

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

WILLIAM KEMPER, et al.,

Plaintiffs,

v.

PRIME TANNING CORP., et al.,

Defendants.

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Case No. 09CN-CV00333

F I L E D  
MAY 04 2010

MOLLY LIVINGSTON  
Clerk of Clinton Co. Circuit Court

**DEFENDANTS' REPLY IN SUPPORT OF THEIR  
MOTION TO TRANSFER VENUE**

Defendants Burns & McDonnell Engineering Company, Inc. and Elementis LTP L.P. submit the following reply in support of their motion to transfer Plaintiff Janet Lasher for improper venue pursuant to Missouri Rule of Civil Procedure 51.045:

As discussed in defendants' motion to transfer venue, there are no factual allegations in the Petition that would indicate that Plaintiff Janet Lasher has any connection to Clinton County, much less that she claims to have been first injured in Clinton County, as required to establish venue in Clinton County under the applicable venue statute. Therefore, from the face of the Petition, venue in Clinton County appears improper for Ms. Lasher. Accordingly, these defendants have moved to transfer Ms. Lasher to a court where venue is proper, pursuant to Rule 51.045.<sup>1</sup>

Under Rule 51.045(b), in response to defendants' motion to transfer venue, plaintiffs were required to come forward with evidence establishing proper venue in Clinton County for Plaintiff Janet Lasher. If they fail to do so, the case must be transferred to a court where venue is proper. Rule 51.045(a); *see also State ex rel. Harness v. Grady*, 201 S.W.3d 48, 50 (Mo. Ct.

<sup>1</sup> The motion to transfer venue pertains only to Plaintiff Janet Lasher, not to Plaintiff William Kemper. Further, this motion is separate from and unrelated to the motions to change venue under Rule 51.03 that were recently withdrawn by National Beef Leathers, LLC and Prime Tanning Corp.

App. E.D. 2006) (“When venue is challenged, the plaintiff has the burden of showing that venue is proper.”). In their response, plaintiffs do not even attempt to provide any evidence of proper venue in Clinton County for Ms. Lasher. Instead, they seem to take the position that the present motion to transfer venue is duplicative of the motions to change venue previously filed by defendants Prime Tanning Corp. and National Beef Leathers, LLC and argue that the Court should change venue to Jackson County or Boone County.<sup>2</sup>

Plaintiffs fail to appreciate the difference between a motion to transfer for improper venue under Rule 51.045 and a motion to change venue from a county with fewer than 75,000 inhabitants under Rule 51.03. In light of the withdrawals, no Rule 51.03 motion to change venue is before the Court. Rather, the only motion before the Court is the present Rule 51.045 motion to transfer for improper venue, which is based on the fact that Ms. Lasher’s cause of action apparently was filed in the wrong court. If Ms. Lasher is not properly venued in Clinton County, the Court can take no action but to transfer her to the proper venue. Rule 51.045(a); *State ex rel. Dillard’s, Inc. v. Ohmer*, 190 S.W.3d 570, 573 (Mo. App. E.D. 2006) (“If venue is improper where an action is brought, prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue.”).<sup>3</sup> This prohibition on the Court’s action includes changing venue of Ms. Lasher’s cause of action under Rule 51.03.<sup>4</sup>

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<sup>2</sup> Again, the previously-filed motions to change venue were recently withdrawn, so they no longer have any bearing on this motion to transfer venue in any event.

<sup>3</sup> By contrast, in response to a Rule 51.03 motion to change venue, such as the motions previously filed by defendants Prime Tanning Corp. and National Beef Leathers, LLC, the Court may, in its discretion, choose a venue based on the convenience of the parties. But Rule 51.03 presupposes that the plaintiff’s case was filed in the proper court to begin with, which does not appear to be the case here.

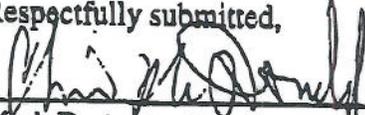
<sup>4</sup> Defendants’ motion to transfer venue is not mooted by the other defendants’ earlier-filed motions to change venue, as plaintiffs claim. Actually, if they had not been withdrawn, the earlier-filed motions to change venue would have been mooted with respect to Ms. Lasher if the Court were to determine that Ms. Lasher has not met her burden of establishing proper venue in Clinton County. At that point, the Court’s only possible action will be to transfer Ms. Lasher to the proper venue.

Proper venue for Ms. Lasher is the location of her alleged first injury. *See* Mo. Rev. Stat. § 508.010.4. Plaintiffs have failed to come forward with any evidence of alleged first injury in Clinton County, and the Court therefore must transfer Ms. Lasher's cause of action to the county in which her first injury allegedly did occur. The "convenience of the parties" standard for change of venue under Rule 51.03 has no relevance to the transfer of an improperly-venued plaintiff to a proper venue under Rule 51.045. Venue is solely determined by the place of alleged first injury; unless Ms. Lasher demonstrates that she was first injured in Jackson or Boone County, she cannot be transferred to Jackson or Boone County. Under similar facts in a case involving the same defendants, Judge Jackson in the Circuit Court of Buchanan County recently transferred eight plaintiffs to DeKalb County and two plaintiffs to Clinton County, on the basis that their alleged first injuries occurred in those counties, not in Buchanan County. *See* April 23, 2010 Order Severing and Transferring Venue of Designated Plaintiffs' Causes of Action, *Johnson, et al. v. Prime Tanning Corp., et al.*, Case No. 09BU-CV06421 (attached).

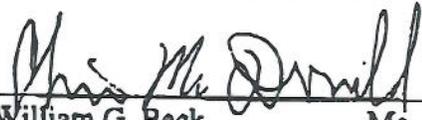
Plaintiffs have failed thus far to provide sufficient information to establish proper venue for Ms. Lasher. Under Rule 51.045(b), in the event that proper venue cannot be determined based on the Petition and plaintiff's response to the motion to transfer venue, the Court "may allow discovery on the issue of venue" before ruling on the motion to transfer.

For the foregoing reasons and for the reasons set forth in defendants' motion to transfer venue and suggestions in support, Defendants Burns & McDonnell Engineering Company, Inc. and Elementis LTP L.P. respectfully request that the Court issue an order (1) transferring the cause of action of Plaintiff Janet Lasher to a court where venue is determined to be proper and (2) directing Plaintiff William Kemper to amend his pleadings to conform to this transfer by removing references to Plaintiff Janet Lasher.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was mailed, by U.S. Mail postage prepaid, this 4<sup>th</sup> day of May, 2010, to:

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ENGINEERING COMPANY, INC.

**-ATTACHMENT-**

IN THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI  
DIVISION No. 1

S. BEERY AND TRACY M. JOHNSON, et al., )  
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 Plaintiffs, )  
 )  
 v. )  
 )  
 PRIME TANNING CORP., et al., )  
 )  
 Defendants. )

Case No. 09BU-CV06421

**ORDER SEVERING AND TRANSFERRING VENUE OF  
DESIGNATED PLAINTIFFS' CAUSES OF ACTION**

Comes now the Court this 23<sup>rd</sup> day of April, 2010, and, being fully advised in the premises, finds that Defendant Burns & McDonnell Engineering Company, Inc.'s Motion to Transfer Venue should be sustained based upon the authority cited in the suggestions filed herein in support of the motion. Specifically, this Court finds that the county of proper venue for the causes of action of Plaintiffs Bruce and Kathleen Moss is Clinton County, Missouri, and the county of proper venue for the causes of action of Plaintiffs David Gabbard, John and Terri Gabbard, Paul DeShon, Clifton and Beverly Deshon, Mark DeShon, and Gabe DeShon is DeKalb County, Missouri. Buchanan County, Missouri is not a county of proper venue for those causes of action. Therefore, this Court is required to transfer the causes of action brought by said plaintiffs to the respective counties of proper venue pursuant to Supreme Court Rule 51.045.

**IT IS THEREFORE ORDERED** that Defendant's Motion to Transfer Venue, filed February 19, 2010, is hereby sustained; and .

**IT IS FURTHER ORDERED** that those plaintiffs, with their causes of action as noted above, are severed from the Buchanan County (Case No. 09BU-CV06421) lawsuit and venue of the causes of action brought by Plaintiffs Bruce and Kathleen Moss is hereby transferred to

Clinton County, Missouri, and venue of the causes of action brought by Plaintiffs David Gabbard, John and Terri Gabbard, Paul DeShon, Clifton and Beverly Deshon, Mark DeShon, and Gabe DeShon is hereby transferred to DeKalb County, Missouri; and

**IT IS FURTHER ORDERED** that the circuit clerk of Buchanan County, Missouri shall transfer a full copy of the Case No. 09BU-CV06421 file and a copy of all docket entries, duly certified, to the circuit clerks of Clinton and DeKalb Counties pursuant to Supreme Court Rule 51.09, while leaving the original filings and docket entries in Buchanan County Case No. 09BU-CV06421.

Signed this 23<sup>rd</sup> day of April, 2010.

  
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Judge of the Circuit Court