

SC97429

**In The
SUPREME COURT OF MISSOURI**

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

v.

**THE HONORABLE JASON R. BROWN
Respondent**

**Missouri Court of Appeals
Southern District No. SD35345**

**Original Proceeding
Circuit Court of Greene County, Missouri
Case No. 1731-CC01453**

**REPLY BRIEF OF RELATORS IN SUPPORT OF WRIT OF MANDAMUS
OR IN THE ALTERNATIVE WRIT OF PROHIBITION**

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ARGUMENT

Plaintiff's Brief in Opposition filed on behalf of Respondent does its best to confuse this simple venue determination by ignoring the plain language and application of RSMo § 508.010. Improper venue is a fundamental defect, and a court that acts when venue is improper acts in excess of its jurisdiction. *State ex rel. Green v. Neill*, 127 S.W.3d 677, 678 (Mo. banc 2004). Venue for this Declaratory Judgment action has been improper since Plaintiff filed its Petition in Greene County, Missouri.

A. Respondent/Plaintiff's Brief In Opposition Suggests An Improper Standard Of Review.

On behalf of Respondent, Plaintiff suggests to this Court that "[t]he burden of proof and persuasion are upon the party attempting to demonstrate that venue is improper" and that "[s]ubstantive evidence is required; unsworn statements and argument by counsel cannot be relied upon" based on this Court's prior dissenting opinion. *State ex rel. Trans World Airlines, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. banc 2005) (quoting *Respondent/Plaintiff's Brief*, page 10).

It is well established in Missouri that "the burden of showing that venue is proper always has been with the plaintiff when venue is challenged". *Igoe v. Department of Labor and Indus. Relations of State of Missouri*, 152 S.W.3d 284, 288 (Mo. banc 2005). "Where venue is an issue, the plaintiff carries the burden of proof to show an honest belief that there is a justiciable claim against a resident party". *Raska Foods, Inc. v. Southwest Whey, Inc.*, 978 S.W.2d 46, 49 (Mo. App. 1998). The burden has always been on Plaintiff, not Relators/Defendants.

B. Relators' Brief In Support Of Prohibition Argues One Issue – Improper Venue.

Plaintiff asserts that Relators' point relied upon is multifarious and preserves nothing for this Court's review. Relators' point relied upon is solely related to this issue of improper venue and nothing else. As such, Relators contend that their brief in support of prohibition does not violate Missouri Supreme Court Rule 84.04(d).

Relators' brief is very clear and sets forth three (3) separate reasons as to why venue has been improper in Greene County, Missouri, for this Declaratory Judgment action since its inception- all based solely on Respondent's failure to comply with RSMo § 508.010. Relators' one point relied upon brings into play no other issues, statutes, or Rules of this Court. The structure of Relators' brief here certainly does not impede disposition of this case on its merits. If this Court disagrees and finds Relators' brief in support of a permanent writ to be in violation of Rule 84.04(d), non-compliance with the Rule was completely inadvertent. If that is what the Court ultimately finds here, Relators respectfully request that the Court exercise its discretion to review Relators' point *ex gratia* as it did in the cases of *Kirk v. State* and *Griffitts v. Old Republic Insurance Company*, which are the two (2) cases Plaintiff cites for its authority on this argument. 520 S.W.3d 443, 450 (Mo. 2017); 550 S.W.3d 474 (Mo. banc 2018).

C. Relators' Argument On Tort Venue Is Based On Respondent's And Plaintiff's Own Contentions.

There is no question that here we are dealing with a Declaratory Judgment action based on the terms of an insurance contract, Relators do not disagree with Plaintiff on this fact. However, Respondent partly based his first Order and Judgment denying Ronald

Prater's Motion to Dismiss and to Transfer for Improper Venue on Plaintiff's argument that:

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.

(Respondent/Plaintiff's Brief, page 12)(PW, Exhibit A, A1). Case No. 1331-CC01525 was purely a tort action. If this Court were to agree with Respondent and Plaintiff's reasoning that venue should be determined based on what the present action is "logically related to" or "an outgrowth of"-- an analysis of tort venue under RSMo § 508.010.4 would be necessary, since this Declaratory Judgment is logically related to and an outgrowth of two (2) consolidated tort cases. Relators set forth this argument in an abundance of caution. It is Relators' position that "logical relation to" or "outgrowth of" are inappropriate considerations when making a venue determination. Since this is a Declaratory Judgment action based on the terms of an insurance contract with no count alleging a tort, venue shall be determined under RSMo § 508.010.2.

Relators¹ have argued that venue is improper under RSMo § 508.010.2 since their very first filings in this Declaratory Judgment action:

Venue is not proper in the Circuit Court of Greene County, Missouri, for USAA's Petition for Declaratory Judgment as none of the Defendants reside in Greene County, Missouri. Defendant, Ronald Prater, incorporates by reference his Motion

¹ Of the Relators, Ronald Prater was the only one initially named or served at the inception of this case. Thus, the first Motion to Dismiss and Motion to Transfer for Improper Venue were filed on behalf of Ronald Prater. After the Court ordered them to be named and served, the remaining Relators joined in Prater's argument. *(PW, Exhibit C, A10-15).*

to Transfer for Improper Venue as though more fully set forth herein.

(PW, Exhibit F, A34)

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.

(PW, Exhibit F, A37). Relators' position has been well preserved for this Court to properly rule under RSMo §508.010.2.

D. Venue in The Underlying Tort Case Is Irrelevant.

Plaintiff asserts that Relators consented and stipulated to Greene County, Missouri, in the underlying tort case of Case No. 1331-CC01525, therefore waiving venue in this Declaratory Judgment action. The Prater family (Relators) filed both of their lawsuits for the death of Juanita Prater and the injury claim for Ronald Prater in the proper venue of Pulaski County, Missouri. (PW, Exhibit H, A46). The mere fact that Dakota Ball through numerous procedural filings ultimately got a change of venue as a matter of right, which Relators stipulated to in the interest of efficiency, does not rewire the venue rules and statutes as to USAA GIC's separately filed Declaratory Judgment action, and certainly does not amount to a waiver of challenging venue. *Id.* In its Opposition, Plaintiff puts in bold type that the underlying tort action was pending “**for four years and one month**” which is of absolutely no consequence in this newly filed Declaratory Judgment action. (*Plaintiff/Respondent's Opposition, page 12*). Plaintiff has not met its burden to persuade this Court that Relators have consented, stipulated, or waived their right to challenge venue in this Declaratory Judgment action because Plaintiff can only point to the facts of a separate and underlying tort case to support its

position, a tort case that Plaintiff USAA GIC was not even a party to. (*Answer to Preliminary Writ, Exhibit M. PW, Exhibits D and K*). Plaintiff cannot cite to any stipulation or agreement in this Declaratory Judgment action showing Relators consented to Greene County, Missouri, as a proper venue. (*Plaintiff/Respondent's Opposition, pages 12-13*). Additionally, venue is determined solely by statute. *State ex rel. Doe Run Resources Corp v. Neill*, 128 S.W.3d 502, 507 (Mo. banc 2004). Plaintiff's argument on this point cites no statutory authority and no Rules of this Court. (*Plaintiff/Respondent's Opposition, pages 12-13*).

1. No Waiver or Consent

This Court's Rules specifically state that: "[i]f a timely motion to transfer venue is filed, the venue issue is not waived by another action in the case". Mo. Sup. Ct. R. 51.045 (emphasis added). Plaintiff and Respondent take the position that venue has been waived by Relators' action in another case, when this Court's Rules are clear that not even another action in this case would constitute a waiver. *Id.*

The only way a party can waive a challenge of venue is by failing to timely file their motion: "[i]f a motion to transfer venue is not timely filed, the issue of improper venue is waived". *Id.* To timely file a motion to transfer venue alleging improper venue, the party doing so must file within 60 days of being served. *Id.* Relator Ronald Prater was served in this Declaratory Judgment action on November 16, 2017. (*PW, Exhibit C, page A15*). Less than 60 days after being served, on December 8, 2017, Ronald Prater filed his Motion to Transfer for Improper Venue and Motion to Dismiss. (*PW, Exhibit C, page A14*). At the trial court's direction to name and serve the remaining Relators,

Relators Lucille Curtman and Deann Thompson were served in this Declaratory Judgment action on May 15, 2018. (*PW, Exhibit C, A11*). The final remaining Relator, Gwendalyn Gonzales, was served on May 29, 2018. *Id.* Less than 60 days after being served, on June 4, 2018, Lucille Curtman, Deann Thompson, and Gwendalyn Gonzales filed their Motion to Transfer for Improper Venue. Therefore, it cannot be said that Relators have waived their right to challenge venue in this Declaratory Judgment action. Mo. Sup. Ct. R. 51.045.

This Court has held that a party cannot waive venue until he or she is before the court. *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820, 822 (Mo. banc 1994); *see also Allstate Ins. Co. v. Dejarnett*, 175 S.W.3d 692, 695 (Mo. Ct. App. E.D. 2005). In *Dejarnett*, a party did not waive his right to object to improper venue in an automobile insurer's Declaratory Judgment action where his first filing was a motion to transfer for improper venue. *Id.* Like in *Dejarnett*, here all of Relators' first filings were motions to transfer for improper venue. (*PW, Exhibit C, A10-A15*). The Court in *Dejarnett* made the issue of waiver as to a challenge of venue very clear:

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. Rule 51.045. Allstate makes no argument that *Dejarnett's* motion to transfer venue was untimely filed. Therefore, *Dejarnett's* point one on appeal is granted.

Id. at 695. Like Allstate in *Dejarnett*, here USAA GIC/Plaintiff makes no argument that Relators' motions to transfer were untimely filed. Thus, since Greene County, Missouri, is an improper venue for this Declaratory Judgment action, and because Relators timely filed their motions challenging venue, this case “**shall** be transferred to a court where

venue is proper”. *Id.*; Mo. Sup. Ct. R. 51.045. This argument by Plaintiff is without merit and is completely contrary to this Court’s Rule that governs waiver.

2. Venue For This Declaratory Judgment Action Is Determined By RSMo § 508.010.2.

Venue is determined solely by statute. *Neill*, 128 S.W.3d 502, 507 (Mo. banc 2004). “Venue is within the province of the legislature” and courts called upon to adjudicate venue challenges “must be guided by what the legislature says.” *Willman v. McMillen*, 779 S.W.2d 583, 585 (Mo. banc 1989). When interpreting a statute, the primary rule is to give effect to legislative intent as reflected in the language of the statute. *See State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007). Words used in statutes are to be interpreted in accordance with their plain and ordinary meaning, unless the legislature expressly indicates otherwise. *See Lincoln Indus., Inc. v. Dir. Of Revenue*, 51 S.W.3d 462, 465 (Mo. banc 2001); *Lonergan v. May*, 53 S.W.3d 122, 126 (Mo. App. W.D. 2001).

Missouri Revised Statute §508.010.2 states in relevant part:

in all actions in which there is no count alleging a tort, venue shall be determined as follows: (1) When 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; (2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county. .

None of the Defendants to this Declaratory Judgment action reside in Greene County, and none were found there when served with USAA’s Declaratory Judgment action, so venue cannot be proper in Greene County, MO. (*Petition for Writ of Mandamus, Exhibit E, pages 027-032, A27-32*).

- Relator/Defendant Ronald Prater was served in Miller County, Missouri, on November 16, 2017, in this Declaratory Judgment action. (*PW, Exhibit C, A15*).
- Relator/Defendant Deann Thompson was served in Miller County, Missouri, on May 15, 2018, in this Declaratory Judgment action. (*PW, Exhibit C, A11*).
- Relator/Defendant Lucille Curtman was served in Miller County, Missouri, on May 15, 2018, in this Declaratory Judgment action. (*PW, Exhibit C, A11*).
- Relator/Defendant Gwendalyn Gonzales was served in Pulaski County, Missouri, on May 29, 2018, in this Declaratory Judgment action. (*PW, Exhibit C, A11*).
- Defendant Dakota Ball was served in Washington County, Maryland, on December 1, 2017, in this Declaratory Judgment action. (*PW, Exhibit C, A14*).
- Defendant Christina Gruendler was served in Pulaski County, Missouri, on November 17, 2017.² (*PW, Exhibit C, A15*).

In *Dejarnett*, Allstate filed a petition for declaratory judgment against two (2) defendants, alleging their policy of insurance did not cover criminal acts. *Id.* The Appellate Court reversed the trial court's denial of Defendants' motion to transfer venue on the grounds that they immediately challenged the "propriety of venue" and thus did not waive the issue, and because neither defendant resided in the county where plaintiff Allstate filed the lawsuit. *Id.* Like in *Dejarnett*, where the court made a venue determination under RSMo 508.010.2 because Allstate filed a declaratory judgment

² Christina Gruendler was dismissed without prejudice on March 6, 2018. (*PW, Exhibit C, A13*).

action based on the terms of an insurance contract, here USAA GIC has done the same. *Id.* (PW, Exhibit B, A4). Also like in *Dejarnett*, where Allstate filed its petition in a venue where neither defendant resided, here USAA GIC has done the same. *Id.* (PW, Exhibit E, A27-A32). The facts here are nearly identical, and the result should be the same.

Since the trial court and Respondent have proceeded with this Declaratory Judgment action in which venue is improper after Relators' timely challenges, this Court should issue a writ of mandamus ordering the transfer of a case from a court of improper venue to a court of proper venue. A writ of mandamus is an appropriate remedy when a court fails to perform a ministerial act such as ordering the transfer of a case from a court of improper venue to a court of proper venue. *State ex rel. Turnbow v. Schroeder*, 124 S.W.3d 1, 3 (Mo. App. E.D. 2003). Or in the alternative, this Court should issue a writ of prohibition forbidding the court from taking any further action in the case other than transferring it to a proper venue. *See State ex rel. Ssm Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. banc 2002). Improper venue is a fundamental defect, and a court that acts when venue is improper acts in excess of its jurisdiction. *Neill*, 127 S.W.3d 677, 678 (Mo. banc 2004). Respondent has failed to perform the ministerial act of ordering the transfer of this Declaratory Judgment action from Greene County, Missouri, where venue is improper, to Pulaski or Miller counties, Missouri, where venue is proper and where Relators and Defendants reside and were served. (PW, Exhibit E, A27-A32); *Schroeder*, 124 S.W.3d 1, 3 (Mo. App. 2003).

E. Dakota Ball Resides and Was Served in Washington County, Maryland.

Plaintiff again contends that Relators have not met their “burden” to establish Greene County as an improper venue, specifically as to the residence of Dakota Ball. (*Respondent/Plaintiff’s Opposition*, page 13). It is well established in Missouri that “the burden of showing that venue is proper always has been with the plaintiff when venue is challenged”. *Igoe*, 152 S.W.3d 284, 288 (Mo. banc 2005). “Where venue is an issue, the plaintiff carries the burden of proof to show an honest belief that there is a justiciable claim against a resident party”. *Raska Foods*, 978 S.W.2d 46, 49 (Mo. App. 1998). The burden has always been on Plaintiff, not Relators/Defendants. To support its creative position, Plaintiff argues Relators did not state Dakota Ball’s county of residence in their Petition for Writ. Relators’ Petition for Writ clearly establishes the only thing about Dakota Ball’s residency necessary for this Court to determine whether venue is improper in Greene County: “[n]one of the named Defendants to USAA General Indemnity Company’s underlying Declaratory Judgment action are residents of Greene County, Missouri”. (*PW*, page 3, paragraph 2). This paragraph in Relators’ Petition cites to “Exhibit E, Return Summons’ for Defendants” for support. *Id.* The Return Summons’ for Defendant Dakota Ball shows he was served and resides in Washington County, Maryland. (*PW*, *Exhibit E*, A32).

Plaintiff has made no showing to this Court that Dakota Ball resides or was served in Greene County, Missouri, for this Declaratory Judgment action, and therefore has not met its burden under Missouri law. In an attempt to do so, Plaintiff suggests his guardian *ad litem*’s residence, who was appointed on his behalf, should be substituted in place of

his own. RSMo § 508.010.2 makes no mention of considerations for residence of a guardian *ad litem* and Plaintiff cites no supporting case law on this point. Interestingly, here USAA GIC is advocating for the interests of Dakota Ball in the same Declaratory Judgment action it instituted to deny him coverage, where Dakota has a Judgment of over \$1,000,000 against him and in favor of Relators. (*PW, Exhibit B, A9*)(Respondent/Plaintiff's Opposition, page 6).

This Court has held that “venue is determined as the case stands when brought” *Mummert*, 870 S.W.2d 820 (Mo. banc 1994). Determining venue as the case stands when brought results in “predictability, efficiency and stability.” *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). When this Declaratory Judgment action was brought in October of 2017, no guardian *ad litem* had been appointed on behalf of Defendant Dakota Ball. (*PW, Exhibit C*). In fact, Patricia Keck was not appointed guardian *ad litem* for Dakota Ball until **six (6) months later** in April of 2017, which is four (4) months after Ronald Prater’s timely Motion to Dismiss and Motion to Transfer for Improper Venue. (*PW, Exhibit C, A11*). Since venue is determined as the case stands when brought, Dakota Ball’s residence for purpose of venue is Washington County, Maryland. (*PW, Exhibit E, A32*). Additionally, none of Respondent’s Orders and Judgments at issue cite the residence of Dakota Ball’s guardian *ad litem* as a basis for rejecting Relators’ challenges. (*PW, Exhibit A, A1-3*). Residence cannot be established by a defendant’s attorney’s acceptance of service or process. *Dejarnett*, 175 S.W.3d 692, 694. Here, Dakota Ball’s guardian, Patricia Keck, was not even served in this case. (*PW, Exhibit C, A10-15*). Moreover, Plaintiff has made no showing to this Court that Mr.

Ball's guardian resides in Greene County. (*Respondent/Plaintiff's Opposition*, page 13-14). Under Missouri law, this argument has no merit.

F. Transferring This Case To A Proper Venue Is Require Under Missouri Law.

Transferring a case from an improper venue to a proper venue is not a “useless act” or “futile”, as Plaintiff suggests. The decisiveness and plain language of RSMo § 508.010 certainly does not say anything about a party's ability to file suit in an improper venue and then allow the suit to remain there if that improper venue could/would somehow be the end result after taking a change of venue as a matter of right. Plaintiff cites to no case law supporting this new theory.

When considering the decisiveness of the language in RSMo § 508.010, it is also significant to note that this Section has been amended to speak in more decisive terms. The prior version of Section § 508.010, which was in effect until August 28, 2005, stated that an action “shall” be brought in specified locations, “except as otherwise provided by law”. RSMo § 508.010 (2004). The amended version of § 508.010, which has been in effect since August 28, 2005, states that “venue shall be determined as follows.” RSMo § 508.010. Thus, the current version does not appear to make any exception for other potential methods of determining venue.

To support this new theory, Plaintiff argues it would be entitled to a change of venue under Missouri Supreme Court Rule 51.03 because this Declaratory Judgment action would be triable by jury. RSMo § 527.090 only permits a jury to determine factual disputes in a declaratory judgment action, not to determine the ultimate issue. A coverage determination under the terms of an insurance contract/interpretation of an

insurance policy is purely a question of law. *Griffitts*, 550 S.W.3d 474 (Mo. banc 2018).

Moreover, Rule 51.03 states in relevant part: “shall order the case transferred to some other county convenient to the parties, first giving all parties the opportunity to make suggestions as to where the case should be sent.” If this case were filed in the proper venue of either Pulaski or Miller counties, Relators would object to the suggestion of Greene County for a number of reasons. Relators are not bound by their stipulation to Greene County in the underlying tort case for this separately filed Declaratory Judgment action. Pulaski County, in the 25th Circuit, has three (3) other counties in its circuit. Miller County, in the 26th Circuit, has four (4) other counties in its circuit. Greene County, in the 31st Circuit, sits by itself. Relators graciously request the court to take Judicial Notice of these facts. Needless to say, if this case were properly filed in Miller or Pulaski Counties, it is highly unlikely any court would send this case to Greene County over Relators’ objections, and it is certainly not guaranteed as Plaintiff suggests. This argument has no application under Missouri law.

USAA GIC also argues that it would **likely** be entitled to a change of venue under Missouri Supreme Court Rule 51.04, based on media attention from this wreck and criminal prosecution of Dakota Ball, in this Declaratory Judgment action regarding interpretation of an insurance policy. USAA GIC is **extremely unlikely** to satisfy this burden. Rule 51.04 permits a change of venue after a clear showing of cause where: (1) the inhabitants of the county are prejudiced against the applicant; or (2) the opposite party has an undue influence over the inhabitants of the county. Any media attention that may have occurred surrounding this wreck, and any criminal prosecution against Mr. Ball, is

completely unrelated to USAA GIC and its Declaratory Judgment action regarding a policy of insurance and a question of law. This assertion is completely unfounded and not well-taken.

Plaintiff cites to no authority supporting its propositions that transferring venue to a proper venue is futile, and that is because the law in Missouri is directly contrary to Plaintiff's position. "An appellate court should employ prohibition when a circuit court has erroneously denied transfer. . ." *State ex rel. Mo. Pub. Serv. Comm'n v. Joyce*, 258 S.W.3d 58, 60 (Mo. banc 2008). "If venue is improper where an action is brought, prohibition lies to bar the trial court from taking any further action, except to transfer the case to the proper venue." *State ex rel. Etter, Inc. v. Neill*, 70 S.W.3d 28, 32 (Mo. App. E.D. 2002). It is well-established that this Court "accepts the use of an extraordinary writ to correct improper venue decisions of the circuit court before trial and judgment." *State ex rel. Kansas City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. banc 2009). A writ of prohibition prevents an "exercise of extra-jurisdictional power" by barring a court "from taking any further action, except to transfer the case to a proper venue." *Neill*, 78 S.W.3d 140. This Court is clear that:

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

State ex rel. Johnson v. Griffin, 945 S.W.2d 445, 446-47 (Mo. banc 1997). Relators challenged venue with their first filings in this case, because Greene County is clearly an improper venue for this Declaratory Judgment. (*PW, Exhibit C, A10/A14*). Relators'

rights under the law should not be infringed because Respondent has erred and abused his discretion to not transfer venue.

G. The 90-Day Rule of RSMo § 508.010.10 is Clearly Applicable Here.

Missouri Revised Statute §508.010.10 provides that all Motions to Dismiss or to Transfer for Improper Venue **SHALL** be deemed granted if not denied within 90 days of the filing of the motion. (emphasis added). The relevant part of §508.010.10 provides:

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 the motions unless such time period is waived in writing by all parties.

Ronald Prater filed his Motion to Dismiss and Motion to Transfer for Improper Venue on December 8, 2017. (*PW, Exhibit C, A14*). Relators graciously request the Court to take judicial notice of the fact that 90 days after December 8, 2017, is March 8, 2018.

Respondent's Order and Judgment of April 5, 2018, denying Ronald Prater's Motion to Dismiss and Motion to Transfer for Improper Venue is well beyond the 90 day deadline set forth by RSMo § 508.010.10. (*PW, Exhibit A, A1*) (*PW, Exhibit C, A14*).

Additionally, the 90 day deadline was not waived in writing by any party, let alone all parties. As such, Respondent's Orders and Judgment of April 5, 2018, April 19, 2018, and July 31, 2018, are nullities and exceed the trial court's jurisdiction in that Ronald Prater's Motions were deemed granted on March 8, 2018.

This Court reviews writ petitions that involve orders on motions to transfer venue for abuse of discretion, "and an abuse of discretion occurs where the circuit court fails to follow applicable statutes." *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007). When interpreting a statute, the primary rule is to give effect to

legislative intent as reflected in the language of the statute. *Whittington*, 219 S.W.3d at 225 (Mo. banc 2007). Words used in statutes are to be interpreted in accordance with their plain and ordinary meaning, unless the legislature expressly indicates otherwise. *Lincoln Indus., Inc.*, 51 S.W.3d at 465 (Mo. banc 2001); *Loneragan*, 53 S.W.3d at 126 (Mo. App. W.D. 2001). Plaintiff is again arguing that another section of RSMo § 508.010 does not mean what it says, another conclusion that would undermine the efficiency and predictability these provisions were designed to achieve.

Nothing in Respondent's April 5, 2018, Order suggests there was an enlargement of time for the 90 day deadline imposed by RSMo § 508.010.10. Nowhere in § 508.010.10 does the legislature mention that the 90 day deadline may be enlarged by the court. Respondent could have enlarged the 90 day deadline by requesting that all parties waive the deadline in writing, but he chose not to. (*PW, Exhibit C, A10-15*).

Respondent's April 5, 2018, Order clearly shows this Court that the trial court did not follow the applicable statute of RSMo § 508.010.10 with regard to Ronald Prater's December 8, 2017, Motion to Dismiss and Motion to Transfer for Improper Venue. The legislative intent is clear in § 508.010.10. If the trial court does not rule on a party's Motion to Dismiss or Motion to Transfer for Improper Venue within 90 days, said motions **shall** be granted, unless all of the parties have agreed to waive the deadline in writing- period. As such, Respondent abused his discretion by not granting Ronald Prater's Motion to Dismiss and Motion to Transfer for Improper Venue pursuant to the applicable statute of RSMo § 508.010.10. This is an additional reason why respondent's

Orders denying transfer were an abuse of discretion and this Court's preliminary writ should be made absolute.

1. No Waiver.

Plaintiff argues that because Ronald Prater's December 8, 2017, Motion to Transfer For Improper Venue does not specifically cite to or argue RSMo § 508.010.10, he has waived the 90 day rule it sets forth. In sum, Plaintiff is suggesting to this Court that a party must argue the 90 day rule before a motion to transfer for improper venue is filed, and before the 90 day clock even starts ticking.

Moreover, § 508.010.10 clearly states, in relevant part: "**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. . .". (emphasis added). Ronald Prater's two (2) motions filed on December 8, 2017, his first filings in this Declaratory Judgment action, are titled "DEFENDANT RONALD PRATER'S MOTION TO DISMISS USAA'S DECLARATORY JUDGMENT" and "DEFENDANT RONALD PRATER'S MOTION TO TRANSFER FOR IMPROPER VENUE". (PW, Exhibit F, A33/A37). Ronald Prater's Motion to Transfer For Improper Venue is based upon a claim of improper venue on its face. Additionally, Ronald Prater's Motion to Dismiss, paragraph 3, states in relevant part: [v]enue is not proper in the Circuit Court of Greene County. . . Defendant, Ronald Prater, incorporates by reference his Motion to Transfer for Improper Venue. . ." which amounts to not just one (1), but two (2) motions based upon a claim of improper venue.

Another reason Plaintiff's argument of waiver fails here is because RSMo § 508.010.10 specifically sets out the only way the 90 day rule may be waived, and that is in writing by all parties. Words used in statutes are to be interpreted in accordance with their plain and ordinary meaning, unless the legislature expressly indicates otherwise. *Lincoln Indus., Inc.*, 51 S.W.3d at 465 (Mo. banc 2001). When a statute's words are clear, this Court must apply its plain meaning. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012). The legislature does not indicate any other method for waiver of the 90 day rule.

This argument is unfounded, without merit, and illogical. How could a party argue that the trial court failed to rule on a motion before a statutorily imposed 90 day deadline before the deadline even starts running?

2. RSMo § 508.010.10 Does Not Violate Section V of The Missouri Constitution.

This Court has reasoned that “[a]n attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal.” *Land Clearance for Redevelopment Auth. of Kansas City, Mo. v. Kan. Univ. Endowment Ass'n*, 805 S.W.2d 173, 176 (Mo.banc 1991). Nevertheless, the purpose of requiring a constitutional question to be raised at the earliest opportunity is “to prevent surprise to the opposing party and accord the trial court an opportunity to fairly identify and rule on the issue.” *Dodson v. Ferrara*, 491 S.W.3d 542, 552 (Mo.banc 2016). Plaintiff does not cite to any previously filed pleading in this action to show this Court that it properly preserved this Constitutional challenge, and that is because the argument was raised for

this first time in Respondent/Plaintiff's Answer to this Court's Preliminary Writ. For this reason alone, Plaintiff's Constitutional challenge should fail, but Relators will address the challenge in an abundance of caution.

In an attempt to circumvent mandatory transfer under § 508.010.10, Plaintiff now contends on behalf of Respondent that the statute's 90 day deadline is inconsistent with Missouri Supreme Court Rule 51.045, which imposes no deadline for a trial court to rule on a transfer motion. (*Respondent's Answer to Preliminary Writ*, p. 14). But there is no inconsistency between the deadlines to file and reply to a transfer motion found in Rule 51.045 and the deadline to rule on that motion found in §508.010.10. The former requirement is imposed on the parties litigating the issue of improper venue, while the latter is directed to the court tasked with ruling on the matter. The ability of the Rule and statute to operate concurrently without conflict is evident.

The Rule sets a 60 day deadline from the date of service on any party seeking transfer. Mo. Sup Ct. R. 51.045(a). The Rule also sets a 30 day deadline after the filing of a motion seeking transfer on an opposing party's reply. Mo. Sup. Ct. R. 51.045(b). Thus, the statute affords the court 60 days after a timely reply to rule on a venue motion.

Moreover, the trial court can request a written waiver of the statute's 90 day deadline from the parties. RSMo § 508.010.10. A circuit court can therefore ensure that the Rule's filing and reply deadlines are followed and still decide the motion within the statutory time period. See *City of Normandy v. Greitens*, 518 S.W.3d 183, 201 (Mo. banc 2017). The Supreme Court Rules do not specify the time period in which the court must rule on the venue motion. As this Court recognized in *City of Normandy*, "additional

deadlines are not in conflict when existing rules do not contain time limits. *Id.*; *see also* Mo. Sup. Ct. R. 41.04 (“If no procedure is specially provided by rule, the court having jurisdiction shall proceed in a manner consistent with the applicable statute,” if not inconsistent with the rules generally).

Without RSMo § 508.010.10 in place, a transfer motion could remain pending for an indefinite amount of time and defeat Rule 51.045’s goal for a prompt ruling on venue. The two procedural deadlines work to promote the same objective—avoiding unnecessary delay and consequent wasteful litigation in the wrong venue.

This Court’s recent ruling in *State ex rel. HeplerBroom, LLC v. Moriarty* clearly explains how § 508.010.10 is constitutionally sound:

Plaintiff correctly contends Rule 51.045(b) does not impose a time limit in which the circuit court must rule upon a motion to transfer venue. Plaintiffs also correctly note Rule 51.045 contemplates the circuit court may allow discovery on the issue of venue, which may prevent the circuit court from issuing a ruling on a motion to transfer venue within the ninety-day time period stated in section 508.010.10. However, this Court declines Plaintiffs’ invitation to create a conflict between these provisions that otherwise does not exist. It is evident the circuit court may comply with both the section and the rule while permitting parties to conduct discovery while litigating venue disputes. Specifically, should the circuit court determine discovery is necessary to resolve a venue dispute, section 508.010.10 expressly allows the parties to waive the ninety-day time period in writing, hence alleviating any concern the circuit court would have to rule upon a motion to transfer prematurely. *See also City of Normandy v. Greitens*, 518 S.W.3d 183, 201 (Mo. banc 2017) (holding no conflict existed between a statute and rule regarding deadlines to present an arrestee to a judge because municipalities could comply with both provisions).

When a statute’s words are clear, this Court must apply its plain meaning. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012). Relator’s motion was filed October 6, 2017. Pursuant to section 508.010.10, the deadline for the circuit court to rule upon Relator’s motion was January 4, 2018. The circuit court did not rule until May 10, 2018. Hence, the plain language of section 508.010.10 requires this Court to hold the circuit court’s failure to rule upon Relators’ motion to

transfer within the ninety-day period resulted in Relators' motion being deemed granted. Hence, the circuit court lacked authority to do anything other than transfer the cause to St. Charles County. *See State ex rel. Schwarz Pharma, Inc. v. Dowd*, 432 S.W.3d 764, 769 (Mo. banc 2014).

2019 WL 350332, SC97200 (Mo. 2019). It is clear that the legislative intent in adding the 90-day time limit to the statute as part of the 2005 Tort Reform Act was to expedite venue determinations so that litigation would not be unduly delayed at its inception. Plaintiff cites to no cases holding that the time limit has impaired venue determinations. (*Respondent/Plaintiff's Opposition*, pages 21-24). Moreover, this Court is presumed to have been aware of the 90-day time limit when it amended Rule 51.045 in 2012, and the Court did not add any provisions to Rule 51.045 that contradicted the statutory time limit set forth in § 508.010.10.

This Court should again hold the 90 day deadline ruling on a transfer motion in § 508.010.10 means what it says. Respondent had no discretion to deny Ronald Prater's Motion to Transfer for Improper Venue or Motion To Dismiss after the motions remained pending well beyond the statutory deadline. This type of delay and inefficiency supports enforcement of the 90-day time limit on venue motion rulings found in § 508.010.10.

CONCLUSION

For all of the reasons set forth above, and for the reasons set forth in Relators' Brief in Support, Relators respectfully request the Court to issue a permanent Writ of Mandamus requiring Respondent, the Honorable Jason R. Brown, to transfer Greene County Circuit Court Case No. 1731-CC01453 to Pulaski County, because venue is improper in Greene County, Missouri. Or in the alternative, Relators respectfully request the Court to issue a permanent Writ of Prohibition prohibiting Respondent, the Honorable Jason R. Brown, from taking any further action in Greene County Circuit Court Case No. 1731-CC01453.

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RULE 84.06(c) CERTIFICATION

Pursuant to Supreme Court Rule 84.06(c), the undersigned hereby certifies that:

(1) this brief was served pursuant to Rule 103.08; (2) this brief complies with the limitations contained in Rule 84.06(b); and (3) this brief contains 6,819 words, as calculated by the Microsoft Word software used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that, 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 11th day of February, 2019, I electronically filed the foregoing using the Missouri Courts eFiling System, which will send notice of electronic filing.

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