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IN THE
SUPREME COURT OF MISSOURI

No. SC96718

STATE ex rel. ABBOTT LABORATORIES INC.

Relator,

v.

THE HONORABLE STEVEN R. OHMER,

Respondent.

Circuit Court of the City of St. Louis, Missouri
Case Number
The Honorable Steven R. Ohmer

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Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

I. The Court Should Quash the Preliminary Writ of Prohibition Because the Trial Court Followed the Law and Properly Exercised its Discretion in Refusing to Sever the *Lopez* Claim. 8

A. Assuming Arguendo that the Three-Judge Concurrence in Barron v. Abbott Laboratories States the Law of Missouri, the Trial Court Nonetheless Properly Exercised Its Discretion on the Motion Before It. 10

1. The trial court had not "determined that each plaintiff's claims [were] to be tried separately." 10

2. "[T]he goals of efficiency and expeditiousness underlying Rule 52.05(a)" are not exhausted in this case. 12

B. Even If Abbott Met the Three-Judge Concurrence's Test for Severance, Transfer of Venue is not Proper under §508.012. 15

C. The Supreme Court's Rules Do Not Permit Later Reassessment of the Propriety of Joinder After It Is Determined that Joinder was Proper at The Time Of The Filing Of The Action. 19

1. Severance and Separate Trials are Distinct Procedural Devices Serving Distinct Purposes for Use in Single Actions Filed Under Rule 52.05(a) 24

II. 28

III. Rule 51.01 Does Not Apply in this Case 29

A. Sections 508.010.4 & .5 are silent as to venue when multiple plaintiffs are properly joined against a single defendant for whom venue is proper in two places. 29

B. Section 508.010 permits properly joined plaintiffs to file in either of two statutorily-prescribed venues where both in-state and out-of-state plaintiffs sue defendants in a county where venue is proper as to all defendants. 31

C. Permitting more than one venue in properly joined cases is appropriate..... 37

IV. Abbott's Point II B is addressed in Respondent's Point I..... 38

CONCLUSION 38

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

TABLE OF AUTHORITIES

Cases

Akely v. Kinnicut, 144 N.E. 682, 684 (N.Y. 1924) 21

Barron v. Abbott Laboratories, Inc., 529 S.W.3d 795, 800 (Mo. banc 2017) 8, 9, 12, 13

Belleville v. Dir. of Revenue, 825 S.W.2d 623, 624–25 (Mo. 1992) 9

Buemi v. Kerckhoff, 359 S.W.3d 16, 20 (Mo. 2011) 20

Elmore v. Henderson, 227 F.3d 1009, 1012 (7th Cir. 2000) 22

Hunt v. Dallmeyer, 517 S.W.2d 720, 725 (Mo. App. 1974) 24

In Re Depakote: Hertzberg et al v. Abbott Laboratories, Inc., et al, 14 CV-1052-MJR-SCW (Order Oct. 20 2017) 14

In Re Depakote: Alexander et al v. Abbott Laboratories, Inc., et *al*, No. 12-CV-52-NJR-SCW (S.D.Ill.) (Order July 21, 2017 at 10) 14

Kerperien v. Lumberman's Mut. Cas. Co., 100 S.W.3d 778, 781 (Mo. banc 2003) ... 32, 33

State ex rel DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. 1994) 18

State ex rel. Bank of Am. N.A. v. Kanatzar, 413 S.W.3d 22, 29 (Mo.App. 2013) 35

State ex rel. Bierman v. Neill, 90 S.W.3d 464 (Mo. 2002) 18

State ex rel. Blond v. Stubbs, 485 S.W.2d 152, 157 (Mo. App. 1972) 20

State ex rel. Cabool v. Tex. Cty. Bd. of Equalization, 850 S.W.2d 102, 105 (Mo. banc 1993) 8

State ex rel. Farmers Ins. Co. v. Murphy, 518 S.W.2d 655, 662 (Mo.1975) 21

State ex rel. Kansas City S. Ry. Co. v. Nixon, 282 S.W.3d 363, 367 (Mo. banc 2009) ... 19, 35

State ex rel. Kansas City Southern Ry. Co. v. Nixon, 282 S.W.3d 363, 368 (Mo. banc 2009) ... 16

State ex rel. Kinsey v. Wilkins, 394 S.W.3d 446, 453 (Mo. App. E.D. 2013) ... 35

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 857 (Mo. banc 2001) ... 8, 18, 21, 23

State ex rel. Neville v. Grate, 443 S.W.3d 688, 695 (Mo. App. W.D. 2014) ... 32

State ex rel. Palmer v. Goeke, 8 S.W.3d 193, 196 (Mo. App. E.D. 1999) ... 35

State ex rel. Proctor v. Messina, 320 S.W.3d 145, 156 (Mo. banc 2010) ... 20

State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo.1991) ... 30, 32, 35, 37

State ex rel. Selimanovic v. Dierker, 246 S.W.3d 931, 932-33 (Mo. banc 2008) ... 35

State ex rel. Turnbough v. Gaertner, 589 S.W.2d 290, 290 (Mo. banc 1979) ... 35, 36

State ex rel. Union Elec. Co. v. Barnes, 893 S.W.2d 804, 805 (Mo. banc 1995) ... 34

State ex. rel. Vee–Jay Contracting Co. v. Neill, 89 S.W.3d 470, 471–72 (Mo. banc 2002) ... 19

State Farm Mut. Auto. Ins. Co. v. Johnson, 586 S.W.2d 47, 55–56 (Mo. Ct. App. 1979) 30

Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660, 667-68 (Mo. banc 2010) ... 34

United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966) ... 21

Willman v. McMillen, 779 S.W.2d 583, 586 (Mo.1989) ... 37

Statutes

§1.090, R.S.Mo. (2017) ... 30

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

§507.040 R.S.Mo. (2017) 34

§508.010(4) R.S.Mo. (2000) 18, 19, 29, 30

§508.010, RSMo. (2017) ..... passim

§508.012 R.S.Mo. (2017) ..... passim

Other Authorities

BLACK'S LAW DICTIONARY 32 (8th ed.2004) 30

David Jacks Achtenberg, *Venue in Missouri After Tort Reform*, 75 UMKC L.REV. 593, 621 (2007) 33

Eldon E. Fallon et. al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2325 (2008) 13

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged) 1921 (2002) 16

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged) 713 (2002) 12

Rules

F.R.C.P. 20 21

Rule 41.03 15

Rule 42.01 30

Rule 51.01 ..... 29, 36

Rule 52.05 ..... passim

Rule 52.06 ..... 9, 20, 23, 24

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

Rule 53 30

Rule 66.01 13

Rule 66.02 ..... 22, 23

Rule 74.01 ..... 25, 26

Treatises

1A C.J.S. Actions § 1 31

7 Fed. Prac. & Proc. Civ. § 1653 (3d ed.) 21

7 Fed. Prac. & Proc. Civ. § 1660 (3d ed.) 22

9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2387 (1971) 24, 25

MANUAL FOR COMPLEX LITIGATION, FOURTH, §22.315 (2004) 13

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

I. The Court Should Quash the Preliminary Writ of Prohibition Because the Trial Court Followed the Law and Properly Exercised its Discretion in Refusing to Sever the *Lopez* Claim.

The *Lopez* claim is the second of two claims originally set for trial from the 24 claims filed as a single action pursuant to Rule 52.05(a) (Appendix to Respondent's Brief-A16) asserting birth defects from the taking of Abbott Laboratories, Inc's drug Depakote by the Plaintiffs' mothers. In the first trial, the evidence showed that: "(1) Depakote posed a considerably higher risk of overall birth defects than other antiepileptic drugs, and should be avoided by women of childbearing potential unless all other alternatives had been tried and failed; (2) the overall risk of birth defects was 10 percent or even greater; (3) the risk of spina bifida was significantly higher than 1 or 2 percent; and (4) the risk of spina bifida amounted to a twentyfold increased risk compared with the background rate in the general population." *Barron v. Abbott Laboratories, Inc.*, 529 S.W.3d 795, 800 (Mo. banc 2017).

Abbott seeks this Court's order making its preliminary writ of prohibition permanent or, alternatively, its preliminary writ in mandamus made peremptory. Prohibition "is discretionary and will lie only 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. Linthicum v. Calvin,* 57 S.W.3d 855, 857 (Mo. banc 2001). Mandamus is appropriate only when the officer against whom the writ is lodged has failed to carry out a purely ministerial duty. "Matters involving the exercise of discretion are not subject to attack by mandamus." *State ex rel. Cabool v. Tex. Cty. Bd. of Equalization,* 850 S.W.2d 102, 105 (Mo. banc 1993). "Judicial discretion is abused when a trial court's ruling is

clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Belleville v. Dir. of Revenue*, 825 S.W.2d 623, 624–25 (Mo. 1992).

Abbott filed a Motion to Sever as its initial pleading in this case. That Motion rested on Rule 52.06 (A18) and asserted misjoinder or improper joinder – the only grounds for severance recognized under the Rules. Following this Court's decision in *Barron*, Abbott filed a "Renewed Motion to Sever and Transfer for Improper Venue the Case of Mariah Lopez." (A40). That motion acknowledged the three-judge concurring opinion in *Barron* as its model, but Abbott *never* asked the trial court to sever *Lopez* on the grounds that the efficiencies served by the joinder rule would no longer be served if a separate trial occurred in *Lopez*. Indeed, Abbott simply asserted again that venue was not proper in the City of St. Louis and assumed that the three-judge concurrence had announced as a *per se*, immutable rule, that once filed, the trial court had virtually no discretion whatever to deny the motion.

The three-judge concurrence did not announce such a *per se* rule. Rather, that concurrence required a showing of three elements:

1. The trial court had "determined to try ***each*** plaintiff's claims separately." (*Barron*, 529 S.W.3d at 801)(emphasis added).
2. "[T]he goals of efficiency and expeditiousness underlying Rule 52.05(a)" are exhausted. (*Id*. at 803).
3. There was no continuing basis for joinder and thus it is an abuse of discretion for the trial court to fail to sustain a motion to sever.

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

Abbott's motion never argued elements 1 & 2. Abbott merely asserted element 3 and because *Lopez* had been set for a separate trial (and because Abbott believed venue was not proper *ab initio)* severance and transfer must follow as night the day.

A. Assuming Arguendo that the Three-Judge Concurrence in Barron v. Abbott Laboratories States the Law of Missouri, the Trial Court Nonetheless Properly Exercised Its Discretion on the Motion Before It.

First, and assuming for argument's sake that the three-judge concurrence properly states the law of Missouri, it fell to Abbott to show that elements 1 & 2 had been met in order to justify severance and a reassessment of venue. Absent proof (or at least compelling legal argument) supporting those initial two elements, the trial court was not required to reach the severance/transfer issue.

Abbott's pleading/argument failure is important here because the trial court was never given the opportunity to explain (or shown the need to explain) its exercise of discretion to deny the motion on the grounds Abbott stated in its renewed motion to sever. Even so, the record refutes element 1. Common sense and a passing familiarity with modern procedures for handling multiple joined cases refutes element 2.

1. The trial court had not "determined that each plaintiff's claims [were] to be tried separately."

The original action was filed by 24 sets of plaintiffs. They came from 13 states. Of the original 24 plaintiffs, thirteen states are represented, as follows:

- 4 Missouri

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- 4 Pennsylvania
- 2 Oklahoma
- 2 Georgia
- 2 Montana
- 2 Louisiana
- 2 Illinois
- 1 Texas
- 1 North Carolina
- 1 New York
- 1 Florida
- 1 Tennessee
- 1 Minnesota (The *Barron* case, now affirmed on appeal)

The trial court initially decided to try two of the twenty-four cases separately – one chosen by the Plaintiffs and one chosen by the Defendants. On May 22, 2014, the trial court entered a scheduling order based on that decision. (A36) This essentially established test or bellwether cases to make subsequent determinations about what efficiencies could be achieved once the court and the parties were familiar with the case, had learned of the commonalities in the cases, had tested their theories and evidence and assessed the relative

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

strengths and weaknesses of the remaining cases. *Barron* was a Plaintiff's choice; *Lopez* was a Defendant's choice.[1]

The three-judge concurrence required, as a first step toward severance, a showing that "each" of the joined cases had been set for a separate trial. In its common meaning in this context, "each" is used to refer to every one of the plaintiffs – "all considered one by one" or "each one." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged) 713 (2002). Absent a showing that the trial court had "determined that each plaintiff's claims [were] to be tried separately", that is, absent a showing that the trial court had concluded that every one of the 23 remaining plaintiffs' cases would be tried separately, Abbott failed to sustain its burden on its motion to sever.

As shown below, the three-judge concurrence's use of the word "each" assured that the discretion of the trial court to achieve expedition and efficiency would not be pretermitted prematurely when the trial court had not determined that each case would be tried separately.

2. "[T]he goals of efficiency and expeditiousness underlying Rule 52.05(a)" are not exhausted in this case.

The use of bellwether cases is a well-accepted tool used by thoughtful courts to achieve efficiencies and expedition in multiple-party cases. A selected case "take[s] on

[1] Since then, Respondent set another single case for trial, *Hance/Maggard*, and discussed trying two cases together, the separate plaintiffs who are siblings, born at separate times, *Karina Koneski* and *Kyle Konseki*.

bellwether'" qualities, … when it is selected for trial because it involves facts, claims, or defenses that are similar to the facts, claims, and defenses presented in a wider group of related cases." Eldon E. Fallon et. al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2325 (2008). Bellwether or test cases "enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis and what range of values the cases may have if resolution is attempted on a group basis." MANUAL FOR COMPLEX LITIGATION, FOURTH, §22.315 (2004).

Rule 66.01 (A20) permits a trial court to conduct a joint trial of "any or all the matters in issue in the civil actions…." In an action properly filed as a joint action under Rule 52.05(a), the trial court is permitted to try the cases *en masse*, try common questions of law or fact *en masse*, or try claims or entire cases separately under Rule 52.05(b). This is the Rule-based discretion "bounded only by … ingenuity and the circumstances of the action" to pursue "resolution of claims with common questions of law" to which the three-judge concurrence referred. *Barron*, 529 S.W.3d at 803 (Wilson, J., concurring).

Thus, by designing a bellwether system, the trial court necessarily believed that a refusal to sever this case was a decision in keeping with the hope that as the parties and the court learned more, the possibility of trying common issues in a single trial across the

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remaining cases would increase. Other courts have decided to do just that in Depakote cases.[2]

For example, the trial court could decide to try certain liability issues and fact issues– e.g. Abbott's duty to warn; the adequacy of the warning it actually gave; whether the warning was deceptive; whether Abbott knew that the warning it gave was inadequate and deceptive – in a single trial for several cases. This would achieve significant efficiencies for the entire litigation. Likewise, cases could be grouped for trial such that multiple claims would be tried together. And even if the trial court did not believe it wise to try these issues across the remaining twenty-two cases because, for example, of state law differences, the trial court could still decide to try all cases together where the applicable law was the same for several of the plaintiff's cases.

This belief was (and is) entirely reasonable under these circumstances and, because it is reasonable, it was within the discretion of the trial court to let that informed belief influence its discretion in addressing Abbott's renewed motion to sever – even under the rubric suggested by the three-judge concurrence. Further, the trial court could reasonably

[2] Two federal judges also assigned multiple Depakote cases have determined that cases can and should be tried in groups. *See, In Re Depakote: Alexander et al v. Abbott Laboratories, Inc.*, et *al*, No. 12-CV-52-NJR-SCW (S.D.Ill.) (Order July 21, 2017 at 10) (A25), and *In Re Depakote: Hertzberg et al v. Abbott Laboratories, Inc., et al*, 14 CV-1052-MJR-SCW (Order Oct. 20 2017) (A57).

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

have concluded that severing the cases prematurely would necessarily defeat the Rules' goals to "secure the just, speedy and inexpensive determination of every action." Rule 41.03 (A13). Sending single cases to St. Louis County would mean significant additional delay. Each case would come to St. Louis County, be placed at the end of the line in that circuit and await trial on a crowded docket. Any hope held by the rules for expedition for every party would be dashed under Abbott's scenario.

No doubt, these realities of litigation and the goals of the Court's rules informed the three-judge concurrence and its careful selection and use of the word "each." By limiting its reach to circumstances in which a trial court had concluded that all that remained were separate trials, the three-judge concurrence understood that efficiencies still remain where bellwether cases are to be tried and the learning curve about those efficiencies had not become flat.

For these reasons, the trial court properly exercised its discretion to overrule the motion to sever. Expedition and efficiency were well-served by the trial court's decision to overrule the motion to sever given its decision to proceed with bellwether cases – and even to add another single case and to attempt a joint trial for related plaintiffs. See fn 1.

On these grounds alone, the preliminary writ should be quashed.

B. Even If Abbott Met the Three-Judge Concurrence's Test for Severance, Transfer of Venue is not Proper under §508.012.

§508.012 R.S.Mo. (2017) (A10) is not ambiguous. It provides:

At any time prior to the commencement of a trial, if a ***plaintiff <u>or</u> defendant***, including a third-party plaintiff or defendant, is either added or ***<u>removed</u>***

> ***from a petition*** filed in any court in the state of Missouri which would have, if originally added or removed to the initial petition, altered the determination of venue under §508.010, then the judge shall upon application of any party transfer the case to a proper forum under §476.410.

Id. (Emphasis added). "The clear intent of [§508.012] was to combat pretensive jonder…." *State ex rel. Kansas City Southern Ry. Co. v. Nixon*, 282 S.W.3d 363, 368 (Mo. banc 2009)(Fischer, J. dissenting).

In considering the proper application of §508.012, two words require attention here: "removed" and "or."

The context of the statute speaks to a specific kind of removal – a removal "from a petition." "Removed" means "to go away: disappear, depart" from the petition. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged) 1921 (2002).[3] One commentator for whom Abbott has great affection has noted that "[p]arties are only added to or removed from that document by filing an amended petition." David Jacks Achtenberg, *Venue in Missouri After Tort Reform*, 75 UMKC L. REV. 593, 682 (2007). This seems correct. A single defendant among several who is dismissed against the plaintiff's wishes or a plaintiff against whom summary judgment is

[3] It is true, of course, that cases are "removed" from state court to federal court – that is to a court with preemptive jurisdiction. The dictionary also defines remove to mean "to change or shift the location, position, station or residence." *Id.* But the law of Missouri uses the word "transfer" for that purpose as does §508.012.

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rendered while other plaintiffs remain in the case, remain in the petition, subject to appeal when a final judgment is entered. See, *Chouteau v. Rowse*, 2 S.W. 209, 210 (1886)(court distinguished between a voluntary non-suit by which a plaintiff "abandons his suit, and it is ended," and an involuntary non-suit which manifests plaintiff's intention "not to abandon the prosecution of the suit, but to further prosecute it by appeal.") See, also *Magee v. Blue Ridge Prof'l Bldg. Co.*, 821 S.W.2d 839, 842 (Mo. 1991)(summary judgment against one party, standing alone when other issues and parties remain in the case, does not remove that party from the case).

Removal of a defendant or a plaintiff requires a voluntary dismissal or an amended petition by the plaintiff. That has not occurred.

It is for this reason that "or" is also important and reflects an unusually cogent understanding of procedure by the legislature. The entirely different meanings of "or" and "and" – conjunctive (joining together) and disjunctive (separating apart) – are not interchangeable within §508.012. Given its plain meaning, §508.012 applies only when a plaintiff <u>*or*</u> defendant is removed from the petition. "Or" is never a synonym for "and."

This textual argument is sufficient standing alone to defeat application of § 508.012 here, even if there is a severance. Even if one could conclude that severing one party's claim against a common defendant *removed* both of those parties from the petition, such a removal is not of a single party but of *both* a plaintiff <u>*and*</u> a defendant. More accurately, however, it is a claim that is separated for trial, not a plaintiff <u>*or*</u> a defendant removed from a petition.

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

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§508.012 simply does not apply where the trial court orders a separate trial or even severs properly joined claims.

Even though §508.012 is not ambiguous, the circumstances in which the legislature passed that statute as part of the 2005 tort reform package explain the unusual precision of the legislature's language.

Before 2005, plaintiff's lawyers in St. Louis had initiated the affectionately dubbed "two-step" to obtain venue in the City of St. Louis. *State ex rel. Bierman v. Neill*, 90 S.W.3d 464 (Mo. 2002) is illustrative. There, the plaintiff first filed suit solely against Bierman, a doctor with California residence, in St. Louis City Circuit Court. In doing so, plaintiff implicated then §508.010(4) R.S.Mo. (2000) (A4), which stated that when all defendants are non-residents of Missouri, plaintiff may bring suit in any county in the state. A few days later, plaintiff performed the second step, amending his petition to add two other defendants with residence in St. Louis County, one individual and one corporation. Defendants filed a motion to dismiss for improper venue. Although two of the three defendants were residents of St. Louis County, *State ex rel DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. 1994) precluded the court from dismissing the case for improper venue because at the time *Bierman* was filed, "venue is determined as the case stands when brought." *Id*. at 822. Since venue was proper when plaintiff filed the initial petition in *Bierman*, the Circuit Court denied the motion.

In *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), a bare majority of the Court stopped the two-step when a plaintiff *added* a defendant. The majority reasoned that adding a defendant was essentially "bringing" the case anew under the

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

meaning of §508.010(4) ("Suits instituted by summons shall…be brought…"). This new "bringing" required a new venue analysis. Even if *Linthicum* solved the pretensive nonjoinder issue, no case addressed what occurred if a plaintiff or defendant was deleted (removed) from an existing petition. Thus, §508.012 addressed all strategically delayed additions and deletions of parties from a petition to create venue.

Again, "[t]he clear intent of [§508.012] was to combat pretensive jonder…." *Nixon*, 282 S.W.3d at 368 (Fischer, J. dissenting). There is no claim of pretensive joinder in this case. §508.012 simply does not apply to properly joined cases filed under Rule 52.05(a).

C. The Supreme Court's Rules Do Not Permit Later Reassessment of the Propriety of Joinder After It Is Determined that Joinder was Proper at The Time Of The Filing Of The Action.

This discussion begs a further question. Do the Rules permit a reassessment of the propriety of joinder if the joinder was proper when the action was filed? Said differently, is it ever proper to sever properly joined claims under the current wording of the Rules?

This Court has announced its intention to abide by its own rules.

> This Court is constrained by the language of [its rules] when construing [the rules] and may not find a meaning that is not supported by the language of the rule. This Court interprets its rules by applying the same principles used for interpreting statutes. *State ex. rel. Vee–Jay Contracting Co. v. Neill*, 89 S.W.3d 470, 471–72 (Mo. banc 2002). Consequently, "[t]his Court's intent is determined by considering the plain and ordinary meaning of the words in the Rule." *Id.* at 472. To determine the plain and ordinary meaning of a term

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or phrase, this Court utilizes the definition found in the dictionary. *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 156 (Mo. banc 2010).

Buemi v. Kerckhoff, 359 S.W.3d 16, 20 (Mo. 2011).

There is no basis in the rules for a decision to sever cases properly joined into a single action under Rule 52.05(a). As will be explained, Rule 52.06 does not "authorize the dropping of any party who has been properly joined under the provisions of Rule 52.05." *State ex rel. Blond v. Stubbs*, 485 S.W.2d 152, 157 (Mo. App. 1972). Under the Rules, severing a claim is only proper if that claim was not properly part of a joined action. The Rules make no provision for severance on the basis a loss or diminished efficiency.

Rule 52.05 provides:

> **(a) Permissive Joinder.** All persons may join ***in one action*** as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrences or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their

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> respective rights to relief, and against one or more defendants according to their respective liabilities.

Id. (Emphasis added).

The propriety of joinder is determined based on the initial action as defined in the petition. In deciding a motion to sever, courts examine the "face of the [petition] by which we must decide the [motion to sever] question…." 7 Fed. Prac. & Proc. Civ. § 1653 (3d ed.)(discussing F.R.C.P 20 (A11) and quoting as "the approach that should be taken" *Akely v. Kinnicut*, 144 N.E. 682, 684 (N.Y. 1924)).

Unlike the Court's marked disagreement in *Linthicum* about the meaning of the word "brought" in the former §508.010(4), there is no word in the joinder Rule that purports to or even suggests by inference that a properly joined action suddenly becomes improperly joined at a later point in the litigation. The Rules generally and Rule 52.05(a) specifically seek a common purpose – to create as much efficiency as possible for the judiciary and the parties while preserving the rights of the parties to litigate their case without the potential prejudice of other, unrelated cases being litigated at the same time. Speaking to F.R.C.P. 20 (A-30), (from which Rule 52.05(a) is taken)[4], *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) said: "The impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties;

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[4] The interpretation of a Missouri rule generally should be "in accord with the interpretation of the federal rule from which it came." *State ex rel. Farmers Ins. Co. v. Murphy*, 518 S.W.2d 655, 662 (Mo.1975).

joinder of claims, parties and remedies is strongly encouraged." Thus, "[t]he purpose of Rule 20(a) in permitting joinder in a single suit of persons who have separate claims, albeit growing out of a single incident, transaction, or series of events, is to enable economies in litigation, not to merge the plaintiffs' rights so that the defendant loses defenses that he might have had against one of the plaintiffs." *Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000). *See also*, 7 Fed. Prac. & Proc. Civ. § 1660 (3d ed.)("The general philosophy of the joinder provisions of the federal rules is to allow virtually unlimited joinder at the pleading stage but to give the district court discretion to shape the trial to the necessities of the particular case").

Indeed, the Missouri Supreme Court Rules address all manner of ways in which joinder rules are subject to judicial control, that is to allow a court to "shape" the trial to the necessities of the particular case. Severance is not one of them.

For example, Rule 52.05 also provides:

> **(b) Separate Trials--Protective Orders.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a person as a party against whom the party asserts no claim and the person asserts no claim against the party and ***may order separate trials*** or make other orders to prevent delay or prejudice.

Id. (Emphasis added.). And Rule 66.02 (A22) provides:

> The court, in furtherance of convenience or to avoid prejudice, or ***when separate trials*** will be conducive to expedition and economy, may order a ***separate trial*** of any claim, cross-claim, counterclaim, or third-party claim,

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> or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Id. (Emphasis added).

Neither Rule 52.05(b) nor Rule 66.02 uses the word "sever" – or even suggests that a properly joined action is subject to a later assessment of the propriety of joinder. There is simply no language in the Rules that permits a reassessment of joinder, if joinder was proper at the time of the filing of the action. As Judge Stith cogently noted in her dissent in *Linthicum*: "There is also a good deal of elegance to the simplicity of a rule that states that the time of the original filing of the suit is the point – the only point – at which venue [or here, joinder] is determined." *Linthicum*, 57 S.W.3d at 864 (Stith, J. dissenting). This is particularly so where there is no textual support for the later reassessment that Abbott suggests is proper here. Should this Court believe that a properly joined action should be subject to severance late in the litigation, it can (and can only) achieve that result by amending its Rules. Otherwise, the Court itself will be operating outside its Rules in contravention of the teaching of *Buemi*.

Rule 52.06 does address severance.

> **52.06. Misjoinder and Nonjoinder of Parties**
>
> Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

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Id. The heading of the Rule explains its purpose and scope and recognizes what has become settled law where similar rules regarding separate trials and severance have been parsed.

1. Severance and Separate Trials are Distinct Procedural Devices Serving Distinct Purposes for Use in Single Actions Filed Under Rule 52.05(a)

Courts (and Abbott here) sometimes confuse two procedural devices at issue here: an order permitted by Rule 52.05(b) for a separate trial of a claim contained in a single action filed under Rule 52.05 and the severance of improperly joined claims under Rule 52.06. Severance and separate trials are not procedural synonyms but are carefully chosen words designed to achieve specific procedural ends.

a. Severance

"A severance occurs when a lawsuit is divided into two or more separate and independent or distinct causes." 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2387 (1971). Persons properly joined in a single action do not, by definition, present separate, independent or distinct causes. Thus, severance properly occurs only when there is improper joinder or misjoinder. Severance is thus a recognition that the single action filed was not a single action at all because the commonality required by Rule 52.05(a) did not exist. Rule 52.06 permits severance, rather than requiring the dismissal of the claims of improperly joined persons, in order to preserve the validity of the original filing of all claims whether properly joined or not. "[M]isjoinder is not grounds for dismissal of an action. *Hunt v. Dallmeyer*, 517 S.W.2d 720, 725 (Mo. App. 1974).

b. Separate Trials

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

"An order for a separate trial keeps the lawsuit intact while enabling the court to hear and decide one or more issues without trying all of the controverted issues at the same hearing." 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2387. "Separate trials usually will result in one judgment, but severed claims become entirely independent actions to be tried, and judgment entered thereon, independently." 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2387 (1971).

c. The purposes of the distinct procedural devices

Thus, the salient distinctions between these two procedural devices are two-fold. First, the two procedural rules create distinct procedural devices to be employed by courts to proceed based on whether joinder was proper or not. Second, they preserve the original filing for improperly joined cases. Third, they create distinctions for purposes of the appealability of an order terminating the proceedings in a partitioned piece of the litigation: The judgment in a severed action is final, enforceable and appealable when it disposes of all parties and issues. Conversely, the order entered at the conclusion of a separate trial is only interlocutory because a final and appealable judgment cannot be rendered until all of the controlling issues have been tried and decided.

Rule 74.01(b) (A23) operates only where there are separate trials. There is no need for a Rule 74.01(b) order where a severance occurs. Rule 74.01(b) thus expresses the intent of Rule 52.05(a) that properly joined cases remain joined for all purposes, <u>even if</u> a separate trial is conducted on a claim. The only rule-based way to appeal the results of a separate trial of a properly joined case is for the trial court to enter an order that "there is no just

reason for delay." Absent such a designation, no final judgment can be entered in the case and no separate appeal lies.

The role of Rule 74.01(b) in a bellwether setting is particularly important. Thus, the no-just-reason-for-delay designation provides a tool to further efficiency in a bellwether setting by permitting an appeal of a separate trial's verdict because that appeal will result in a final decision that will likely contribute to resolution of issues that may arise in a subsequent grouped trial.

Importantly, the designation for appeal under Rule 74.01(b) does not operate as a severance, as Abbott claims. Indeed, if Abbott were correct, a court would have to sever any case ordered to be tried separately. This is simply not the law because such a rule would nullify the rule permitting separate trials of properly-joined cases. In fact, it would frustrate the purpose of joining cases.

A trial court decision to conduct separate trials is not a decision to sever at all because the petition and the parties remain intact, particularly when the plan is to conduct bellwether trials to determine if significant efficiencies and speed will be the expected product of those tests. Separate trials in this context are thus in furtherance of the joinder rules, of efficiency and of the broader goals of the Rules. Separate trials are not a conclusion that joinder has suddenly become wrong, inefficient or otherwise prejudicial but, as in this case, may well be a decision to further the exact opposite outcome. When that is the case, the trial court discretion controls.

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

Conclusion

Having failed to meet the requirements set out by the three-judge concurrence, Abbott's Motion to Sever was properly denied by the trial court in a reasonable exercise of the trial court's discretion and a proper reading of the law. Even if an order under Rule 52.05(b) for a "separate" trial is deemed a severance, contrary to limits imposed by Rule 52.06, severance does not permit a transfer of venue under §508.012. Further, there is no basis for a late-in-the-litigation reassessment of joinder where joinder was proper at the time the action was filed. The preliminary writ should be quashed.

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

II.

Although Abbott enthusiastically embraced certain portions of the three-judge concurrence, its Point II rejects the underlying premise of the three-judge concurrence – that venue and joinder were proper when Plaintiffs filed their case. Point II thus attempts to seek yet another review of the bare venue issue in this case. This review is outside the grounds stated by Abbott in seeking the writ in this case.

Abbott's Petition for Writ of Prohibition (A49) seeks this Court's writ to require the trial court to sever the *Lopez* case from the remaining twenty-two cases. It is only after severance that the three-judge concurrence permits the resurrection of the venue issue. Although Respondent has shown that Abbott failed to properly plead its severance case to the trial court, that the trial court properly exercised its discretion to deny severance in order to permit further efficiencies in the case, and that severance was not proper under the rules in any event, the bare venue question is the focus of Point II.

Without waiving the argument that this prohibition case does not allow the Court's consideration of the bare venue question – because of the self-imposed limits of Abbott's pleadings – Respondent nevertheless addresses the bare venue question in the event that the Court wishes to address this issue.

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

III. Rule 51.01 Does Not Apply in this Case

Abbott asserts that the Court overlooked Rule 51.01 (A15) in *Barron*. Rule 51.01 provides: "These Rules shall not be construed to extend or limit … the venue of civil actions therein." Abbott incorrectly insists that Rule 52.05 does just that.

A. Sections 508.010.4 & .5 are silent as to venue when multiple plaintiffs are properly joined against a single defendant for whom venue is proper in two places.

§508.010, RSMo. (A4), the venue statute, provides:

> 4. 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.
>
> 5. 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 outside the state of Missouri, venue shall be determined as follows:
>
> (1) If the defendant is a corporation, then venue shall be in any county where a defendant corporation's registered agent is located or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiff's principal place of residence on the date the plaintiff was first injured;

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

§508.010, RSMo. (2017) (emphasis added). The Court will note that the use of the word "actions" is new. §508.010 RSMo 2000, now repealed and replaced by the current version of §508.010 provided: "Suits instituted by summons shall… be brought."

The first question that must be answered is: What did the legislature mean when it employed the word "actions" for the first time in 2005 to describe the focus of its venue selection provisions? The legislature did not define "actions."

§1.090, RSMo. (2017) (A1) requires that "technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." Venue, and thus actions, are technical terms related to lawsuits and litigation. "Venue is a designation of the location or geographical situs where the court has jurisdiction to act in a particular lawsuit." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 196 (Mo. banc 1991). Because venue relates to litigation, that is, to the approved place where litigation can occur, "action" must also be understood in the way it is used technically in a litigation context. That is the mandate of §1.090.

§508.010.4, RSMo. (and §508.010.5) (A4) require that the judicial analyst determine whether the *action* filed, which necessarily encompasses whatever the Rules define action to include, falls within the geographical situs permitted by that statute for an action to proceed.

Rule 53 (A19) provides that "[a] civil action is commenced by filing a petition with the court." "A civil action as that term is used in Rule 42.01 (A14)… involves private rights and duties." *State Farm Mut. Auto. Ins. Co. v. Johnson*, 586 S.W.2d 47, 55–56 (Mo. Ct. App. 1979). *Accord*, BLACK'S LAW DICTIONARY 32 (8th ed.2004)("an action brought to

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

enforce, redress, or protect a private or civil right") and 1A C.J.S. Actions § 1 ("An action is a legal demand of one's rights in a court of justice, or a legal proceeding in a court of justice to enforce a right or to redress a wrong").

A properly joined action against a single defendant filed by multiple plaintiffs seeking relief based on common questions of law or fact is a single action. Rule 52.05(a) provides:

> **(a) Permissive Joinder.** All persons may join ***in one action*** as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action…..

Id. (Emphasis added). Because, by Rule, a joined action is a single action, the venue analysis asks: Is this single action, taken as a singularity, one that can be filed where it was filed?

B. Section 508.010 permits properly joined plaintiffs to file in either of two statutorily-prescribed venues where both in-state and out-of-state plaintiffs sue defendants in a county where venue is proper as to all defendants.

By its plain terms, §508.010.4 applies to this action. Abbott cannot dispute that as to some Plaintiffs venue is proper in the City of St. Louis.

Under §508.010, two venues are proper: the City of St. Louis and St. Louis County. This is because some plaintiffs in the action fall under §508.010.4 (first injured by Abbott

in the City of St. Louis) and others fall under §508.010.5 (injured by Abbott outside of Missouri).

The statute is silent when both scenarios occur in a single action involving a single defendant.

This Court has addressed silent statutes, concluding that facial statutory silence does not equate to actual ambiguity and that where a statute provides no guidance, it provides no guidance:

> Rules of construction are not to be used if the statute contains no ambiguity.
>
> In this case, the legislature made no specific provision for a post-trial settlement. Rather, the statute addresses only two situations: where an amount is recovered with a finding of comparative fault, and where an amount is recovered without a finding of comparative fault. The statute does not contain an ambiguity….

Kerperien v. Lumberman's Mut. Cas. Co., 100 S.W.3d 778, 781 (Mo. banc 2003).

"It is readily apparent that [the venue statutes]… do not in express terms cover all possible situations likely to arise." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). Where no venue is prescribed, "we are left to the conclusion that the legislature did not intend to prescribe a particular venue under the present set of circumstances." *State ex rel. Neville v. Grate*, 443 S.W.3d 688, 695 (Mo. App. W.D. 2014).

In the absence of ambiguity, legislative intent is determined only by the words used in the statute. Resorting to canons of construction is *verboten* absent ambiguity. All of

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

Abbott's references to the intentions of a Governor or a legislative summary or law review articles discussing statutes never passed must be ignored absent a showing that the venue statute is ambiguous.

Abbott never argues the venue statute is ambiguous. Nonetheless, Abbott asks the Court to read additional words or requirements into the venue statutes that are not spelled out in those statutes. Abbott's argument, particularly its "first injury" argument, requires the Court to add the word "and" between §§508.010.4 and .5 Adding this word permits Abbott to argue that a court should deem the place of the "first injury" for all plaintiffs to be where the earliest-injured plaintiff was injured, as though both statutes must be read to create a single venue rule. Abbott's "first injury" argument thus ignores the fact that the "first injury" for Plaintiffs for whom venue is proper in the City of St. Louis occurred there. As earlier shown, if the venue is proper as to some Plaintiffs in the "action," it becomes proper as to all claims in the "action." The legislative silence on which venue rule applies permits Plaintiffs to choose any proper venue for their "action."

Abbott looks to a law review article by Professor David Achtenberg for support. Yet, even Professor Achtenberg acknowledges that "[o]n its face, the [Tort Reform] act [of 2005, which amended the venue statute] *does not seem to indicate how these rules apply* in actions in which some plaintiffs are first injured within the state and some outside it." David Jacks Achtenberg, *Venue in Missouri After Tort Reform*, 75 UMKC L.REV. 593, 621 (2007). This confession alone resolves the issue. "Does not seem to indicate how these rules apply" is long-hand for silence.

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

Abbott next insists that requiring the venue statute to give the word "actions" its meaning within a litigation context leads to an absurdity. But it is not absurd at all for the legislature to have intended the normal joinder rules to apply in an action. After all, the legislature used the word "action" to describe the thing to which the venue rules apply, abandoning the word "suits." The legislature is presumed to know that its own stated policy expressed in §507.040 (A2), copied verbatim in Rule 52.05,[5] applies when a defendant is otherwise in a proper venue. *See Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 667-68 (Mo. banc 2010) ("It is presumed that the General Assembly legislates with knowledge of existing laws."). Judicial efficiency is a purpose that joinder serves; the legislature that passed the venue statute did not find judicial efficiency absurd. Given the legislature's use of the word "actions," one can and should infer that the statutory silence was intended and that separate subsections describing two distinct factual predicates for the two independently operable venue provisions fulfill the legislature's plan to assure defendants of a convenient forum as well as efficient conduct of litigation through proper joinder.

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[5] On matters of practice, procedure and pleadings, the statute remains a joint source of law unless there is a conflict between the Supreme Court's Rules and the statute, in which case the Rules prevail. *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995). Because §507.040 R.S.Mo. (2017) and Rule 52.05(a) are identical, the statute still states the Legislature's policy.

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

The legislature's decision to treat subsections .4 and .5 as two separately operable rules is evidenced by (a) the use of distinctly defined factual scenarios that control the application of each subsection, (b) the fact that the subsections are separately numbered, expressing an intentional and clean bifurcation between subsections .4 and .5, and (c) no "and" or other linguistic linkage between .4 and .5 exists in the statute. The venue statute does not expressly assign a single venue in circumstances in which both in-state and out-of-state plaintiffs bring a properly joined action. This simply means that the legislature chose to let the venue assignments it did make suffice. Here, because both subsections .4 and .5 establish proper venue over the single defendant, Plaintiffs' choice between the two controls. *State ex rel. Palmer v. Goeke*, 8 S.W.3d 193, 196 (Mo. App. E.D. 1999); *accord State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 932-33 (Mo. banc 2008).

Further, Abbott seems unaware of this Court's teaching that there may be two correct venues in a case. *State ex rel. Kansas City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 367 (Mo. banc 2009). On their faces, subsections .4 and .5 prescribe two independently proper venues in a properly joined action. Indeed, "[v]enue can be proper in more than one county." *State ex rel. Bank of Am. N.A. v. Kanatzar*, 413 S.W.3d 22, 29 (Mo. App. W.D. 2013).

Abbott pins its hopes on *State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290, 290 (Mo. banc 1979). *Turnbough* does not require reversal. It is no longer valid law. *State ex rel. Kinsey v. Wilkins*, 394 S.W.3d 446, 453 (Mo. App. E.D. 2013) makes this point when considering the application of the 2005 venue rules to a multiple-defendant scenario. *Kinsey* reads § 508.010.4 expressly to allow joinder of multiple defendants in a single

action even if venue is *not* proper as to one defendant, if the joinder is otherwise proper because of common liability. This is because the place of the first injury to the plaintiff now controls. Joinder of a second-injury-causing, commonly-liable defendant from an otherwise improper venue does not contravene §508.010.4. Thus, *Kinsey* concludes that "[t]here is no longer conflict between the venue statute and Rule 52.05(a), because Rule 52.05(a) is not the vehicle that expands or limits venue (as required by Rule 51.01 (A-19)) in these circumstances." *Id.* Venue need not be proper for each defendant when a plaintiff properly joins two defendants in a single action even when venue is improper as to one of the defendants.

Obviously, *Kinsey* found that §508.010 expressly permits what *Turnbough* denied – suits against multiple defendants to be joined in a county in which venue is not proper as to one defendant.

But even if *Turnbough* were the law, it applies only in circumstances in which multiple defendants are sued. None of the cases Abbott cites deal with a case like this one – a Rule-sanctioned action in which multiple properly joined plaintiffs sue a single defendant in one of two statutorily sanctioned venues. Nor, of course, do they deal with the plain language of the venue statute at issue here. The language of the statute, the policy choices furthered by that language, the value of efficient trials of properly joined cases, and the convenience-to-the-defendant basis for venue rules all point in a single direction: Where multiple properly joined plaintiffs bring an action and sue a single defendant in a county in which venue is proper as to the defendant, venue is proper for all properly joined plaintiffs.

Electronically Filed - SUPREME COURT OF MISSOURI - February 09, 2018 - 01:35 PM

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C. Permitting more than one venue in properly joined cases is appropriate.

Permitting two venues in properly joined cases reflects an understanding of the extant statutory and case law as well as the policy choices that are the legislature's alone to make.

Venue rules are now properly seen as legislatively chosen, defendant-centric shields against inconvenience and little else, their purpose being to provide "a convenient, logical and orderly forum for litigation." *Rothermich*, 816 S.W.2d at 196. The statutory designation of a site where venue is proper "presupposes [a] legislative determination that it cannot be overly inconvenient for a defendant to appear in that location." *Willman*, 779 S.W.2d at 586. Where the statutorily assigned venue is proper as to a defendant and some plaintiffs, something that even Abbott cannot dispute here, the venue is <u>necessarily</u> "a convenient, logical and orderly forum for litigation" properly joined under Rule 52.05. The Court can conclude that the legislature presumed that a single defendant sued in the proper venue by multiple plaintiffs in a properly joined action would have no basis for complaining about venue, since the defendant is properly there anyway.

In sum, nothing in §508.010 limits venue to a single county where properly joined plaintiffs sue a *single* corporate defendant in a place where venue is proper as to that defendant for at least some of the plaintiffs. Abbott's insistence that proper joinder is piggybacking to create venue simply ignores the venue statute's use of the word "action," and the fact that, in this case, venue is proper where Plaintiff filed this action.

When Plaintiffs filed this action in St. Louis City, all of the requirements for filing the action there were met and venue for the "action" was proper there.

IV. Abbott's Point II B is addressed in Respondent's Point I

CONCLUSION

When Plaintiffs filed this action in the Circuit Court of the City of St. Louis all of the requirements for proper joinder and venue were met and those requirements remain intact. Respondent did not abuse his discretion. For the reasons expressed, the preliminary writ in prohibition previously issued by the Court should be quashed.

Respectfully submitted,

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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 8,769 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/ Edward D. Robertson, Jr.

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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 February 9, 2018.

/s/ Edward D. Robertson, Jr.