No. SC97872

In the Supreme Court of Missouri

STATE EX REL. UNIVERSAL CREDIT ACCEPTANCE, INC.,
RELATOR,

v.

THE HONORABLE GLORIA CLARK RENO,
RESPONDENT.

ORIGINAL PROCEEDING IN MANDAMUS
TO THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Under Rule 84.04(f), if the responding party is dissatisfied with the accuracy or completeness of Relator Universal Credit Acceptance, Inc.'s ("Plaintiff") statement of facts, the response may include a statement of facts. Plaintiff's statement of facts omits, minimizes, or mischaracterizes relevant facts supporting the trial court's ruling.

Plaintiff sued Defendant Renwick Ware ("Ware") in the associate circuit division of St. Charles County for breach of contract. *Universal Credit Acceptance, Inc. v. Ware*, 556 S.W.3d 69, 71 (Mo. App. 2018). Ware resided in St. Louis County, was served in St. Louis County, and Plaintiff is a nonresident of Missouri. (A21, A40, A60, A79; B1–7).[1]

A default judgment was entered against Ware, which Ware moved to set aside. *Universal*, 556 S.W.3d at 76. On September 19, 2016, Ware filed a proposed answer with an affirmative defense asserting: "Venue is improper in [St. Charles County]. Venue should be transferred to St. Louis County, Missouri." (B9). The trial court set aside the default judgment and permitted the parties to file any necessary pleadings. *Universal*, 556 S.W.3d at 72.

"On September 28, 2016, the day after the default judgment was set aside, [Ware] filed his answer and counterclaims. Six minutes later, Plaintiff filed a notice of voluntary dismissal." *Id.* at 76. Ware's answer asserted this affirmative defense: "Venue is improper in [St. Charles County]. Venue should be transferred to St. Louis County, Missouri." (B26).

[1] Plaintiff's exhibits filed with its Appendix begin with "A." Citations to exhibits filed by Ware with his Appendix begin with "B."

On April 20, 2017, Ware applied for a change of judge, which was granted the same day. *Universal*, 556 S.W.3d at 76. "Plaintiff then moved to strike [Ware's] application for change of judge, arguing the voluntary dismissal it filed on August 19, 2016, while the motion to set aside the default judgment was still pending, was effective on the date it was filed and deprived the trial court of jurisdiction to take any further action in this case." *Id.* The motion to strike was denied by Judge Steimel on April 28, 2017. *Id.*

On April 28, 2017, Ware moved for change of venue to St. Louis County because that was where Ware was served and resided (before and after Plaintiff sued). (A60). Ninety days from April 28, 2017, was July 27, 2017. Ware set the venue motion for hearing on May 9, 2017. (A8). Plaintiff opposed hearing the venue motion on May 9, 2017, and the hearing was passed to June 6, 2017. (A8). The motion for change of venue was reset multiple times because of Plaintiff's request for change of judge and motion to reconsider. *Universal*, 556 S.W.3d at 76; (A6-8). Ware's motion for change of venue was finally heard on August 8, 2017 (over 90 days after it was filed). (A6–7). However, the trial court never reached the venue issue because it agreed with Plaintiff it lacked jurisdiction based on Plaintiff's voluntary dismissal and dismissed Ware's counterclaim. *Universal*, 556 S.W.3d at 76.

The Court of Appeals found Plaintiff's voluntary dismissals were "gesture[s] without effect," and held "the trial court erred and abused its discretion in granting Plaintiff's motion to reconsider …, in finding [Ware's] counterclaims were untimely and invalid, and in dismissing those counterclaims." *Id.* at 78, 80. The Court of Appeals reversed and remanded for the trial court to proceed on Ware's counterclaim. Plaintiff

moved the Court of Appeals to enforce an (unenforceable) settlement agreement and dismiss the appeal. *Universal Credit Acceptance, Inc. v. Ware*, No. ED106009. The Court of Appeals denied the motion. *Id.*[2] This Court denied Plaintiff's request for transfer on September 25, 2018. *Universal Credit Acceptance, Inc. v. Ware*, No. SC97310.

Due to Plaintiff's litigation tactics, Ware's motion for change of venue wasn't heard until April 3, 2019 (705 days after the motion was filed). (A12–16). On April 10, 2019, the trial court granted Ware's motion to transfer venue and ordered the action transferred to St. Louis County. (A81). The action was transferred to St. Louis County with case number 19SL-CC01873, pending before Judge Nancy M. Watkins Mclaughlin.

Plaintiff petitioned for a writ of mandamus in the Court of Appeals, which was denied on May 2, 2019. (A82). On May 10, 2019, Plaintiff petitioned this Court for a writ of mandamus. This Court issued a preliminary writ on September 3, 2019.

SUMMARY OF ARGUMENT

"Venue is determined by statute." *State v. Green*, 576 S.W.3d 183, 185 (Mo. banc 2019). Rule 51.01 states the rules of civil procedure, including Rule 51.06, "shall not be construed to extend …. the venue of civil actions therein." Because the St. Charles County associate circuit division (the "transferor court") transferred the underlying action to its only proper venue under § 508.010.2 (St. Louis County), the Court should quash the preliminary writ of mandamus issued on September 3, 2019.

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[2] The facts surrounding Plaintiff's procurement of the unenforceable settlement agreement mirror those of the unenforceable settlement agreement it procured in another case as discussed in the Suggestions to Oppose the Issuance of a Writ in *State ex rel. Universal Credit Acceptance, Inc., v. Miller*, No. SC97814.

Ware resided in St. Louis County, was served in St. Louis County, and Plaintiff is a nonresident of Missouri, so venue was proper only in St. Louis County. *See* § 508.010.2. Plaintiff doesn't suggest otherwise. Ware moved for transfer based upon a claim of improper venue on April 28, 2017. Under § 508.010.10, the deadline for the transferor court to rule upon Ware's motion was July 27, 2017. *State ex rel. HeplerBroom, LLC v. Moriarty*, 566 S.W.3d 240, 244 (Mo. Banc 2019). No ruling was made by then, so the "plain language of section 508.010.10" means the transferor "court's failure to rule upon [Ware's] motion to transfer within the ninety-day period resulted in [Ware's] motion being deemed granted." *Id.*

Plaintiff seeks a permanent writ of mandamus requiring Respondent to transfer the action from St. Louis County (the uncontested proper venue under § 508.010.2) back to St. Charles County (an improper venue under § 508.010.2). Although mandamus may be appropriate "if the circuit court fails to perform its ministerial duty to transfer a case from an improper venue to a proper venue," *State ex rel. Prater v. Brown*, 572 S.W.3d 94, 95 (Mo. banc 2019), Plaintiff cites no case, and Ware isn't aware of one, where this Court used mandamus to require a case be transferred back to an improper venue under § 508.010.2. Regardless, Plaintiff's writ relies exclusively on Rule 51.06(a), which applies (if at all) "except where otherwise provided by law." Rule 41.01(d); § 517.021; *Exchange Nat. Bank v. Wolken*, 819 S.W.2d 45, 48 (Mo. banc 1991); *Becker Glove Intern., Inc. v. Jack Dubinsky & Sons,* 41 S.W.3d 885, 887 (Mo. banc 2001). "Except where otherwise provided by law" includes § 508.010.10 (requiring "all" venue motions to be granted if not ruled on

in 90 days).[3] It's also "inconsistent with the simplified nature of chapter 517 proceedings to apply the use-it-or-lose-it technicality of" Rule 51.06(a). *Becker Glove*, 41 S.W.3d at 888.

STANDARD OF REVIEW

"A writ of mandamus is discretionary, and there is no right to have the writ issued." *Curtis v. Missouri Democratic Party*, 548 S.W.3d 909, 914 (Mo. banc 2018) (internal quote omitted). Mandamus relief shouldn't be granted unless the petitioner "alleges and proves that [it] has a clear, unequivocal, specific right to a thing claimed." *Id*. Mandamus may be appropriate if petitioner alleges and proves the trial court failed "to perform its ministerial duty to transfer a case from an improper venue to a proper venue." *Brown*, 572 S.W.3d at 95. "Rulings on motions to transfer venue are reviewed for an abuse of discretion." *Moriarty*, 566 S.W.3d at 243.

Plaintiff's writ relies exclusively on Rule 51.06, which it calls a "procedural" rule. *See* Plaintiff's Brief p. 16. "Procedural rules are but the means through which we seek to ensure the fair and orderly resolution of disputes and to attain just results. They are not ends in themselves." *Heintz v. Woodson,* 758 S.W.2d 452, 454 (Mo. banc 1988). Courts rarely "consider noncompliance with rules or statutory procedures to warrant reversal in the absence of prejudice." *Id.* Plaintiff hasn't (and cannot) prove it has a clear, unequivocal, and specific right

[3] "All" doesn't mean motions only complying with Rule 51.06(a); "all" means "all." *Treasurer of State v. Witte*, 414 S.W.3d 455, 467 (Mo. banc 2013) (rejecting statutory interpretation limiting the word "all" to less than "all").

to have the action retransferred to an *improper venue* under § 508.010.2 because of an alleged violation of a procedural rule.

ARGUMENT

I. The Court should quash its preliminary writ of mandamus because, under § 508.010.10, transferor court lacked authority to do anything other than transfer the action to St. Louis County.

In Ware's briefing in the courts below and this Court, he repeatedly referred to § 508.010.10 to explain why Plaintiff's arguments lack merit. Tellingly, Plaintiff ignores the statute's existence, with no mention of it in Plaintiff's Petition, Suggestions in Support, and opening Brief. But § 508.010 exists, and its existence dooms Plaintiff's position.

This action was pending in the associate circuit division when Ware moved for a change of venue and remained pending there for over 90 days after Ware moved for change of venue.

> Chapter 517 sets out provisions relating to the practice and procedure in civil cases originally filed in an associate circuit division. Section 517.021 says that the rules of civil procedure "shall apply to cases or classes of cases to which this chapter is applicable, *except where otherwise provided by law."* Rule 41.01(d) likewise provides in pertinent part: "Civil actions pending in the associate circuit division shall be governed by Rules 41 through 101 *except where otherwise provided by law."*

Becker Glove, 41 S.W.3d at 887 (emphasis in original; footnote omitted).

According to Plaintiff, "[u]nder the mandatory, controlling language of Rule 51.06(a), Ware's Motion to Transfer Venue was improper, untimely, and could not be granted by the trial court" because Ware was "previously granted a change of judge[.]" *See* Plaintiff's Brief p. 18. Plaintiff's argument invites this Court to create a conflict between §

508.010.10 and Rule 51.06(a) because § 508.010.10 requires the trial court to grant "all" venue motions if not ruled on in 90 days. "All" doesn't mean motions only complying with Rule 51.06(a); "all" means "all." *Witte*, 414 S.W.3d at 467 (rejecting statutory interpretation limiting the word "all" to less than "all"); *Awuah v. Coverall North America, Inc.*, 703 F.3d 36, 43 (1st Cir. 2012) ("'All' means 'all,' or if that is not clear, all, when used before a plural noun means the entire or unabated amount or quantity of, the whole extent, substance, or compass of, the whole." (cleaned up)).[4] Plaintiff's interpretation requires the Court to rewrite § 508.010.10 to delete the word "all" and replace it with "timely and proper." However, it's "this Court's duty to interpret the law, not rewrite it." *Estate of Mickels*, 542 S.W.3d 311, 314 (Mo. banc 2018). Plaintiff's interpretation also renders § 508.010.10 90-day deadline to rule on a motion for change of venue meaningless because parties could endlessly litigate (and certainly litigate longer than the 90-day deadline) over whether a motion for change of venue was "timely" and "proper" under the rules of civil procedure. "This Court cannot ignore words in a statute and must give meaning to every word used." *Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm'n,* 555 S.W.3d 469, 473 (Mo. banc 2018).

Plaintiff knows it's asking this Court to create a conflict because it argues "Supreme Court rules govern over contradictory statutes[.]" *See* Plaintiff's Brief p. 14. But like in *Moriarty*, this Court should decline

[4] "'Cleaned up' is a new parenthetical used to eliminate unnecessary explanation of non-substantive prior alterations." *US v. Steward*, 880 F.3d 983, 986 n. 3 (8th Cir. 2018). "This parenthetical can be used when extraneous, residual, non-substantive information has been removed, in this case, internal quotation marks, brackets, additional quoting parentheticals and an ellipsis." *Id.*

Plaintiff's "invitation to create a conflict between these provisions that otherwise does not exist." 566 S.W.3d at 244. "This is not a case in which [this Court] must determine whether this Court's rules trump the mandates of the legislature where there is a conflict between the two." *Wolken*, 819 S.W.2d at 48. That's because Rule 51.06(a) applies (if at all) "except where otherwise provided by law." Rule 41.01(d); § 517.021; *Wolken*, 819 S.W.2d at 48; *Becker Glove,* 41 S.W.3d at 887. "Except where otherwise provided by law" includes § 508.010.10 (requiring "all" venue motions to be granted if not ruled on in 90 days).

Plaintiff doesn't dispute Ware moved to transfer based on improper venue on April 28, 2017, when the case was in the associate circuit division, and the motion wasn't denied within 90 days of its filing. Nor did the parties waive the 90-day deadline in writing. Because there is no irreconcilable conflict between Rule 51.06 and § 508.010.10 for cases pending in associate circuit division, and § 508.010.10's "words are clear," the trial "court lacked authority to do anything other than transfer the cause to" St. Louis County after having not ruled on Ware's motion for change of venue by the 90-day deadline. *Moriarty*, 566 S.W.3d at 244. The transferor court couldn't "abuse its discretion" by complying with § 508.010.10, so the Court should quash its preliminary writ for this reason alone.

II. The Court should quash its preliminary writ of mandamus because Ware's motion for change of venue was timely under § 517.061 and Rule 51.06 doesn't change the timing requirements for a change of venue in associate circuit division.

Plaintiff argued below Rule 51.06 applies to the timing of a motion to transfer venue. (A69) ("[Ware's] Motion for Change of Venue Was Not

Timely"). It argues the same here, alleging Ware's motion for change of venue was "untimely[.]" *See* Plaintiff's Brief p. 18. "In section 517.061, the legislature established a time different than the one prescribed by" the rules of civil procedure to apply for a change of venue before associate circuit judges. *State ex rel. Waack v. Thornhill*, 515 S.W.3d 839, 842 (Mo. App. 2017). And the rules of civil procedure yield "to legislative enactments establishing specialized procedures for actions before associate circuit divisions." *Id.*; *see also Wolken,* 819 S.W.2d at 48.

Here, there's no dispute Ware's motion for change of venue was timely. Under § 517.061, a motion for change of venue is timely when the cause isn't tried on the return date (like here) if "made not later than five days before the date set for trial." The case wasn't set for trial, so Ware's motion for change of venue was timely under § 517.061, and this Court should quash the preliminary writ.[5]

III. The Court should quash its preliminary writ of mandamus because Rule 51.06 doesn't apply in associate circuit division.

Plaintiff suggests § 517.061 "is silent as to whether a party may file separate motions for change of judge and change of venue," so Rule 51.06 applies. *See* Plaintiff's Brief p. 16. Plaintiff's argument about § 517.061's "silence" is like the argument rejected in *Becker Glove*. The sole question in *Becker Glover* was "whether the compulsory counterclaim rule found in Rule 55.32(a) applies to an action filed in an associate circuit division under chapter 517." 41 S.W.3d at 886. Although Chapter 517 required

[5] Even assuming, *arguendo*, Rule 51.06 didn't relate to "timing" as contemplated by § 517.061, Plaintiff invited this error by characterizing it as a "timing" issue. "[I]t is axiomatic that [Plaintiff] may not take advantage of self-invited error or error of his own making." *State v. Wise*, 879 S.W.2d 494, 519 (Mo. banc 1994).

counterclaims to be in writing, it was silent regarding whether a party must assert ordinarily compulsory counterclaims. *Id.* at 888. The defendant argued the compulsory counterclaim rule from 55.32 applied because of this silence, but this Court rejected that argument: "It is inconsistent with the simplified nature of chapter 517 proceedings to apply the use-it-or-lose-it technicality of the compulsory counterclaim rule." *Id.*

Although § 517.061 is silent as to whether a party may file separate motions for change of judge and change of venue, it's "inconsistent with the simplified nature of chapter 517 proceedings to apply the use-it-or-lose-it technicality" that Rule 51.06(a) would require under Plaintiff's interpretation. Rather, § 517.061's purpose was to make it simpler, less formal, and easier for litigants in associate circuit division (many of which lack the benefit of counsel) to obtain a change of judge or venue on short notice. *State ex rel. Acuity v. Thornhill*, 516 S.W.3d 400, 403 (Mo. App. 2017). Ware acted consistent with the simplified and informal nature of cases pending in associate circuit division because Ware asserted in his affirmative defenses that venue was improper long before he applied for a change of judge, Ware move for a change of venue within seven days after applying for a change of judge, and there was no intervening litigation activity between the two that would prejudice Plaintiff. The result achieved (a change of judge followed by a change of venue) is also consistent with the purpose of Rule 51.06(a), which "allows the disqualification of the original judge once and for all." *State ex rel. Davis v. Lewis*, 893 S.W.2d 81, 819 (Mo. banc 1995).

The Court should quash its preliminary writ because § 517.061 "is a law whose provisions displace the otherwise required adherence to" Rule 51.06(a). *Becker Glove*, 41 S.W.3d at 888.

IV. The Court should quash its preliminary writ of mandamus because Ware's timely request for a change of venue means the issue of improper venue wasn't waived by any other action.

Plaintiff argued twice below "that Ware waived his right to request a change of venue under Rule 51.06(a) by not joining the request with his previously granted application for change of judge." *See* Plaintiff's Brief pp. 8, 9. But this argument conflicts with Rule 51.045(a) and confirms § 517.061 is a law whose provisions displace Rule 51.06(a).[6] Under Rule 51.045(a), "[i]f a timely motion to transfer venue is filed, the venue issue is not waived by any other action in the case." Ware's motion for change of judge was timely under § 517.061, as discussed above, so no action taken by Ware, including applying for change of judge separate from moving for a change of venue, could constitute a waiver as Plaintiff argued. Rule 51.045(a). The Court should quash its preliminary writ because Ware's timely request for a change of venue couldn't be waived by a separate request for change of judge. *Id.*

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[6] Rule 51.045 was adopted after Rule 51.06. This Court construes its rules like it does statutes, which means where two rules "covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect. If harmonization is impossible, a chronologically later [rule], which functions in a particular way will prevail over an earlier [rule] of a more general nature, and the latter [rule] will be regarded as an exception to or qualification of the earlier general [rule]." *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009) (internal quotes and citations omitted).

V. The Court should quash its preliminary writ of mandamus because extraordinary writ relief isn't appropriate to transfer a case from the proper venue to an improper one based on an alleged procedural error.

Although a writ of mandamus might be appropriate to correct an erroneous venue ruling that would cause a case to be adjudicated in an improper venue, Plaintiff hasn't identified, and Ware's research hasn't revealed, any cases where this Court or the Court of Appeals has issued an extraordinary writ to move a case from a proper venue to an improper one. *See* Plaintiff's Brief p. 12 (citing two cases where this Court issued permanent writs to retransfer cases erroneously transferred out of proper venues: *State ex rel. Mo. Pub. Serv. Com'n v. Joyce*, 258 S.W.3d 58, 59–60 (Mo. banc 2008); and *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 632 (Mo. banc 2007)).

Plaintiff suggests writ relief is needed to correct the trial court's venue decision. But the justification for granting extraordinary relief is absent here. This Court has granted extraordinary relief because "[i]mproper venue is a fundamental defect," so "a court which acts when venue is not proper has acted in excess of its [authority]." *State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. banc 1985).[7] "Mandamus is the appropriate remedy where 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. Domino's Pizza, Inc. v. Dowd*, 941 SW 2d 663, 664 (Mo. App. 1997) (citing *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994)) (emphasis added).

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[7] In *Kinder*, the Court refers to "jurisdiction" instead of authority. However, Ware understands *Kinder*'s use of "jurisdiction" to refer to a court's "authority." *JCW ex rel. Webb v. Wyciskalla*, 275 SW 3d 249 (Mo. banc 2009).

Here, however, there is no "fundamental defect;" the transferor court moved the litigation ***from an improper venue to a proper venue***. Venue is proper in St. Louis County because Ware has resided in St. Louis County at all relevant times (from execution of the contract through the present). *See* § 508.010.2.

Even if this Court finds the transferor court erroneously granted Ware's change of venue, Plaintiff isn't entitled to "extraordinary relief." Plaintiff alleges the transferor court violated Missouri "rules or statutory procedures;" Plaintiff doesn't claim it would be prejudiced by litigating the case in St. Louis County. But a showing of prejudice is required to warrant reversal on appeal (i.e., "ordinary relief"), so prejudice should be a prerequisite for granting extraordinary relief:

> Procedural rules are but the means through which we seek to ensure the fair and orderly resolution of disputes and to attain just results. They are not ends in themselves. For this reason, we do not generally consider noncompliance with rules or statutory procedures to warrant reversal in the absence of prejudice.

Heintz, 758 S.W.2d at 454. Although the transferor court properly followed procedural rules and legislative enactments, any perceived procedural errors wouldn't warrant extraordinary relief—especially when granting such relief would move a case from a proper venue to an improper one. The preliminary writ should be quashed.

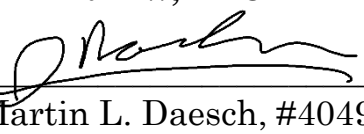
CONCLUSION

Plaintiff's argument violates Rule 51.01 because it requires this Court to construe Rule 51.06 to extend the venue of civil actions, ignores the legislature has provided for rules other than those provided for in the rules of civil procedure, and invites this Court to create unnecessary conflicts with legislative enactments and this Court's own rules. The

transferor court didn't (and couldn't) abuse its discretion in properly applying Missouri's applicable change of venue laws. The transferor court "lacked authority to do anything other than transfer the cause[.]" *Moriarty*, 566 S.W.3d at 244. Plaintiff also hasn't (and can't) meet its burden of alleging and proving it has a clear, unequivocal, and specific right to having the case transferred back to St. Charles County (an uncontested improper venue under § 508.010.2).

The Court should quash the preliminary writ of mandamus issued on September 3, 2019, and allow the case to proceed in St. Louis County (the uncontested proper venue under § 508.010.2).

ONDERLAW, LLC

By: 

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify on February 28, 2020, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all attorneys of record. I also certify this brief complies with Supreme Court Rule 84.06(b) and contains 4,447 words, excluding the cover, certificate of service, certificate of compliance, signature, and appendix, as determined by the Microsoft Word software used to prepare this document.