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 of St. Louis County,

Respondent.

RELATOR'S REPLY BRIEF

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I. The bases that Hillsdale can assert and that the courts can consider for venue being proper in St. Louis County and not in Boone County are limited to what Hillsdale stated in its Reply to the Motion for Change of Venue—*i.e.*, that pleading contract rather than trust claims is sufficient to exclude its case from the special venue statute for cases involving trusts.

The first questions before this Court are the scope and impact of Rule 51.045(b), and how that rule affects the arguments Plaintiff Hillsdale College may make and Respondent and other courts may consider. That rule imposes a strict time limit on a plaintiff's identification of bases to support its claim for one venue and its arguments against a venue proposed by a defendant. After imposing a 60-day deadline on defendants to file "[a]ny motion to transfer venue alleging improper venue," the rule requires that the non-movant plaintiff file its reply "[w]ithin 30 days after the filing of" that motion. It then defines the required content of the reply: "The reply shall state the basis for venue in the forum or state reasons why venue is not proper in one or more counties specified by the movant." Finally, it expressly bars any consideration of points that go beyond the scope of those timely stated: "The court shall not consider any basis not stated in the reply…." That scheme, when added to the time limit imposed by § 508.010.10, ensures the prompt resolution of venue disputes in the circuit court.

Relator was served on February 26, 2017. Relator filed its motion for change of venue on March 28, 2017. Hillsdale filed its Reply on April 27, 2017. The question that Hillsdale was required to address in that Reply

under Rule 51.045 was "the basis for venue in" St. Louis County and "why venue is not proper in" Boone County. Under Rule 51.025(b), then, the circuit court, the court of appeals, and now this Court, may consider only the bases for venue in St. Louis County and the challenges to venue in Boone County that were asserted by Hillsdale in its Reply. The courts (and a party arguing on a court's behalf) cannot come up with new bases for a venue choice nor for attacking the venue proposed by the movant.

In its reply to the motion for change of venue, Hillsdale did not contest that venue would be proper in Boone County were venue determined by § 456.2-204.[1] Rather, Hillsdale accurately summarized its asserted basis for claiming that venue was proper in St. Louis County and not in Boone County: "Because this is a contract case, the general venue statute applies. Venue is proper under that statute because the University may be found in St. Louis County, as its Answer to the Petition admits." Plaintiff's Opposition to Defendant's Motion for Change of Venue ("April Opp.") at 1 (Supplemental Appendix ("S.A.") at SA-4).

[1] That is why the extensive discussion in Respondent's brief of venue-related discovery is immaterial. Under Rule 51.045, if Hillsdale wanted to challenge the factual basis for placing venue in Boone County pursuant to § 456.2-204, it was required to include that challenge in its reply to the motion for change of venue. If Hillsdale needed additional time for discovery before filing its reply, it could have requested it. Rule 51.045(b) ("For good cause shown, the court may extend the time to file the reply or allow the party to amend it.") *See State ex rel. HelperBroom v. Moriarty*, No. SC97200 (Mo. Jan. 29, 2019), slip op. at 4 & n.4. But Hillsdale did not seek additional time, conceded by its silence the facts set out in the affidavit attached to the motion (*see* Hillsdale's replies to the original motion, S.A. at SA-3-SA-14, and to the amended motion, S.A. at SA-37-SA-52), and confirmed that the location of the funds—a subject of the discovery Hillsdale belatedly says it requires—was immaterial to its argument ("the location of the funds does not transform the nature of the case" (S.A. at SA-7)).

Hillsdale claimed that § 456.2-204 did not apply because, as pled by Hillsdale, "This Is Not a Judicial Proceeding Regarding the Administration of a Trust." April Opp. at 4; S.A. at SA-6. Hillsdale's argument went directly to the connection between the trust and the nature of its cause of action as pled. In fact, Hillsdale conceded that the funds were placed in trust, and stated its argument by contrast: "The fact that funds from the Will were placed in trusts does not turn this contract case into one about trust administration." April Opp. at 7; S.A. at SA-9. The remainder of Hillsdale's Reply addressed its theories for venue being proper in St. Louis County under the general venue statute—*i.e.*, that under *State ex rel. Ormerod v. Hamilton*, 130 S.W.3d 571, 572 (Mo. 2004), the Curators have no residence for purposes of venue analysis, and that "there is no rationale for requiring a nonresident plaintiff to reside in a county in this state in order to bring contract claims against the University" (a position that the Curators have never taken in this case).

Under Rule 51.045, then, the only basis that any court can consider for venue being proper in St. Louis County and not in Boone County is that the trust venue statute does not apply here because the claims pled purportedly do not involve the administration of what were conceded to be trusts, and that the general venue statute allows the nonresident plaintiff (unlike a resident plaintiff) to file wherever a defendant can be found (which, as discussed further in IV below, still would not permit suit against the Curators in St. Louis County because they are "found" only in Boone County).

After the circuit court heard argument, on the Court's invitation Hillsdale filed Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion for change of Venue. S.A. at SA-15—SA-18. Nothing in rule 51.045 permitted the addition in such a document of any additional basis for venue in St. Louis County or against venue in Boone County. And appropriately,

Hillsdale made no attempt there to add to such bases: the document simply addressed cases that in some fashion appear to have related to a trust, but that were purportedly adjudicated in circuit court outside the probate division.[2]

On August 8, 2018, Hillsdale filed its Second Amended Petition, Exhibit 1 to the Petition. The same day, the Curators filed the Amended Second Motion for Change of Venue Now Directed to Plaintiffs' Second Amended Petition. On August 15, Hillsdale filed its Memorandum in Opposition to that motion. S.A. at SA-21—SA-51 ("August Opp."). This time, Hillsdale carefully avoided speaking of "trusts" (much as it did in the Second Amended Petition, where for the first time it omitted quotations from the Hibbs will that included that word). Again, Hillsdale characterized its petition as stating contract, not trust claims: "This is a declaratory judgment and breach of contract action. Plaintiff, Hillsdale College, sued the University, alleging that MU violated the terms of express and implied contracts regarding a conditional bequest." August Opp. at 1; S.A. as SA-37. Hillsdale then reiterated the same two points made in its April Reply—and only those two points.

In Respondent's Brief, counsel for Hillsdale reiterates those points. And in its opening brief, Relator anticipated and responded to them.

But speaking for Respondent, Hillsdale's counsel also now claim that despite their statement in the April reply that the funds had been placed in trust, and their repeated arguments that a tangential relationship between a cause of action and a trust is not sufficient to involve "trust administration" in a case, the real problem here is that *Mr. Hibbs did not establish any trust*.

[2] Hillsdale has repeatedly suggested that merely because this matter is assigned to the probate division pursuant to § 456.2-204, Hillsdale will be deprived of a jury trial. *E.g.*, Respondent's Brief at 36. But Hillsdale has never explained the basis for that suggestion, nor cited statutory or caselaw support for it.

That is an entirely new basis for claiming that venue is proper in St. Louis County and not in Boone County. It is not permitted by Rule 51.045.

The situation here finds its parallel in *State ex rel. Mylan Bertek Pharm., Inc. v. Vincent*, 561 S.W.3d 68 (Mo. App. E.D., 2018). We paraphrase the language used there by the Court of Appeals:

> In its motion to transfer, Relator alleged that venue in St. Louis County was improper and contended that venue was proper only in Boone County because the cases involves the administration of a trust and the place of trust administration is Boone County. Plaintiff Hillsdale did not, in its reply to that motion, challenge whether the Hibbs bequest created a trust, nor whether the trust was administered in Boone County. The only stated bases in Hillsdale's reply for venue being proper in St. Louis County and not in Boone County were that the causes of action pled were contract and not trust causes of action, and that despite their connection to the Hibbs trust those claims did not involve trust administration. Hillsdale did not challenge the existence of a trust, nor that the trust is administered in Boone County. Hillsdale's failure to assert in the reply the absence of a trust as a reason why venue was proper in St. Louis County and not in Boone County, means that the alleged absence of a trust was not a reason that can be considered.

See id. at 73, citing Rule 51.045(b) and *State ex rel. Trans World Airlines, Inc. v. David*, 158 S.W.3d 232, 234 (Mo. banc 2005) ("where motion for transfer asserted facts showing that chosen venue was improper and reply 'did not dispute or even address' those facts, the court deemed the facts undisputed").

II. The manner of Mr. Hibbs' bequest of funds to the Curators "as trustees, in trust," did defeat his declared intent to establish a trust.

As noted above, Respondent gives two new reasons for claiming that Mr. Hibbs failed to actually place the funds at issue "in trust," as his bequest specified. Both present questions of first impression in Missouri. But neither is sufficient to negate Mr. Hibbs' intent. And as Respondent states correctly, "Whether a trust was created depends on Mr. Hibbs' intent." Respondent's brief at 26. Mr. Hibbs' intent was unequivocal. The new arguments articulated by Hillsdale's counsel here claim that Mr. Hibbs defeated his own declared intent, in two ways.

a. Mr. Hibbs did not negate his express intent to establish a trust by designating "the Curators," rather than someone outside the University, "as trustees," then instructing the trustees to give the funds to professors in the University's School of Business to use as they wish.

First, Hillsdale's counsel, for Respondent, claim that Mr. Hibbs did not establish a trust because he named "the Curators" as "trustees," then required that the funds go to professors appointed to chairs and professorships in the College of Business in the university that the Curators govern. That claim (unlike the claim discussed in (b)) is connected to language in the statute—the requirement that "the same person is not the sole trustee and sole beneficiary." § 456.4-402.1(5). But that claim ignores the actual identity of the trustees and beneficiaries designated by Mr. Hibbs.

Mr. Hibbs bequeathed the funds to "the Curators of the UNIVERSITY … as trustees." Exhibits, p. 44. That he used the plural there and each time he referred to those he was charging with management of the funds is not confusing, as Respondent suggests (Respondent's Brief at 27). Rather, it confirms the identity of the group that was given that charge: the Curators,

i.e., the Board of Curators of the University of Missouri. That Mr. Hibbs did not intend to use "curators" merely as part of the name of the legal entity that Hillsdale eventually sued is evident from his use of capitalization. Throughout bequest 83, every time he referred to the entity, he used all caps, *e.g.*:

- "(83) Five Mission ($5,000,000.00) Dollars to the Curators of the UNIVERSITY OF MISSOURI, as trustees, in trust, to be held and administered upon the following terms and conditions";
- "(b) the said and named trust funds are established for the benefit of and shall be used at the UNIVERSITY OF MISSOURI-COLUMBIA COLLEGE OF BUSINESS AND PUBLIC ADMINISTRATION";
- "(ii). Investment and reinvestment of the fund shall be in accordance with the policy of the Curators of the UNIVERSITY OF MISSOURI";
- "(v) The length of time the appointee shall occupy his or her position, and the selection of the appointee shall be recommended to the Provost of the UNIVERSITY OF MISSOURI-COLUMBIA by the Dean of the College of Business and Public Administration".

Id. That Mr. Hibbs deliberately chose to use an initial cap rather than all caps for "the Curators" (as he did for the Dean and the Provost) demonstrates his understanding that the trustees were the Curators and not the impersonal, corporate entity.

Mr. Hibbs also distinguished between the University and the beneficiaries. The funds he gave to the Curators as trustees were not available for the Curators to use themselves, as they wished, for the good of the University—nor even to generally fund activities that promote a "free and

open market economy." The Curators could not give any of the money to a professor in the Department of Economics or the Department of History, for example—even if that professor were a "devoted disciple" of the free and open market economy. The *only* way that the trustees (and their subordinates, the Dean of the College of Business and the Provost) could allocate the funds was to individual professors in the College of Business appointed to the chairs and professorships listed by Mr. Hibbs. And the Hibbs bequest authorized those professors to use the funds as they saw fit, *i.e.*, "in his or her sole discretion." Exhibits p. 44. Those professors, exercising that discretion, are not "the Curators," nor the University of Missouri, nor its School of Business.

Respondent's argument that the trustees, the University, and the professors are collectively the "sole trustee" and the "sole beneficiary" and that their unity defeats Mr. Hibbs' declared intent has troubling implications. In Respondent's view, if a person gives funds in trust to a legal services organization for use in supplementing attorney salaries, it is an invalid trust unless someone outside the organization is the trustee. Funds entrusted to an educational institution to be used to fund activities of that institution or its employees—or scholarships for students—could never be in trust. We have not found—and Respondent has not provided—any authority in Missouri or Florida to support that conclusion. Nor are we aware of any policy justification for it.

Perhaps even more troubling is the broader prospect that the "sole trustee cannot be the sole beneficiary" rule, as Respondent reads it, could invalidate myriad *charitable* trusts. Mr. Hibbs "was an enthusiast of the Austrian School of Economics and left $5 million to his alma mater to encourage further development of the Austrian School in academia." April Opp. at 2 n. 1, S.A. at SA-2. His objective, ultimately, is an academic,

educational one—which made his a charitable educational trust. According to Respondent, for such a trust to exist to benefit constituents of an educational institution, the grantor must either designate a third party as the trustee or designate beneficiaries (and not just contingent beneficiaries) outside the institution. Again, we have not found—and Respondent has not provided—any authority in Missouri or Florida to support that conclusion. And there is no policy justification for it.

b. Mr. Hibbs did not negate his express intent to establish a trust by directing that in the event the trustees did not perform as he instructed, the funds would go to Hillsdale rather leaving disposition for a court to decide.

Respondent's second attack on Mr. Hibbs' creation of a trust is based on Mr. Hibbs' choice to specify a contingent beneficiary and define criteria for funds to pass to that beneficiary, rather than fully trusting a court to construe and enforce his intent. In Respondent's view, that choice was a fatal self-inflicted blow on Mr. Hibbs' stated intent to create a trust.

In making that attack, Respondent cites no Missouri or Florida statute. That is significant. When Missouri and Florida enacted their versions of the Uniform Trust, they largely replaced the common law with statute—and these statues control this matter. This court should not tell Mr. Hibbs, posthumously, that although he expressly declared he was creating a trust, he torpedoed his declared intent by including instructions for the disposition of the funds if the designated trustees did not administer them as he specified.

Respondent cites no Missouri or Florida caselaw on point. Rather, he cites four decisions in other states, none of which present facts parallel to those here. And Respondent's quotation from the single non-California case, *Application of Mareck*, points to a key distinction: an affirmative duty

(imposed on a trustee in a trust) v. a "permissive right to use" ("[i]n the case of a conditional fee). 100 N.W.2d 758, 763 (Minn. 1960) (Resp. Br. at 29). Mr. Hibbs' bequest did not grant a "permissive right to use." It imposed an affirmative duty. Indeed, the very provisions of the bequest that Respondent cites define that affirmative duty: The trustees had to provide the funds to certain professors who could then use the funds as they wished, and had to appoint professors who would have that power: "If the Chair or Distinguished Professorship, as the case may be, remains vacant for a period of five (5) consecutive years," *i.e.*, if the Curators did not ensure that someone could use the funds as Mr. Hibbs specified, then "the trustees shall forthwith distribute the then balance of the fund to HILLSDALE COLLEGE." Exh. p. 45.

That instruction highlights another problem with Respondent's argument. In Hillsdale's scenario, there can be no trustees because there is no trust, and thus there is no one designated to distribute the balance of the funds. It is also notable that Hillsdale's contingency is attached to another contingency: "If Hillsdale College is not then an organization described in Sections 170(c) and 2055(a) of the Internal Revenue Code of 1986 at the time when any principal or income of the fund is to be distributed to it, then the trustees shall distribute the balance of the fund to such one or more publicly supported charitable organizations described in Sections 170(c) and 2055(a) as the trustees in their sole discretion shall select." Exh. pp. 28-29.

Respondent provides no policy justification for the adoption of what he suggests this Court should adopt, for itself or for Florida, as the common law rule. And were Respondent to suggest such a policy justification, it would be contrary to the interest of persons such as Mr. Hibbs. Absent the kind of language Mr. Hibbs used, the question of where funds go when they are not or cannot be used by the trustee for the purposes set out in the trust is a

question that would be answered by a judge—presumably with the involvement of the attorney general. *See*, *e.g.*, *Obermeyer v. Bank of America, N.A.*, 140 S.W.3d 18 (Mo. 2004). Courts apply the "*cy pres* doctrine[, which] is based on the concern of equity to protect and preserve charitable bequests." *Id.* at 22. It is hardly surprising that Mr. Hibbs would not leave the matter to the courts' application of *cy pres* and invite the persuasive voice of an attorney general. But this Court should not endorse the proposition that by creating one, limited mechanism to help ensure the purpose of his trust is achieved, Mr. Hibbs or any other grantor defeats their own express intent to create a trust.

But again, the question ultimately must be Mr. Hibbs' intent—which, here, was expressly manifest in the language of his bequest. "The law is well settled that in order to create an express trust, it is not essential that any particular form be followed, or that the words 'trust' or 'trustee' or their equivalent be used." *St. Louis Uniformed Firemen's Credit Union v. Haley,* 190 S.W.2d 636, 639 (Mo. App. 1945). But Mr. Hibbs chose such words—and used them consistently and repeatedly in his bequest to the Curators, but not in his bequests to other institutions. And "the primary consideration in all such cases is the intention of the settlor or creator; and any words which indicate with sufficient certainty an intention to create a trust will be effective for that purpose." *Id.* This Court should give full credit to Mr. Hibbs' declared intent. He

> is presumed to know and intend the legal effect of the language he uses in his will, and conceptually this applies to a grantor of an inter vivos trust. Words with a well-known technical meaning should be construed according to their technical meaning unless a contrary meaning appears in the granting instrument. Whether an ambiguity exists in the instant trust estate instrument is a question of law….

In re Nelson, 926 S.W.2d 707, 709 (Mo. App. S.D. 1996). Here, there is no ambiguity in Mr. Hibbs' use of "trust" and "trustee."

c. The is no requirement that this matter now be remanded for a determination whether there was a trust—a question Respondent presumably would have answered, had Hillsdale timely raised it.

It is apparent from Respondent's argument that entire factual basis on which to decide whether Mr. Hibbs created a trust was the bequest itself, attached to and incorporated into each of Hillsdale's petitions. Here, arguing for Respondent, Hillsdale's counsel assert that the Court should send this matter back to the circuit court, which has "not ruled that the trust is administered in Boone County." Resp. Br. at 37. But remand would make no sense here: the entirety of Respondent's Brief demonstrates that the question is one of law based on undisputed facts.

But that also brings us back to the procedure and burdens embodied in Rule 51.045 and caselaw. The obligation to ensure that the circuit court is presented and rules on such a question is imposed on the plaintiff—on the party that bears the burden of showing that venue is proper. *See State ex rel. Mylan Bertek Pharm., Inc. v. Vincent*, 561 S.W.3d 68, 73 (Mo. App. E.D. 2018) ("When a party moves to transfer the case on the basis of venue, the plaintiff has the burden of showing that venue is proper."), citing *Igoe v. Department of Labor & Industrial Relations of State of Missouri*, 152 S.W.3d 284, 288 (Mo. banc 2005). And the time in which to seek such a determination must be the 90 days permitted by § 508.010.10. *See State ex rel. HelperBroom v. Moriarty*, No. SC97200 (Mo. Jan. 29, 2019), slip op. at 4 & n.4.

III. The "written contracts" Respondent cites do not, as shown on their face, meet the requirements for creating a contract.

As an alternative, Hillsdale, speaking for Respondent, returns to a claim made in its reply to the amended motion for change of venue (August Opp., S.A. 37-52): that in addition to a claim based on the bequest, with its trust language, the Second Amended Petition states a claim for breach of contract based on certain "express contracts." Of course, it only takes one claim based on trust to bring the case within the scope of § 456.2-204 vis-à-vis venue. But if Hillsdale had only pled its "express contract" claim and not a claim based on the bequest (*i.e.*, the trust), that claim would necessarily fail—not just because trustees cannot unilaterally replace a trust with a contract, but because, as shown by the Second Amended Petition and its attachments, there are no such contracts.

As Judge Draper recently reminded us, "A valid contract requires 'offer, acceptance, and bargained for consideration.'" *Soares v. Easter Seal Midwest*, No. SC97018 (Mo. Dec. 18, 2018) (Draper, J. dissenting), dissent slip op. at 2. The documents that Respondent calls "express contracts" do not meet those very basic requirements. Despite the heading on the documents, they are proposals memorializing the trusts made by the Provost and Dean, approved by the Board of Curators. They do not show any offer by Mr. Hibbs or his estate. Nor could they: as Hillsdale stated to the circuit court last April, "[t]he Estate of Sherlock Hibbs was closed by a Florida probate court in 2003 after all distributions were made" (April Opp. p. 2, n. 2), yet the so-called "contracts" were dated March/April 2004 (Exhibits pp. 63, 66, 69, 72, 75, and 78). They do not reflect any consideration being exchanged by anyone. The only "acceptance" they show is approval by the Board of Curators—*i.e.*, by the

trustees designated by Mr. Hibbs. And what did the Curators accept? The recommendation of the Dean and Provost.[3]

IV. Respondent's claim that the Curators are "found" in St. Louis County for venue purposes is contrary to precedent and statute.

In claiming that St. Louis County can be an appropriate venue because the Curators can be "found" there (as required by § 508.010.2(1)), Respondent ignores pertinent caselaw and statutory rules.

Applying § 508.010, this Court has said that a person is "found" where it is served—and referred to statute to define the proper location for service. *State ex rel. Ford Motor Co. v. Manners*, 161 S.W.3d 373, 375-376 (Mo., 2005), citing §506.150. In *Ford*, the Court was addressing a corporation that sells vehicles and provides financing through dealers in many, perhaps most Missouri counties—a presence almost as pervasive as the University of Missouri. The statute the Court cited to limit the places where Ford could be served and thus "found" for purposes of venue also includes a specific provision regarding public entities:

> Service shall be made as follows:
> 2. …(5) Upon a public, municipal, governmental, or quasi-public corporation or body, by delivering a copy of the summons and of the petition … to the chief executive officer in the case of any other public, municipal, governmental or quasi-public corporation or body. …

§ 506.150. The chief executive officer of the University is, of course, its president—who resides and is served in Boone County.

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[3] Respondent doesn't attempt to explain the contradiction between saying that the Curators, the Dean, the Provost, and the appointed professors are a single entity, the University, but asserting that a document naming and signed only by the Curators, the Dean, and the Provost constitutes an express contract. The University cannot contract with itself.

Respondent would say that when the plaintiff is a nonresident (unlike a resident plaintiff), the Curators of the University of Missouri could be sued anywhere in the State: in McDonald County for something that happened at UMSL, in Atchison County for something that happened at MS&T, or in Pemiscot County for something that happened at UMKC.

The practical result, ironically, would be the opposite of what the Court accomplished in *Ormerod*. There the plaintiff tried to force The Curators to litigate in Jackson County a case where the facts arose and the parties were in Boone County. The Court moved the case to Boone County. The Court should do the same here—whether because § 456.2-204 applies, because the Court decides to revisit *Ormerod* and finds that The Curators reside for venue purposes in Boone County, or by applying *forum non conveniens*.

CONCLUSION

For the reasons stated in the Petition, Relator's brief, and here, the Court should issue a writ requiring that this case be moved to Boone County.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that the Reply Brief of Relator State ex rel, The Curators of the University of Missouri, includes information required by Supreme Court Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 4.974 words as determined by Microsoft Office Word-counting system.

/s/ James R. Layton
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