

NO. SC87057

**IN THE
MISSOURI SUPREME COURT**

**STATE OF MISSOURI *ex rel.* MEMORIAL PARK
CEMETERY ASSOCIATION OF MO., and HENRY W. DeVRY, III,
and MARK H. BAILEY,**

Relators,

vs.

**HON. RANDALL R. JACKSON,
Judge, Division 1, Fifth Judicial District
Circuit Court of Buchanan County, Missouri,**

Respondent.

RESPONDENT'S BRIEF

R. Dan Boulware Missouri Bar #24289
Seth C. Wright Missouri Bar #51830
SHUGHART THOMSON & KILROY, P.C.
3101 Frederick Avenue
P. O. Box 6217
St. Joseph, Missouri 64506-0217
Telephone: (816) 364-2117
Facsimile: (816) 279-3977
dboulware@stklaw.com
swright@stklaw.com

ATTORNEYS FOR PLAINTIFFS
HORIZON MEMORIAL GROUP, L.L.C.
and BAILEY AND COX FAMILY FUNERAL
SERVICE, INC.

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 3

POINTS RELIED ON 6

 I. RESPONSE TO POINTS I and II..... 6

 II. RESPONSE TO POINT III..... 6

 III. RESPONSE TO POINT IV..... 6

STATEMENT OF FACTS..... 7

ARGUMENT..... 8

 I. RESPONSE TO POINTS I and II..... 8

 A. STANDARD OF REVIEW 8

 B. ARGUMENT 9

 1. Respondent’s Determination of Venue on the Basis of Plaintiffs’ Amended
 Pleading is Consistent with *Linthicum* and § 508.010 10

 2. Strong Public Policy Supports Respondent’s Ruling..... 14

 3. Alternatively, This Court Should Re-Examine *Linthicum* 16

 II. RESPONSE TO POINT III..... 17

 A. STANDARD OF REVIEW 17

 B. ARGUMENT 18

 III. RESPONSE TO POINT IV..... 19

 A. STANDARD OF REVIEW 19

B. ARGUMENT	21
1. Writs Are Not Appropriate to Remedy Challenges to the Sufficiency of Pleadings.....	21
2. Plaintiffs Have Stated a Claim for Fraudulent Inducement to Contract	22
a. Plaintiffs Have Sufficiently Pled Fraud with Particularity	22
b. Bailey’s Present Intent Not to Perform is Actionable	23
c. Plaintiffs Have Sufficiently Alleged Damages.....	25
d. Plaintiffs Have Sufficiently Pled Reasonable Reliance.....	26
IV. CONCLUSION	29
RULE 84.06(c) AND (g) CERTIFICATES	31

TABLE OF AUTHORITIES

Error! No table of authorities entries found.Error! No table of authorities entries found.

Treatises

Kansas 66210

29

Error! No table of authorities entries found.

POINTS RELIED ON

I. RESPONSE TO POINTS I AND II

Barrett v. Missouri Pac. R. Co., 688 S.W.2d 397 (Mo. App. 1985)

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo. banc 1994)

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

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. 2001)

RSMo § 506.110 (2000)

RSMo § 508.010 (2000)

RSMo § 508.010 (eff. 8/28/05)

Mo. R. Civ. P. 55.33(c)

II. RESPONSE TO POINT III

Dzur v. Gaertner, 657 S.W.2d 35 (Mo. App. E.D. 1983)

Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. banc 1984)

O'Neal v. Stifel, Nicolaus & Co., Inc., 996 S.W.2d 700 (Mo. App. E.D. 1999)

Trimble v. Pracna, 167 S.W.3d 706 (Mo. banc 2005)

III. RESPONSE TO POINT IV

Oster v. Kribs Ford, Inc., 611 S.W.2d 535 (Mo. 1981)

Sofka v. Thal, 662 S.W.2d 502 (Mo. banc 1984)

Trimble v. Pracna, 167 S.W.3d 706 (Mo. banc 2005)

State ex rel. Pisarek v. Dalton, 549 S.W.2d 904 (Mo. App. E.D. 1977)

Mo. R. Civ. P. 55.15

STATEMENT OF FACTS

Relators' Petition for Writ of Prohibition and Writ of Mandamus arises from a civil action brought by Plaintiffs Horizon Memorial Group, L.L.C. and Bailey & Cox Family Funeral Service, L.L.C. (hereinafter collectively referred to as "Plaintiffs") against Relators for, in essence, breach of non-compete agreements, tortious interference with business contracts and expectancies, and civil conspiracy. *See* Relators' Ex. A (L.F. 1).

Plaintiffs filed their suit in the Circuit Court of Buchanan County, Missouri, the county in which the non-compete agreements were made. Relators' Ex. A, ¶ 2 (L.F. 2). Relators filed motions challenging venue, arguing that venue was improper under either RSMo § 508.010(2) or (6) (2000),¹ because none of the defendants resided in Buchanan County, nor did the tort claims arise there. Relators' Ex. B (L.F. 56); Relators' Ex. C (L.F. 62).

In an effort to cure the venue defect, Plaintiffs filed a motion for leave to amend their petition to assert a new count for fraudulent inducement to contract. Relators' Ex. F (L.F. 118). That previously overlooked claim arose out of the same transactions and occurrences as alleged in their original Petition and thus related back to the date the Petition was filed.² Plaintiffs' fraudulent inducement claim is a tort claim that arose in Buchanan County, and therefore, Plaintiffs submitted, venue of their action in Buchanan County is proper under

¹ Unless otherwise stated, all statutory references are prior to the tort reform effective August 28, 2005.

² The amended pleading also added a new claim for breach of duty of loyalty. This Court first recognized that cause of action on April 26, 2005, shortly after Plaintiffs' original petition was filed. *See Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477 (Mo. banc 2005).

RSMo § 508.010(6), which fixes venue for tort actions in the county where the tort occurred, regardless of the residence of the parties.

After briefing and oral argument, Respondent granted Plaintiffs leave to amend their petition, and denied Relators' motion to transfer venue. Relators' Ex. J (L.F. 232). Respondent found that it had "full authority" to grant leave to amend; that Relators failed to meet their burden of proving pretensive joinder of any Defendant; and that Respondent has venue pursuant to RSMo § 508.010. *Id.*

ARGUMENT

I. RESPONSE TO POINTS I AND II

The issue asserted by Relators in their Point II is not a separate claim of error. Rather, Point II addresses a certain argument that Plaintiffs asserted in response to Relators' Point I. As a result, Respondent will address Points I and II together.

A. Standard of Review

In their Petition filed in this Court, Relators sought both a Writ of Prohibition and a Writ of Mandamus. This Court issued only a preliminary Writ of Mandamus, and the title of Relators' Brief and Conclusion suggests that they are now urging only that a writ of mandamus issue. Writs of mandamus and prohibition serve different purposes, and different standards apply with respect to their issuance. For this reason, Respondent will address the standard of review for both.

Prohibition is an extraordinary remedy that issues only when there unequivocally "exists an extreme necessity for preventive action." *Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985). "Prohibition will lie only to prevent an abuse of judicial discretion, to

avoid irreparable harm to a party, or to prevent exercise of extra-judicial power.” *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001).

Mandamus is also an extraordinary remedy. *See State ex rel. Landmark KCI Bank v. Stuckey*, 661 S.W.2d 58, 59 (Mo. App. W.D. 1983). It lies only to compel performance of a clearly established and presently existing specific right. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc 1994). “[T]he purpose of the writ is to execute, not to adjudicate.” *Id.*

B. Argument

Relators contend that venue over this action must be determined based on the claims as asserted in Plaintiffs’ original Petition. *See State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. 2001); *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820, 823 (Mo. banc 1994). Because, Relators argue, venue was improper over this action as originally pled, the trial court had no authority to grant Plaintiffs leave to amend their Petition to assert an omitted claim -- even though venue would be proper in Buchanan County under the pleading as amended. According to Relators, the trial court had no authority to do anything but to transfer the case to a court in which venue over those claims was proper, *i.e.*, Clinton, Clay or Jackson Counties. *See State ex rel. Green v. Neill*, 127 S.W.3d 677, 678 (Mo. 2004).

But Relators’ position is neither compelled under existing authority, nor consistent with public policy. As established below, the question presented here has not previously been determined by Missouri courts. A writ of mandamus does not lie to *establish* a right, but rather only to compel performance of a right that *already exists*. *Chassaing*, 887 S.W.2d at 576-77. Thus, where, as here, there is an unsettled question of law, a relator does not have

a clear, unequivocal, presently existing specific right, and mandamus is improper. *See id.* at 578. Further, if Relators’ position were accepted, it would create an extremely harsh and impractical rule that would prohibit a plaintiff from ever curing a curable defect in venue. And plaintiffs would be deprived of their significant right to select the forum for their claims. *See Barrett v. Missouri Pac. R. Co.*, 688 S.W.2d 397 (Mo. App. 1985); *State ex rel. Domino’s Pizza v. Dowd*, 941 S.W.2d 663, 667 (Mo. App. E.D. 1997).

1. Respondent’s Determination of Venue on the Basis of Plaintiffs’ Amended Pleading is Consistent with *Linthicum* and § 508.010

In *DePaul*, this Court established the rule that venue under the general venue statute, RSMo § 508.010 (2000) (App. A3), is determined as of the date the petition is “brought.” *DePaul*, 870 S.W.2d at 823. But despite *DePaul*’s language suggesting an unqualified, bright-line rule that venue may only be determined as the case stood when the original petition was filed, this Court nevertheless later recognized an expansion of that rule. In *Linthicum*, this Court held that a trial court may also re-examine venue when, by amended pleading, a new defendant is later added. *See Linthicum*, 57 S.W.3d at 857. The *Linthicum* Court explained that a suit is “‘brought’ against the original defendants when the petition is initially filed,” and is also “‘brought’ against subsequent defendants when they are added to the lawsuit by amendment.” *Id.* at 858.

The issues presented in *DePaul* and *Linthicum* involved the effect on venue when a plaintiff amends its petition to either add or drop a *party defendant*. Importantly, neither case addressed the issue presented here: the effect on venue of an amendment to add an *omitted claim*. The issue presented in this case is whether venue may be determined on the

basis of an amended petition asserting an omitted claim that relates back to the date of the filing of the original Petition, *i.e.*, when the suit was “brought.” Or, more particularly, whether a trial court has authority to grant a party leave to amend its pleading to assert an overlooked claim where venue would be proper in that court had the party asserted that claim in its original petition.

Respondent has found no Missouri authority addressing the unique circumstances of this case. The fact that *Linthicum* permits a court to re-examine venue based on an amended pleading suggests that a court is not, in all circumstances, limited to deciding venue based on the pleading as initially filed, as Relators urge. The circumstances of this case call for recognition of a further clarification of *DePaul*, permitting a court to determine venue based on an amended pleading, where the newly added claim, which relates back to the filing of the original action, establishes that venue in the original court is proper. Such a rule would be consistent with *DePaul* and *Linthicum*'s construction of the word “brought” as used in § 508.010.

In arguing that venue may only be determined on the basis of the original Petition, Relators are ignoring the effect of Missouri Rule of Civil Procedure 55.33(c). That rule provides that whenever a new claim is asserted that “arose of the conduct, transaction or occurrence set forth . . . in the original pleading, the amendment relates back to the date of the original pleading.” Mo. R. Civ. P. 55.33(c) (App. A7). The effect of this rule is that where, as here, a plaintiff amends his petition to assert an omitted claim that would make venue proper, that amendment relates back to when the original petition was “brought.” In other words, the amended petition was effectively “brought” at the time the original petition

was filed. Thus, a court may, consistently with *DePaul, Linthicum* and § 508.010, properly consider venue on the basis of a pleading as amended.

Relators argue that the relation-back doctrine is inapposite because it applies only for statute of limitations purposes and to amendments changing the party against whom a claim is asserted. That argument finds no support in the plain text of Rule 55.33(c), or the case law upon which Relators rely. Indeed, the very first sentence of Rule 55.33(c) plainly states that the relation-back doctrine applies to *claims*: “Whenever the *claim* or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading. . . .” Mo. R. Civ. P. 55.33(c) (App. A7) (emphasis added). The rule then goes on to discuss the effect of an amendment changing a party defendant. In that case, not only must the amendment arise from the same conduct, transaction or occurrence in the original pleading, but it also must be brought within the statute of limitations period. *See id.* Clearly, under the plain language of the Rule, the relation-back doctrine applies both to amendments adding claims, as well as amendments changing parties. *See, e.g. Southwestern Bell Yellow Pages v. Wilkins*, 920 S.W.2d 544, 550 (Mo. App. E.D. 1996).

Relators have taken *Windscheffel* and *Smith* completely out of context by arguing that they held that the relation back doctrine applies *only* to amendments changing the party against whom a claim is asserted, and not to amendments to add new claims. In stating that the doctrine applies only to amendments changing a party, those courts were distinguishing between *remedying a mistake in naming* a party versus adding a *new* party, since Rule 55.33(c) applies only to the former, not the latter. *See Windscheffel v. Benoit*, 646 S.W.2d

354, 356 (Mo. 1983); *Smith v. Overhead Door Corp.*, 859 S.W.2d 151, 152 (Mo. App. 1993). Neither case held that the relation back doctrine does not apply to an amendment adding a new claim. Indeed, such would be antithetical to the plain language of the Rule.

Although, as Relators note, the primary purpose of the relation back doctrine is to save claims from being time-barred and Rule 55.33(c) does not mention venue, that does not preclude this Court from considering the effect of that rule on venue. Indeed, in holding that a suit instituted by summons is “brought” for venue purposes when a new defendant is added, the *DePaul* Court considered RSMo § 506.110.1(1) (App. A2) – dealing with how a suit is instituted – even though that statute does not expressly relate to venue. *See DePaul*, 870 S.W.2d 820, 821-22 (Mo. banc 1994). In the same way, the relation back doctrine also colors the analysis of when a suit is “brought” for venue purposes.

Relators rely on *State ex rel. Green v. Neill*, 127 S.W.3d 677 (Mo. 2004), for the proposition that a trial court has no authority to do anything other than transfer the case to a proper venue. Relators argued that since venue was improper over Plaintiffs’ action as originally pled, the trial court had no authority to grant Plaintiffs leave to amend their Petition. But *Green* did not involve the situation, as here, in which venue would be proper if leave to amend were granted. Rather, *Green* was a pretensive joinder case. There, this Court held only that the plaintiff could not state a claim against the sole defendant upon whose residence venue was predicated and therefore the trial court had no authority to proceed with the litigation. *Id.* at 678. *Green* did not involve a motion for leave to add an omitted claim, as here, and thus cannot be read as holding a court is prohibited from granting leave to

amend a petition in order to retain jurisdiction over a case that is properly venued there under the pleading as amended.

Plaintiffs' First Amended Petition asserts a valid cause of action for fraudulent inducement, which is a tort claim that arose in Buchanan County. Thus, had the fraudulent inducement claim been asserted in Plaintiffs' original petition, venue would have been proper in Buchanan County pursuant to RSMo § 508.010(6) (App. A3). Granting leave to amend under these circumstances merely permits a trial court to retain venue over a cause of action that is properly venued there. If a trial court has authority to transfer to the proper venue, then it necessarily has authority to, in effect, transfer the case to itself, by granting leave to amend.

2. Strong Public Policy Supports Respondent's Ruling

The extension of *Linthicum* to permit venue to be determined on an amended pleading under the circumstances presented here is supported not only by sound legal reasoning (the relation back doctrine), but also by strong public policy. It is well-established that a plaintiff's right to select the forum of his choice is "significant." *See Barrett v. Missouri Pac. R. Co.*, 688 S.W.2d 397 (Mo. App. 1985); *State ex rel. Domino's Pizza v. Dowd*, 941 S.W.2d 663, 667 (Mo. App. E.D. 1997). As stated above, Plaintiffs' original choice of forum is proper under their pleadings as amended. A rule denying Plaintiffs an opportunity to cure any venue deficiencies in their pleading by amendment would deprive them of their significant right to select their forum. *See DePaul*, 870 S.W.2d at 823 (Limbaugh, J., dissenting) (criticizing holding that "preclude[s] plaintiffs from curing defects in venue.").

It would also run contrary to numerous other long-held policies of this Court, in particular avoiding delay, inefficiencies, and a waste of judicial resources. If Relators' position were accepted, Plaintiffs would be forced to dismiss their claims, only to turn around and re-file them in Buchanan County. These machinations would not only be unduly harsh to Plaintiffs, it would be unnecessarily burdensome on the court's administration. The trial court would be burdened with the duplicative and wasteful administrative costs of closing the original file, then opening a new file when Plaintiffs re-file their action. The multiple filings would also increase the court's costs of storing the duplicative files.

And the costs to Plaintiffs, both in terms of delay and expense, would not serve the interests of justice. Obviously, a rule requiring Plaintiffs to first dismiss and then re-file their action would cause an unnecessary delay in Plaintiffs' right to a prompt resolution of their claims. Plaintiffs would have to pay a second filing fee to re-file their action, and suffer the consequences of a voluntary dismissal as set forth in Rules 67.02(a) (limiting the rights of a plaintiff who has once dismissed an action to thereafter dismiss without prejudice) and 67.02(d) (providing that the court may order the plaintiff to pay any unpaid costs of the previously dismissed action and stay the pending action until such payment is made). *See DePaul*, 870 S.W.2d at 823 (Limbaugh, J., dissenting) (suggesting that a rule that does not permit a plaintiff to cure venue defects would be "awkward" and would not promote an expeditious resolution).

Moreover, this Court has established a policy of liberal amendment of pleadings when justice so requires. *See* Mo. R. Civ. P. 55.33(a) (App. A7). Denying a plaintiff the ability to amend its pleadings to cure a defect brought to its attention after the filing of the petition

would not be in keeping with the policy to “freely” give a party leave to amend and would not promote the interests of justice.

3. Alternatively, This Court Should Re-Examine *Linthicum*

In the alternative, this Court should re-examine its construction of § 508.010 in *Linthicum*. In construing § 508.010, this Court in *Linthicum* focused on the word “brought,” as used in RSMo § 508.010. Section 508.010 states: “Suits instituted by summons shall, except as otherwise provided by law, be brought” App. A3. It then lists the six rules for determining where venue is proper. *See id.*

Construing this phrase, the Court stated that “brought” means to “to advance or set forth in a court.” *Linthicum*, 57 S.W.3d at 858. Thus, it construed “brought” in a *temporal* sense as defining *when* venue may be determined. Respondent suggests that § 508.010 was intended only to define *where* venue is proper; it does not speak to *when* venue is determined. Section 508.010 does not place any time limits on when or if venue may be re-determined. Indeed, although the *Linthicum* Court stated that § 508.010 should *not* be construed in a temporal sense, that is precisely what it did when it construed § 508.010 as permitting venue to be re-evaluated when a new defendant is added to the suit. *Id.* at 858. In effect, the Court construed the word “brought” as used in § 508.010 as relating not only to *where* venue is proper, but also to *when* venue may be determined.

Respondent submits that *Linthicum* should be re-examined. Section 508.010 should be construed as dictating only *where* venue is proper, and is silent as to *when* venue may be determined. Such a construction would clarify that courts are not precluded from re-evaluating venue when a new defendant or new claim is added by amendment.

It is also consistent with legislative intent as expressed in the new tort reform legislation that went into effect on August 28, 2005. RSMo § 508.010 (eff. 8/28/2005) (App. A4), now not only specifies *where* venue in a tort case is proper (*see* § 508.010.4) but also *when* it is to be determined. Section 508.010.9 provides that venue is determined as of the date the plaintiff was first injured. App. A4. Although it might be possible to imagine a scenario in which the date of first injury might change with the addition of a new party or claim, in most cases, it would not. Plaintiffs here were first injured when Bailey fraudulently induced them into the contracts in Buchanan County.

For these reasons, Respondent did not act in excess of its jurisdiction in granting Plaintiffs leave to amend their Petition, and Relators' Motion to Transfer for Lack of Venue was properly denied.

II. RESPONSE TO POINT III

A. Standard of Review

As stated with respect to Points I and II, Relators sought both a writ of mandamus *and* prohibition, but this Court issued only a preliminary writ of mandamus. Therefore, the standard of review for both are set forth herein.

Prohibition is an extraordinary remedy that issues only when there unequivocally “exists an extreme necessity for preventive action.” *Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985). “Prohibition will lie only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-judicial power.” *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001).

Mandamus is also an extraordinary remedy. *See State ex rel. Landmark KCI Bank v. Stuckey*, 661 S.W.2d 58, 59 (Mo. App. W.D. 1983). It lies only to compel performance of a clearly established and presently existing specific right. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc 1994). “[T]he purpose of the writ is to execute, not to adjudicate.” *Id.*

B. Argument

Relators argue that even if Respondent had authority to grant Plaintiffs leave to amend their Petition to assert their fraudulent inducement claim, the case must still be transferred because that claim accrued in Clinton County, not Buchanan County. That argument is plainly wrong, and reflects a serious misperception of the law. Relators correctly cite the rule for determining where a cause of action accrues for venue purposes: “For venue purposes, a cause of action ‘accrues’ at the place where the wrongful conduct causing injury or damage occurred.” *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 436 (Mo. banc 1984). But Relators then proceed to misapply the rule, commingling it with the rule for determining *when* a cause of action accrues for purposes of the statute of limitations.

Relators argue that a cause of action for fraudulent inducement does not accrue until the plaintiff suffers damage, a necessary element of their claim. Because, they argue, Bailey allegedly breached his non-compete agreement in Clinton County, that is where Plaintiffs suffered damage and thus where Plaintiffs’ cause of action arose. While it is true that Plaintiffs’ fraudulent inducement claim did not accrue *for purposes of determining when the statute of limitations began to run* until they suffered damages, the place where the last act giving rise to a cause of action does not determine *where* a plaintiff’s cause of action accrues

for venue purposes. With respect to venue, the rule fixes venue where the *conduct that caused* the injury occurred – not where the *injury* occurred. *See Dzur v. Gaertner*, 657 S.W.2d 35, 36 (Mo. App. E.D. 1983) (holding that although for statute of limitation purposes a wrongful death claim accrues when the death (the injury occurs); for venue purposes, it accrues where the wrongful conduct that caused the death occurred).

If this were a breach of contract claim, Relators would be correct that the place where the breach occurred determines venue (because that is where the conduct that caused the injury occurred). But a breach of contract claim and fraudulent inducement to contract claim are separate and distinct claims involving two separate wrongs. *Trimble v. Pracna*, 167 S.W.3d 706, 711 (Mo. banc 2005); *Schreibman v. Zanetti*, 909 S.W.2d 692, 703 (Mo. App. W.D. 1995). In a fraud case, the conduct causing the injury is the making of the false statement that induced the plaintiff to contract. *See O’Neal v. Stifel, Nicolaus & Co., Inc.*, 996 S.W.2d 700, 702 (Mo. App. E.D. 1999) (fraudulent inducement claim arose out of representations during negotiations). It is alleged that Bailey made his false statements in Buchanan County and that the parties entered into the contract in Buchanan County. First Amended Petition, ¶ 11-13 (Relators’ Ex. F). Thus, the conduct causing Plaintiffs’ injury (*i.e.*, the false statements inducing them to contract) occurred in Buchanan County and it, not Clinton County, is the proper venue for Plaintiffs’ fraudulent inducement claim.

III. RESPONSE TO POINT IV

A. Standard of Review

In Point IV, Relators challenge the sufficiency of Plaintiffs’ pleading of a fraud-in-the-inducement claim. Mandamus is an extraordinary remedy. *State ex rel. Landmark KCI*

Bank v. Stuckey, 661 S.W.2d 58, 59 (Mo. App. W.D. 1983). It lies only to compel performance of a *clear, unequivocal* and *presently existing specific right*. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc 1994). A writ of mandamus will not issue to compel the performance of a discretionary act. *Burns v. Gillis*, 102 S.W.3d 66, 68 (Mo. App. W.D. 2003). A discretionary act is “one requiring the exercise of reason in determining how or whether the act should be done.” *Id.* (citation omitted).

Further, a writ of mandamus will not issue where the relator is seeking an interlocutory appeal of an alleged error that can be remedied on appeal after final judgment. *See Less v. O’Brien*, 814 S.W.2d 2 (Mo. App. E.D. 1991); *Kupier v. Busch Entertainment Corp.*, 845 S.W.2d 697, 699 (Mo. App. E.D. 1993). “The purpose of the writ is to execute, not to adjudicate.” *Chassaing*, 887 S.W.2d at 576.

For these reasons, mandamus does not lie to review the sufficiency of a pleading. *State ex rel. Pisarek v. Dalton*, 549 S.W.2d 904, 905 (Mo. App. E.D. 1977) (“[m]andamus does not ordinarily lie to review the sufficiency of pleadings”). Such an issue is properly left for the ordinary appeal process. *See id.*

Prohibition is an extraordinary remedy that issues only when there unequivocally “exists an extreme necessity for preventive action.” *Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985). “Prohibition will lie only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-judicial power.” *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001).

B. Argument

1. Writs Are Not Appropriate to Remedy Challenges to the Sufficiency of Pleadings

In Point IV, Relators argue, as they did in the trial court below, that Plaintiffs failed to state a claim for fraudulent inducement to contract. *See* Relators' Ex. I, at p. 5 (L.F. 228). Respondent necessarily rejected that argument when it granted Plaintiffs leave to amend their Petition. *See* Relators' Ex. J (L.F. 233) (App. A1).

Mandamus does not lie as to challenge the sufficiency of a pleading. *State ex rel. Pisarek v. Dalton*, 549 S.W.2d 904, 905 (Mo. App. E.D. 1977) (“[m]andamus does not ordinarily lie to review the sufficiency of pleadings . . .”). Respondent’s decision in that regard was a discretionary decision that is inappropriate for relief by mandamus. *See Burns v. Gillis*, 102 S.W.3d 66, 68 (Mo. App. W.D. 2003) (a writ of mandamus will not issue to compel the performance of a discretionary act, *i.e.*, “one requiring the exercise of reason in determining how or whether the act should be done.”) *Id.* (citation omitted).

And Respondent’s order is an interlocutory order that can be remedied in due course through the ordinary appeal process. *Pisarek*, 549 S.W.2d at 905. As stated in *Pisarek*, “if extraordinary legal remedies were allowed to override the normal appellate process where the usual appeal would function to obtain justice, confusion if not chaos would be generated.” *Id.*

For these reasons, Relators have not shown – indeed, they do not have -- a clearly established, presently existing specific right warranting mandamus. Nor have they

demonstrated any extraordinary circumstances that would render the normal appeal process inadequate. Accordingly, mandamus should not be granted.

Nor is prohibition warranted. Relators have not shown any abuse of discretion, that they will suffer irreparable harm, or that prohibition is necessary to prevent exercise of extra-judicial power, by Respondent's holding that Plaintiffs stated a claim for fraudulent inducement to contract. *See State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001).

Should this Court nevertheless reach the merits of Relators' arguments, they are wholly without merit.

2. Plaintiffs Have Stated a Claim for Fraudulent Inducement to Contract

a. Plaintiffs Have Sufficiently Pled Fraud with Particularity

Relators first argue that Plaintiffs did not allege fraud with particularity as required by Rule 55.15, but do not flesh out in what respects Plaintiffs' allegations are insufficient. *See* Relators' Brief in Support of Writ of Mandamus, p. 27.

Rule 55.15 states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. . . ." Mo. R. Civ. P. 55.15 (App. A6). In paragraph 11 of their First Amended Petition, Plaintiffs allege:

Defendant Bailey induced the Plaintiffs to enter into the sale transaction and respective agreements by assuring Plaintiffs that he (Bailey) would not enter into, accept or continue employment with Park Lawn Funeral Home or any other entity owned by Hank DeVry, if the employer or a related entity was engaged in direct

competition with Plaintiffs. These representations by Defendant Bailey took place in St. Joseph during negotiations for the transaction, and but for these representations, Plaintiffs would not have entered into or consummated the sale transaction.

L.F. 125. These allegations are unquestionably sufficient to satisfy the particularity standard of Rule 55.15, and Respondent did not abuse its discretion in so holding.

b. Bailey’s Present Intent Not to Perform is Actionable

Relators next argue that Plaintiffs failed to state a claim for fraudulent inducement because statements and representations “as to expectations and predictions for the future are insufficient to authorize recovery for fraudulent misrepresentation,” citing *O’Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700 (Mo. App. 1999). They also cite *Yerington v. Riss*, 374 S.W.2d 52, 58-59 (Mo. 1964), for the proposition that a fraud claim cannot be “predicated on representations or statements which involve things to be done or performed in the future.” Relators’ Brief, p. 27.

But Relators ignore this Court’s holding in *Sofka v. Thal*, 662 S.W.2d 502 (Mo. banc 1984), that “a promise *accompanied by a present intent not to perform* is a misrepresentation of present state of mind, itself an existing fact, sufficient to constitute actionable fraud.” *Id.* at 507 (emphasis added). *Yerington* is no longer good law. This Court abrogated two cases expressing the same view as *Yerington*. See *Connor v. Bruce*, 983 S.W.2d 625 (Mo. App. S.D. 1999) (citing *White v. Mulvania*, 575 S.W.2d 184, 188 (Mo. banc 1978)). *Sofka* is the correct statement of the law. See *id.*

In Count I, Plaintiffs allege that Defendant Bailey induced them to contract with false promises that he would not enter into, accept or continue employment with Memorial Park or

any entity owned by Hank DeVry if the employer or related entity was engaged in direct competition with Plaintiffs.” First Amended Petition, ¶ 30 (L.F 130). Plaintiffs further expressly allege that at the time he made those representations, Bailey had no present intent to honor his promise. *Id.* at ¶ 32.

Relators argue that these allegations, without factual support, are insufficient to suggest that Bailey had no present intent not to perform his promise when it was made, and thus Plaintiffs are in reality asserting nothing more than a breach of contract claim under the guise of a fraudulent inducement claim. But under Rule 55.15, intent may be averred generally. Mo. R. Civ. P. 55.15 (App. A7); *Rhodes Engineering Co., Inc. v. Public Water Supply Dist. No. 1 of Holt Co.*, 128 S.W.3d 550, 567 (Mo. App. W.D. 2004). Accordingly, Plaintiffs are not required to plead evidentiary facts to support their allegation of Bailey’s intent, and Plaintiffs allegations are unquestionably sufficient to state a claim for fraudulent inducement. *See Sofka*, 662 S.W.2d at 507.

Moreover, Relators’ argument that plaintiffs cannot and should not be permitted to plead both a contract and tort claim arising from the same transaction is without basis in law. Indeed, this Court stated in *Trimble* that “[a] party who fraudulently induces another to contract and then also refuses to perform the contract commits two separate wrongs, so that *the same transaction gives rise to distinct claims* that may be pursued to satisfaction consecutively.” *Trimble v. Pracna*, 167 S.W.3d 706, 711 (Mo. banc 2005) (emphasis added). Thus, a plaintiff may recover benefit-of-the-bargain damages “resulting from fraud in inducing her to contract and also recover additional damages, if any, resulting from breach of the contract, as both rest on affirmance of the contract.” *Id.* Although the damages from the

two theories may merge and a plaintiff is not entitled to a double recovery should a jury award identical damages on both claims, that does not preclude a plaintiff from pleading and proceeding with both claims. *See id.; Schreiberman v. Zanetti*, 909 S.W.2d 692, 703-04 (Mo. App. W.D. 1995).

c. Plaintiffs Have Sufficiently Alleged Damages

Relators also argue that Plaintiffs have not alleged facts showing that they sustained damage as a result of being fraudulently induced into the non-compete agreement with Bailey. They argue that Plaintiffs' damages, if any, flow from the *breach* of the contract, not from having *entered into* the contract. Again, the damages flowing from a breach of contract claim and a fraudulent inducement claim may be based on the same items of damage, but it does not preclude a plaintiff from submitting both claims to a jury, as long as a court merges any duplicative damages. *See Trimble*, 167 S.W.3d at 711; *Schreiberman*, 909 S.W.2d at 703-04.

As Relators acknowledge, it can be reasonably inferred from Plaintiffs' First Amended Petition that Plaintiffs would not have entered into the employment contract with Bailey had they known he did not intend to abide by its terms. *See* Petition for Writ of Prohibition and Writ of Mandamus, p. 12. Clearly, Plaintiffs suffered damages as a result of having been induced by fraud to enter into a contract that Bailey had no intention of fulfilling when he entered into it and later did breach. As one example, had Plaintiffs never entered into the employment contract with Bailey, he obviously would never have gained access to Plaintiffs' proprietary pre-need list, which he then used to unlawfully compete with Plaintiffs

to their damage. *See* Relators' Ex. F, ¶¶ 19, 28 (L.F. 128, 130). Accordingly, Plaintiffs have sufficiently alleged damages.

d. Plaintiffs Have Sufficiently Pled Reasonable Reliance

Relators lastly argue that Plaintiffs did not plead facts supporting their right to rely on Bailey's misrepresentations. Although Missouri is a fact pleading state, a plaintiff "need not allege evidentiary facts;" rather, he must allege "ultimate facts informing the defendant of what the plaintiff will attempt to establish at trial." *M & H Enterprises v. Tri-State Delta Chemicals, Inc.*, 984 S.W.2d 175, 181 (Mo. App. S.D. 1999); *Charron v. Holden*, 111 S.W.3d 553, 555 (Mo. App. W.D. 2003). The purpose of fact pleading is "to enable a person of common understanding to know what is intended." *M & H Enterprises*, 984 S.W.2d at 181. The allegations are liberally construed and the plaintiff is entitled to all reasonable inferences "fairly deducible from the facts stated." *Murphy v. Mathews*, 841 S.W.2d 671, 672 (Mo. banc 1992). Given the preference to dispose of a case on the merits, "the liberality with which a petition must be viewed . . . and the right of plaintiff to amend," a motion to dismiss should not be granted unless no set of facts can be alleged entitling the plaintiff to relief. *Oster v. Kribs Ford, Inc.*, 611 S.W.2d 535, 536 (Mo. 1981) (citation omitted); *Bennett v. Mallinckrodt*, 698 S.W.2d 854, 865 (Mo. App. E.D. 1985). Any insufficiency due to lack of definiteness or informality is not proper grounds for dismissal but are more properly addressed by a motion to make more definite and certain. *See Oster*, 611 S.W.2d at 536 (citation omitted); *Bennett*, 698 S.W.2d at 865.

Relators argue that Plaintiffs could not have relied on Bailey's misrepresentations because they required the representations be reduced to writing. Relators fail to comprehend

the claim of fraudulent inducement to contract. It is absurd to suggest that if the representations are reduced to writing the claim fails. The entire gist of the cause of action is that the defendants' misrepresentations induced the plaintiff into entering into a contract. Thus, a fraudulent inducement claim could not exist unless the parties actually entered into a contract.

Relators cite *Hoag v. McBride & Son Inv. Co.*, 967 S.W.2d 157, 174 (Mo. App. 1998), for the proposition that Plaintiffs cannot “merely conclude [in their petition] that they had the right to rely on the alleged misrepresentation.” But in *Hoag*, the court held that it is sufficient for a plaintiff to plead *allegations which infer the facts* supporting its contention that it had the right to rely on the defendant's statements, *Id.* at 174. In that case, it was clear on the face of the petition that the plaintiffs were aware of facts that demonstrated they could not reasonably have relied on the misrepresentation. *See id.*

In contrast, Plaintiffs' Petition here alleges no facts suggesting that their reliance on Bailey's representations was unreasonable. In negotiating the terms of the non-compete agreements, Bailey specifically requested a caveat that he be permitted to work for DeVry, a competitor of Plaintiffs'. Based on his representation that he would not work for DeVry or Park Lawn if they engaged in direct competition with Plaintiffs,³ the parties carved out an express qualification to the non-compete that allowed Bailey to work for DeVry so long as DeVry and Park Lawn did not operate a funeral home within a 30-mile radius of St. Joseph or any funeral home owned or acquired by Plaintiffs. Relators' Ex. F, ¶ 10 (L.F. 123).

³ See First Amended Petition, ¶ 11 (Relators' Ex. F, at L.F. 125).

The fact that Bailey requested, and then negotiated and agreed on the parameters of, a carve-out for future employment by DeVry would cause a reasonable person to believe that he was being truthful in representing that he would not accept employment by DeVry in direct competition with Plaintiffs. A dishonest person would not have mentioned *any* desire to work for a competitor. Plaintiffs, being unaware of any facts that would cause a reasonable person to doubt Bailey’s representations, had the right to rely on them. Plaintiffs’ First Amended Petition thus pleads facts inferring the existence of their right to rely on Bailey’s representations sufficient to survive a motion to dismiss.

Relators argue that Plaintiffs are only “speculat[ing] from the circumstances” that Bailey had no present intent to keep his promises, and have produced no “objective evidence” showing his intent. In arguing that Plaintiffs must be able to present specific evidence proving Bailey’s *subjective* intent not to perform his contract before having an opportunity to conduct discovery, Relators seek to hold Plaintiffs to an impossible standard – one not required by courts in this State. *See Rhodes*, 128 S.W.3d at 567 (intent may be averred generally). If Plaintiffs’ allegations are lacking in particularity, they should be given an opportunity to amend, not suffer a dismissal. *Oster*, 611 S.W.2d at 536; *Bennett*, 698 S.W.2d at 865.

As established by the foregoing, Respondent did not abuse its discretion or exceed its judicial powers in finding that Plaintiffs sufficiently pled a claim for fraudulent inducement to contract, and thus prohibition is not proper. Nor have Relators shown that they will suffer irreparable harm that cannot be remedied through the ordinary appeal process. Further, mandamus is not proper to challenge the sufficiency of a pleading.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to deny Relators' Petition for Writ of Prohibition and Writ of Mandamus. In the alternative, should this Court find that venue is not proper in Buchanan County under RSMo § 508.010(6), then this case should be transferred to the forum of Plaintiffs' choice, Jackson County, where venue is also proper under § 508.010(2).

Respectfully submitted,

SHUGHART THOMSON & KILROY, P.C.

By _____

R. DAN BOULWARE - #24289

SETH C. WRIGHT - #51830

3101 Frederick Avenue

P.O. Box 6217

St. Joseph, Missouri 64506

Telephone: (816) 364-2117

Facsimile: (816) 279-3977

dboulware@stklaw.com

swright@stklaw.com

ATTORNEYS FOR PLAINTIFFS
HORIZON MEMORIAL GROUP, L.L.C.
and BAILEY AND COX FAMILY FUNERAL
SERVICE, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **RESPONDENT'S BRIEF**, with a copy on disk, was served, via overnight mail, postage prepaid, this 5th day of December, 2005, to:

Fritz Edmunds, Jr., Esq.
Edmunds Law Office, L.L.C.
10990 Quivira Road, Suite 200
Overland Park, Kansas 66210

ATTORNEYS FOR RELATORS/DEFENDANTS
MEMORIAL PARK CEMETERY ASSOCIATION
OF MO., AND HENRY W. DeVRy, III

Jeffrey W. Bruce, Esq.
The Bruce Law firm
P. O. Box 797
Belton, Missouri 64012

ATTORNEYS FOR RELATOR/DEFENDANT
MARK BAILEY

The Honorable Randall R. Jackson
Circuit Court of Buchanan County
411 Jules Street
St. Joseph, Missouri 64501

RESPONDENT

Attorney for Plaintiffs

RULE 84.06(c) AND (g) CERTIFICATES

I hereby certify that RESPONDENT'S BRIEF includes the information required by Rule 55.03, and that the brief complies with the limitations contained in Rule 84.06(b). Respondents' Substitute Brief consists of 7,225 words, exclusive of the cover, certificate of service, certificate required by Rule 84.06(g), signature block and appendix, as determined by the word count of the Microsoft Word word-processing system.

I hereby certify that the floppy disk filed by Respondent in this matter has been scanned for viruses and that it is virus free.

BY _____
ATTORNEY FOR PLAINTIFFS