IN THE SUPREME COURT OF THE STATE OF MISSOURI

No. SC97418

STATE ex rel. THE CURATORS
OF THE UNIVERSITY OF MISSOURI,

Relator,

v.

THE HONORABLE JOSEPH L. GREEN,
Judge of the Circuit Court of St. Louis County,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
CAUSE NO 17SL-CC03833
HONORABLE JOSEPH L. GREEN

RESPONDENT'S BRIEF

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SUMMARY

Sixteen years ago, the University of Missouri faced a difficult decision.[1] It had received a $5,000,000 bequest from Sherlock Hibbs to promote a school of conservative economic thought that the University's administrators found distasteful. Brady Deaton, the University's Provost, was concerned that the University and its Business School were being "held hostage by a particular ideology," and he objected to the bequest's condition that it be used to promote "disciples" of the Austrian School of Economics. (A001.) Those same administrators, however, including John Stowe, Associate Dean of MU's Trulaske College of Business ("TCB"), considered it "unconscionable" to reject the gift. (A003.) So rather than comply with the condition of Mr. Hibbs' bequest, they re-wrote it, "focusing on some Austrian tenets that are compatible with what we do in our business school." (A004.) These same individuals, not one of whom was a trustee of any purported trust involving the bequest, then concealed their conduct from the University's Board of Curators, from the professors they appointed to the positions funded by the bequest, and from Hillsdale. Worse still, they pressured those professors to falsely certify to the Board of Curators and to Hillsdale—repeatedly—that the University had complied with the condition of the Hibbs' bequest.

[1] The University of Missouri system is a legal entity consisting of several campuses and other offices throughout the State and should not be confused with the individual members of the Board of Curators who govern the system. The legal name of the University of Missouri System is "The Curators of the University of Missouri." R.S. Mo. § 172.020 ("the state university is hereby incorporated and created as a body politic and shall be known by the name of 'The Curators of the University of Missouri'"). In order to avoid confusion, Respondent Hillsdale College ("Hillsdale") refers to Relator as "MU" or the "University."

> Remember we're all working toward the same goal, namely, approval of the report (including the certification statements) by first the Curators and then Hillsdale College—both without publicity, use of much more of all of our time, and without a challenge by Hillsdale College and potential legal battle that would ensue from that. And also remember, these named positions are very beneficial to MU, the college, and—most importantly—each of you.

(A008.)

In 2017 Hillsdale sued the University, seeking to enforce Mr. Hibbs' expressed intent. From inception, MU has chosen to pursue an expensive, and ultimately temporary, venue strategy rather than engage on the merits. Despite lacking any possible claim of prejudice in defending this case in St. Louis County, the University's pursuit of a venue transfer has been so single minded that it: (1) failed, and now refuses, to produce records identifying where the funds from the Hibbs' bequest are kept, even though the question is central to its argument that venue is proper in Boone County; (2) sought, after issuance of the Preliminary Writ and before Hillsdale could even answer the Petition, to convince the Circuit Court to transfer the case to Boone County (A009-10); and (3) ignores obvious unresolved questions of fact with respect to whether Mr. Hibbs' bequest created an interest subject to a condition subsequent, as Hillsdale contends, or a trust, as the University's venue argument requires. As explained below, there are unresolved questions of fact and settled principles of law that preclude MU from demonstrating a clear and unequivocal right to relief. As a consequence, the Preliminary Writ in Prohibition should be quashed.

STATEMENT OF FACTS

A. The Hibbs' Last Will and Testament.

Sherlock Hibbs was an adherent of the Ludwig von Mises (Austrian) School of Economics. The Austrian School emphasizes free markets, private property, and limited government, and differs in significant respects from Keynesian and other schools of economic thought. (Petition for Writ of Mandamus, Ex. A, page 5, ¶ 12.) In 2002, Mr. Hibbs, a 1926 graduate of MU, donated $5,000,000 to fund three Chairs and three Distinguished Professorships at MU's Trulaske College of Business ("TCB"). (*Id.* at Ex. A, page 4, ¶ 8 & Ex. A-1, page 44, ¶ 83.) The Hibbs Will required that the bequest be divided into six separate funds. This included three separate sums of $1,100,000 to be used to establish and fund (1) a Chair of Money, Credit and Banking, (2) a Chair of Business and Economics, and (3) a Chair of Entrepreneurship, and three additional amounts ($567,000, $567,000, and $566,000) to establish and fund three Distinguished Professorships. (*Id.* at Ex. A, page 4, ¶ 9.) The Will also required that each appointee to a Chair and Distinguished Professorship be a dedicated and articulate disciple of the Ludwig von Mises Austrian School of Economics. (*Id.* at Ex. A-1, page 45, ¶ 83(c)(vi).)

Although the Will stated that the bequest was made to "the Curators of the UNIVERSITY OF MISSOURI as trustees, in trust," *id.* at Ex. A-1, page 44, ¶ 83, the Will did not rely on trust principles to enforce the condition of the bequest. Consistent with his Austrian School orientation, Mr. Hibbs relied on a mechanism of private enforcement by Hillsdale, an entity with an incentive to police compliance because MU would forfeit the funds to Hillsdale if MU did not comply with the condition. (*Id.* at

Ex. A-1, pages 45-46, ¶ 83(c)(vi).) The Will contained two forfeiture provisions that applied to the gift. First, at the end of each four-year term commencing with Mr. Hibbs' death, the University was required to promptly and in writing inform Hillsdale of the name and qualifications of each appointee, and "certify that the appointee is a dedicated and articulate disciple of the Ludwig von Mises (Austrian) School of Economics." (*Id.* at Ex. A-1, pages 45-46, ¶ 83(c)(vi).) "Failure to promptly so inform and certify shall create a legal presumption that the balance of the fund shall be transferred to HILLSDALE COLLEGE ..." (*Id.*) Second, "if the Chair or Distinguished Professorship, as the case may be, remains vacant for a period of five years, the trustees shall forthwith distribute the then balance of the fund to" Hillsdale. (*Id.*)

B. The Endowment Contracts.

The funds from the Hibbs Will were the subject of six endowment contracts that funded each of the Chairs and Distinguished Professorships. (*Id.* at Ex. A, page 11, ¶ 36.) The endowment contracts require each appointee to a Chair or Distinguished Professorship to be a dedicated and articulate disciple of the Ludwig von Mises (Austrian) School of Economics. (*Id.* at Ex. A, page 11, ¶ 38.) The endowment contracts also identify Hillsdale College as a third-party beneficiary. (*Id.* at Ex. A, pages 11-12, ¶ 39.) MU titled each endowment contract an agreement "between THE ESTATE OF SHERLOCK HIBBS and THE BOARD OF CURATORS UNIVERSITY OF MISSOURI." (*Id.* at Ex. A, page 11, ¶ 36; *id.* at Exs. A-2 through A-7, pages 61-78 (Endowment Contracts).)

C. MU Did Not Appoint Dedicated and Articulate Disciples of the Austrian School of Economics to the Chairs and Distinguished Professorships.

Rather than decline the bequest or comply with its specific conditions, however, the Dean of the TCB appointed individuals to the Chairs and Distinguished Professorships whom he knew were not Austrian economists, much less "dedicated and articulate disciples" of the Ludwig von Mises (Austrian) School of Economics.[2] (*Id.* at Ex. A, page 9, ¶ 26, page 10, ¶ 32, page 12, ¶ 43, page 18, ¶ 69, page 19, ¶ 73, page 20, ¶¶ 77-78.) Indeed, in the Dean's own words, "the Austrian School of Economics is quite controversial. We didn't want to wade into that controversy, so we focused on some Austrian tenets that are compatible with what we do in our business school." (*Id.* at Ex. A, page 8, ¶ 23; A004) MU has *never* appointed a dedicated and articulate disciple of the Ludwig von Mises (Austrian) School of Economics to a Chair or Distinguished Professorship funded by Mr. Hibbs' gift. (Petition for Writ of Mandamus, Ex. A, page 9, ¶ 26.) Instead, MU provided millions of dollars over 15 years to individuals who were not Austrian economists. In doing so, MU violated the terms of contracts that established the Chairs and Distinguished Professorships, and Hillsdale seeks to recover damages as the third-party beneficiary of those contracts.[3] (*Id.* at Ex. A, pages 20-24, ¶¶ 81-92 & 94-95.)

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[2] Declining a bequest is not unusual when a donee cannot, or does not want to, comply with its conditions. In fact, a donee of the Hibbs Will—Robert College—declined a $1,000,000 bequest rather than comply with the Austrian School condition. (*Id.* at Ex. A, page 6, ¶ 14.)

[3] In the alternative, Hillsdale is a third-party beneficiary of an implied contract between the University and the Estate of Sherlock Hibbs based on the University's acceptance of

D. Proceedings in the Circuit Court and Elsewhere.

Hillsdale's original Petition was filed on October 18, 2017. That Petition specifically alleged that Hillsdale was the third-party beneficiary of an implied contract created by MU's acceptance of the Hibbs' bequest. (A016-17, ¶¶ 23-28.) Hillsdale's first set of Requests for Production of Documents and Interrogatories were served on the University on February 28, 2018. Among other things, Hillsdale requested that the University produce all documents related to its efforts to comply with any conditions imposed on it by the Hibbs' Will, and all documents related to any trusts established with funds from the Hibbs' Will. (A061-62.) The University moved to transfer venue on March 28, 2018. The motion was argued on May 4 and denied by the Circuit Court on May 18.[4]

On May 23, 2018, after numerous extensions and the Circuit Court's denial of its venue motion five days earlier, MU finally responded to Hillsdale's first discovery requests. It produced six express written endowment contracts between "The Estate of Sherlock Hibbs and The Board of Curators University of Missouri" establishing the Chairs and Distinguished Professorships at issue. (Petition for Writ of Mandamus, Exs. A-2 through A-7, pages 61-78.) Each endowment contract specifically recites Hillsdale's

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the bequest, and it seeks damages for MU's breach of that implied contract. (*Id.* at Ex. A, pages 20-24, ¶¶ 81-88 & 93-95.)

[4] After Judge Green denied the motion, MU filed a Petition for Writ of Prohibition in the Missouri Court of Appeals (ED106773), which was denied. MU subsequently filed a Petition for Writ of Prohibition in this Court (SC97249), which was denied on July 9, 2018. (*See* Petition for Writ of Mandamus, at pp. 1-2.)

right to the endowment funds if MU fails to appoint dedicated and articulate disciples of the Ludwig von Mises (Austrian) School of Economics. (*Id.*) In its May 23 responses, the University also agreed to produce all documents demonstrating "its efforts for compliance with the terms of the will." (A075.) Such documents plainly would have included books and records pursuant to which the trust that MU argues was created by the Hibbs' bequest was administered. But no books or records relating to the purported trust were included in any of the University's document productions made over the ensuing months.

On August 6, 2018, the Circuit Court granted Hillsdale's motion to file its Second Amended Petition. In it, Hillsdale alleges three causes of action against MU. In Count I, Hillsdale seeks a declaratory judgment that MU's failure to appoint dedicated and articulate disciples of the Ludwig von Mises (Austrian) School of Economics violates the terms of the endowment contracts and Mr. Hibbs' bequest. (Petition for Writ of Mandamus, Ex. A, pages 20-22, ¶¶ 81-88.) In Count II, Hillsdale alleges that MU entered into and subsequently breached the endowment contracts and/or an implied contract between MU and the Estate of Sherlock Hibbs. (*Id.*at Ex. A, pages 23-24, ¶¶ 89-95.) And in Count III, pleaded in the alternative, Hillsdale alleges that MU has been unjustly enriched by retaining a bequest while failing to comply with its terms. (*Id.* at Ex. A, pages 24-25, ¶¶ 96-101.)

MU's motion for change of venue directed to the Second Amended Petition was argued before, and denied by, Judge Green on August 22, 2018. (*Id.* at Ex. C, page 80 (Circuit Court Order).) MU filed a Petition for Writ of Prohibition on the venue issue in

the Court of Appeals later that same day. The Court of Appeals denied the Petition on September 11, 2018.

On August 31, 2018, Hillsdale served its second set of Requests for Production of Documents and Interrogatories. Having received no books or records relating to the administration of the purported trust, Hillsdale specifically requested "all records referred to in the second paragraph of Ms. Ashley E. Caldwell's Affidavit dated March 27, 2018." (A087.) MU filed its Petition for Writ of Mandamus in this Court on September 18, 2018. (Petition for Writ of Mandamus.)

On October 1, the University served its responses to Hillsdale's second set of document requests. Although Ms. Caldwell's Affidavit is what the University contends establishes that the place of administration of the purported trust is Boone County (MU Opening Br. at 14), MU objected to the document request and declined to produce the requested records. (A094.) Hillsdale pressed the University throughout October to respond. On October 22, 2018, counsel for the University assured Hillsdale that they were diligently working on fulfilling its requests (A100), but no documents responsive to Hillsdale's Second Requests for Production have ever been produced, and the response to Hillsdale's First Requests remains incomplete.

On October 30, 2018, this Court issued a Preliminary Writ of Mandamus. On November 2, without inquiring whether Hillsdale intended to answer Relator's Petition, MU's counsel wrote Judge Green and urged him to transfer the case to Boone County immediately. (A009-10.) Hillsdale responded the same day, and the Circuit Court

properly declined the University's invitation. Hillsdale answered the Writ Petition on November 29, 2018.

On December 7, 2018, Hillsdale once again attempted to obtain discovery related to the location of books and records concerning the purported trust. It served a Notice of Deposition pursuant to Mo. R. Civ. P. 57.03(b)(4) that sought a witness to provide, among other things, (1) a description of the records referred to in the second paragraph of Ms. Ashley Caldwell's affidavit dated March 27, 2018, (2) the rules, regulations and policies pursuant to which the University acts as trustee with respect to property left to it by will, and (3) the location of documents, communications, and ESI related to investment of the Hibbs' bequest. (A104-05.) The University filed a motion to quash the Notice and refused to produce a witness. (A106-14.) Because of the Preliminary Writ issued by this Court, Hillsdale could not seek a ruling on MU's motion. The University filed its Opening Brief on December 31, 2018.

POINTS RELIED ON

RESPONSE TO RELATOR'S POINT I

I. Relator is not entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County pursuant to R.S. Mo. § 456.2-204(1), or in mandamus requiring the Circuit Court to transfer venue to Boone County, in that

A. The Circuit Court has not determined whether the Hibbs' bequest is an interest subject to a condition subsequent, as Hillsdale contends, or a testamentary trust, as MU contends, and this is a fact issue that precludes MU from establishing a clear and unequivocal right to extraordinary relief because R.S. Mo. § 456.2-204(1) does not apply to an interest subject to a condition subsequent;

State ex rel. Hewitt v. Kerr, 461 S.W.3d 798 (Mo. 2015)

Mercantile Tr. Co. v. Mercantile Tr. Co., 677 S.W.2d 343 (Mo. App. E.D. 1984)

Walton v. City of Red Bluff, 3 Cal. Rptr. 2d 275 (Cal. Ct. App. 1991)

Restatement (Second) of Trusts § 11, comments a & e (1959)

B. Hillsdale has sued as third-party beneficiary of the endowment contracts, which are not trusts, are not subject to R.S. Mo. § 456.2-204(1), and are at most tangentially related to any purported trust;

In re J.P. Morgan Chase Bank, N.A., 361 S.W.3d 703 (Tex. App. 2011)

McCormick v. Hines, 498 S.W.2d 58 (Tex. Civ. App. 1973)

Powell v. Am. Bank & Trust Co., 640 F. Supp. 1568 (N.D. Ind. 1986)

C. The Circuit Court has not determined that any purported trust is administered in Boone County, and this constitutes a fact issue that precludes MU from establishing a clear and unequivocal right to extraordinary relief.

State ex rel. Hewitt v. Kerr, 461 S.W.3d 798 (Mo. 2015)

State ex rel. Bank of Am. N.A. v. Kanatzar, 413 S.W.3d 22 (Mo. App. W.D. 2013)

RESPONSE TO RELATOR'S POINT II

II. Relator is not entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County, or in mandamus requiring the Circuit Court to transfer venue to Boone County pursuant to R.S. Mo. § 508.010.2(1), in that

A. Venue is proper in St. Louis County either under R.S. Mo. § 508.010.2(1) because Hillsdale is deemed a resident of St. Louis County and Relator can be found in St. Louis County, or under R.S. Mo. § 508.010.2(4) because Relator is the functional equivalent of a nonresident defendant for venue purposes;

State ex rel. Heartland Title Servs., Inc. v. Harrell, 500 S.W.3D 239 (Mo. banc 2016)

Natalini v. Little, 185 S.W.3d 239 (Mo. App. S.D. 2006)

R.S. Mo. § 508.010.2(1) & § 508.010.2(4)

B. Boone County is not the appropriate venue under R.S. Mo. § 508.010.2(1) because Relator does not reside in Boone County for venue purposes, and this Court should not overturn S*tate ex rel. Ormerod v. Hamilton*, 130 S.W.3d 571 (Mo. banc 2004).

State ex rel. Ormerod v. Hamilton, 130 S.W.3D 571 (Mo. banc 2004)

State ex rel. Milham v. Rickhoff, 633 S.W.2d 733, 734 (Mo. banc 1982)

R.S. Mo. § 508.010.2(1)

RESPONSE TO RELATOR'S POINT III

III. Relator is not entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County, or in mandamus requiring the Circuit Court to transfer venue to Boone County, because this Court should not overrule settled case law and adopt an intrastate *forum non conveniens* doctrine.

State ex rel. Heartland Title Servs., Inc. v. Harrell, 500 S.W.3d 239 (Mo. banc 2016)

Willman v. McMillen, 779 S.W.2d 583 (Mo. banc 1989)

State v. Honeycutt, 421 S.W.3d 410, 422 (Mo. banc 2013)

STANDARD OF REVIEW AND PRESERVATION

The standard of review for writs of mandamus and prohibition, including those pertaining to motions to transfer venue, is abuse of discretion. *State ex rel. Missouri Pub. Serv. Comm'n v. Joyce*, 258 S.W.3d 58, 61 (Mo. banc 2008). A litigant seeking mandamus must allege and prove that he has a "clear, unequivocal, specific right" to extraordinary relief. *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 805 (Mo. 2015).

Hillsdale agrees that MU timely challenged venue. (*See* MU Opening Br. at 20.) Hillsdale does not agree, however, that it faces any preservation issue. As described in the Statement of Facts, Hillsdale served document requests in February 2018 that sought from MU, among many other things, all documents related to its efforts to comply with any conditions imposed on it by the Hibbs' Will, and all documents related to any trusts established with funds from the Hibbs' Will. (A061-62.)

On May 23, 2018, after numerous extensions and the Circuit Court's denial of its first motion to transfer venue, MU finally responded. It agreed to produce all written documents demonstrating "its efforts for compliance with the terms of the will." (A075.) Such documents plainly would have included books and records related to the trust or trusts that MU argues were created by the Hibbs' bequest, but these were never produced. When Hillsdale followed up with additional discovery that sought these records specifically, MU stonewalled and refused to produce them. (A094.) Now it claims that Hillsdale has no right to the documents at all, reversing its prior discovery response, and apparently advocating that the University's discovery obstruction be rewarded whether or not venue is *actually* proper in Boone County.

Hillsdale disagrees and is entitled—under the Rules of Civil Procedure and principles of fundamental fairness—to discover where books and records related to the Hibbs' bequest are maintained. We know that the funds at issue always have been held *outside* Boone County at BNY Mellon and Northern Trust. (A120-21.) We also know that the University did not establish "a separate trust fund" for each Chair and Distinguished Professorship, but pooled the monies with its other investments at those institutions. (*Id.*) The question of where the books and records regarding the funds from the Hibbs' bequest are kept is an open one that should be decided in the first instance by the Circuit Court on a full record. Hillsdale did not waive its right to discover documents that MU should have produced months and months ago.

Nor did Hillsdale "waive" any argument that venue is proper in St. Louis County under R.S. Mo. § 456.2-204. (MU Opening Br. at 21.) Hillsdale has not up to this time had any basis to contend that venue is proper in St. Louis County under R.S. Mo. § 456.2-204 because, as explained in the immediately preceding paragraph, the University has stonewalled Hillsdale's attempts to determine whether books and records related to the Hibbs' bequest may actually reside outside Boone County. The Circuit Court is the appropriate forum for this decision, not this Court on extraordinary writ.

SUMMARY OF ARGUMENT

The Hibbs' bequest created a property interest subject to a condition subsequent, not a trust. The bequest contains two forfeiture provisions and purportedly designates the beneficiary as trustee. In the absence of a trust, R.S. Mo. § 456.2-204(1) does not apply. Because there has been no factual determination that Mr. Hibbs' bequest created a trust, MU has not demonstrated a clear, unequivocal, specific right to a writ. This Court should quash the Preliminary Writ so that the issue of whether a trust was created can be decided by the Circuit Court on a full record. The trust administration venue statute also is inapplicable because Hillsdale's claims are based on contract documents that are not trusts and that are, at most, tangentially related to any purported trust created by the Hibbs' bequest. Even further, there has been no factual determination that any purported trust is administered in Boone County, and the University has obstructed Hillsdale's attempts to challenge the contention that it is. As with the issue of whether the Hibbs' bequest created an interest subject to a condition subsequent or a trust, the question of where the books and records related to the funds received from the Hibbs' bequest are kept should be decided by the Circuit Court.

MU's alternative arguments provide no basis for making the Preliminary Writ permanent. In this case the University cannot make even a credible claim of prejudice, the touchstone of Missouri venue analysis. As such, the case is a poor candidate for reconsidering the Court's en banc decision in *State ex rel. Ormerod v. Hamilton*, 130 S.W.3d 571 (Mo. banc 2004). If the University wants its own venue statute, it can petition the Legislature. Similarly, the Court should decline the University's invitation to

overrule its recent unanimous decision in *State ex rel. Heartland Title Servs., Inc. v. Harrell*, 500 S.W.3d 239, 243 (Mo. banc 2016)—and decades of other precedent—to adopt an intrastate *forum non conveniens* doctrine for the primary benefit of MU in this case.

For these reasons, discussed in detail below, Hillsdale asks the Court to quash its Preliminary Writ of Mandamus issued October 30, 2018.

ARGUMENT

RESPONSE TO POINT RELIED ON I:

Relator is not entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County pursuant to R.S. Mo. § 456.2-204(1), or in mandamus requiring the Circuit Court to transfer venue to Boone County, in that

A. The Circuit Court has not determined whether the Hibbs' bequest is an interest subject to a condition subsequent, as Hillsdale contends, or a testamentary trust, as MU contends, and this is a fact issue that precludes MU from establishing a clear and unequivocal right to extraordinary relief because R.S. Mo. § 456.2-204(1) does apply to an interest subject to a condition subsequent;

B. Hillsdale has sued as third-party beneficiary of the endowment contracts, which are not trusts, are not subject to R.S. Mo. § 456.2-204(1), and are at most tangentially related to any purported trust; and

C. The Circuit Court has not determined that any purported trust is administered in Boone County, and this constitutes a fact issue that precludes MU from establishing a clear and unequivocal right to extraordinary relief.

I. RELATOR IS NOT ENTITLED TO A WRIT REQUIRING THE CIRCUIT COURT TO TRANSFER VENUE TO BOONE COUNTY BASED ON R.S. MO. § 456.2-204(1).

MU's Point I argues that venue must be transferred to Boone County under R.S. Mo. § 456.2-204(1) because the Will's gift purportedly created a trust that is administered in Boone County. The Court should deny Point I for the following reasons.

A. This Proceeding Does Not Involve Trust Administration and Is Not Subject to § 456.2-204(1).

MU argues that the words "trust" and "trustees" in the Will's bequest conclusively establish that a trust was created. (MU Opening Br. at 25-28.) Not so. It is well-settled that "[t]he use of the word 'trust' in a grant does not without more make a trust." *Walton v. City of Red Bluff*, 3 Cal. Rptr. 2d 275, 279 (Cal. Ct. App. 1991); *accord*, *e.g.*, *He Depu v. Yahoo! Inc.*, 306 F. Supp. 3d 181, 188 (D.D.C. 2018) ("courts have recognized that there is nothing talismanic about inclusion of the term 'in trust' in an agreement"); *Meima v. Broemmel*, 117 P.3d 429, 444-46 (Wyo. 2005) (finding no trust established even though the parties used the words "in trust"); *Application of Mareck*, 100 N.W.2d 758, 762 (Minn. 1960) ("It is also true that use of the words 'trust' or 'trustee' does not necessarily create a trust"); *Connecticut Junior Republic Ass'n v. Town of Litchfield*, 174 A. 304, 308 (Conn. 1934) ("While the expression 'in trust' is included in the deed, the use of those words 'is by no means conclusive of [an] intention to create a trust, nor did it of necessity operate to create one'") (citation omitted).

Whether a trust was created depends on Mr. Hibbs' intent. *Mercantile Tr. Co. v. Mercantile Tr. Co.*, 677 S.W.2d 343, 346 (Mo. App. E.D. 1984) ("'the keystone of

construction' in determining the meaning of a will is the intent of the testator, and this intent must be gathered from the whole will and not from single words, passages or sentences"). MU says Mr. Hibbs' intent was "crystal-clear." (MU Opening Br. at 28.) Not so. Even the bequest to "the Curators" as "trustees" is ambiguous, because "the Curators" is the singular name of the University. So Mr. Hibbs gave $5,000,000 to the University "as trustees." But that makes no sense—there is only one University. Mr. Hibbs did not make the bequest to the members of the Board of Curators, collectively or individually, and did not name them, collectively or individually, as "trustees."

In addition, there is—at a minimum—a significant factual issue with respect to whether the University is both the trustee and the beneficiary of the purported trust. If so, the bequest cannot constitute a trust, precluding application of R.S. Mo. § 456.2-204(1).[5] It is undisputed that Mr. Hibbs made the bequest to "the Curators of the UNIVERSITY OF MISSOURI," a public corporation, not to the Board of Curators, a separate entity given the status of a public governmental body. *Barish v. Director of Revenue*, 872

[5] As MU and the applicable law recognize, no trust is created if the same person is the sole trustee and sole beneficiary. R.S. Mo. § 456.4-402.1(e) (creation of a trust requires that "the same person is not the sole trustee and sole beneficiary"); Fla. Stat. § 736.0402.1(e) (same); Restatement (Second) of Trusts § 99(5); MU Opening Br. at 28. The essence of a trust is the separation of legal and equitable title, but there is no separation of title where one person has both the legal title to property and the entire beneficial interest. Restatement (Second) of Trust § 99, cmt. 5; *Moore v. Moore*, 189 S.W.3d 627, 636 (Mo. App. W.D. 2006) ("The fundamental nature of a trust is a division of title: the trustee holds legal title and the beneficiary holds equitable title"); *Bank of Am., N.A. v. Roberts*, 2014 WL 1259779, at *2 (E.D. Mo. Mar. 26, 2014) ("Missouri courts have long recognized the division of title inherent in the formation of a trust"); *In re Wells*, 259 B.R. 776, 779 (Bankr. M.D. Fla. 2001) ("The law is firmly established in Florida that a trust cannot exist where the legal and equitable interests of the trust are vested in one individual") (citing cases).

S.W.2d 167, 171 (Mo. App. W.D. 1994). According to MU, furthermore, "the funds bequeathed to The Curators by Mr. Hibbs were given express—and only—to The Curators 'as trustees, in trust.'" (MU Opening Br. at 25.) To avoid the consequence of designating the University as both trustee and beneficiary, the University now contends that the beneficiary of the purported trust is the TCB. (MU Opening Br. at 28.) Even if that were true, it is unclear how it avoids the prohibition on beneficiaries acting as trustees, however, since the TCB is simply part of the University.

As MU points out, Mr. Hibbs also used trust language elsewhere in Article Seven of his will. In those other instances, Mr. Hibbs appointed a trustee by name. (Petition for Writ of Mandamus, Ex. A-1, page 33, ¶ 2, page 47, ¶ 84(c), page 52, Article Eight (k).) With MU, he did not. In addition, MU's bequest was subject to forfeiture provisions to enforce his condition, whereas the other gifts in trust were unconditional. (*Id.* at page 33, ¶¶ 1-2, pages 46-48, ¶ 84, pages 48-52, Article Eight.) Hillsdale contends that these forfeiture provisions create a gift subject to a condition subsequent instead of a trust.

"Where the owner of property transfers it inter vivos or by will 'upon condition' that it be dealt with in a manner beneficial to a third person, a trust is created if the transferor manifested an intention that the transferee should be subject to a duty to use it for the benefit of such third person, rather than that he should be divested of his interest if he should fail to perform the specified act." Restatement (Second) of Trusts § 11, comment c (1959). In contrast, a gift that is subject to forfeiture upon the occurrence or non-occurrence of an event is an interest subject to a condition subsequent, not a trust:

> The nature of a condition subsequent. The owner of property may transfer it, inter vivos or by will, to another person and provide that if the latter should fail to perform a specified act his interest should be forfeited. In such a case the interest of the transferee is subject to a condition subsequent and is not held in trust.

Restatement (Second) of Trusts § 11, comment a (1959). The fundamental distinction between the two interests is the manner by which the condition is enforced:

> In the case of a charitable trust, the trustee assumes an affirmative duty to use the property in accordance with the trust. In the case of a conditional fee, the grantee has permissive right to use as directed and he may lose the title if he departs from such use.

Mareck, 100 N.W.2d at 763.

Although neither Missouri nor Florida courts have directly addressed this issue, other states' courts hold that the existence of a forfeiture provision is incompatible with the creation of a trust.[6] *See, e.g.*, *L.B. Research & Educ. Found. v. UCLA Found.*, 29 Cal.Rptr.3d 710, 714 (Cal. Ct. App. 2005); *City of Palm Springs v. Living Desert Reserve*, 82 Cal. Rptr. 2d 859, 867 (Cal. Ct. App. 1999); *Walton*, 3 Cal. Rptr. 2d at 280;

[6] The bequest called for the application of Florida law to any question of validity or interpretation of the Will. (Petition for Writ of Mandamus, Ex. A-1, page 57, Article 12(d).) Although Florida law recognizes a property interest subject to a condition subsequent, research revealed no Florida cases adjudicating whether an interest constituted a trust or one subject to a condition subsequent. *See, e.g.*, *Genet v. Fla. E. Coast Ry. Co.*, 150 So. 2d 272, 274 (Fla. Dist. Ct. App. 1963) (a condition subsequent "operates to vest title in the grantees subject to a right of termination in the grantor upon the grantee's breach of or failure to perform the express condition"). In one Missouri case—*Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133 (Mo. App. W.D. 2009)—the court noted that a donor of a gift subject to a condition subsequent had standing to enforce the condition, but research found no Missouri cases adjudicating whether an interest was a trust or one subject to a condition subsequent. *Id.* at 137. This Court therefore should look to the law regarding such interests as interpreted by other states.

Mareck, 100 N.W.2d at 763. In *Walton*, two grantors gave land to a City "in trust" to use as a library, and the grant included a condition that if the land was ever not used as a library, the property would revert back to the testator's heirs or assigns. *Walton*, 3 Cal. Rptr. 2d at 280, 288. The court found that "[t]he use of the word 'trust' was precatory, intended to convey to the recipient the solemnity of the grant." *Id.* at 280. The court held that no trust was intended because the gift would be forfeited if the City failed to meet the condition:

> "Where the owner of property transfers it inter vivos or by will 'upon condition' that it be dealt with in a manner beneficial to a third person, a trust is created if the transferor manifested an intention that the transferee should be subject to a duty to use it for the benefit of such third person, rather than that he should be divested of his interest if he should fail to perform the specified act." Here the document evidences an intent to divest the transferee of its interest if it fails to maintain a library, indicating no trust was intended.

Id. at 280 (citation omitted).

In *Mareck*, a grant was made "'in trust, nevertheless, to have, hold, administer and maintain the same as a public park; ... and if said land shall cease to be a public park ... the title thereto shall revert to the above named grantor, ... his heirs or assigns.'" *Mareck*, 100 N.W.2d at 760 (quoting language of gift). The court held that the transfer created a property interest subject to a condition subsequent, and not a trust, because the interest was forfeited upon the failure of a condition. *Id.* at 763-65.

Similarly, in *L.B. Research*, "[a] donor contributed $1 million to establish an endowed chair at the UCLA School of Medicine, which UCLA accepted along with the conditions imposed by the donor." *L.B. Research*, 29 Cal.Rptr.3d at 712. The key

language of the gift agreement provided that the gift would be forfeited to a third party upon the happening of certain conditions. *Id.* at 712-13. At issue was whether the gift created a trust, which defendant contended only the Attorney General had standing to enforce, or an interest subject to a condition subsequent, which both sides agreed plaintiff had standing to enforce. *Id.* at 712. Noting that a donor who provides that property not used for the designated charitable purposes reverts either to the donor's estate or to a contingent donee creates an interest subject to a condition subsequent, the court held that the forfeiture clause created an ownership interest subject to a condition subsequent, not a trust. *Id.* at 714.

These cases demonstrate that no trust is created if a condition subsequent divests the transferee of its interest in the property. This principle is directly on point because the bequest to MU includes forfeiture provisions. If MU failed to certify that the appointees were dedicated and articulate disciples of the Austrian School of Economics, a legal presumption arose that would transfer the funds to Hillsdale. (Petition for Writ of Mandamus, Ex. A-1, pages 45-46, ¶ 83(c)(vi).) And if a Chair or Distinguished Professorship was vacant for five years, as by the absence of a qualified appointee, the Hibbs' Will directed that the funds be transferred to Hillsdale. (*Id.*) The bequest therefore did not create a trust, and in the absence of a trust, R.S. Mo. § 456.2-204(1) does not apply.

Mandamus will "'not issue where the right is doubtful.'" *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980) (citation omitted); *Bethman v. Faith*, 462 S.W.3d 895, 905 (Mo. App. E.D. 2015) (same). "A litigant seeking 'relief by mandamus

must allege and prove that he has a clear, unequivocal, specific right to a thing claimed.'" *Kerr*, 461 S.W.3d at 805 (citation omitted). MU cannot make the necessary showing because no determination has been made by anyone that the Hibbs' bequest created a trust rather than an interest subject to a condition subsequent. This fact issue should be decided on a full record by the Circuit Court, and is not ripe for decision on the partial record submitted in this extraordinary proceeding. This Court should quash the Preliminary Writ, and deny MU's Petition. If, however, this Court reaches the issue, the Court should rule that no trust was created.

B. This Case Does Not Involve Trust Administration and Is Not Subject to R.S. Mo. § 456.2-204(1) Because the Endowment Contracts Are Not Trusts and Hillsdale's Claims Are Based on the Actions of Individuals Without a Connection to the Purported Trust.

Even if this Court decided—wrongly in our opinion—that the Will created a testamentary trust, venue would not be appropriate under R.S. Mo. § 456.2-204(1). MU argues that "[e]very basis for relief that Hillsdale asserts arises from administration of the trust" (MU Opening Br. at 29), but plainly that is not so. The allegations of the Second Amended Petition are directed at the actions of the University's administrators, including the Dean and the Provost, not one of whom was or is a trustee of any purported trust nor had any authority to act on behalf of the purported trust. (Petition for Writ of Mandamus, Ex. A, page 9, ¶ 26, page 10, ¶¶ 31, 33, page 17, ¶¶ 61-63.) To the contrary, Hillsdale alleges that employees of the University acted within the scope of their employment to mislead Hillsdale and the University's Board of Curators, in derogation of the endowment contracts and damaging Hillsdale as a third-party beneficiary of those

contracts. (*Id.* at page 14, ¶ 49, pages 15-16, ¶¶ 53-58, page 17, ¶¶ 61-64.) If those actions constitute "trust administration," every lawsuit that somehow touches trust funds must be prosecuted in probate court exclusively, but that is a fundamental misreading of the law.

The only Missouri case addressing R.S. Mo. § 456.2-204 is *State ex rel. Bank of Am. N.A. v. Kanatzar*, 413 S.W.3d 22 (Mo. App. W.D. 2013). That case clearly addressed trust administration—it sought a ruling whether certain conduct would violate the trust's *in terrorem* provision and also alleged trust "maladministration":

> Goldstein alleged a controversy in the scope and effect of an *in terrorem* provision in the SRG Trust. He petitioned for a "declaration ... to determine whether claims pertaining to construction, interpretation or other administration of the SRG and RHG Trusts would violate the *in terrorem* provision, thereby forfeiting his interests under the RHG Trust." He alleged that he is aware of conduct that constitutes "maladministration" of the two trusts.

Id. at 24-25. In contrast to the *Kanatzar* facts, Hillsdale does *not* seek a declaration regarding its rights as a beneficiary under a trust or construction of a specific trust provision. It has *not* sued any trustee under a trust theory. Here, Hillsdale seeks a ruling that MU breached the terms of express contracts by failing to appoint disciples of the Austrian School of Economics to the Chairs and Professorships. The Dean of the TCB made these appointments, *not* the trustees of any purported trust. (Petition for Writ of Mandamus, Ex. A, page 10, ¶ 33 (TCB Dean Walker stating that "I" made the appointments).) Unlike *Kanatzar*, Hillsdale does not allege "maladministration" of a trust but contract claims based on actions taken by MU employees who are not trustees

regarding the performance of express endowment contracts between MU and the Estate of Sherlock Hibbs and/or an implied contract based on MU's acceptance of the funds from the bequest. (*Id.* at Ex. A, pages 20-24, ¶¶ 81-95.) Hillsdale is a third-party beneficiary of those contracts. (*Id.* at Ex. A, pages 23-24, ¶¶ 92, 93(c).)

Both MU here, and the Western District in *Kanatzar*, rely on § 456.2-202 for the definition of "trust administration." But that section is titled "Jurisdiction over trustee and beneficiary" and specifies the circumstances under which trustees and beneficiaries are subject to *jurisdiction* in Missouri. This provision of the Uniform Trust Code predictably requires all claims of any kind involving a trust to be litigated in the state where the trust is located, rather than requiring the trust to appear in myriad foreign jurisdictions to defend itself. But venue and jurisdiction involve different considerations, and § 456.2-204 does not contain a definition of "trust administration" for venue purposes, nor does it purport to incorporate the expansive *jurisdictional* definition in § 456.2-202. This Court need not wade into muddy waters to define what constitutes a judicial proceeding involving trust administration for venue purposes under § 456.2-204, because Hillsdale's Second Amended Petition for breach of contract plainly does not.

That Mr. Hibbs' original bequest stated that it was conveyed "in trust" is not sufficient to convert Hillsdale's contract claims into a judicial proceeding "involving trust administration." Courts outside Missouri adjudicating a similar venue statute distinguish between a claim tangentially related to trust funds, such as Hillsdale's, and a claim involving actual trust administration, finding that the statute applies *only* to claims

involving actual trust administration.[7] *See, e.g.*, *In re J.P. Morgan Chase Bank, N.A.*, 361 S.W.3d 703, 706-07 (Tex. App. 2011) ("cases construing the scope of [the trust venue statute] have held that the mere fact that trust funds are implicated by a claim does not transform the claim into one 'concerning' or 'involving' trusts"); *McCormick v. Hines*, 498 S.W.2d 58, 62 (Tex. Civ. App. 1973) (trust venue statute does not apply where the "suit was brought not to determine the [e]xistence or non-existence of facts affecting the administration of the trust or for any other of the purposes enumerated in art. 7425b-24(A), nor was it brought against the trust itself, but was brought for the specific performance of a contract to resign as trustees of the Susan McCormick Trust").

There is a federal doctrine, often called the "probate exception" to federal jurisdiction, which recognizes that federal district courts have discretion to decline jurisdiction over cases that involve probate matters. *Loyd v. Loyd*, 731 F.2d 393, 396-97 (7th Cir. 1984); *Dragan v. Miller*, 679 F.2d 712, 713-14 (7th Cir. 1982), *cert. denied*, 459 U.S. 1017 (1982). Courts construing the exception recognize that a case's tangential connection to estate or trust administration is insufficient to render it a probate matter.

> This case has at best a tangential connection to the administration of an estate. The essence of the complaint is that the defendants defrauded the plaintiffs in a stock sale; it just so happens that the stock was the corpus of a testamentary trust. Yet because the plaintiffs do not seek to rescind the sale, but rather want only to get the value of the

[7] MU contends that this case involves "trust administration" because it purportedly will not be possible to resolve Hillsdale's claims without determining the qualifications of those appointed to the Chairs provided for in the bequest. Those qualifications, however, are part of both the implied contract and the written endowment contracts. As such, contract construction, not trust administration, is implicated.

> stock which they were not paid, there is no interference with the … [state] Circuit Court's administration of the Trust.

Powell v. Am. Bank & Trust Co., 640 F. Supp. 1568, 1575 n.1 (N.D. Ind. 1986); *see also Martz v. Braun*, 266 F. Supp. 134, 138 (E.D. Pa. 1967) ("The plaintiff seeks damages against the trustees of a testamentary trust on the ground that they have breached their fiduciary duty to him as an income beneficiary. The action is against them personally and does not call for our administration of the trust assets").

Missouri courts similarly recognize that many cases involving some tangential relationship with trust funds do not belong in probate court. For example, although Missouri Rule of Professional Conduct 4-1.15 requires attorneys to create a Client Trust Account to hold property of clients or third parties, a lawsuit alleging legal malpractice and breach of fiduciary duty against an attorney regarding the distribution of settlement funds from the client trust account was prosecuted in Circuit Court, not Probate Court. *See, e.g.*, *Minor v. Terry*, 475 S.W.3d 124, 130 (Mo. App. E.D. 2014). And where trust beneficiaries brought a legal malpractice action against attorneys who advised a mismanaging trustee, the suit also was brought in Circuit Court. *Huber v. Magna Bank of Mo.*, 959 S.W.2d 812, 813 (Mo. App. E.D. 1997).

The distinction identified by the Texas and federal courts applies here. Even if the funds from the Hibbs Will were conveyed in trust, this would not turn this contract case involving the actions of individuals having no connection to the trust into one involving trust administration. If it did, any party might force an ordinary breach of contract action into probate court (with limited jury trial rights) simply by putting funds required to be

paid under the contract into trust. MU offers no evidence that the Legislature intended § 456.2-204 to sweep into probate court dozens or hundreds of cases with nothing more than a tangential connection to trust law, and that has not been the approach taken by trial judges or practitioners.[8] This is a contract case, not a judicial proceeding involving trust administration, and thus is subject to the general venue statute rather than the trust venue statute. *See generally Kanatzar*, 413 S.W.3d at 24-25; *J.P. Morgan Chase Bank*, 361 S.W.3d at 706-07; *McCormick*, 498 S.W.2d at 62.

C. Even if a Trust Was Created, Transfer to Boone County Is Not Appropriate Because the Circuit Court Has Not Ruled that Any Trust Is Administered in Boone County.

Even if this Court reached the issue *and* held that the Hibbs' bequest created a testamentary trust, venue would not be appropriate under R.S. Mo. § 456.2-204(1) because the Circuit Court has not ruled that the trust is administered in Boone County. This disputed fact issue is not appropriate for adjudication on an extraordinary writ proceeding. As explained, Hillsdale has been trying for months to obtain the books and records that MU claims as its basis for venue, but MU stubbornly has refused to produce

[8] As noted, *Minor* and *Huber* were prosecuted in the Circuit Court's regular Civil Division rather than its Probate Division, even though the cases would come within the University's definition of judicial proceedings involving trust administration. Similarly the claims in *Ellison v. Fry*, 437 S.W.3d 762 (Mo. 2014) and *Robert T. McLean Irrevocable Tr. u/a/d Mar. 31, 1999 ex rel. McLean v. Ponder*, 418 S.W.3d 482 (Mo. App. S.D. 2013) were not prosecuted in the Probate Court, but instead were tried to a jury in Circuit Court. *Ellison*, 437 S.W.3d at 768 ("the jury found for Mary against Linda as trustee for unjust enrichment, breach of fiduciary duty, fraudulent concealment, and conversion and awarded her $35,000"); *Robert T. McLean Irrevocable Tr.*, 418 S.W.3d at 497 ("the Trust failed to present the jury with evidence of damages or harm to the Trust due to the alleged breach of duty").

them. The question of where any purported trust is administered thus is an open one. Because of that, MU has not demonstrated a clear, unequivocal, specific right to relief. *Kerr*, 461 S.W.3d at 805. This fact issue should be decided on a full record by the Circuit Court and is not ripe for decision on the partial record available now. For this additional reason, the Court should quash the Preliminary Writ and deny the University's Writ Petition.

RESPONSE TO RELATOR'S POINT II

Relator is not entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County, or in mandamus requiring the Circuit Court to transfer venue to Boone County pursuant to R.S. Mo. § 508.010.2(1), in that

A. Venue is proper in St. Louis County either under R.S. Mo. § 508.010.2(1) because Hillsdale is deemed a resident of St. Louis County and Relator can be found in St. Louis County, or under R.S. Mo. § 508.010.2(4) because Relator is the functional equivalent of a nonresident defendant for venue purposes; and

B. Boone County is not the appropriate venue under R.S. Mo. § 508.010.2(1) because Relator does not reside in Boone County for venue purposes, and this Court should not overturn State ex rel. Ormerod v. Hamilton, 130 S.W.3d 571 (Mo. banc 2004).

II. RELATOR IS NOT ENTITLED TO A WRIT BECAUSE BOONE COUNTY IS NOT THE APPROPRIATE VENUE UNDER R.S. MO. § 508.010.2(1) AND ST. LOUIS COUNTY IS THE APPROPRIATE VENUE UNDER R.S. MO. 508.010.2(1) AND/OR § 508.010.2(4).

MU's Point II argues that this case should be transferred to Boone County because Boone County will become the proper venue under the general venue statute if this Court overrules controlling precedent. MU is wrong for two reasons. First, venue is proper in St. Louis County under the general venue statute, and it is irrelevant whether venue is

proper in any other County under that statute.[9] Second, venue is not proper in Boone County under the general venue statute because this Court held that MU does not reside in any specific county for venue purposes. *State ex rel. Ormerod v. Hamilton*, 130 S.W.3d 571 (Mo. banc 2004). This Court should reject MU's request to overrule *Ormerod* because the rationale for its holding remains valid—MU has offices in every county and campuses throughout this State, and the Legislature has not designated a specific county for venue. The MU system is far more extensive than its campus in Columbia.

A. Venue Is Proper in St. Louis County Pursuant to R.S. Mo. § 508.010.2(1) and/or R.S. Mo. § 508.010(4).

Missouri's venue statutes are designed to prevent a defendant from being subjected to an unfair or inconvenient place of trial, not to provide the defendant with a venue that is unfair to the plaintiff. "The purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Natalini v. Little*, 185 S.W.3d 239, 246 (Mo. App. S.D. 2006); *accord, e.g.*, *Finnegan v. Squire Publishers, Inc.*, 765 S.W.2d 703, 705 (Mo. App. W.D. 1989);

[9] An action should be transferred only if venue is improper in the forum in which it is filed or a more specific venue statute applies. Rule 51.045(a) ("an 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"); *Igoe v. Dep't of Labor & Indus. Relations of State of Missouri*, 152 S.W.3d 284, 288 (Mo. banc 2005) ("This is a specific venue provision; it supersedes the general venue statute"). As previously discussed, a more specific statute does not apply. Thus, if venue is proper in St. Louis County, the fact that it may be proper elsewhere will not support transfer. *See generally State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 261 (Mo. banc 1997) ("we note that the fact that venue is proper in one county does not mean that venue is improper in another").

see also State ex rel. Lebanon Sch. Dist. R-III v. Winfrey, 183 S.W.3d 232, 237 (Mo. banc 2006) (venue statutes "protect defendants from suit being filed against them in counties 'all over the state' to which neither they nor the cause of action have any connection"); *State ex rel. Neville v. Grate*, 443 S.W.3d 688, 693 (Mo. App. W.D. 2014) ("the legislature adopted the current venue statute in order to restrict venue options for plaintiffs so as to reduce forum-shopping" that would prejudice defendants).

There is nothing unfair or inconvenient about subjecting MU to venue in St. Louis County. Indeed, MU has *never* identified any prejudice it will suffer by defending the case in St. Louis County, where it litigates regularly and where its counsel *in this case* are located. *See, e.g.*, *Dunn v. Bd. of Curators of Univ. of Missouri*, 413 S.W.3d 375, 376 (Mo. App. E.D. 2013) (claim that MU violated veterans statute and Missouri Merchandising Practices Act by certain practices adjudicated in St. Louis County Circuit Court); *Brady v. Curators of Univ. of Missouri*, 213 S.W.3d 101, 104 (Mo. App. E.D. 2006) (trial in St. Louis County Circuit Court on age discrimination claim); *Sharp v. Curators of Univ. of Missouri*, 138 S.W.3d 735, 736-37 (Mo. App. E.D. 2003) (declaratory judgment action in St. Louis County Circuit Court regarding whether MU violated statute by charging tuition).

The general venue statute applies because this is a contract case. R.S. Mo. § 508.010.2 applies to all actions where there is no count involving a tort. Subsection 1 of the statute provides for venue "[w]hen the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found." R.S. Mo. § 508.010.2(1).

MU contends that the language of § 508.010.2(1) must be read literally to preclude a non-resident like Hillsdale from suing MU in Missouri for breach of contract, but this argument is contrary to settled precedent. (MU Opening Br. at 34.) Missouri courts, including this Court, hold that the general venue statute cannot be used to close the courthouse doors to a litigant where personal and subject matter jurisdiction have been established. *State ex rel. Heartland Title Servs., Inc. v. Harrell*, 500 S.W.3d 239, 243 (Mo. banc 2016) ("To interpret § 508.010's silence as barring venue in any Missouri county in which the circuit court's jurisdiction is not contested would lead to the absurd result of precluding a forum to a party in which a Missouri court has subject matter jurisdiction of the case and personal jurisdiction over the defendant"); *Neville*, 443 S.W.3d at 695 (rejecting interpretation of venue statute that would "violate[] Missouri's open courts provision" because "the legislature did not intend to prescribe a particular venue under the present set of circumstances," and holding that "venue is proper in any Missouri county").

In *Heartland Title*, the circuit court dismissed the case because no county in Missouri constituted a proper venue under a literal reading of the general venue statute. 500 S.W.3d at 241. This Court reversed and held that, where § 508.010 fails to identify the proper venue in a given case, venue is proper in *any* county. *Id.* at 243-44. Here, Hillsdale has not chosen "any" county, as it arguably could have under *Heartland Title*. Instead, it has sued in St. Louis County, where MU maintains a substantial presence in

the form of the UM-St. Louis campus.[10] As noted above, "'[t]he purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial.'" *Natalini*, 185 S.W.3d at 246 (citation omitted). The general venue statute eliminates any argument that a county where the defendant can be found is "unfair or inconvenient." That conclusion applies with particular force here, where the University's presence in St. Louis County is so extensive. Hillsdale's residence outside Missouri, furthermore, is wholly irrelevant to the question whether the venue it selected is unfair or inconvenient to MU.

Nor is there a persuasive rationale for requiring a nonresident plaintiff such as Hillsdale to reside in some Missouri county in order to bring contract claims against the University. Closing Missouri's courthouses to contract suits against the University by nonresident plaintiffs would violate the Missouri Constitution's "open courts" provision. Mo. Const. art. I, § 14 ("That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay"). It also would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution by discriminating against out-of-state claimants.

Venue in this case is proper in St. Louis County because MU can be found in St. Louis County under R.S. Mo. § 508.010.2(1), and requiring a defendant to litigate

[10] MU admitted in its Answer to the Second Amended Petition that "the University of Missouri-St. Louis is part of the University of Missouri system and is located in St. Louis County." (A132, ¶ 6(e).)

where it can be found is neither unfair nor inconvenient.[11] This interpretation is fully consistent with this Court's holding that "if personal and subject matter jurisdiction are established, venue is proper in any county in Missouri in the absence of an express provision by the General Assembly restricting venue." *Heartland Title*, 500 S.W.3d at 244. Whether accomplished by the legal fiction of deeming Hillsdale a resident of St. Louis County, or because there is no express provision restricting venue in St. Louis County, the result is the same—venue is proper in St. Louis County Circuit Court.[12]

Hillsdale's Second Amended Petition seeks (1) a declaration that the actions of University employees who are neither curators nor trustees breached the terms of an express contract between the University and the Estate of Sherlock Hibbs by appointing individuals to the chairs and professorships who are not dedicated and articulate disciples of the Ludwig von Mises (Austrian) School of Economics, and (2) damages for that

[11] MU previously contended that it was "found" in Boone County, requiring the case to be venued there, because Hillsdale served process on the University's General Counsel (its registered agent) who is located in Boone County. It is unclear whether, on this go-around, MU has abandoned that novel contention. As we have explained, while it unquestionably is true that a defendant may be found where its registered agent is located, nothing in Missouri law holds that a defendant may be "found" *only* where its registered agent is located. To the contrary, it has long been the law that a defendant may be found anywhere that it has a business office. *Ormerod* specifically resolved this issue as it relates to MU, because the Supreme Court ruled there that "the University of Missouri has offices for conducting its business in every county of the state." *See Ormerod*, 130 S.W.3d at 572.

[12] In the alternative, venue is proper under R.S. Mo. § 508.010.2(4), which provides that venue lies in "any county in this state" when "all the defendants are nonresidents of the state." *Id.* While the University may be a resident of this state for some purposes, this Court held that the University resides in no specific county for venue purposes. *Ormerod*, 130 S.W.3d at 572. As such, the University is the functional equivalent of a nonresident defendant for venue purposes, and thus is within the rationale and scope of R.S. Mo. § 508.010.2(4).

breach. These are ordinary contract-based claims subject to the general venue statute. Because MU can be found in St. Louis County, venue is proper there under R.S. Mo. § 508.010.2(1). This Court therefore should deny MU's Petition for a Writ.

B. Boone County Is Not the Appropriate Venue Pursuant to § 508.010.2(1) Because Relator Does Not Reside in Boone County.

MU contends that venue will become proper in Boone County under the general venue statute if this Court (1) overrules *Ormerod v. Hamilton*, 130 S.W.3d 571, 572 (Mo. banc 2004), and (2) holds that the entire MU system "resides" in Boone County for venue purposes. (MU Opening Br. at 34-37.) MU argues that this would eliminate any need to employ a "legal fiction" regarding Hillsdale's residence with respect to the general venue statute because there would be a proper venue under the general venue statute in Boone County.[13] (*Id.* at 34.) This also would remove the case from the *Heartland Title* rule, 500 S.W.3d at 243-44, because the general venue statute would hold that venue was proper in Boone County. (MU Opening Br. at 35.) In other words, MU asks the Court to adopt the equivalent of a special venue statute precluding a non-resident from bringing a cause of action against MU in any place other than Boone County.

In *Ormerod*, plaintiff contended that venue was proper in Jackson County based on the corporate venue statute. *Ormerod*, 130 S.W.3d at 572. The court held that "section

[13] MU's argument is predicated on the Court holding that venue is not proper in St. Louis County pursuant to the general venue statute. The argument thus requires that the Court interpret the statute literally and hold that Hillsdale has no county of residence, while deeming Boone County to be the residence for MU. Under *Heartland Title*, if the parties are not residents of any county for venue purposes, and personal and subject matter jurisdiction are established, "venue is proper in any county in Missouri in the absence of an express provision by the General Assembly restricting venue." 500 S.W.3d at 244.

508.010 applies to determine venue, even when Curators is the sole defendant in a lawsuit." *Id.* The court further found that "[w]hile Curators is a resident of the state and the University of Missouri has offices for conducting its business in every county of the state, no statute defines or assigns a specific county as corporate residence for Curators." *Id.* The court held that § 508.010(1) (now § 508.010.2(1)) applied because plaintiff resided in Boone County and the University could be found in that county. *Id. Ormerod* therefore stands for the proposition that, because the University resides in no county for venue purposes, it can be sued in any county where it may be found and plaintiff resides.

The *Ormerod* Court's holding was no outlier; it is completely consistent with this Court's 1982 observation that "the legislature did not limit suit against the Board to Boone County." *State ex rel. Milham v. Rickhoff*, 633 S.W.2d 733, 734 (Mo. banc 1982) (citing R.S. Mo. § 172.020, the statute incorporating the "University" as a "body politic"). Almost 37 years ago, this Court held that MU's "statewide interests and activities" made defending suits outside Boone County "not unreasonable or illogical" under the general venue statute:

> Because of these statewide interests and activities, it is not unreasonable or illogical to require the Board to defend suits outside Boone County if venue is otherwise proper under § 508.010.

Id. at 736. For at least 37 years, this Court has held that the general venue statute required MU to defend actions outside Boone County.

Ormerod has been good law for almost 15 years, and MU advances no reasoned basis for reconsidering it now. During those 15 years, no court has criticized *Ormerod*'s

holding or identified problems that the holding created. And while the Legislature has adopted various other venue provisions during that time, it has *not* adopted a statute designating Boone County (or any other county) as MU's residence for venue purposes. The rationale for this Court's decision in *Ormerod* (and *Milham*) remains correct, and this Court should defer to the Legislature if a change is to be made.

RESPONSE TO RELATOR'S POINT III

Relator is not entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County, or in mandamus requiring the Circuit Court to transfer venue to Boone County, because this Court should not overrule settled case law and adopt intrastate forum non conveniens doctrine.

III. RELATOR IS NOT ENTITLED TO A WRIT BECAUSE THIS COURT SHOULD NOT OVERRULE SETTLED CASE LAW AND ADOPT AN INTRASTATE *FORUM NON CONVENIENS* DOCTRINE.

MU's Point III asks the Court to overturn decades of past precedent and establish a new venue rule—intrastate *forum non conveniens*—in cases in which no venue statute directly applies. MU's suggested new rule would not apply in this case because, as shown above, the Court may employ a legal fiction to impute Hillsdale's residence to its chosen forum, and R.S. Mo. § 508.010.2(1) provides proper venue in St. Louis County.[14] The Court does not even reach the question of whether to overrule *Heartland Title* unless it first invokes *Heartland Title* as a basis for venue.

Heartland Title is a unanimous decision from October 2016, where this Court held that "if personal and subject matter jurisdiction are established, venue is proper in any county in Missouri in the absence of an express provision by the General Assembly restricting venue." *Heartland Title*, 500 S.W.3d at 244. According to MU, every Justice erred because the decision "cannot be reconciled with the Court's insistence that venue is determined by statute." (MU Opening Br. at 39.) MU's criticism and suggested solution,

[14] Venue also is proper under R.S. Mo. § 508.010.2(4) because MU is the functional equivalent of a non-resident for venue purposes.

however, are contradictory because MU asks the Court to replace *Heartland Title*'s judicial rule with a different judicial rule. MU's new rule thus suffers from the same purported infirmity that supposedly requires overturning the *Heartland Title* rule—neither is a venue statute.

Nor is there any reasoned basis for this Court to adopt intrastate *forum non conveniens* and apply it in this case. MU contends that the doctrine of *forum non conveniens* was "traditionally" applied in Missouri. (MU Opening Br. at 40; *id.* at 42 ("And courts are free to apply, traditionally did apply, and should apply the principles of *forum non conveniens*").) But this Court has never recognized intrastate *forum non conveniens* as part of the law of this State, so the doctrine was not "traditionally" applied, as MU contends.[15] *See Willman v. McMillen*, 779 S.W.2d 583, 585 (Mo. banc 1989) (surveying cases and finding that Missouri courts recognized the doctrine of *forum non-conveniens* only "in actions that accrue outside Missouri between parties who are not Missouri residents"); *id.* at 586 (rejecting an argument that the part of the common law of England adopted by Missouri included a doctrine analogous to intrastate *forum non conveniens*).[16] MU asks this Court to overrule multiple cases to create a new doctrine

[15] In 1984, the Eastern District Court of Appeals adopted intrastate *forum non conveniens*. *Blankenship v. Saitz*, 682 S.W.2d 116, 117-18 (Mo. App. E.D. 1984). This Court abrogated *Blankenship* in 1989. *Willman*, 779 S.W.2d at 586 ("*Blankenship* is not the law of the state"). That the doctrine was approved for a brief time in one appellate district does not constitute "traditional application" of the doctrine.

[16] Since *Willman*, this Court has continued to recognize that intrastate *forum non conveniens* is not part of the law of this state. *Heartland Title*, 500 S.W.3d at 243 n.6; *State ex rel. Sharp v. Romines*, 984 S.W.2d 500, 500 (Mo. banc 1999).

primarily for its benefit in this case. "Under the doctrine of *stare decisis,* decisions of this Court should not be lightly overruled, especially when 'the opinion has remained unchanged for many years.'" *State v. Honeycutt*, 421 S.W.3d 410, 422 (Mo. banc 2013) (citation omitted); *Eighty Hundred Clayton Corp. v. Dir. of Revenue*, 111 S.W.3d 409, 411 n.3 (Mo. banc 2003) ("a decision of this Court should not be lightly overruled").

The *Heartland Title* rule is easily applied, while, in contrast, MU's proposed new rule would add needless complexity to a venue determination. *See Heartland Title*, 500 S.W.3d at 242-43 ("the purpose of the venue statutes … is to 'provide a convenient, logical and orderly forum for the resolution of disputes'") (citation omitted). MU's proposed rule also would discriminate against out-of-state plaintiffs with contract claims by permitting an in-state plaintiff to bring an action outside Boone County while limiting non-residents to Boone County. Since the University is "at home" in every county, furthermore, it is unclear how suing it in one of those counties prejudices or inconveniences MU. And as noted above, this case was not filed "in any Missouri county," but in the county where the University of Missouri-St. Louis, with more than 10,000 students, is located. This case thus does not present appropriate facts for a reexamination of this settled Missouri law. And since *Heartland Title* adequately addresses the circumstances, there is no reason to overturn decades of precedent and adopt a new doctrine for this case.

This is a relatively straightforward case involving contract claims that the general venue statute and this Court's current jurisprudence adequately address. The Court should

reject the University's request to make wholesale changes in the law for a perceived litigation advantage in a single case.

CONCLUSION

For these reasons, Hillsdale respectfully asks that the Preliminary Writ of Mandamus issued by the Court be quashed, that the Court deny the University's request for a Permanent Writ of Mandamus, and that the Court grant such other relief as it finds just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that the Brief of Respondent, Hillsdale College, includes information required by Supreme Court Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 12,587 words as determined by the Microsoft Office Word-Counting System.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January 2019, the foregoing document was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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