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IN THE
SUPREME COURT OF MISSOURI

No. SC98222

STATE ex rel. JANSSEN PHARMACEUTICALS, INC., JOHNSON & JOHNSON, and JANSSEN RESEARCH & DEVELOPMENT, LLC,

Relators,

v.

THE HONORABLE MICHAEL NOBLE,

Respondent.

Writ of Prohibition

BRIEF OF RELATORS

BRYAN CAVE LEIGHTON PAISNER LLP
Bettina J. Strauss, #44629
Richard P. Cassetta, #43821
Stefani L. Wittenauer, #63334
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750
Telephone: (314) 259-2000
Facsimile: (314) 259-2020
bjstrauss@bclplaw.com
richard.cassetta@bclplaw.com
stefani.wittenauer@bclplaw.com

Attorneys for Relators
Janssen Pharmaceuticals, Inc.,
Johnson & Johnson, and
Janssen Research & Development, LLC

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JURISDICTIONAL STATEMENT

Upon application of Relators Janssen Pharmaceuticals, Inc., Johnson & Johnson, and Janssen Research & Development, LLC, (hereinafter "Defendants"), this Court issued a Preliminary Writ of Prohibition on February 4, 2020. This Court has jurisdiction to hear this Writ pursuant to Article V § 4.1 of the Missouri Constitution. Relators seek a Permanent Order of Prohibition to prevent the Honorable Michael Noble ("Respondent") from enforcing his Order denying Defendants' motion for reconsideration of motion to dismiss or transfer the claims of the non-St. Louis City Plaintiffs for improper venue, and directing Respondent to take no action with respect to the claims of the non-St. Louis City Plaintiffs—Ryan Shelton and Jacob Simms—other than to transfer them to St. Louis County and Dunklin County, respectively.

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INTRODUCTION

This writ petition raises venue issues that this Court has already decided. Unfortunately, some trial courts continue to refuse to follow this Court's clear mandates, requiring Defendants to resort to the extraordinary writ remedy to enforce established law.

Like other cases for which this Court has addressed venue issues, this is a pharmaceutical product liability case in which dozens of unrelated Plaintiffs with no connection to the City of St. Louis brought their claims with those of a single Plaintiff from the City of St. Louis in an effort to extend venue where it otherwise would not exist had they filed their claims separately.

More than 200 days after Defendants moved to dismiss or transfer the claims of the non-City Plaintiffs for improper venue, the trial court denied the motion, holding that joinder of the non-City Plaintiffs' claims with those of a single City Plaintiff ***created venue*** over the claims of all Plaintiffs. Even after this Court's decisions in *HeplerBroom* and *J&J* clearly mandated that claims of non-City Plaintiffs are not conferred venue by joinder and should be transferred, the trial court refused to so transfer, denying Defendants' motion to reconsider their venue motion.

The trial court's refusal to dismiss or transfer the claims of the non-City Plaintiffs for improper venue constitutes an abuse of discretion

for two separate reasons, each of which independently compels issuance of a permanent writ. ***First***, the trial court abused its discretion by refusing to deem Defendants' venue motion granted when that motion was not denied within 90 days of filing, as required by Section 508.010.10, R.S.Mo. and this Court's decision in *HeplerBroom*. ***Second***, the trial court abused its discretion by holding that permissive joinder of claims can confer venue, in direct contravention of this Court, which expressly held it cannot.

Given the opportunity by this Court to correct these errors by setting aside his Order and transferring the claims of the non-City Plaintiffs, the trial court instead filed a written return in this Court repeatedly claiming that *J&J* "was incorrectly decided." But disagreement with this Court's rulings is not a basis for the circuit court to act in contravention of Missouri law. This Court's pronouncement of the meaning of Missouri's venue statutes and rules are not mere suggestions to be followed only by trial courts that agree with them. A cohesive and fair justice system in Missouri requires that trial courts—in ***every*** circuit—adhere to binding precedent. The Court should make the preliminary writ permanent to correct the trial court's manifest errors and make clear that Missouri law must be followed in ***all*** circuit courts.

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STATEMENT OF FACTS

A. Plaintiffs' Petition Joined the Claims of 68 Plaintiffs from 26 States.

The underlying lawsuit was filed in the Circuit Court for the City of St. Louis on May 8, 2015. (Appendix ("A") 13-81.) It was removed to the Eastern District of Missouri on July 19, 2017, and remanded on October 5, 2017. (A1.) In the initial action, 68 Plaintiffs from 26 different states sought recovery against Defendants for alleged physical and economic injuries as a result of taking the FDA-approved prescription medicine Risperdal. (A20-54.)[1]

Only one Plaintiff, Treyvon Johnson, alleged he was injured in the City of St. Louis. (A20-21.) All the other Plaintiffs alleged first injury in other states or other counties in Missouri: specifically, 55 plaintiffs alleged injury in other states, and two Missouri Plaintiffs, Jacob Simms and Ryan Shelton, alleged injury in Dunklin County and St. Louis County, respectively. (A21-54, 392, 395, 405-06, 412.)

B. Defendants' Venue Motion Was Denied More Than 90 Days After it Was Filed.

On June 19, 2015, Defendants timely moved the trial court to dismiss the claims of the non-St. Louis City Plaintiffs for improper venue and on *forum non conveniens* grounds, or in the alternative to transfer

[1] Ten Plaintiffs voluntarily dismissed their claims on July 24, 2015. (A248-97.)

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their claims to proper venues. (A82-141.) The parties did not waive the 90-day period set forth in Section 508.010.10, R.S.Mo.[2] (A446.)

On February 11, 2016—237 days after it was filed—the trial court (Judge David Dowd) denied Defendants' motion, holding that the claims of the sole City Plaintiff, Treyvon Johnson, rendered the City of St. Louis a proper venue for all plaintiffs' claims. (A298-313.)[3]

C. This Court's *HeplerBroom* and *J&J* Decisions Clearly Directed that the Non-City Plaintiffs' Claims Should Be Transferred.

On January 29, 2019, this Court issued its Opinion in *State ex rel. HeplerBroom, LLC v. Moriarty*, 566 S.W.3d 240 (Mo. banc 2019) ("*HeplerBroom*"), holding unequivocally that the 90-day rule set forth in R.S.Mo. § 508.010.10 is non-discretionary and that a court that does not rule on a defendant's motion to transfer within 90 days of filing "lack[s] authority to do anything other than transfer the cause." *Id.* at 244 (A443.) Two weeks later, this Court issued its Opinion in *State ex rel. Johnson & Johnson v. Burlison*, 567 S.W.3d 168 (Mo. banc 2019) ("*J&J*"), reiterating Rule 51.01's mandate that permissive joinder of a plaintiff's

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[2] Unless otherwise noted, all statutory references are to R.S.Mo. 2014, the version of the venue statute in effect at the time Plaintiffs filed the instant case and at the time of the trial court's Order that is the subject of this writ petition.

[3] Judge Dowd also denied Defendants' motion to dismiss the claims of the out-of-state Plaintiffs for lack of personal jurisdiction.

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claims "cannot extend venue to a county where [that plaintiff's] claims could not otherwise be brought and pursued." *Id.* at 175 (A427)

D. The Trial Court Denied Defendants' Motion to Reconsider Its Venue Ruling.

In light of these controlling opinions, on April 9, 2019, Defendants moved the trial court (Respondent Judge Michael Noble) to reconsider the ruling denying their Motion to Dismiss or Transfer for Improper Venue. (A358-65.) The motion was called, heard, and submitted on May 13, 2019. (A390-414.)[4]

On July 31, 2019, the trial court denied Defendants' motion to reconsider. (A415-18.)[5] In a four-page order, the trial court held, in relevant part:

- The 90-day rule set forth in R.S.Mo. §508.010.10 and *HeplerBroom* did not apply because Defendants' venue motion was not noticed for hearing within 90 days of filing. (A416-17.)
- *J&J* did not apply because no individual Plaintiff's claims had been separated out for trial. (A417-18.)

[4] Defendants also renewed their challenge to personal jurisdiction for the out-of-state Plaintiffs, but the trial court declined to hear and rule on that motion at Plaintiffs' request.

[5] Although the Order contains a file-stamp for July 30, 2019, it was signed by the court on July 31, 2019, and the docket reflects that the order date is July 31, 2019. (A9.)

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E. The Out-of-State Plaintiffs Withdrew Their Opposition to Defendants' Motion to Reconsider and Consented to Transfer, But Non-City Plaintiffs Remain in the Case.

On September 3, 2019, this Court issued a preliminary writ in a similar case (*State ex rel. Monsanto Co. v. Hon. Michael K. Mullen*, Case No. SC98009) in which the Court stayed a trial as to all plaintiffs except the one plaintiff who alleged first injury in the City of St. Louis.[6] Following the issuance of that preliminary writ, on October 3, 2019, the 55 out-of-state Plaintiffs in the instant case voluntarily withdrew their opposition to Defendants' motion to reconsider the trial court's venue ruling and consented to transfer of their claims to St. Louis County, where Defendant Janssen's registered agent is located. (A419-21.)

However, two Missouri Plaintiffs with no connection to the City of St. Louis—Ryan Shelton and Angela Simms (as next friend for Jacob Simms)—still remain in the case in the City of St. Louis Circuit Court, along with the single St. Louis City plaintiff, Treyvon Johnson. Ryan Shelton alleges that he is a resident of and was first injured in St. Louis County, while Jacob Simms alleges he is a resident of and was first

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[6] The day after this Court issued its preliminary writ in *State ex rel. Monsanto*, the plaintiffs in that case voluntarily moved to transfer the non-City plaintiffs to St. Louis County, effectively mooting the writ. *See Winston v. Monsanto Co.*, Case. No. 1822-CC00515, Pls.' Withdrawal of Opp'n to Monsanto Co.'s Renewed Mot. to Transfer (filed Sept. 4, 2019).

injured in Dunklin County. (A21-54, 392-93, 395, 405-06, 412.)[7]

On October 11, 2019, Defendants filed a writ petition in the Missouri Court of Appeals, Eastern District, challenging the trial court's refusal to transfer the claims of Plaintiffs Shelton and Simms. After denial of that writ petition (A422), Defendants filed their writ petition in this Court, and this Court issued a preliminary writ of prohibition on February 4, 2020.

[7] The parties have engaged in limited written discovery to date. No depositions have occurred and no trial date is presently set.

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POINTS RELIED ON

I. DEFENDANTS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO TRANSFER PLAINTIFFS' CLAIMS PURSUANT TO THE 90-DAY RULE SET FORTH IN SECTION 508.010.

- Section 508.010.10, R.S.Mo. (2014)
- *State ex rel. HeplerBroom, LLC v. Moriarty*, 566 S.W.3d 240 (Mo. banc 2019)

II. DEFENDANTS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION BECAUSE THE CITY OF ST. LOUIS IS NOT A PROPER VENUE FOR THE CLAIMS OF PLAINTIFFS SHELTON AND SIMMS PURSUANT TO SECTION 508.010 IN THAT RULE 51.01 PROHIBITS JOINDER FROM ALTERING THE VENUE ANALYSIS.

- Section 508.010.4, R.S.Mo. (2014)
- Rule 51.01, Missouri Rules of Civil Procedure
- *State ex rel. Johnson & Johnson v. Burlison*, 567 S.W.3d 168, 175 (Mo. banc 2019)

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STANDARD OF REVIEW

"The standard of review for writs of mandamus and prohibition, including those pertaining to motions to transfer venue, is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes." *State ex rel. Hollins v. Pritchett*, 395 S.W.3d 600, 602 (Mo. App. 2013) (quoting *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007)).

Writs of mandamus and prohibition are appropriate "to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *State ex rel. Bannister v. Goldman*, 265 S.W.3d 280, 283 (Mo. App. 2008). This Court "has repeatedly held that 'prohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.'" *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 860 (Mo. banc 2008) (citation omitted).

Thus, this Court has recognized previously that an extraordinary writ is the most appropriate way to correct a trial court's improper venue ruling. *State ex rel. Kansas City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. banc 2009); *State ex rel. Kinsey v. Wilkins*, 394 S.W.3d 446, 448 (Mo. App. 2013); *Barron v. Abbott Labs., Inc.*, 529 S.W.3d 795, 799 n.6 (Mo. banc. 2017) ("[T]he difficulty in showing prejudice on appeal is why

these types of claims are better raised in the pretrial writ context, which requires no showing of prejudice.").

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ARGUMENT

I. DEFENDANTS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO TRANSFER PLAINTIFFS' CLAIMS PURSUANT TO THE 90-DAY RULE SET FORTH IN SECTION 508.010.

The 90-day rule set forth in Section 508.010.10 is dispositive and compels issuance of a permanent writ. That rule is both clear and non-discretionary, and Respondent's refusal to follow it constitutes an abuse of discretion.

Section 508.010.10, R.S.Mo. (A446) unequivocally states:

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

(Emphasis added.)

As detailed above, on June 19, 2015, Defendants filed a motion to dismiss or transfer the claims of all Plaintiffs except Treyvon Johnson for improper venue. (A82-141.) The trial court did not deny the motion within 90 days of its filing and the parties did not agree, in writing or otherwise, to waive the 90-day period. Nonetheless, 237 days after Defendants' motion was filed, the trial court denied it. (A298-313.)

Last year, in another writ proceeding, this Court made clear that

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Section 508.010.10 is non-discretionary and that a circuit court's failure to rule on a motion to transfer venue within the 90-day statutory period results in the motion being deemed granted. *See HeplerBroom*, 566 S.W.3d at 244. (A443) This Court further held that when a circuit court does not rule on a venue motion within 90 days of filing, it "lack[s] authority to do anything other than transfer the cause." *Id.*

Shortly after that Opinion was issued, Defendants moved the circuit court to reconsider their motion to dismiss or transfer for improper venue because the court's denial of that motion more than 90 days after its filing violated Section 508.010.10. (A358-65.) After briefing and oral argument, the trial court denied the motion to reconsider on July 31, 2019—113 days after its filing. (A415-18.)[8]

[8] In their opposition to Defendant's writ petition in the Court of Appeals, Plaintiffs made the specious argument that the removal and remand of this case in 2017 rendered Defendants' venue motion "moot." That argument fails for several separate reasons. ***First***, at the time of removal, Defendants' motion to transfer venue had already been ruled upon; it was not a pending motion that could be rendered moot. ***Second***, the removal of an action does not alter the state court pleadings. *See Williams v. St. Joe Minerals Corp.*, 639 S.W.2d 192, 195 (Mo. App. 1982) ("Failure to refile a pleading after remand is not fatal to a state court ruling on the pleading."). ***Third***, Rule 51.045(a)(2) explicitly states that "[i]f a timely motion to transfer venue is filed, the venue issue is not waived by any other action in the case." ***Fourth***, Plaintiffs ignore that ***following*** remand, Defendants filed a Motion to Reconsider the Motion to Transfer, which the court again did not deny within 90 days. (A9-10.)

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In denying Defendants' motion, the trial court's Order essentially re-wrote Section 508.010 to add a hearing requirement that was not enacted by the legislature and does not exist anywhere in the statute. Specifically, the Order concluded that Section 508.010.10, and this Court's holding in *HeplerBroom*, do not require transfer in this case because Defendants' original venue motion "was not noticed for hearing and argued to the Court with[in] the ninety day requirement of §508.010.10," and thus, "[b]ecause there was no hearing within the ninety days of the motion's filing, there was no opportunity for the court to deny the motion within that time." (A416-17.)

The legislature did not include in the statute a condition precedent of a hearing. Rather, the statute plainly and unequivocally states that a motion based on improper venue "**shall be deemed granted** if not denied within ninety days of filing." §508.010.10, R.S.Mo. (A446) (emphasis added.) The trial court's Order interpreting the statute to insert a hearing requirement has no legal support. *See Macon Cty. Emergency Svcs. Bd. v. Macon Cty. Comm'n*, 485 S.W.3d 353, 356 (Mo. banc 2016) ("The Court will not add words to a statute under the auspice of statutory construction."); *State v. Vaughn*, 366 S.W.3d 513, 518 (Mo. banc 2012) (same, quoting *Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002)); *see also State ex rel. Stinson v. House*, 316

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S.W.3d 915, 919 (Mo. banc 2010) ("This Court must give effect to statutes as they are written.").

As supposed support for its decision, the trial court's Order refers to certain local rules (A416) it claims *require* that motions be noticed within a certain time period, but the Circuit Court for the City of St. Louis has no such local rule. Instead, the local rules referenced in the Order merely state which judge hears motions (L.R. 33.7.2) and that a hearing cannot occur without five days' notice of same (L.R. 44.01(d)). In other words, Defendants did not violate any local rules.[9] Moreover, there was nothing preventing Plaintiffs' counsel from noticing the motion for hearing (or seeking waiver of the 90-day rule), nor was there anything preventing the trial court from setting a hearing on the motion or ruling on it without hearing.

Defendants' motion to dismiss or transfer for improper venue was not denied within 90 days of filing, and the 90-day period was not waived by the parties. As a result, the trial court lacked authority to do anything other than transfer the claims of the non-City Plaintiffs, and its refusal to do so was an abuse of discretion.

[9] In any event, a local rule cannot displace a statutory requirement. *See, e.g.*, *Jones v. City of Kan. City*, 569 S.W.3d 42, 61 (Mo. App. 2019).

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II. DEFENDANTS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION BECAUSE THE CITY OF ST. LOUIS IS NOT A PROPER VENUE FOR THE CLAIMS OF PLAINTIFFS SHELTON AND SIMMS PURSUANT TO SECTION 508.010 IN THAT RULE 51.01 PROHIBITS JOINDER FROM ALTERING THE VENUE ANALYSIS.

The non-discretionary 90-day rule is dispositive and requires that the preliminary writ be made permanent. Thus, this Court need not consider or address the additional issue of the interplay between joinder and venue. However, because the trial court's Order addressed and ruled on that issue, and because that ruling also constituted an abuse of discretion, Defendants include it here for completeness and as an alternative basis for relief.

A. *J&J* Affirms That Rule 51.01 Means What it Says.

In another venue decision issued last year, *J&J*, this Court unequivocally confirmed that plaintiffs cannot use permissive joinder as a means to file their cases in a venue where they could not file their own individual cases. The trial court's Order held the opposite in direct contradiction of the plain language of Rule 51.01, Missouri's venue statute, and this Court's unequivocal decision in *J&J*.

Rule 51.01 provides that "[t]hese Rules shall not be construed to **extend** or limit the jurisdiction of the courts of Missouri, or **the venue of**

civil actions therein." (A448) (emphasis added.) Rule 52.05(a), which allows for permissive joinder, is a rule of civil procedure. Thus, under the plain terms of Rule 51.01, plaintiffs cannot use permissive joinder to extend venue.

In *J&J*, this Court confirmed that Rule 51.01 means exactly what it says. In that case, plaintiff Michael Blaes alleged that his wife was first exposed to a toxic substance in St. Louis County. Pursuant to Rule 52.05, he joined his claim with the claims of a plaintiff who alleged first injury in the City of St. Louis. The trial court held that venue for Blaes' claim in the City was proper because it was joined with the City plaintiff's claim. 567 S.W.3d at 170 (A425.)

This Court issued a permanent writ of prohibition, holding that venue for ***each*** plaintiff's claims must be determined ***separately***, and because Blaes' "wife was first injured in St. Louis County . . . , venue [was] only proper in St. Louis County." *Id.* at 173 (A426.) This Court further held that "joinder of [Blaes'] claims in the petition with the other plaintiffs' claims . . . cannot establish venue in St. Louis city or any other county in Missouri." *Id.* Any other holding would be "contrary to the express provisions of Rule 51.01." *Id.* Accordingly, this Court concluded:

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> What Rule 51.01 and the holding in *Turnbough* make clear is ***joinder of Blaes' claims with the other claims alleged in the petition cannot extend venue to a county where Blaes' claims could not otherwise be brought and pursued.*** Because Blaes' wife was first injured in St. Louis County, § 508.010.4 dictates the proper venue for Blaes' claims is St. Louis County. The city of St. Louis is an improper venue for Blaes to pursue his claims.

567 S.W.3d at 175 (A427) (emphasis added.)

This Court's holding in *J&J* was grounded in Rule 51.01's prohibition against the use of permissive joinder to extend venue:

> Pursuant to § 508.010.4, venue is only proper in St. Louis County for Blaes' independent, separate claims against Relators, and ***joinder of his claims in the petition with the other plaintiffs' claims as authorized by Rule 52.05(a) cannot establish venue in St. Louis city or any other county in Missouri***. To hold otherwise would mean, contrary to the express provisions of Rule 51.01, venue would be established by means of Rule 52.05(a) when it would not have existed without such joinder.

Id. at 173 (A426) (emphasis added.)

This case is identical in all relevant respects to *J&J*. Here, multiple Plaintiffs allege they were injured by Defendants, but only one Plaintiff, Treyvon Johnson, alleges first injury in the City of St. Louis. Here, like in *J&J*, the other two Missouri plaintiffs (Shelton and Simms) predicate venue for their claims in the City of St. Louis on joinder with the claims of the one City plaintiff. As this Court recognized, "[t]his is a clear and direct violation of the express language of Rule 51.01," and venue must

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be evaluated independently for each plaintiff's claims. *J&J*, 567 S.W.3d at 174. (A427.)

When venue is evaluated independently for each plaintiff's claims, Treyvon Johnson is the only Plaintiff whose claims are properly venued in the City of St. Louis. The proper venue for the two remaining Plaintiffs is the county where each was first injured.[10] §508.010.4, R.S.Mo. (A446) ("Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the state of Missouri venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action."). Indeed, Respondent's written return to Defendants' writ petition plainly ***admits*** that "***venue would not have existed in the City of St. Louis as to the claims of Plaintiff Ryan Shelton and Plaintiff Jacob Simms . . . absent joinder with the Plaintiff from the City of St. Louis***." Return at 2 (emphasis added.) This undisputed fact required transfer of the claims of Plaintiffs Shelton and Simms and compels issuance of a permanent writ of prohibition.

B. Rule 51.01 and *J&J* Mandate Transfer Here, and the Trial Court Was Required to Follow Them.

The trial court's refusal to determine venue separately for each

[10] Ryan Shelton and Jacob Simms allege first injury in St. Louis County and Dunklin County, respectively. (A21-54, 392-93, 395, 405-06, 412.)

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Plaintiff ignores and violates Rule 51.01, §508.010 R.S.Mo., and this Court's clear mandates in *J&J*. The law is both directly applicable and binding, and the trial court's attempts to evade it are improper.

1. Rule 51.01 Does Not Apply *Only* When Claims Are Designated for Separate Trial.

The trial court's Order strained to distinguish this Court's holding in *J&J* by focusing on the fact that there, plaintiff Blaes' claim was designated for a separate trial. (A417) ("the designation for a separate trial is [a] critical fact distinguishing" *J&J*). But the *J&J* decision was not based on the fact that Blaes' claims had been designated for a separate trial, and there is not a single sentence in the decision supporting the trial court's conclusion that separation for trial is a factor to be considered in determining the propriety of venue. Indeed, the first substantive sentence in the Opinion specifically makes clear that its holding unequivocally applies to the issue of permissive joinder not separation for trial:

> The central issue in this case is whether permissive joinder of separate claims may extend venue to a county when, absent joinder, venue in that county would not otherwise be proper for each claim. ***It cannot and does not.***

567 S.W.3d at 171 (A426) (emphasis added.)

J&J is firmly rooted in the conclusion that Rule 51.01 does not permit plaintiffs to use permissive joinder to extend venue where it would

not otherwise exist. That point is made repeatedly throughout this Court's majority Opinion:

- "[J]oinder of [Blaes'] claims in the petition with the other plaintiffs' claims . . . cannot establish venue in St. Louis city or any other county in Missouri." Any other holding would be "contrary to the express provisions of Rule 51.01." *Id.* at 173 (A426.)

- "[T]he only basis for venue in St. Louis city is joinder of Blaes' claims with Swann's individual, separate claims pursuant to Rule 52.05(a). This is a clear and direct violation of the express language of Rule 51.01 . . . ." *Id.* at 174 (A427.)

- "Whether joinder is justified by Rule 52.05 (parties), Rule 52.06 (claims), or any other court rule, Rule 51.01 prohibits extending venue, beyond statutory venue constraints, . . . and it does not matter if the separate claims were brought by multiple plaintiffs against a single defendant . . . ." *Id.* at 174 (A427.)

Judge Wilson's dissent in *J&J* underscores that the majority opinion was not based on the designation of Blaes' claim for a separate trial. In his concurring opinion in *Barron*, Judge Wilson opined that a separate venue determination for joined claims should be required only upon severance of a joined claim after it has been set for a separate trial. *Barron*, 529 S.W.3d at 802-04 (J. Wilson, concurring). Notably, Judge Wilson recognized in his *J&J* dissent that the majority ***did not*** adopt the approach he advocated, which would have turned on whether a claim was designated for separate trial. Rather, he plainly acknowledged that "[t]oday . . . ***the Court holds that no plaintiff or claim can be joined***

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with any other plaintiff or claim unless venue can be established independently for each claim." *J&J*, 567 S.W.3d at 183 (A432) (Wilson, J., dissenting) (emphasis added.) And he further characterized the majority opinion to hold that: "[P]roperly joined plaintiffs under the first sentence of Rule 52.05(a) nevertheless must independently establish venue for each of their joined claims." *Id.* at 184 (A433.)

The trial court's Order provides no support for its conclusion and does not even mention Rule 51.01. The reason is obvious—there is no way to justify the Order's departure from the clear mandates of Rule 51.01 and *J&J*. Indeed, Respondent's written return to Defendants' writ petition repeatedly professed that this Court "incorrectly decided" *J&J*. *See* Return at 2, 4, 8, 14-19. But a trial court is not free to ignore Missouri law announced by this Court with which it disagrees. The clear, binding law requires the trial court to apply this Court's rulings and independently assess venue for each Plaintiff's claims which mandate transfer of the claims of all plaintiffs except Treyvon Johnson.

2. Post-Order Changes to Missouri's Venue Statutes Have No Effect Here and Cannot Provide a Basis for the Trial Court's Order, Which Constituted an Abuse of Discretion When Issued.

The Order that is the subject of this writ petition was issued on July 31, 2019 and it reconsidered an order issued in 2016. (A298-313, A415-418.) The Order purported to apply *J&J* and Missouri's venue

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statute as it existed at that time, and the trial court had no authority other than to transfer the claims of Plaintiffs Shelton and Simms for the reasons stated above.

On August 28, 2019—***after*** the trial court issued its Order—certain new venue statutes took effect in Missouri. One such statute was §508.013, R.S.Mo. (2019), which provided limited exceptions to the applicability of the 2019 venue statutes for certain plaintiffs with pending claims. Respondent's written return to the writ petition claims, for the first time, that "§508.013 dictates the claims of Plaintiffs Shelton and Simms remain in the City of St. Louis . . . ." Return at 19.

This *post-hoc* argument fails for at least two reasons. First, Section 508.013 took effect on August 28, 2019. It was not in effect at the time of the trial court's Order and was not a basis for that Order. (A415-418.) Indeed, the trial court's Order did not rely on or mention the new venue statute but instead ruled on the basis of an incorrect interpretation of Rule 51.01 and *J&J*. Statutory provisions post-dating the trial court's Order have no bearing on whether that Order was proper when issued and should not be considered.

Second, even if the 2019 revisions to the venue statute were at all relevant to this writ petition (they are not), it would not change the result because the 2019 revisions did not alter the 90-day rule set forth in

Section 508.010.10. The 2014 and 2019 versions of that section are identical:

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

§508.010.10, R.S.Mo. (2014) (A446); §508.010.10, R.S.Mo. (2019). Thus, even under this new, unsupported argument about the new venue statute, the trial court "lacked authority to do anything other than transfer the cause" under Section 508.010.10. *See HeplerBroom*, 566 S.W. at 244. (A443.)

* * *

In summary, Respondent admits that "venue would not have existed in the City of St. Louis as to the claims of Plaintiff Ryan Shelton and Plaintiff Jacob Simms . . . absent joinder with the Plaintiff from the City of St. Louis." Return at 2. This admission is dispositive and requires transfer of those Plaintiffs' claims pursuant to the plain dictates of Rule 51.01 and this Court's Opinion in *J&J*, which represents binding precedent and is not optional for the City of St. Louis courts.

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CONCLUSION

Because the trial court abused its discretion in refusing to transfer the claims of the non-City of St. Louis Plaintiffs, and because the City of St. Louis is not a proper venue for those Plaintiffs' claims under the venue rules, statutes, and this Court's clear mandates, this Court should make the preliminary writ permanent.

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

By: */s/ Bettina J. Strauss*

Bettina J. Strauss, #44629
Richard P. Cassetta, #43821
Stefani L. Wittenauer, #63334
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750
Telephone: (314) 259-2000
Facsimile: (314) 259-2020
bjstrauss@bclplaw.com
richard.cassetta@bclplaw.com
stefani.wittenauer@bclplaw.com

Attorneys for Relators
Janssen Pharmaceuticals, Inc.,
Johnson & Johnson, and
Janssen Research & Development, LLC

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this brief complies with Rule 55.03 and the length limitations contained in Rule 84.06(b) in that there are 5,689 words in the brief (excluding the cover, signature block, certificate of service, and certificate of compliance) according to the word count of the Microsoft Word word-processing system used to prepare the brief.

/s/ Bettina J. Strauss

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 6, 2020, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the court's electronic filing system on all counsel of record.

/s/ Bettina J. Strauss