

**SC97429**

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**In The  
SUPREME COURT OF MISSOURI**

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**STATE OF MISSOURI *ex rel.* RONALD PRATER,  
GWENDOLYN GONZALES, DEANN THOMPSON,  
AND LUCILLE CURTMAN,  
Relators,**

**v.**

**THE HONORABLE JASON R. BROWN,  
Respondent.**

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**Missouri Court of Appeals Southern District No. SD35345  
Circuit Court of Greene County, Missouri Case No. 1731-CC01453**

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**RESPONDENT AND PLAINTIFF'S BRIEF  
IN OPPOSITION TO WRIT OF MANDAMUS OR PROHIBITION**

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## **STATEMENT OF FACTS**

### *The Precipitating Event*

On February 6, 2011, there was an automobile collision between vehicles driven by Defendant Dakota Ball and Relator Ronald Prater in Pulaski County. (WP ¶1).<sup>1</sup> As a result, Ronald Prater was injured and his wife, Juanita Prater, died. (*Id.*)

### *The Underlying Tort Litigation and Relators' Consent to Greene County*

In 2012, Ronald Prater filed suit against Dakota Ball for his own personal injuries. (WP ¶5). He and Relators Thompson, Wonder, and Curtman – as wrongful death beneficiaries of Juanita Prater – also filed a wrongful death action against Dakota Ball. (WP ¶4).

On November 6, 2013, Relators and Dakota Ball stipulated in *Ronald Prater et al v. Dakota Ball*, Greene County Circuit Court, Case No. 1331-CC01525 that Greene County was a proper venue in which to adjudicate the claims among them. (R.72). The underlying litigation in Case No. 1331-CC01525 was pending in Greene County from November 21, 2013 through December 21, 2017 – *i.e.*, four years and one month. (R.74).

On December 21, 2018, a Consent Judgment was entered, *inter alia*, in favor of Relator Ron Prater for \$500,001 for his bodily injuries a money judgment in favor of all Relators for \$500,001 for the wrongful death action. (R.74).

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<sup>1</sup> Respondent will cite to the undisputed facts of the Petition for Writ as WP ¶\_\_\_\_; and to the Record as R.\_\_\_\_. Respondent also notes that he began his page numbers subsequent and consecutively to Relators' page numbers.

Dakota Ball

Dakota Ball is a young man with mental infirmities. (R.4, ¶4). The initial Declaratory Judgment Petition sought to appoint his mother as his Defendant *ad litem*. (*Id.*) She ultimately refused. Mr. Ball's attorney, Patricia Keck, from the underlying Greene County action between Relators and Mr. Ball consented to serve, and was appointed as his guardian *ad litem*. (R.107-08).

Other than Ms. Keck, a Greene County attorney who is his representative for this case, Mr. Ball has no other connection to the State of Missouri. Relators maintain that Dakota Ball is a citizen of Missouri. (R. 79, ¶3; R. 87, ¶7; R. 93, ¶7).

USAA GIC and USAA

Plaintiff USAA General Indemnity Company (USAA GIC) issued policy No. 02529 38 54 G 7101 3 to Christiana Gruendler, Dakota Ball's step-mother. (the "Gruendler Policy"). (R. 6, ¶13).

Non-party United Services Automobile Association, a different company than Plaintiff USAA General Indemnity Company, issued policy No. 0146 24 22U 710 1 to Stacy Ball, and listed Dakota Ball as an additional operator. (the "Ball Policy"). (R. 6, ¶14). USAA had paid its policy limits.

The Ancillary Declaratory Judgment Action Emanating  
from the Underlying Green County Action

USAA General Indemnity Company filed its initial Petition for Declaratory Judgment in Green County on October 26, 2017. (R.4). By that time, separate entity and non-party United States Automobile Association (USAA) had agreed to pay its policy limits. (R.6, ¶15.a.). A significant component of USAA GIC's Declaratory Judgment

Action was to determine if it had any duty to defend Dakota Ball in the then still pending litigation between Relators and Dakota Ball in Greene County. (R.9, ¶21).

The main thrust of USAA GIC's Greene County Declaratory Judgment Action as to why there is no coverage and no duty to defend or indemnify is:

Dakota Ball was driving a 2004 Mitsubishi Eclipse owned by his father, Stacy Ball, which was insured by non-party United Services Automobile Association, when he injured the Prater family. Dakota Ball was listed as a driver on Stacy Ball's policy with USAA. Dakota Ball **WAS NOT** driving a 2004 Chevy Silverado owned by his step-mother, Christiana Gruendler, which was insured by Plaintiff USAA GIC, when he injured the Prater family. Dakota Ball **WAS NOT** listed as a driver under Ms. Gruendler's policy with USAA GIC. (R.6-9, ¶¶13-21).

Respondent ordered USAA GIC to file an amended Petition naming all of the Relators. (R.1). On April 9, 2018, USAA GIC did so. (R.109).

### *The Litigation over Venue*

On December 8, 2017, Relator Prater filed a motion to transfer for improper venue. (R.37). At the same time, Relator Prater also filed a motion to dismiss which incorporated venue as a basis for dismissal. (R.34, ¶3).

The parties appeared before Respondent Brown on December 21, 2017 to argue USAA GIC's motion for judgment on the pleadings. (R.110). At the December 21, 2017 hearing, the Court set the venue motions for hearing on March 2, 2018 to accommodate counsel for Defendant Prater, who announced that he had an extended vacation scheduled. (*Id.*)

On March 1, 2018, Relators filed a separate action in Johnson County, Missouri which is not a proper venue for any of the actions among these parties. (R.77). On March 1, 2018, Relator Prater filed an 11<sup>th</sup> hour motion to dismiss, which potentially impacted the Court's subject matter jurisdiction to address the venue motion on March 2, 2018. (R.99). In the March 1, 2018 Second Motion to Dismiss, Relator Prater asserted anew,



that venue was improper. (R.102, ¶7) (“Finally, venue is improper in Greene County and this action must be transferred to Pulaski County pursuant to Missouri Supreme Court Rule 51.045.”)

On March 2, 2018, the parties appeared and argued the pending motions. (R.109). The Court permitted an extension of time to submit supplemental briefing based on Relator Prater’s 11<sup>th</sup> hour filing impacting venue, on the eve of the venue hearing:

GELBACH, BELANCIO AND STUBBLEFIELD. ARGUMENT  
HEARD ON MOTION(S) TO DISMISS AND TO CHANGE  
VENUE. ALL MOTIONS ARE TAKEN UNDER ADVISEMENT.  
PLAINTIFF GRANTED 14 DAYS TO BRIEF, AND DFTS  
GRANTED 14 DAYS THEREAFTER TO RESPOND, IF  
DESIRED. PULL TO REVIEW AND RULE IN 28 DAYS. JRB/

(R.109). The Court also ordered USAA GIC to amend its Petition. (R.1). USAA GIC filed its Amended Petition on April 9, 2018. (R.13).

On April 23, 2018, by docket entry, the Court appointed Attorney Patricia Keck of Greene County as Defendant Dakota Ball’s guardian *ad litem*. (R.107-108). Relator Prater filed an Answer on May 4, 2018. (R.87). Relators Gonzales, Thompson and Curtman filed an Answer on June 4, 2018. (R.93).

Relators also filed venue motions anew. (R.49).

### *The Backdoor Equitable Garnishment in Johnson County*

After several months of inaction on the case, Relator Prater filed a Petition for Equitable Garnishment in Johnson County, Missouri on March 1, 2018, and immediately filed a motion to dismiss the Green County Declaratory Judgment arguing that based on the factual predicate of the very existence of his March 1, 2018 petition for equitable garnishment there is no justiciable controversy or basis to proceed in the Greene County Declaratory Judgment Action. (R.77-86, 99-103). Relator denied that motion. (R.1).

## **STANDARD OF REVIEW**

A writ of prohibition or mandamus is available, among other things, to remedy an abuse of discretion where the lower court lacks the power to act as intended or where a party may suffer irreparable harm if relief is not granted. *State ex. rel. Jackson Cnty. Prosec. Atty. v. Prokes*, 363 S.W.3d 71, 75 (Mo.App. 2011); *State ex rel. Wohl v. Sprague*, 711 S.W.2d 583, 585 (Mo.App. 1986).

A writ of mandamus “may lie both to compel a court to do that which it is obligated by law to do and to undo that which the court was by law prohibited from doing.” *State ex. rel. Schuck Mkts., Inc. v. Koehr*, 859 S.W.2d 696, 698 (Mo. banc 1993). As Missouri courts have emphasized, “the purpose of a writ of mandamus is to execute a clear, unequivocal and specific right.” *State ex rel. v. Reif v. Jamison*, 271 S.W.3d 549, 550 (Mo. banc 2008).

The burden of proof and persuasion are upon the party attempting to demonstrate that venue is improper. *State ex rel. Trans World Airlines, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. banc 2005). Substantive evidence is required; unsworn statements and argument by counsel cannot be relied upon. *Id.*

A reviewing court accepts as true the factual findings that underpin the trial court’s order unless the factual findings are not supported by substantial evidence or are against the weight of the evidence. *Prokes*, 363 S.W.3d at 75.

## **ARGUMENT**

### **A. Relators’ Multifarious Point Relied Upon Preserves Nothing for Review.**

“Multifarious points relied on are noncompliant with Rule 84.04(d) and preserve nothing for review.” *Griffitts v. Old Republic Insurance Company*, 550 S.W.3d 474, 478 n.6 (Mo. banc 2018) (*quoting*, *Kirk v. State*, 520 S.W.3d 443, 450 n.3 (Mo. banc 2017)).

Relators combine two or more points of relief upon into a single point. They argue both that venue is improper for multiple reasons and then they combine that with a separate assertion that Respondent erred by allowing more than 90 days to pass. (Rel. p.5). These are distinct arguments.

Relators’ multifarious point leaves nothing for this Court to review. Therefore, the Petition for Writ should be dismissed.

### **B. Tort Venue Is Not Determinative of Venue in a Declaratory Judgment Action where No Tort Is Alleged. (Responding to Relators’ Subpoint A)**

USAA GIC’s action is for Declaratory Judgment based on the terms of an insurance contract. (R.4-9). It is a declaratory judgment action filed simultaneous with the personal injury action as advised by the Appellate Courts of this state. “Missouri courts have expressly advised that insurers with good faith coverage questions ... should file a declaratory judgment action simultaneous to the underlying personal injury action...” *U-Haul Company of Missouri v. Carter*, WD81506, 2019 WL 272698, at \*2, n.4 (Mo.App. W.D. January 22, 2019).

In an action alleging a tort, the location of the injury is the determinative factor for venue. *R.S.Mo.* §508.010.4. Relators argue that they were first injured in Pulaski county, the location of the automobile accident. (Rel. Br. p. 11, §A). Relators argument over

location of the injury is misplaced. USAA GIC's Declaratory Judgment Action is not a tort case. There is no count alleging a tort in the Petition. (R.4-9).

USAA GIC does not dispute that the underlying action in Greene County Circuit Court Case No. 1331-CC01525 was a tort action between Relators and Dakota Ball for the automobile collision and wrongful death. In that case, the Relators waived Pulaski County as venue and consented to Greene County. (R.72). The underlying case was pending in Greene County for over four years. (R.74).

Relators should not be permitted to equivocate and conflate the underlying tort action with the subsequent ancillary declaratory judgment action to create a venue determination that is only applicable in tort cases.

**C. Consent, Stipulation, Waiver –Via Agreement and Litigation in Greene County for over Four Years. (Responding to Relators' Subpoint A)**

Greene County is no stranger to this litigation. On November 6, 2013, Relators and Dakota Ball stipulated in *Ronald Prater et al v. Dakota Ball*, Green County Circuit Court Case No. 1331-CC01525, that Greene County was a proper venue in which to adjudicate the claims between them. (R.72). From November 21, 2013 through December 21, 2017, **for four years and one month**, the underlying action was pending in the Greene County Circuit Court, based upon a stipulation of venue between the Relators and Dakota Ball. (R.74).

The present action is logically related to, and an outgrowth of, Case No. 1331-CC01525. It is a simultaneously filed declaratory judgment. It is based on whether USAA GIC had a duty to defend or indemnify Dakota Ball in Greene County, Case No. 1331-CC01525. As recently discussed in *U-Haul*, the Appellate Court's advice to file Declaratory Judgments "rings hollow when insurers follow such advice and they are denied the remedy we have recommended to them."

Venue is a personal privilege. *Bizzell v. Kodner Development Corp.*, 700 S.W.2d 819, 822 (Mo banc 1985). Parties can waive or consent to venue. *Id.* USAA GIC contends that stipulation of venue in the underlying action is a consent waiver of venue in

actions that are a logical outgrowth of the underlying action. No County other than Greene County would have an interest in whether there was a defense or indemnity for a case pending in Greene County. Thus, although venue in a declaratory judgment on an insurance policy contract for defense and indemnity does not flow from tort venue, as discussed above, it should emanate from the County where the underlying tort action is ultimately venued and was being litigated at the time the Declaratory Judgment Action was filed.

**D. Mr. Ball Should Be Deemed a Resident of Greene County. (Responding to Relators' Subpoint B).**

Relators do not state Defendant Dakota Ball's county of residence in their Petition for Writ – which is a necessary component of any venue analysis. As discussed above, it is Relators burden to prove that venue is improper. Relators have not fulfilled that burden. Relators, however, maintain that Defendant Dakota Ball is a citizen of Missouri in this and in other litigation. If Defendant Dakota Ball is a citizen of Missouri, his only link to Missouri is the location of his guardian *ad litem*, Patricia Keck, who is in Greene County. Thus, he should be deemed a resident of Greene County, if he is a citizen of Missouri.

Dakota Ball is a defendant over whom the Plaintiff USAA GIC has no control. Dakota Ball is a young man with mental infirmities. (R.4, ¶4). The initial Declaratory Judgment Petition sought to appoint his mother as his defendant *ad litem*. (*Id.*) She ultimately refused. (R.114, ¶7). Mr. Ball's attorney, Patricia Keck, from the underlying Greene County action between Relators and Mr. Ball consented to serve. (*Id.*) Ms. Keck was appointed as his guardian *ad litem*. (R.107-08).

Other than Ms. Keck, a Greene County attorney who is his representative for this case, Mr. Ball has no other connection to the State of Missouri. Relators maintain that Dakota Ball is a citizen of Missouri. (R. 79, ¶3; R. 87, ¶7; R. 93, ¶7).

There are a few cases discussing defendants *ad litem* not taking the place of the deceased's residence as the defendant *ad litem* is a mere figurehead with no personal

interest in the matter. *See e.g., State ex rel. Gannon v. Gaertner*, 592 S.W.2d 214 (Mo.App.1979); *State ex rel. Picker v. Gaertner*, 599 S.W.2d 45, 45 (Mo.App. 1980).

However, Ms. Keck is not a defendant *ad litem*. She was appointed as guardian *ad litem*. (R.107-08). Her interest is much more than as a mere figurehead for the case. A guardian *ad litem* stands in the place of the mentally infirm and has personal responsibilities to “collect testimony, summon witnesses, and jealously guard the rights of” her ward. *See e.g., In re Marriage of Sisk*, 937 S.W.2d 727, 733 (Mo.App. S.D. 1996).

Between the roles of guardian *ad litem*, and Relators’ continued insistence of maintaining Mr. Ball’s Missouri citizenship for their own purposes, Mr. Ball’s guardian’s locus of Greene County, Missouri should be used for any analysis of where the parties reside for purposes of venue. As such, venue would be proper under pursuant to *R.S.Mo.* §508.010.2(2), which provides:

2. In all actions in which there is no count alleging a tort, venue shall be determined as follows:

....

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

*R.S.Mo.* §508.010.2(2). Therefore, Relators’ Petition for Writ should be denied.

#### **E. The Law Does Not Require a Futility. (Responding to Relators’ Subpoints A and B).**

The law never requires a useless act. *Guelker v. Director of Revenue*, 28 S.W.3d 488, 491 (Mo.App. E.D. 2000); *State ex rel. Sageser v. Ledbetter*, 559 S.W.2d 230, 233 (Mo.App. 1977) (“the law does not require the doing of a useless thing”). As such, USAA GIC should not be required to first have the action pend in Pulaski County to file its change. Instead USAA GIC should be permitted to avoid that futility and file the action in a County where Defendant Prater and Defendant Ball already decided is an appropriate forum to litigate disputes between them.

To wit, if USAA General Indemnity Company filed this action in Pulaski County, as Defendant Prater suggests, it would be entitled to file a Rules 51.03 or 51.04 motion for change of venue.

In *State ex rel. Kansas City Southern Ry. Co. v. Nixon*, this Court discussing the futility doctrine as it relates to venue, stated:

The second reason for allowing an amendment before ruling on the motion to transfer is practical. If the court immediately had ordered the case transferred to St. Louis County, as the railway urged, the plaintiffs could have dismissed the action without prejudice under Rule 67.02 and filed a new petition in Jackson County naming the railway and McIntosh as defendants. And, of course, venue would be proper. Time and money would be wasted in this process, and the ultimate effect would be nil.

282 S.W.3d 363, 367 (Mo. banc 2009). The practical implication is if it can occur, one need not jump through extra hoops just to make it occur.

### **Rule 51.03**

Pursuant to *Mo. R. Civ. P.* 51.03, all that is required for a peremptory change is the potential of an action triable by jury, and a county with less than 75,000 inhabitants. USAA General Indemnity Company requests that this Court take judicial notice that Pulaski County has only 52,654 inhabitants.

A jury could potentially determine the fact issues in a declaratory judgment action as it does in other civil actions. *R.S.Mo. §527.090; Turnbull v. Car Wash Specialties, LLC*, 272 S.W.3d 871, 874 (Mo.App. E.D. 2008) (the Court to determine which issues are tried to the Court and which to a jury).

Therefore, as the Declaratory Judgment action has portions that could be triable to a jury, and Pulaski County has less than 75,000 inhabitants, a change of venue from Pulaski County would be in order. As such, USAA GIC should not have to jump through extra hoops to make this occur. USAA GIC should be found to have utilized its peremptory change, and this matter should remain in Greene County.

### **Rule 51.04**

In addition, USAA General Indemnity Company would likely be entitled to a change of judge under *Mo. R. Civ. P. 51.04* as there was significant media regarding the motor vehicle collision, and Mr. Ball was criminally prosecuted for the motor vehicle collision in Pulaski County via charges for involuntary manslaughter for the death of Juanita Prater and Cory Parker.

Defendant Ball's father only knew his son was in an automobile collision as at the result of radio coverage regarding the same.

Based on the media attention and criminal prosecution in a county with a relatively small population, USAA GIC suggests that the conditions necessary for a change pursuant to Rule 51.04 are also met.

As the law does not require a futility and USAA GIC would be entitled to a change of venue from Pulaski County, where Relators and Dakota Ball have already stipulated to the propriety of a Greene County Court making decisions in related litigation, this matter should remain in Greene County.

#### **F. Any Purported 90-Day Rule Is Not Applicable in This Case. (Responding to Relators' Subpoint C).**

Relators' argument that *R.S.Mo. §508.010.10* requires a transfer be granted if not denied in 90 days should be denied for the following reasons:

##### **1. A Trial Court Has Authority to Order an Amended Petition Instead of Transferring Venue – Relators' Writ as to the Original Petition Is Mooted by the Filing on an Amended Petition. (Responding in Part to Relators' Subpoints, A-C).**

A trial court is vested with continued authority to allow an amended petition to add defendants despite a pending motion for transfer of venue. *State ex rel. Kansas City Southern Ry. Co. v. Nixon*, 282 S.W.3d 363, 367 (Mo. banc 2009). In holding that the "shall" of the venue statutes does not create an immediate mandatory duty, this Court vested trial courts with the ability to order an amendment of the pleadings in lieu of



transferring venue. *Id.* In other words, the trial court retains some discretionary abilities even where the venue statute states “shall.”

In addition to objecting to venue, Relators also objected to proceeding without adding all the wrongful death beneficiaries. (R.34, ¶4; R.101, ¶5). Based on Relator’s objections, Respondent ordered USAA to file an amended Petition. (R.1). An amended Petition supersedes all prior Petitions, which are deemed abandoned. “Once an amended pleading is filed, any prior pleadings not referred to or incorporated into the new pleading are considered abandoned and receive no further consideration in the case for any purpose.” *State ex rel. Bugg v. Roper*, 179 S.W.3d 893, 894 (Mo. banc 2005). By acceding to Respondent’s Order and filing a First Amended Petition on April 26, 2018, (R.11), USAA GIC abandoned its original petition. As such, any of Relator’s arguments for change of venue based on the original petition are moot. *See e.g., State ex rel. Hawley v. Heagney*, 523 S.W.3d 447, 450 (Mo. banc 2017) (discussing mootness).

Respondent had authority to allow an amended Petition in lieu of transferring the case. In that regard, there can be no error in failing to transfer venue as to the original petition, including any argument based on 90 days elapsing. If Relators wanted to writ the original petition and the motion to transfer thereon, they needed to have sought a writ prior to the abandonment of that petition via amendment.

## **2. The Venue Statute’s and Venue Rule’s (Rule 51.045) Interplay with Rule 44.01(b)(1) Regarding Time.**

Rule 44.01(b)(1) allows a Court to *sua sponte* extend deadlines without motion or notice:

**(b) Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time **in its discretion** (1) with or **without motion or notice** order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order ...; but it may not extend the time for taking any

action under Rules 52.13, 72.01, 73.01, 75.01, 78.04, 81.04, 81.07, and 84.035 or for commencing civil action.

*Mo. R. Civ. P. 44.01(b)(1)* (emphasis added). *Troxell v. Welch*, 687 S.W.2d 902, 909 (Mo.App. W.D. 1985) (the court did not abuse its discretion in *sua sponte* granting an extension of time to file a responsive pleading); *See also, Suarez v. Anthem, Inc.*, 697 Fed.Appx. 607, 608 (10<sup>th</sup> Cir. 2017) (noting that under similar Federal Rule 6(b)(1)(A), the "... district court has the power to extend to the time *sua sponte* before the time period has run").

On March 2, 2018, the Court necessarily granted an extension of time, when it ordered the parties to submit briefing after the 90-day limit of §508.010.10:

GELBACH, BELANCIO AND STUBBLEFIELD. ARGUMENT  
HEARD ON MOTION(S) TO DISMISS AND TO CHANGE  
VENUE. ALL MOTIONS ARE TAKEN UNDER ADVISEMENT.  
PLAINTIFF GRANTED 14 DAYS TO BRIEF, AND DFTS  
GRANTED 14 DAYS THEREAFTER TO RESPOND, IF  
DESIRED. PULL TO REVIEW AND RULE IN 28 DAYS. JRB/

(R.13).

There was good cause to extend the time prescribed. On March 1, 2018, Defendant Prater filed an 11<sup>th</sup> hour motion to dismiss, which potentially impacted the Court's subject matter jurisdiction to address the venue motion on March 2, 2018. (*Id.*) At the March 2, 2018 hearing, USAA GIC argued that the motions to dismiss needed to be addressed first as they implicated the Court ability to proceed with the venue issues. As part of the oral pronouncement of March 2, 2018, Respondent expressly asked the parties to brief the matter of the order in which the pending motions need to be addressed. (*Id.*) USAA GIC complied with that Order on March 16, 2018. (*Id.*)

On April 5, 2018 Respondent ruled on the motions to dismiss, and, then denied Relator Prater's motion to transfer venue. (R.1).

Moreover, Rule 44.01(b) expressly delineates and enumerates that Rule 44.01(b) cannot be used to extend deadline under Rules 52.13, 72.01, 73.01, 75.01, 78.04, 81.04,

81.07, and 84.035. Rule 51.045, which controls venue motions for improper venue, is not included in that list.

Furthermore, Rule 44.01(b) also expressly provides that the Rule cannot be used to extend the time “for commencing a civil action,” which statutes of limitation are fixed by statute, not rule. *See e.g., R.S.Mo. §§516.120, 537.100.* Although Rule 44.01(b) limits its use in certain statutes, there is nothing in Rule 44.01 that prohibits its use or application as to the venue statute at §508.010.10.

In sum, the Court’s *sua sponte* and *sub silentio* grant of an extension of time was within its discretion and was supported by good cause of the circumstances.

### **3. Relator Prater’s Waiver of Any Purported 90-Day Rule.**

USAA GIC filed its Declaratory Judgment on October 26, 2017. Relator Prater was served promptly on November 8, 2017. On December 8, 2017, Relator Prater filed a *pro forma* motion to transfer venue, which stated:

#### **DEFENDANT, RONALD PRATER'S,** **MOTION TO TRANSFER FOR IMPROPER VENUE**

COMES NOW, Defendant, Ronald Prater, by and through counsel, pursuant to Missouri Supreme Court Rule 51.045 and requests the Court to transfer this case to the Circuit Court of Pulaski County, Missouri, which is where the subject motor vehicle wreck occurred and where the Prater family filed their Wrongful Death and Personal Injury suits. (See Plaintiff’s Exhibit A attached hereto.) Venue is not proper in Greene County, Missouri, as none of the Defendants reside in Greene County, Missouri and the cause of action at issue occurred in Pulaski County, Missouri. (See Plaintiff’s Petition for Declaratory Judgment paragraphs 2, 3 and 5.)

WHEREFORE, Defendant, Ronald Prater, prays for relief in conformity herein.

(R.37). Relator Prater raises Rule 51.045. Relator Prater **does not** state, cite or argue *R.S.Mo. §508.010.10*, which is the only location where the purported 90-day rule appears.

A Court cannot be charged with an error where an argument was not raised. *E.g., Central Parking System of Missouri, LLC v. Tucker Parking Holdings, LLC*, 519 S.W.3d 485, 493 (Mo.App. E.D. 2017). Thus, Respondent cannot be charge with error in not applying a 90-day rule as to his April 5, 2018 Order. (R.1).

The Court held a December 21, 2017 hearing on Plaintiff USAA GIC's motion for judgment on the pleadings as to the Defendant Gruendler, (who is now dismissed as she no longer has standing or an interest in the subject matter). (R.110). In setting the venue motion for hearing, Relator Prater's counsel announced that he would be out-of-town in Hawaii, it is believed from 1/25/18 to 2/27/18. Based upon counsel's representation, the Respondent specially set a March 2, 2018 hearing on the venue motion and motion to dismiss to accommodate counsel's schedule. (R.110).

On Monday, January 8, 2018, USAA GIC timely filed its Suggestions in Opposition to Relator Prater's Motion to Transfer Venue. (R.52); *Mo. R. Civ. P.* 51.045(b), 44.01(a).

After several months of inaction on the case, on the eve of the March 2, 2018 hearing, Relators filed a Petition for Equitable Garnishment in Johnson County, Missouri on March 1, 2018. (R.77-86). Relator Prater then immediately also filed a motion to dismiss the Greene County Declaratory Judgment Action arguing that based on the factual predicate of the very existence of Relators' March 1, 2018 petition for equitable garnishment in Johnson County, there is no justiciable controversy or basis to proceed in the Greene County Declaratory Judgment Action. (R.99-103).

The Court held its specially set hearing on March 2, 2018. (R.13). The Court delayed ruling on the venue motion based on Relator Prater's March 1, 2018, 4:41 p.m. filing of his second motion to dismiss, with his Johnson County, Missouri equitable garnishment petition attached as an exhibit thereto. (R.13). At that hearing, Relator Prater also affirmatively requested time after March 8, 2018 to file supplemental suggestions regarding venue and the motion to dismiss.

In short, the timing of Relators' counsel's vacation and his conduct in a last-minute filing of a motion which affected, or had the potential of affecting, the venue

motion, should be treated as a waiver of the purported March 8, 2018 prescribed time to rule.

**4. The Legislature’s attempted procedural amendment of Rule 51.045 and 44.01(b)(1) violates the Article V, §5 of the Missouri Constitution.**

Article V, §5 of the Missouri Constitution provides:

The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.

*Mo. Const., Art. V. §5.* As such, Supreme Court Rules override statutes as to procedural matters. *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995) (“if there is a conflict between this Court's rules and a statute, the rule always prevails if it addresses practice, procedure or pleadings”).

This Court recognized that there is a potential conflict between Rule 51.045 and §508.010.10, but did not reach the issue and resolved the matter on the merits. *State ex rel. Schwarz Pharma, Inc. v. Dowd*, 432 S.W.3d 764, 767 n.3 (Mo. banc 2014).

It is one thing for the Legislature to legislate the substance of how venue will be determined. USAA GIC takes no issue with those portions of §508.010. However, it is not proper for the Legislature to affix procedural times, where Rule 51.045 already contains procedural deadlines.

The Legislature is empowered by Article V, §5 to amend procedural rules. But to the extent that the Legislature was attempting to amend Rule 51.045 by appending

§508.010's timeline to it, it was required to follow the procedures of Article V, §5 in doing so:

However, [a]ny rule may be annulled or amended in whole or in part *by a law limited to the purpose*. For a statute to qualify as one limited to the purpose of annulling or amending a rule, it must refer expressly to the rule and be limited to the purpose of amending or annulling it.

*City of Normandy v. Greitens*, 518 S.W.3d 183, 201 (Mo. banc 2017) (internal citations and quotations omitted). There is no mention of Rule 51.045 in §508.010's fourteen subparagraphs.

In *State ex rel. Collector of Winchester v. Jamison*, this Court struck down a statute that attempted to change who could serve as a class representative. 357 S.W.3d 589, 594 (Mo. banc 2012). In finding the same violative of Article V, §5, the Supreme Court found that it was improper to attempt to amend a Rule by statute that went to 18 other matters. Moreover, it was independently invalid because it failed to state that the Legislature was attempting to amend Rule 52.08. *Id.*

In this case, §508.010 does not state that it is attempting to amend Rule 51.045. Moreover, to the extent that anyone infers that §508.010 is amending Rule 51.045, the other 13 sections do not deal with the procedural rule but deal with the substance of venue. §508.010 is not limited in purpose as is required by the Constitution.

Even more important, to the extent that the Legislature is attempting to deprive this Court of its ability to use its discretion to extend time limits under Rule 44.01(b), §508.010 is silent. Rule 44.01(b) expressly describes those rules and substantive statutory areas where Rule 44.01(b) cannot apply. Section §508.010 does not comply with Article V, §5 to deprive this Court of its discretion under Rule 44.01(b) as it neither lists Rule 44.01(b) nor is it limited to the purpose of amending Rule 44.01(b).

For any of the above reasons, §508.010 is constitutionally infirm and must be disregarded.

**5. The Legislature’s attempted implementation of §508.010.10 usurps the judicial functions of how and when a Court will declare the law, and what the Court must declare it; and thus, violates Article V, §§1, 14 of the Missouri Constitution.**

The Missouri Constitution vests judicial power in the Courts, and the Circuit Courts have jurisdiction over all civil and criminal matters. “The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts.” *Mo. Const.*, Art. V, § 1. “The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal.” *Mo. Const.*, Art. V, § 14.

The Legislature can neither add to nor take away from courts the jurisdiction given to them by the constitution. *State ex rel. York v. Locker*, 181 S.W. 1001, 1002 (Mo. 1915). USAA GIC does not dispute that the Legislature can set deadlines for parties to litigation. However, the deadline at issue in §508.010.10 is not a proscription upon a party. It is an attempt to circumscribe the conduct of the Circuit Court.

Section 508.010.10 is an usurpation of the Constitutionally vested judicial power as it tells Respondent how he must rule a motion and when he must rule a motion:

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

*R.S.Mo.* §508.010.10 (emphasis added). It is an attempt to deprive this Court of the judicial function in which jurisdiction is vested with the Circuit Court. The Legislature may not take away this Court’s power to rule on a motion over which it was given constitutional jurisdiction to rule. *York*, 181 S.W. at 1002.

This is a basic separation of powers issue. A Court can declare that a legislative act is void, but the Court lacks the power to compel that the Legislature amend the legislation. *Treme v. St. Louis County*, 609 S.W.2d 706, 710 (Mo.App. E.D. 1980). The latter would be legislating, which is not the function of the Court. *Id.*

In that same vein, how a motion should be ruled is a judicial function, not a function of legislating. In this circumstance, §508.010.10 tells the Judiciary how it must rule a motion to transfer by granting the same, and by dictating when the Court must issue its ruling.

This is very different than statutes of limitations or timelines for appeal,<sup>2</sup> which legislate the conduct of the parties. Section 508.010.10 attempts to legislate the conduct of the Court, not the conduct of the parties to the action.

A superior Article V Court could limit Respondent's time to act via a Rule. *See e.g., Mo. R. Civ. P. 78.06* (after trial motion is overruled if not granted within 90 days). However, nothing in the Constitution would permit the Legislature to affix timelines on Respondent for the Respondent's own judicial conduct.

The Legislature's attempt to limit the power of the judiciary as to when and how it must rule a venue motion is a violation of separation of powers and should not be countenanced. The Petition for Writ should be denied.

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<sup>2</sup> Comparison with Appellate jurisdiction is not apt as the Courts of Appeal do not have a constitutional grant of power as broad as the circuit courts. Rather, parties to an action have no constitutional right to appeal as it is a right conferred by statute and thus timely filing of the notice of appeal pursuant to that statute is jurisdictional. *E.g., Labrier v. Anheuser Ford, Inc.*, 621 S.W.2d 51, 53 -54 (Mo. banc 1981).



## **CONCLUSIONS**

Respondent and Plaintiff USAA GIC request that this Court quash its preliminary writ, and return this matter to the Circuit Court of Greene County, Missouri for further disposition for any of the following reasons:

- Relators' Petition for Writ should be dismissed because its multifarious point relief on preserves nothing for this Court to review.
- Relators' Petition for Writ should be denied because it is based on an error of law that tort venue controls the location of this suit.
- Relators' Petition for Writ should be denied because Relators consented to, and personally availed themselves of Greene County as the venue for their suit against Dakota Ball for over four years, and USAA GIC's suit for interpretation a policy of insurance emanates from that Greene County suit.
- Relators' Petition for Writ should be denied because Dakota Ball should be considered a resident of Greene County, the location of his guardian *as litem*, and his only nexus to the State of Missouri.
- Relators' Petition for Writ should be denied because the law does not require a futility.
- Relators' Petition for Writ should be denied because the purported 90-day Rule of the venue statute is inapplicable in that:
  - A Circuit Court has authority to permit an amendment of the Petition in lieu of granting transfer;
  - Rule 44.01(b)(1) permits an extension of time, which the Respondent *sub silentio* granted;
  - Relators waived their ability to assert a 90-day rule, where their conduct is what necessitated the Respondent to rule on April 5, 2018 instead of before March 8, 2018;

- The Legislature's enactment of §508.010.10 was unconstitutional in that it violated Article V, §5 of the Constitution by not following its strictures on how to amend a procedural rule; or
- The Legislature's enactment of §508.010.10 was unconstitutional in that it violated the Constitution's separation of powers clauses as it attempts to legislate what the judge must declare and when the judge must declare it.

Respectfully submitted,

**FOLAND, WICKENS, ROPER,  
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## **Certificate of Compliance and Service**

I, W. James Foland, hereby certify as follows:

1. The attached brief complies with the limitations contained in Rule 84.06(b) The brief was completed using Microsoft Office 365, in Times New Roman size 13-point font. Including the cover page, the signature block, the acknowledgement, this certification, and the certificate of service, the brief contains 7,275 words, which does not exceed the words allowed for a respondent's brief.
2. The foregoing brief was filed electronically through the Court's Case.Net system. It was scanned for viruses on January 30, 2019 with the most recent version of a commercial virus scanning program WebRoot Secure Anywhere Version 9.0.21.18, updates are automatically performed in real time, and, according to the program is free of viruses.
3. In conformity with Rule 55.03(a), the original of this electronic filing was signed by me and will be maintained in my file. I further certify that on this 30<sup>th</sup> day of January 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice and a copy of the electronic filing of the Brief and to all counsel of record.

By: /s/ W. James Foland

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