

IN THE MISSOURI SUPREME COURT

NO. SC85135

STATE OF MISSOURI, ex rel. BJC HEALTH SYSTEM and
MISSOURI BAPTIST MEDICAL CENTER,

Relators,

v.

THE HONORABLE MARGARET M. NEILL, Circuit Court Judge,
22nd Judicial Circuit Court (St. Louis City),

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION
CIRCUIT COURT OF ST. LOUIS CITY CAUSE NO. 012-0056

REPLY BRIEF OF RELATORS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2

POINTS RELIED ON.....3

 I.....3

 II.....4

ARGUMENT.....5

 I.....5

 II.....13

CONCLUSION.....16

CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME
COURT RULE 84.06(b) AND RULE 84.06(g).....17

CERTIFICATE OF SERVICE.....18

TABLE OF AUTHORITIES

CASES

Bizzell v. Kodner Dev. Corp., 700 S.W.2d 819 (Mo. banc 1985)9

In re Estate of Van Cleave, 574 S.W.2d 375 (Mo. banc 1978)11

State ex rel. BJC Health System v. Neill, 86 S.W.3d 138 (Mo. App.
E.D. 2002)3, 4, 14, 15

State ex rel. Ellsworth Freight Lines, Inc. v. State Tax Commission of MO,
651 S.W.2d 130 (Mo. banc 1983)11

State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 140 (Mo. banc
2002)3, 5, 6, 8, 9, 10, 11, 13, 14, 15

STATUTES

§ 355.176.4, RSMo3, 4, 5, 6, 7, 9, 10, 11, 14

§ 476.4103, 5, 12

§ 508.010, RSMo7

§ 508.040, RSMo 7, 9, 10

§ 508.050, RSMo7

§ 510.180, RSMo 4, 13, 15

RULES

Missouri Supreme Court Rule 51.0453, 4, 5, 12, 14

Missouri Supreme Court Rule 66.024, 13, 15

POINTS RELIED ON

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE PURSUANT TO SECTION 355.176.4, RSMo, THE EXCLUSIVE VENUE FOR THE CLAIMS AGAINST NON-PROFIT CORPORATION MISSOURI BAPTIST MEDICAL CENTER IS IN ST. LOUIS COUNTY IN THAT IT IS UNDISPUTED THAT THE PERTINENT VENUE FACTS ARE THAT THE CAUSE OF ACTION ACCRUED THERE, ITS PRINCIPAL PLACE OF BUSINESS WAS AND IS LOCATED THERE AND THE OFFICE OF ITS REGISTERED AGENT WAS AND IS LOCATED THERE, AND RESPONDENT THEREFORE, HAD A MINISTERIAL DUTY UNDER SECTION 476.410, RSMo, AND RULE 51.045 TO TRANSFER THE ENTIRE CASE TO ST. LOUIS COUNTY.

State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 140 (Mo. banc 2002)

State ex rel. BJC Health System v. Neill, 86 S.W.3d 138 (Mo. App. E.D. 2002)

§ 355.176.4, RSMo

Missouri Supreme Court Rule 51.045

II. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE RESPONDENT EXCEEDED HER JURISDICTION AND ABUSED HER DISCRETION IN THAT SHE *SUA SPONTE* SEVERED FOR SEPARATE TRIAL THE CLAIMS AGAINST MISSOURI BAPTIST MEDICAL CENTER FROM THOSE AGAINST ALLEGED JOINT TORTFEASOR BJC HEALTH SYSTEM, IN CONTRAVENTION OF MISSOURI POLICY AND LAW, INCLUDING SUPREME COURT RULE 66.02 AND SECTION 510.180, RSMo.

State ex rel. BJC Health System v. Neill, 86 S.W.3d 138 (Mo.App. E.D. 2002)

§ 355.176.4, RSMo

§ 510.180, RSMo

Missouri Supreme Court Rule 66.02

ARGUMENT

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE PURSUANT TO SECTION 355.176.4, RSMo, THE EXCLUSIVE VENUE FOR THE CLAIMS AGAINST NON-PROFIT CORPORATION MISSOURI BAPTIST MEDICAL CENTER IS IN ST. LOUIS COUNTY IN THAT IT IS UNDISPUTED THAT THE PERTINENT VENUE FACTS ARE THAT THE CAUSE OF ACTION ACCRUED THERE, ITS PRINCIPAL PLACE OF BUSINESS WAS AND IS LOCATED THERE AND THE OFFICE OF ITS REGISTERED AGENT WAS AND IS LOCATED THERE, AND RESPONDENT THEREFORE, HAD A MINISTERIAL DUTY UNDER SECTION 476.410, RSMo, AND RULE 51.045 TO TRANSFER THE ENTIRE CASE TO ST. LOUIS COUNTY.

A. Standard for Issuance of Extraordinary Writ

A writ of prohibition will be issued only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent the exercise of extra-jurisdictional power. *State ex rel. SSM Health Care St.*

Louis v. Neill, 78 S.W.3d 140, 142 (Mo. banc 2002). Because improper venue is a fundamental defect, a court that acts when venue is improper acts in excess of its jurisdiction, and prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue. *Id.*

B. Pursuant to § 355.176.4 and the holdings of the two *State ex rel. SSM Health Care St. Louis v. Neill* cases, the entire case must be transferred to the Circuit Court of St. Louis County as the only proper venue for Plaintiffs' claims against Defendant Missouri Baptist Medical Center.

In her Brief, Respondent argues that venue as to allegedly jointly liable BJC is venue as to Missouri Baptist Medical Center. (Respondent's Brief, page 14). As a nonprofit corporation, and pursuant to § 355.176.4, RSMo (1994), however, Missouri Baptist can be sued *only* in one of the following three locations: (1) the county in which the nonprofit corporation maintains its principal place of business; (2) the county where the cause of action accrued; and (3) the county where the office of the registered agent for the nonprofit corporation is located. As acknowledged by Respondent

(*Exhibit 14*, pages 3-4)¹, under the facts of this case, Missouri Baptist can be sued *only* in the Circuit Court of St. Louis County in that there is no dispute that the alleged cause of action against Missouri Baptist accrued in St. Louis County, the office of its registered agent is located in St. Louis County, and its principal place of business is located in St. Louis County. (*Exhibit 14*, pages 3-4).

In holding that venue was improper in the City of St. Louis, this Court in *State ex rel. SSM Health Care v. Neill*, 78 S.W.3d 140, 143 (Mo. banc 2002), closely analyzed the language of § 355.176.4 when compared to other venue statutes, including §§ 508.010, 508.040 and 508.050. *Id.* at 143-44. This Court concluded that § 355.176.4, RSMo, provided the “exclusive venues” in which a nonprofit corporation can be sued. *Id.* at 144-45 (emphasis added). Therefore, § 355.176.4 in effect acts as a venue trump card over all other venue statutes and all other venues that might be proper to other defendants, whether individual or corporate. Thus, all other venue rights yield to it. *Id.*

¹ All exhibit references are to the Exhibits submitted by Relators with their Petition for Writ of Mandamus and/or Prohibition and Suggestions in Support.

In the case at bar, the *only* venue proper for all Defendants and improper as for none is St. Louis County. Respondent concedes in her November 27, 2002, order that the only proper venue for Missouri Baptist is in St. Louis County; it is a nonprofit corporation and as such can *only* be sued (1) where it maintains its principal place of business (St. Louis County), (2) where the cause of action accrued (St. Louis County), or (3) the location of the office for its registered agent (St. Louis County). (See *Exhibit 14, pages 3-4; A3 – A4*). Pursuant to § 355.176.4, the Circuit Court of St. Louis County is the exclusive venue within which Missouri Baptist can be sued. Furthermore, co-defendant BJC Health System is a Missouri nonprofit corporation with its registered agent in St. Louis County and the alleged cause of action against it, if any, accrued at Missouri Baptist, which is only located in St. Louis County. (See *Exhibits 1, ¶ 8; Relators’ Brief at page 6*). Thus, under the facts of this case, the only proper venue for both of these nonprofit corporations is in St. Louis County.

Boiled down, Respondent’s argument is that, although this Court in *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140 (Mo. banc 2002), has identified § 355.176.4 as providing the exclusive venues for suits against a nonprofit corporation, Defendant BJC’s presence in the City of St. Louis as an allegedly jointly liable defendant trumps Missouri Baptist’s

venue rights under that statute. As is evident from her Brief, Respondent's support for this argument comes from a misplaced reliance on § 508.040, and the cases interpreting that statute, and Respondent's erroneous contention that § 508.040 and § 355.176.4 are analogous. (See Respondent's Brief, pages 14-16). Further, Respondent's argument ignores long standing Missouri law that venue is a personal privilege of a defendant granted by statute. *Bizzell v. Kodner Dev. Corp.*, 700 S.W.2d 819, 822 (Mo. banc 1985).

As this Court noted, “[w]hile [an] analogy to the interpretation of section 508.040 is appealing at first blush, it fails to sufficiently take into account the difference in wording between section 508.040 and section 355.176.4.” *SSM Health Care*, 78 S.W.3d at 144. Section 508.040 provides that “[s]uits against corporations ***shall be commenced***...” in one of two locations. Section 508.040 (emphasis added). Section 355.176.4, by contrast, expressly states that “[s]uits against a nonprofit corporation ***shall be commenced only*** in one of” three locations. Section 355.176.4 (emphasis added).

In *SSM Health Care v. Neill*, this Court made two important holdings that are directly applicable to the facts of this matter. First, this Court noted that § 355.176.4 governs venue in suits in which a nonprofit corporation is

sued alone or with other nonprofit corporate defendants. 78 S.W.3d at 143. Second, this Court held that “the legislature’s use and placement of *both* the words ‘shall’ and ‘only’ in section 355.176.4 signifies on its face that the legislature intended to designate **exclusively** those locations set out in section 355.176.4 as permissible venues for suit against nonprofit corporations, and **restrict** venue to them...” 78 S.W.3d at 143 (emphasis to “both” in original, remaining emphasis added). What is clear from the *SSM Health Care* holdings, therefore, is that § 355.176.4, unlike § 508.040, is a restricting or limiting venue statute, designed to specifically identify the only three permissible venues for suits against a nonprofit.

Respondent, by contrast, cites to § 508.040 and relies heavily on cases interpreting that statute to support the erroneous conclusion that venue as to one nonprofit corporation is venue as to all nonprofit corporations. Respondent’s conclusion, however, completely ignores the plain differences in the language of § 355.176.4 and this Court’s interpretation of that language. “Section 355.176.4 expressly provides the **exclusive venues in which a nonprofit can be sued** in Missouri.” 78 S.W.3d at 145.

Here, there is no dispute that Missouri Baptist, a nonprofit corporation, maintains its principal place of business in St. Louis County,

that the cause of action accrued in St. Louis County, and that Missouri Baptist's registered agent's office is in St. Louis County. Thus, under § 355.176.4 and *State ex rel. SSM Health Care v. Neill* the "exclusive venue" within which Missouri Baptist can be sued under the facts of this case is St. Louis County. Since there is no dispute that venue is also proper as to BJC in St. Louis County, there is no conflict, venue impasse, or inconsistency with transfer of this entire case to St. Louis County, the ONLY and exclusive county within which Missouri Baptist can be sued under § 355.176.4.

Respondent attempts to create a venue impasse by raising hypothetical questions of what might happen if there is no one venue which is proper as to all nonprofit defendants under § 355.176.4. (See *Respondent's Brief*, page 21). It is undisputed, however, that those are not the facts of this case, and Respondent's argument in this regard amounts to nothing more than a request for an advisory opinion; something this Court has said it cannot and will not deliver. *State ex rel. Ellsworth Freight Lines, Inc. v. State Tax Commission of Mo.*, 651 S.W.2d 130, 132 (Mo. banc 1983); *In re Estate of Van Cleave*, 574 S.W.2d 375, 376 (Mo. banc 1978).

Here, the exclusive venue within which Missouri Baptist can be sued, St. Louis County, is also a proper venue under § 355.176.4 for BJC Health

System. A transfer of the entire case to St. Louis County does not mean that venue has been analyzed separately for each allegedly jointly liable Defendant, but rather that venue is being analyzed *consistently* for all such Defendants. The law mandates that, if possible, Respondent simply transfer the entire case to a venue that is proper as to all defendants. Rule 51.045; § 476.410, RSMo. In this case, that venue is St. Louis County.

II. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT (OR THE CURRENT PRESIDING JUDGE) FROM TAKING ANY FURTHER ACTION EXCEPT TRANSFERRING THIS ENTIRE CASE TO ST. LOUIS COUNTY BECAUSE RESPONDENT EXCEEDED HER JURISDICTION AND ABUSED HER DISCRETION IN THAT SHE *SUA SPONTE* SEVERED FOR SEPARATE TRIAL THE CLAIMS AGAINST MISSOURI BAPTIST MEDICAL CENTER FROM THOSE AGAINST ALLEGED JOINT TORTFEASOR BJC HEALTH SYSTEM, IN CONTRAVENTION OF MISSOURI POLICY AND LAW, INCLUDING SUPREME COURT RULE 66.02 AND SECTION 510.180, RSMo.

A. Standard for Issuance of Extraordinary Writ

A writ of prohibition will be issued only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent the exercise of extra-jurisdictional power. *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. banc 2002). Because improper venue is a fundamental defect, a court that acts when venue is improper acts

in excess of its jurisdiction, and prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue. *Id.*

B. There was no authority or jurisdiction in undertaking any task pursuant to Supreme Court Rule 51.045 other than transferring the entire case to St. Louis County.

Respondent contends that the indivisible nature of a wrongful death claim mandates that the November 27, 2002, order be vacated and that the claims against Missouri Baptist be transferred back to the City of St. Louis. (See Respondent's Brief, page 25). Although Respondent is correct that discovery and trial of this wrongful death action in two separate venues is contrary to Missouri law, it does not follow that all claims must be tried in the City of St. Louis.

As addressed in the first of the Points Relied On herein, the undisputed venue facts pertinent to the operation of § 355.176.4, RSMo, mandate that Respondent transfer this entire case to St. Louis County. Therefore, upon a finding that St. Louis County is the exclusive proper venue for Plaintiffs' claims against Missouri Baptist and upon finding that St. Louis County is a proper venue for BJC, the entire case should have been transferred to St. Louis County because there was no jurisdiction to do anything else. *State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138, 141

(Mo. App. E.D. 2002). A court that acts when venue is improper acts in excess of its jurisdiction. *SSM v. Neill*, 78 S.W.3d at 142.

No party hereto, including Plaintiffs, moved to have the Circuit Court sever any claims in the case for separate trial. (See Exhibit 18 for trial court's minute record). Respondent held in her November 27, 2002, order, that Plaintiffs pleaded this case against Defendants Missouri Baptist and BJC as a theory of alleged joint tortfeasors. As such, separate trials for these two Defendants (1) is contrary to the legal policy in Missouri that claims against alleged joint tortfeasors are to be tried in a single trial; (2) is contrary to Rule 66.02 (and its parallel statutory provision in § 510.180, RSMo); (3) ignores Plaintiffs' allegations of joint liability; and (4) is erroneous in holding that judicial economy supports severance of the claims against BJC from those against Missouri Baptist.

In the case at bar, Plaintiffs' alleged theory is that Defendants Missouri Baptist and BJC acted as joint tortfeasors for health care at Missouri Baptist in June 2000. The relief and damages Plaintiffs seek from both these two Defendants is the same -- for reparation for the alleged injury to, and death of, Hazel Trimble in June 2000. Thus, all claims and issues against these Defendants must have a single trial.

Clearly, there was no basis for there being jurisdiction to order anything but a transfer of this entire case to St. Louis County. Furthermore, it was an abuse of discretion to order a separate trial for Defendant BJC Health System and to not transfer Plaintiffs' claims against it to St. Louis County.

CONCLUSION

Relators BJC Health System and Missouri Baptist Medical Center request that this Court make absolute its Preliminary Writ of Prohibition, thereby precluding Respondent (or the current presiding judge for the Circuit Court for the City of St. Louis) from taking any further action, other than to transfer the entire case to the Circuit Court for St. Louis County, where venue is proper as to all defendants, and to grant such other and further relief as this Court deems just and proper.

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CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing Reply Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Word 2000 by which it was prepared, contains 2,728 words of proportional type, exclusive of the cover, Certificate of Service, this Certificate of Compliance, and the signature block. Microsoft Word 2000 was used to prepare this Reply Brief.

The undersigned further certifies that the diskette filed herewith containing the Reply Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) and that it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copy of the foregoing Reply Brief and a 3-1/2 inch diskette containing the Reply Brief were mailed, postage prepaid, this 27th day of June 2003, to:

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