline was missed as a consequence of inadvertence or oversight is neither "good cause" nor "excusable neglect" in any event. *See Flowers v. City of Campbell*, 384 S.W.3d 305, 314 (Mo.App. S.D. 2012) (unjustified failure to exercise due diligence in responding to summary judgment motion was not "excusable neglect"); *cf. Mylan Bertek*, 2018 WL 4326473, *2 (under Rule 44.01(b)(2), finding excusable neglect for untimely reply where transfer motion was incorporated into larger motion seeking relief on other grounds not subject to a time-limited response).

Consistent with Rule 51.045's manifest purpose to resolve venue disputes early and efficiently, and the case law's placement of the burden to show proper venue on the plaintiff, the Rule's filing deadlines should be enforced as written. One obvious purpose of the time limitations in Rule 51.045 is to force litigants to give serious consideration to the question of proper venue *before* a lawsuit is filed. Failure to enforce the Rule's time limitations simply encourages careless venue allegations that, like in this case, shift when venue is challenged, wasting resources of courts and litigants. The failure to enforce those limitations here was an abuse of discretion and an independent reason why the preliminary writ in prohibition should be made permanent.

III. THE 90-DAY STATUTORY DEADLINE TO RULE ON TRANSFER MOTIONS IS NOT INCONSISTENT WITH RULE 51.045 AND SHOULD BE ENFORCED.

As this Court emphasized in *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445, 446-47 (Mo. banc 1997):

> If venue is improper, it inures to the benefit of the parties and the judicial system, for the purpose of efficient administration of justice, to bring the issue to the trial court's attention at the earliest possible time. This allows disposition of the issue to be made promptly so that the litigation can proceed elsewhere.

In this case, once HeplerBroom timely filed its motion to transfer, no activity occurred in the litigation until respondent ruled on the motion seven months later. This type of delay and inefficiency supports enforcement of the 90-day time limit on venue motion rulings found in § 508.010.10 RSMo.

Plaintiffs do not dispute that respondent did not comply with the statute. Rather they assert that the 90-day period in § 508.010.10 should be ignored because it is allegedly inconsistent with Rule 51.045. But there is no inconsistency between § 508.010.10 and Rule 51.045, and divining one in this case would exceed this Court's authority and improperly intrude on the authority of the General Assembly. "'Where the legislature has enacted a statute pertaining to a procedural matter which is not addressed by or inconsistent with any supreme court rule, the statute must be enforced.'" *State ex rel. Missouri Public Defender Com'n v. Pratte*, 298 S.W.3d 870, 886 (Mo. banc 2009) (quoting *State ex rel. Kinsky v. Pratte*, 994 S.W.2d 74, 76 (Mo.App. E.D. 1999)).

This Court has addressed what it means for one legal mandate to be inconsistent with another in a far less sensitive context than one involving the legislature. In *State ex rel. State v. Riley*, 992 S.W.2d 195 (Mo. banc 1999), the Court considered whether a local discovery rule in the City of St. Louis was inconsistent with the Missouri Supreme Court Rules. The Court noted that an inconsistency would be found "if the local court rule specifically prohibits something this Court's rules permit or if the local court rule

specifically permits something that this Court's rules prohibit." *Riley*, 992 S.W.2d at 196. In *Riley*, the Court found that the local rule simply added reasonable additional requirements to discovery responses that were not found in the Supreme Court Rules. Therefore, the rules were not inconsistent. *Id.*; *see also State ex rel. Audrain Healthcare, Inc. v. Sutherland*, 233 S.W.3d 217, 218 (Mo. banc 2007) ("not all differences are contradictions").

Here, as well, § 508.010.10 adds an additional requirement to the venue determination process—a 90-day time limit—that is not found in nor prohibited by Rule 51.045. There is no inconsistency. This Court's decision in *City of Normandy v. Greitens*, 518 S.W.3d 183 (Mo. banc 2017), is directly on point. Plaintiffs' attempt to distinguish the case illustrates precisely why it applies here: "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." Respondent's Brief, p. 22. Similarly, § 508.010.10 imposes a 90-day time limit on the circuit court's venue determination, after which the motion to transfer will be deemed granted. Rule 51.045 contains no time limit. As this Court explained in *City of Normandy*, "additional deadlines are not in conflict when existing rules do not contain time limits." 518 S.W.3d at 201.

It is clear that the legislative intent in adding the 90-day time limit to the statute as part of the 2005 Tort Reform Act was to expedite venue determinations so that litigation would not be unduly delayed at its inception. There are no reported cases reflecting that the time limit has impaired venue determinations. Moreover, this Court is presumed to

have been aware of the 90-day time limit when it amended Rule 51.045 in 2012, *see State ex rel. R-1 School District of Putnam County*, 404 S.W.2d at 439, and the Court did not add any provisions to Rule 51.045 that contradicted the statutory time limit.

Plaintiffs' final attempt to create an inconsistency between the statute and the rule is to point out that Rule 51.045 provides for the possibility of discovery on the issue of venue, which "would be time consuming to the parties." Respondent's Brief, p. 22. Yet the possibility of discovery is not inherently inconsistent with the 90-day requirement. Discovery, if granted, would presumably be narrowly tailored to address venue issues only, and therefore should not be time consuming. In practice, any reply to the transfer motion should be filed within 30 days, and the motion can be called up for argument soon thereafter. The circuit court will then have a period of time up to 60 days to rule on the motion, during which period any necessary venue discovery and additional briefing could be completed. The time restriction simply requires the parties and the court to work together to schedule efficient completion of these tasks. The parties and the circuit court "can comply with both the rule and the statute." *See City of Normandy*, 518 S.W.3d at 201.

Moreover, the statute contemplates and addresses the possibility of unusually time-consuming discovery by allowing the 90-day deadline to be waived. *See* § 508.010.10 RSMo. (motions to transfer shall be deemed granted if not denied within ninety days of filing "unless such time period is waived in writing by all parties"). Presumably, if the circuit court deemed that discovery was necessary to decide the transfer motion, and the discovery could not be completed in time to allow the court to

meet the deadline, a waiver would be the solution. In such a scenario it is unlikely either party would rebuff the circuit court's request. *See, e.g., Van Den Heuvel v. Albany Int'l Corp.*, 2013 WL 9679912, *1 (Mo. Cir. June 20, 2013) (order in asbestos case noting defendants' consent to extend 90-day period for consideration of motion to transfer venue pending completion of plaintiff's deposition).

This Court has recognized that it should not lightly rule that an express statutory deadline is a nullity. If there is a way to harmonize the statute and the rule, and here there clearly is, that path should be taken. *See State ex rel. Audrain*, 233 S.W.3d at 219 (finding chapter 508 and Rule 51.03 do not contradict each other and noting that "[i]f a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted").

Since there is no inconsistency between § 508.010 RSMo. and Rule 51.045, and no dispute that the statutory deadline was not met, it was an abuse of discretion to deny HeplerBroom's venue motion. This is an additional, independent reason why this Court's preliminary writ should be made permanent and this case transferred to St. Charles County.

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 permanent 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: November 29, 2018

HAAR & WOODS, LLP

/s/ Robert T. Haar
Robert T. Haar, #30044
Lisa A. Pake, #39397
Matthew A. Martin, #64000
1010 Market Street, Suite 1620
St. Louis, Missouri 63101
(314) 241-2224
(314) 241-2227 (facsimile)
roberthaar@haar-woods.com
lpake@haar-woods.com
mmartin@haar-woods.com

Attorneys for Relators

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that: (1) Relators' Reply 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 and this certificate, contains 3,910 words, as determined by the word count tool contained in Microsoft Word 2013.

November 29, 2018 /s/ Robert T. Haar

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of November, 2018, Relators' Reply 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:

Larry A. Bagsby
THE BAGSBY LAW FIRM
125 North Main Street, Suite 204
St. Charles, Missouri 63301
larrybagsby@aol.com

Attorney for Plaintiffs/Respondent

/s/ Robert T. Haar