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.

Circuit Court of the City of St. Louis, Missouri
Case Number 1522-CC01010-01
The Honorable Michael Noble

RESPONDENT'S BRIEF

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INTRODUCTION

Relators paint the issues presented with a broad brush, claiming they have been addressed in *State ex rel. HeplerBroom v. Moriarty* ("*HeplerBroom*") and *State ex rel. Johnson & Johnson et al. v. Burlison* ("*J&J*") and Respondent's ruling is a departure from precedent. The reality is the issues presented are narrow and novel. Those issues, properly framed, are: (1) does the trial court have to be given an opportunity to rule on a venue motion within 90 days of filing? And (2) does the Legislature's edict after *HeplerBroom* and *J&J* dictate the two Missouri citizens' claims remain joined with their City of St. Louis brethren? Respondent submits both questions are properly answered in the affirmative and dispositive.

First, *HeplerBroom* is distinct from the procedural posture there because the trial court in *HeplerBroom* was given an opportunity to rule before the expiration of the 90 days set forth by R.S.Mo. § 508.010.10.[1] In *HeplerBroom*, there was a hearing, the court was on actual notice of the pendency of the motion, and it could have made an informed decision on the merits before the prescribed period expired. Here, Relators did not call up their motion within 90 days and no hearing took place within that time. It would be absurd and unreasonable to interpret the Legislature's intent behind the language of R.S.Mo. § 508.010.10 to apply an irrational, unconstitutional "gotcha" standard to the actions or inactions of the trial court in favor of an improper venue.

[1] The language of R.S.Mo. § 508.010.10 (2014) remains the same in the amended R.S.Mo. § 508.010.10 (2019). Further, all statutory references herein are to Section 508.010 (2019) unless otherwise specified.

Second, after *HeplerBroom* and *J&J*, the Legislature clarified that plaintiffs, situated like the two non-St. Louis City Plaintiffs are here, remain in the venue of filing, despite the application of R.S.Mo. § 508.010. The qualifying criteria are: (1) the plaintiff is a Missouri resident; (2) the court has jurisdiction; (3) the case is pending in state court as of February 13, 2019; and (4) the case had been set before February 13, 2019, for a trial date beginning by August 28, 2019. *Id*. All four are met, so regardless of the application of *HeplerBroom* and *J&J*, the motion to transfer was properly denied.

As an additional point, Respondent asserts the *J&J* decision turned on the fact the trial court had determined the underlying plaintiff's claim was to be tried separately. The trial court retains discretion to deny a motion to sever and transfer where there are continuing gains to be had in efficiency or expeditiousness. Alternatively, Respondent respectfully submits *J&J* was wrongly decided and the proper analysis is that of the dissenting opinion(s).

The Preliminary Writ should be quashed.

STATEMENT OF FACTS

Relators' Statement of Facts omits that while their motion to dismiss or transfer based on improper venue was filed on June 19, 2015, Relators did not file a Notice of Hearing on the motion until November 23, 2015, for a hearing on the motion that took place before The Honorable David Dowd on December 10, 2015, outside of 90 days of filing. (Relators' Appendix ("Rel. A") 3).

POINTS RELIED ON

I. RESPONDENT CORRECTLY FOUND SECTION 508.010 INHERENTLY CONTEMPLATES THE COURT HAVING AN OPPORTUNITY TO MAKE AN INFORMED RULING.

a. Interpreting Section 508.010.10 Providing the Motion "shall be deemed granted" as Divesting the Trial Court of All Discretionary Authority Raises Grave and Doubtful Constitutional Questions.

b. Construing Section 508.010.10 to Inherently Contemplate a Hearing is both Constitutional and Harmonious with *HeplerBroom*.

c. The Provision of Section 508.010.10 that the Parties May Agree to Waive the 90 Day Requirement is Immaterial to Construing the Statute.

II. THE GENERAL ASSEMBLY CLEARLY EXPRESSED ITS INTENT TO AVOID APPLICATION OF *STATE EX REL. HEPLERBROOM V. MORIARTY* AND *STATE EX REL. JOHNSON & JOHNSON V. BURLISON* WHEN, LIKE IN PLAINTIFFS' CASE, THE CASE WAS FILED BEFORE FEBRUARY 13, 2019, AND SET FOR TRIAL BEFORE AUGUST 28, 2019.

III. *STATE EX REL. JOHNSON & JOHNSON V. BURLISON* DOES NOT DEMAND THE SEVERANCE AND TRANSFER OF PROPERLY-JOINED CLAIMS THAT AREN'T DESIGNATED FOR SEPARATE TRIALS.

ARGUMENT

I. RESPONDENT CORRECTLY FOUND SECTION 508.010 INHERENTLY CONTEMPLATES THE COURT HAVING AN OPPORTUNITY TO MAKE AN INFORMED RULING.

Unlike *HeplerBroom*, Relators' venue motion was never set for hearing or argued before the trial court until the 90-day statutory period had expired.[2] (Rel. A3-5). At issue are the implications of interpreting R.S.Mo. § 508.010.10 to remove all discretion from the trial court where it was not given an opportunity to hear the motion, inform itself of the merits, and rule within 90 days.

Relators' argument that R.S.Mo. § 508.010.10 creates a categorical rule automatically demanding transfer absent written waiver if not ruled on in 90 days would create an absurd result, and an unconstitutional one at that.[3] (*See* Relators' Brief at 17-20). A categorical rule was not the Legislature's intent.

Section 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 of the motion unless such time period is waived in writing by all parties.

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[2] Relators' motion to dismiss or transfer based on improper venue was filed on June 19, 2015. (Rel. A5). Relators filed a Notice of Hearing on November 23, 2015, and the trial court held a hearing on the motion December 10, 2015. (Rel. A3). In *HeplerBroom*, the motion to transfer was filed on October 6, 2017, and the court conducted a hearing on November 28, 2017, within 90 days of filing. *See State ex rel. HeplerBroom, LLC, v. Moriarty*, 566 S.W.3d 240, 242 (Mo. banc 2019).

[3] Respondent's Order did not determine R.S.Mo. § 508.010.10 is unconstitutional as written. Rather, an interpretation inconsistent with that of Respondent would be an absurd, unconstitutional reading of the statute, violative of the separation of powers provision of Missouri Constitution Article II § 1.

It is silent on a hearing taking place to allow the trial court to inform itself of the merits and rule on the motion. *Id*. While silent, the Legislature could not have constitutionally intended on depriving the trial court from making an informed ruling on the merits of a motion. Nor could the Legislature have intended on its legislation being interpreted to produce absurd results. Relators' construction is both unconstitutional and absurd.

To analyze R.S.Mo. § 508.010.10, it can be broken down into three parts. The first part indicates to which motion the Subsection applies, that being "[a]ll motions to dismiss or to transfer based upon a claim of improper venue…" Interpretation of this language is not in dispute.

Part two speaks to the obligation of the trial court: the motion "shall be deemed granted [by the court] if not denied within ninety days of filing of the motion…" *Id*. This is an improper, unconstitutional directive to the trial Court, in violation of the separation of powers provision of Missouri Constitution Article II § 1, if construed to void all discretion of the trial court beyond 90 days under any circumstance. Such an interpretation would yield absurd results and usurp the broad discretion of the trial court to administer its docket. It would also violate the Local Rule of the 22nd Judicial Circuit providing motions "*shall be heard*," which dictates a ruling will not take place automatically on the pleadings alone; the onus is on the movant to call up the motion and a failure of the movant to call up a venue motion within 90 days should be treated as a denial by the court and/or an abandonment by the movant. L.R. 33.7.2. These problems are considered and alleviated by construing the statute to anticipate the trial court actually hearing the motion.

The third and final part of the Subsection provides an exception, "unless such time period is waived in writing by all parties." *Id*. This is immaterial; it does nothing to cure the problems with Relators' construction. There is no obligation a party waive the time period. And the exception does not provide the court a relief valve that prevents what would otherwise be a legislative trampling of its authority. The problems with Relators' construction lie in employing an unyielding directive to the trial court on how it must handle its docket and rule, not on what the statute allows the parties to do.

The Preliminary Writ of Prohibition should be quashed.

A. Interpreting Section 508.010.10 Providing the Motion "shall be deemed granted" as Divesting the Trial Court of All Discretionary Authority Raises Grave and Doubtful Constitutional Questions.

Section 508.010.10's provision the venue motion "shall be deemed granted" is an improper directive to the trial court if construed to remove all discretion beyond the 90 days where the trial court has not been given an opportunity to rule.

Missouri Constitution Article II § 1 provides:

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

(Respondent's Appendix ("Resp. A") 4). The General Assembly cannot "appropriat[e] authority to encroach on powers vested solely in the separate, coequal branches of government" because "the separation of powers doctrine is fundamentally vital to our form of government." *Rebman v. Parson*, 576 S.W.3d 605, 609 (Mo. banc 2019) (internal

quotations omitted). It is axiomatic only the trial court can grant a motion directed to the trial court; the Legislature cannot rule on a motion by self-appointed proxy through legislation.

Under the doctrine of constitutional avoidance, when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." *Harris v. United States*, 536 U.S. 545, 555, 122 S. Ct. 2406, 2413, 153 L. Ed. 2d 524 (2002), overruled on other grounds by *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). This Court has recognized there is a duty to invoke the doctrine not only where one interpretation raises "grave and doubtful constitutional questions" but also where one interpretation would be unconstitutional. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. banc 1991); *see also Doe v. St. Louis Cmty. Coll.*, 526 S.W.3d 329, 345 (Mo. App. 2017) ("We acknowledge that this Court has a duty to interpret the Regulation in a way that does not violate the Constitution if such an interpretation is plausible.").

In interpreting Section 508.010.10, it must be presumed the Legislature did not rule on the merits of motions on behalf of the trial court where the court has not had an opportunity to rule. A construction interfering with the opportunity to rule would raise "grave and doubtful constitutional questions," and this Court must avoid such interpretation.

Respondent does not believe the General Assembly drafted R.S.Mo. § 508.010.10 with intent to impermissibly usurp Missouri courts' judicial powers. The Preliminary Writ should be quashed.

B. Construing Section 508.010.10 to Inherently Contemplate a Hearing is both Constitutional and Harmonious with *HeplerBroom*.

A common sense construction of Section 508.010.10 inherently contemplating the trial court having an opportunity to hear the venue motion within 90 days is: (1) harmonious with *HeplerBroom*; (2) does not raise constitutional separation of powers concerns; (3) follows the trial court's broad discretion to administer its docket and the Local Rules of the City of St. Louis, and (4) avoids absurd and unreasonable results.

The crucial difference between *HeplerBroom* and the case *sub judice* is the trial court in *HeplerBroom* heard the venue motion within 90 days of filing and had an opportunity to make an informed ruling. *HeplerBroom*, 566 S.W.3d at 242. Where a Court is given the opportunity to rule within 90 days and did not do so, it can be presumed it deliberately did not to do so as a matter of choice. In other words, the court had an opportunity to rule, giving rise to a presumption the trial court intended to adopt a finding on the merits by default as prescribed by statute, thereby relieving all constitutional concerns associated with the Legislature usurping the authority of the court.

And this logical interpretation of Section 508.010.10 follows the notion the trial court is vested with broad discretion in controlling its docket. *Nixon v. Director of Revenue*, 883 S.W.2d 945, 946 (Mo. App. 1994). Forcing a trial court to rule within 90 days on an unnoticed motion interferes with that broad discretion.

To that end, Local Rule 33.7.2 of the Twenty-Second Judicial Circuit provides "[a]ll other pre-trial motions *shall be heard* in the division in which the case is pending, except that if the judge in the division in which the case is pending is unavailable, a motion may be heard and determined in Division 1." (Resp. A3). Thus, Relators' suggestion the trial court should have ruled on the motion or that there was some expectation of a ruling without a hearing is a non-sequitur. (Relators' Brief at 20).

Relators artfully craft the contention they have "not violated any local rules." *Id*. While they did not actively violate any local rules, they passively ignored (for the benefit of making their statutory arguments) the requirements they know necessary per local rule to obtain relief in the City of St. Louis by way of any motion. Thus, they did not "timely move the trial court to dismiss the claims of the non-St. Louis City Plaintiffs for improper venue" as they contend. (Relators' Brief at 9). Moving parties are on notice filing a motion is not enough to obtain a ruling and the motion must be noticed up if there is to be a ruling on the merits and relief afforded. Relators cannot in good faith contend they anticipated receiving any relief absent calling up their motion. The mere filing of a motion is not effective to "move the trial court," and a failure to call up a motion should be deemed an abandonment of that motion per local rule.[4]

Circumstances may also outright preclude a hearing and ruling within 90 days of filing a motion. As this brief is being drafted, civil litigation has slowed to a snail's pace

[4] Relators' Brief, FN 9, cites *Jones v. City of Kan. City*, 569 S.W.3d 42, 61 (Mo. App. 2019) for the proposition "a local rule cannot displace a statutory requirement." The local rule requiring motions "shall be heard" in order for a party to obtain relief is not inconsistent with the statutory requirements of R.S.Mo. § 508.010.

due to COVID-19, with in-person hearings suspended altogether. Was it really the Legislature's intent that a trial court spend its time conducting telephonic hearings on *pro forma* venue motions during a global pandemic rather than focus its time and resources on "carry[ing] out the core, constitutional functions of the Missouri judiciary as prescribed by law and continue to uphold the constitutional rights of litigants seeking redress in any Missouri court"?[5] Or did the Legislature inherently contemplate an unfettered opportunity for the Court to take up the merits of a venue motion before the judgment of the Legislature takes hold? The former is an absurdity, whereas the latter allows for reason in construing a statute otherwise silent on whether a hearing must presumptively take place.

While we are living in an unusual time, the undersigned submits it is not so unusual for trial courts and the parties to be challenged to have a hearing and get a ruling within 90 days of filing a motion. Hearings are always subject to the availability of the court, with some venues having very heavy dockets and limited resources. This seems, at least anecdotally, true regarding rural circuits with a few judges rotating between counties. Again, Respondent submits the Legislature's intent was not to "pile on" to a burdened docket by establishing an unyielding rule that takes away the court's authority.

Finally, Relators' reading of the statute could lend itself to gamesmanship. To be clear, the undersigned is not contending Realtors engaged in gamesmanship, outside of the resting on their laurels until after the 90 days expired. But Relators' interpretation could

[5] *See In re: Operational Directives for Easing COVID-19 Restrictions on In-Person Proceedings*, Order of May 4, 2020 (Mo. banc eff. May 16, 2020).

encourage the movant to take measures aimed at "running out the clock" before a hearing can take place to get a case transferred by default to an improper venue.

Courts interpret statutes in a manner "that subserve[s] rather than subverts legislative intent." *Elrod v. Treasurer of Missouri*, 138 S.W.3d 714, 716 (Mo. banc 2004). The Supreme Court "will not construe the statute so as to work unreasonable, oppressive, or absurd results." *Elrod*, 138 S.W.3d at 716. Consistent with the foregoing principles, Respondent believes his common-sense construction is the correct one because it is harmonious with *HeplerBroom*, does not infringe on the constitutional separation of powers, follows the trial court's broad discretion to administer its docket, and avoids absurd and unreasonable results. The Preliminary Writ should be quashed.

C. The Provision of Section 508.010.10 that the Parties May Agree to Waive the 90 Day Requirement is Immaterial to Construing the Statute.

Relators cite the fact Section 508.010.10 allows the parties to agree to waive the 90-day period. In doing so, they contend "there was nothing preventing Plaintiffs' counsel from noticing the motion for hearing or seeking waiver of the 90-day rule…" (Relators' Brief at 20). These are red herrings.

First, to the extent a waiver would have been sought by Plaintiffs, Defendants had no obligation by statute or otherwise to consent. Second, to the extent circumstances permit a plaintiff, as non-movant, to notice the moving party's venue motion for hearing within 90 days of filing, that is irrelevant to construing the statute. This is because the statute's problematic directive is to the court, not the parties.

Judge Dowd's denial of Relators' venue motion and Respondent's denial of Relators' motion to reconsider follow *HeplerBroom* and R.S.Mo. § 508.010.10. The Preliminary Writ should be quashed.

II. THE GENERAL ASSEMBLY CLEARLY EXPRESSED ITS INTENT TO AVOID APPLICATION OF *HEPLERBROOM* AND *J&J* WHEN, LIKE IN PLAINTIFFS' CASE, IT WAS FILED BEFORE FEBRUARY 13, 2019, AND SET FOR TRIAL BEFORE AUGUST 28, 2019.

After *HeplerBroom* and *J&J*, the Legislature directed Missouri courts to avoid the application of R.S.Mo. §§ 507.040, 507.050, 508.010, 508.012, and 537.762 under the specific circumstance here, regardless of how those Sections are to be construed. L.2019, S.B. No. 7, § 1, codified as R.S.Mo. § 508.013 (Eff. Aug. 28, 2019).

The full text of R.S.Mo. § 508.013 provides:

> The provisions of sections 507.040, 507.050, 508.010, 508.012, and 537.762 shall apply to any action filed after February 13, 2019. A plaintiff who is a resident of Missouri and who has a case that:
> (1) Is pending in a court in this state as of February 13, 2019;
> (2) Has proper jurisdiction in this state; and
> (3) Has or had been set at any time prior to February 13, 2019, for a trial date beginning on or before August 28, 2019, *may continue to trial in the venue as filed*.

R.S.Mo. § 508.013 (emphasis added) (Resp. A9). Plaintiffs meet all four requirements.

All three Plaintiffs are Missouri residents and Relators do not dispute the City of St. Louis has jurisdiction. (Rel. A20, 35, 50). Plaintiffs filed the case on May 8, 2015. (Rel A13). It remains pending. And on May 13, 2015, the case was set for jury trial on April 18, 2016. (Rel. A6).

Relators assert Section 508.013 should not apply because it was not in effect at the time of the trial court's Order. (Relators' Brief at 28). However, the fact R.S.Mo. § 508.013

had been signed into law but did not go into effect until four weeks after the Order was handed down is irrelevant.[6] The general rule of statutory construction is to apply statutes prospectively unless there is clear legislative intent to do otherwise. *Department of Social Services v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 332 (Mo. banc 1985). Only if the express language of the statute is retroactive or it is retroactive by unavoidable implication can the presumption be overcome. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34 (Mo. banc 1982). Here, the Legislature made Section 508.013 retroactive by unavoidable implication by including the historic cutoff dates for case filing and trial setting.

Relators also errantly argue R.S.Mo. § 508.013 is not applicable because it was not a basis for the trial court's Order. (Relators' Brief at 28). However, appellate courts are "primarily concerned with the correctness of the result reached by the trial court" and "are not bound by its rationale and may affirm the judgment on any grounds sufficient to sustain it." *Russo v. Bruce*, 263 S.W.3d 684, 687 (Mo. App. 2008). Thus, the correct result is paramount, not how the trial court arrived at it.

Relators additionally contend R.S.Mo. § 508.013 does not change the result because of the 90-day rule of Section 508.010.10. The correct interpretation of Section 508.010.10 inherently contemplates a hearing and opportunity for the court to rule within 90 days. And Section 508.013 clarifies what plaintiffs' claims are to remain in the venue of filing, regardless whether an earlier ruling of the trial court took place within the 90 days.

[6] Section 508.013 was signed into law on July 10, 2019, prior to Respondent's Order of July 31, 2019, but did not take effect until August 28, 2019.

Following the General Assembly's directive as codified in R.S.Mo. § 508.013, the undisputed facts establish all three Plaintiffs "may continue to trial in the venue as filed." *Id*. This case was filed in the City of St. Louis and venue is proper for all three Missouri Plaintiffs' claims. The Preliminary Writ should be quashed.

III. *STATE EX. REL JOHNSON & JOHNSON V. BURLISON* DOES NOT DEMAND THE SEVERANCE AND TRANSFER OF PROPERLY-JOINED CLAIMS THAT ARE NOT DESIGNATED FOR SEPARATE TRIALS.

In *J&J*, this Court found a plaintiff with claims designated for a *separate trial* could not be joined with a co-plaintiff unless he could independently establish venue. *J&J*, 567 S.W.3d at 170. Here, Plaintiffs' claims have not been separated for trial. Relators rely on *J&J* but ignore that distinction.

Before *J&J*, this Court routinely denied applications for writs based on denials of motions to sever and transfer like Relators' venue motion, as Respondent's Order noted. (Rel. A417). This Court was presented with a petition for writ of prohibition that asserted venue was improper as to joined plaintiffs under a procedural posture consistent with that here between the oral argument on *J&J* and issuing the *J&J* opinion. *See State ex rel. Johnson & Johnson et al. v. Burlison*, SC97183 (Writ Denied May 25, 2018).[7] That writ petition was denied, presumably sanctioning and supporting the distinction underlying Respondent's Order here. *Id*. *J&J* did not cause a seismic shift in the law justifying a

[7] Oral argument on *J&J* took place on February 27, 2018, the referenced writ was denied on May 25, 2018, and *J&J* was hand down February 13, 2019.

different outcome. The Supreme Court noted its decision followed "nearly 40 years of this Court's precedent." *J&J*, 567 S.W.3d at 171.

Unlike in *J&J*, the two non-St. Louis City Plaintiffs' claims are not designated for separate trials. (Rel. A417). Because the two non-St. Louis City Plaintiffs' claims are properly joined with the claims of Plaintiff Johnson (who was first injured in St. Louis City and resides there), venue is proper for all three Plaintiffs' claims.

To the extent the majority opinion in *J&J* is to be construed otherwise, Respondent respectfully submits the proper analysis is that of the dissenting opinions penned by Judge Draper and/or Judge Wilson. *J&J*, 567 S.W.3d at 176-190 (Draper, J., dissenting, Wilson, J., dissenting with Fischer, C.J., concurring). In that event, Respondent asks the Court to overturn *J&J* as Judge Wilson's dissent invites. *Id*. at 186. (Wilson, J., dissenting).

CONCLUSION

Respondent's construction of Section 508.010.10 inherently contemplating a hearing and opportunity to rule is harmonious with *HeplerBroom*, does not raise constitutional separation of powers concerns, follows the trial court's broad discretion to administer its docket and the Local Rules of the City of St. Louis, and avoids absurd and unreasonable results.

Plaintiffs' claims meet the criteria of R.S.Mo. § 508.013 so they may proceed to trial in the City of St. Louis. The Court need not even apply *J&J*. To the extent it would, *J&J* differs in that the Plaintiffs' claims have not been designated for separate trials. Alternatively, *J&J* should be overturned.

WHEREFORE, Respondent respectfully requests the Preliminary Writ of Prohibition be quashed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies, under Missouri Supreme Court Rule 84.06(c), this brief complies with Rule 55.03 and the length limitations in Rule 84.06(b) because there are 4,597 words in the brief (except the cover, signature block, certificate of compliance, and certificate of service) according to the word count of Microsoft Word used to prepare the brief.

/s/ *W. Wylie Blair*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Brief and Appendix was served on registered counsel via the Missouri Courts E-filing System on May 11, 2020.

/s/ *W. Wylie Blair*