IN THE MISSOURI SUPREME COURT
No. 86300

STATE OF MISSOURI, ex rel.,
DENIS TATE AND DOROTHY TATE
Relators,

vs.

THE HONORABLE JAMES A. FRANKLIN,
JUDGE, CIRCUIT COURT OF
LACLEDE COUNTY
Respondent.

Writ of Mandamus Directed to the Circuit Court of Laclede County
Cause No. CV304-964CC

Hon. James A. Franklin, Judge

BRIEF OF RESPONDENT THE HONORABLE JAMES A. FRANKLIN

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JURISDICTIONAL STATEMENT

This is a petition for writ of mandamus against the Honorable James A Franklin, Judge, of the Circuit Court of Laclede County in a case now pending therein. In their brief in support of their petition for writ of mandamus, Relators contend that venue of this lawsuit was proper in the Circuit Court of Saint Louis County in that there was a proper cause of action stated against Bette Willis. In the alternative, Relators assert that the Circuit Court of Saint Louis County lacked jurisdiction to transfer the case after it granted the motion to dismiss of Bette Willis in that the motion to transfer of Bette Willis was moot and there was no

other motion to transfer pending. The Missouri Court of Appeals, Southern District, denied Relators' petition. (Exhibit 7). This Honorable Supreme Court has jurisdiction over this Writ under the provisions of Article V §4 of the Missouri Constitution (1945), Rule. 97.01 *et seq*., and §530.020 R.S.Mo. (2000).[1]

[1] All statutory references unless otherwise noted are to the revised statutes of the state of Missouri, 2000 revision. All references to the Rules are to the Missouri Rules of Civil Procedure unless otherwise noted.

STATEMENT OF FACTS

Relators Denis and Dorothy Tate ("Relators") instituted the present action in the Circuit Court of Saint Louis County seeking damages for personal injuries allegedly sustained on November 28, 2002, when they were involved in a motor vehicle accident in Laclede County, Missouri. (See Exhibit 1). The action was filed against The Estate of Herbert W. Willis by Elaine Gilley, Executor, and Bette Willis. (Id).

The amended petition alleged that Bette Willis was the wife of Herbert Willis. (See Exhibit 1.) The petition further alleged that, on the date of the accident, Herbert Willis was operating a motor vehicle jointly owned by himself and his wife. (Id.) Bette Willis was alleged to be a passenger in the vehicle. (Id.) As the alleged result of negligence on the part of Herbert Willis, the vehicle he operated was involved in an accident with a vehicle occupied by the Relators. (Id.)

The first amended petition alleged that Bette Willis was benefiting from the operation of the vehicle by Herbert Willis and that Herbert Willis was acting as the agent, servant or employee of Bette Willis at the time of the accident. (Id). No actual facts regarding how Bette Willis benefited from the operation of the vehicle are set forth nor are there any facts set forth establishing an agency, employment or servant relationship. (Id).

In response to the first amended petition, Bette Willis filed both a motion to dismiss for failure to state a claim and a motion to transfer venue. (See Exhibit 2; and Exhibit 3). The motion to transfer alleged that Relators' claims against Bette Willis were without any merit and filed solely to obtain venue in the Circuit Court of Saint Louis County. (See Exhibit 3).

On June 2, 2004, the Honorable Barbara W. Wallace, Circuit Court of Saint Louis County, heard arguments on the motion to dismiss and motion to transfer. (See Exhibit 4). The trial court provided Relators time to file a memorandum in opposition to the motions. (Id.) The trial court further supplied time for a response in support of the motions. (Id.) Finally, the trial court expressly ordered that the Estate of Herbert W. Willis be granted until July 2, 2004, to file responsive pleadings to Relators' first amended petition. (Id.)

On or about June 14, 2004, counsel for Relators forwarded correspondence to the trial court setting forth his arguments in opposition to the motion to dismiss and motion to transfer. (See Exhibit 5.) In this correspondence, Relators claimed agency based upon Missouri case law, mostly from the 1950's and before, that held that the driver of a motor vehicle is the agent of a passenger. See e.g. *Dinger v Burnham*, 228 S.W.2d 696 (Mo. 1950). (Id). No further allegations were set forth to indicate how Herbert Willis was or could be an agent, servant or employee of

Bette Willis. (Id). Instead, the correspondence clearly set forth Relators' theory that, as the driver of the car, he was Mrs. Willis' agent. (Id).

In addition to sending the correspondence, Relators also proffered an unsigned second amended petition. (See Exhibit 5 at page 18). The second amended petition added an allegation at paragraph 15 that Bette Willis controlled or had the right to control her husband. (See Exhibits to writ at pages 16-17; also at 20). The second amended petition lodged by the Relators failed to set forth any facts to support any of the allegations of agency or control. (Id).

On June 21, 2004, Bette Willis filed her reply memorandum. (Attached to answer of Respondents as Exhibit A). This memorandum set forth that the case law relied upon by the Relators in arguing the theory of agency was no longer to be followed. (Id). See e.g. *Stover v. Patrick*, 459 S.W.2d 393 (Mo. 1970). (co-ownership of vehicle is not sufficient basis for imputing negligence); *McAuliffe v Vondera*, 494 S.W.2d 692 (Mo.Ct.App.1973)(spouse passenger cannot be held liable for the alleged negligence of the spouse driver). It was further pointed out that Relators' "allegations" set forth no facts whatsoever and were nothing other than conclusions. (Id).

On June 22, 2004, the trial court entered its order sustaining the motion to dismiss and motion to transfer. (Exhibit 6.) Relators then proceeded with the present action.

POINTS RELIED ON

I

RELATORS ARE NOT ENTITLED TO AN ORDER IN MANDAMUS AS THE TRIAL COURT[2] DID NOT ERR IN GRANTING THE MOTION TO DISMISS OF DEFENDANT BETTE WILLIS BECAUSE RELATORS' PETITION FAILED TO STATE A CLAIM OR CAUSE OF ACTION AGAINST BETTE WILLIS IN THAT: (A) RELATORS' PETITION STATED CONCLUSIONS AND NO FACTS TO SUPPORT ANY CLAIM OF AN AGENCY RELATIONSHIP BETWEEN BETTE WILLIS AND HER LATE HUSBAND; AND (B) RELATORS' MEMORANDUM OF LAW CLEARLY AND UNAMBIGUOUSLY DEMONSTRATED THAT THE CLAIM WAS BASED SOLELY ON THEIR RELATIONSHIP AS HUSBAND AND WIFE; AND (C) THE PROPOSED SECOND AMENDED COMPLAINT ADDED NOTHING TO RELATORS CLAIM OF AGENCY, GRANTING THE MOTION WOULD HAVE BEEN A FUTILE ACT AND THE SECOND AMENDED PETITION WAS UNSIGNED; AND (D) A WRIT SHOULD NOT ISSUE WITH RESPECT

[2] As the writ in this matter was filed after the case was already transferred to Laclede County, Respondent was not the judge that entered the order that is claimed to be erroneous. For this reason, the judge entering the order shall be referenced to as the "trial court" to distinguish her from Respondent.

TO A MOTION TO DISMISS AS THE GRANTING OF A MOTION TO DISMISS CAN BE REVIEWED ON APPEAL.

Stover v Patrick, 459 S.W.2d 393 (Mo. 1970)

McAuliffe v Vondera, 494 S.W.2d 692 (Mo.Ct.App. 1973)

State ex rel. Harvey v Wells, 955 S.W.2d 546 (Mo. banc 1997)

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

II

RELATORS ARE NOT ENTITLED TO AN ORDER IN MANDAMUS REQUIRING RESPONDENT TO RETRANSFER THIS MATTER TO SAINT LOUIS COUNTY BECAUSE THE TRIAL COURT DID NOT IMPROPERLY GRANT BETTE WILLIS' MOTION TO TRANSFER BASED UPON THE PROPREITY OF VENUE IN SAINT LOUIS COUNTY IN THAT: (A) THE TRIAL COURT DID NOT ERR IN GRANTING BETTE WILLIS'S MOTION TO DISMISS; AND (B) THE CLAIMS AGAINST BETTE WILLIS WERE PRETENSIVE.

Stover v Patrick, 459 S.W.2d 393 (Mo. 1970)

McAuliffe v Vondera, 494 S.W.2d 692 (Mo.Ct.App. 1973)

State ex rel. Harvey v Wells, 955 S.W.2d 546 (Mo banc 1997).

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

III

RELATORS ARE NOT ENTITLED TO AN ORDER IN MANDAMUS REQUIRING RESPONDENT TO RETRANSFER THIS MATTER TO SAINT LOUIS COUNTY BECAUSE THE TRIAL COURT HAD JURISDICTION TO TRANSFER THE CASE AFTER GRANTING THE MOTION TO DISMISS IN THAT: (A) RULE 51.045 THEN IN FORCE EXPRESSLY DIRECTED A COURT TO TRANSFER A CASE TO THE CORRECT VENUE WHERE A MOTION TO TRANSFER HAS BEEN FILED AND THE COURT'S FINDINGS ARE IN FAVOR OF THE MOTION; (B) MISSOURI STATUTES, IN PARTICULAR §476.410, PERMIT THE COURT TO TRANSFER THE CASE TO A CORRECT VENUE; AND (C) THERE WAS NO WAIVER OF VENUE BY ANY OF THE DEFENDANTS.

Mo. R. Civ. Pro. 51.045

§476.410 R.S.Mo (2000)

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

ARGUMENT

RELATORS ARE NOT ENTITLED TO AN ORDER IN MANDAMUS AS THE TRIAL COURT DID NOT ERR IN GRANTING THE MOTION TO DISMISS OF DEFENDANT BETTE WILLIS BECAUSE RELATORS' PETITION FAILED TO STATE A CLAIM OR CAUSE OF ACTION AGAINST BETTE WILLIS IN THAT: (A) RELATORS' PETITION STATED CONCLUSIONS AND NO FACTS TO SUPPORT ANY CLAIM OF AN AGENCY RELATIONSHIP BETWEEN BETTE WILLIS AND HER LATE HUSBAND; AND (B) RELATORS' MEMORANDUM OF LAW CLEARLY AND UNAMBIGUOUSLY DEMONSTRATED THAT THE CLAIM WAS BASED SOLELY ON THEIR RELATIONSHIP AS HUSBAND AND WIFE; AND (C) THE PROPOSED SECOND AMENDED COMPLAINT ADDED NOTHING TO RELATORS CLAIM OF AGENCY, GRANTING THE MOTION WOULD HAVE BEEN A FUTILE ACT, AND THE SECOND AMENDED PETITION WAS UNSIGNED; AND (D) A WRIT SHOULD NOT ISSUE WITH RESPECT TO A MOTION TO DISMISS AS THE GRANTING OF A MOTION TO DISMISS CAN BE REVIEWED ON APPEAL

Standard of Review

"Mandamus is a discretionary writ, and such a writ will only be issued where there is a clear, unequivocal, specific right to be enforced." *State ex rel. Mo Growth Assoc., v State Tax Comm'n,* 998 S.W.2d 786 (Mo. banc 2001). Mandamus lies to compel a trial court to perform a ministerial duty. *State ex rel. Bunting v Koehr,* 865 S.W.2d 351 (Mo. banc 1993). A writ of mandamus will issue where a court has exceeded its jurisdiction or authority. *State ex rel. Keystone Laundry & Dry Cleaners v McDonnell*, 426 S.W.2d 11, 14 (Mo. 1969). The writ may lie both to compel a court to do what it is obligated to do by law and to undo that which the court was prohibited by law from doing. (Id).

In a mandamus proceeding, the burden rests on the petitioning party to show that the trial court exceeded its jurisdiction. *See State of Missouri ex rel. Ford Motor Company v. Westbrook*, 12 S.W.3d 386, 391 (Mo. banc 2000). There is an overwhelming presumption of the part of the reviewing court that the trial court acted correctly. (Id.). Mandamus should not issue where adequate relief can be afforded by appeal. (Id).

Propriety of Dismissal

Relators' first argument contends that the trial court erred in granting the motion to dismiss of defendant Bette Willis. The argument is premised on the

suggestion that the first amended petition stated a claim or cause of action against Bette Willis under principles of agency.

Relators' first amended petition alleged that on November 28, 2002, Herbert Willis was driving a 2001 Chevrolet 1500 pick-up truck. (See exhibit 1 at page 2). The truck was owned by Herbert Willis and his wife, Bette Willis, who were legally married. (Id.) On that date, Mr. Willis was involved in a motor vehicle accident with Relators. (Id.) Bette Willis was a passenger in the vehicle at the time of the accident. (Id.)

Relators alleged that Bette Willis was "benefiting directly or indirectly from the operation of the motor vehicle by Herbert Willis at that time" and that "at the time of the foregoing motor vehicle crash, Herbert Willis was acting as the agent servant or employee of Defendant Bette Willis." (See Exhibit 1 at page 3.) Based upon these allegations, Relators alleged Bette Willis was vicariously liable for the negligent acts of Herbert Willis. (Id.)

After Bette Willis filed her motion to dismiss, the trial court ordered that the parties brief the matter. (See Exhibit 4). Relators' brief in opposition to the motion to dismiss set forth, in some detail, the basis for their claim of liability against Bette Willis. (See Exhibit 5). In their memorandum, Relators cited the trial court to several cases stating that the mere relationship of husband and wife was entitled to substantial weight to establish an agency relationship. (See Exhibit 5 at page 2).

They also claimed that, if a husband is taking a wife to a doctor, then this established an agency relationship. (See exhibit 5 at page 4).

It was clear from Relators' memorandum, and could not be clearer, that the basis of Relators' claim of agency rested on the marital relationship of Bette Willis and Herbert Willis. Indeed, Relators admitted they had no actual facts to support their claim of agency and made the allegation merely because they wanted to conduct discovery to see what conversations the couple had, where they were going, and whether the trip was at the request of Mrs. Willis. (See Exhibit 5 at page 5). "For all we know, Mr. Willis may have been driving Mrs. Willis to the doctor exactly the same as the driver was bringing the passenger to the doctor in *McCarthy v Wulff*, above, which would render Mrs. Willis liable here in the exact same manner." (Id.) Relators' counsel even alleged Mrs. Willis created the fact difficulty by ignoring his calls to discuss the accident just a few months after the death of her husband. (Id.)

It has long been the rule in Missouri that the mere existence of a husband-wife relationship does not cause the negligence of one spouse to be imputed to another. *Moon v St Louis Transit*, 141 S.W. 870 (Mo. 1911). Further, trips made for mutual pleasure or for a family purpose do not result in imputing the negligence of the spouse driver to the spouse passenger. *Stover v Patrick*, 459

S.W.2d 393 (Mo. 1970); *Greenwood v Bridgeways, Inc.*, 243 S.W.2d 111 (Mo.Ct.App. 1951).

An exception to the above rule existed for many years in Missouri where the vehicle involved in the accident was jointly owned by the driver and passenger. See *Perrin v Wells*, 22 S.W.2d 863 (Mo. 1930). The cases cited by the Relator in their memorandum in opposition are largely based upon these joint ownership cases.

The problem with these cases, however, is that the Missouri Supreme Court eliminated this theory as a viable claim in 1970. *Stover v Patrick,* 459 S.W.2d 393 (Mo. 1970). There, Mr. Stover was driving westbound to Springfield with his wife as a passenger. Mrs. Patrick was traveling eastbound on the same road. There had been a lot of snow the night before and the roads were slick. Mrs. Patrick either slid into the oncoming lanes or attempted to pass another car and collided with the Stovers. The Stovers brought suit and Patrick defended based upon contributory negligence. The contributory negligence of Ms. Stover was based upon the agency of her husband in operating the vehicle. This agency was based upon the joint ownership of the vehicle and the fact that the Stovers were going to a wedding together. *Stover,* 459 S.W.2d at 398. After an adverse verdict, the Stovers appealed.

On appeal, the Missouri Supreme Court examined the rule permitting the negligence of the driver to be imputed to the passenger and noted that this rule was based upon the belief that both the driver and passenger had an equal right to control. (Id.) It then noted that this theory of equal control was fallacious and that only the driver was truly in control of the vehicle. (Id.) The Court then reviewed cases from other jurisdictions and, finding their reasoning impressive, rejected the continued use of co-ownership of a vehicle as a viable basis for imputing negligence under Missouri law. *Stover*, 459 S.W.2d at 401. All decisions determining otherwise were no longer to be followed. (Id.) This included the rationale in *McCarthy v Wulff*, 452 S.W.2d 164 (Mo. 1970) which had been decided by the Court just a few months earlier and was heavily relied upon by Relators below.

Relators' claim that Herbert Willis was somehow acting as his wife's agent at the time of the accident is unsupported by current Missouri law. In *McAuliffe v Vondera*, 494 S.W.2d 692 (Mo.Ct.App. 1973) the Missouri Court of Appeals, Eastern District, clearly held that a spouse passenger cannot be held liable for the alleged negligence of the spouse driver. In *McAuliffe*, plaintiff Stephanie McAuliffe was injured while riding as a passenger driven by her husband. The defendant-driver of another automobile pleaded contributory negligence as a defense to plaintiff's recovery. The defendant alleged that the negligence of the

husband driver was imputed to the wife passenger on a theory that the husband-driver was serving as the agent of the wife-passenger. The Court of Appeals, in reversing the trial court, found that the wife had no right to control her husband's actions and he was in no sense of the law serving as the wife's agent. *McAuliffe*, 494 S.W.2d. at 694. The *McAuliffe* opinion clearly establishes the Relators' claims against Bette Willis are unfounded on a theory of agency.

The cases cited below by Relators in are certainly interesting historically, but they no longer represent the law in this state. Instead, the law is clear that merely sitting as a passenger in a motor vehicle does not serve as a sufficient bass for imputing the acts of the driver to the passenger. This is true regardless of ownership.

Relators' theory rested upon these long discarded cases. In both the first amended and proffered second amended petition, Bette Willis is referred to as the "co-owner" of the vehicle. (See Exhibit 1 at paragraph 11; see also Exhibit 4, Second Amended Petition at paragraph 11). As of thirty-four years ago, however, this factual allegation ceased to be relevant.

Even if this Court decided to turn the clock back to the 1960's and determine that the acts of a driver are imputed to the owner of a vehicle, Relators' claim against Bette Willis still would need to be dismissed. Missouri is a fact pleading state. *State ex rel Harvey v Wells*, 955 S.W.2d 546, 548 (Mo. banc 1997); Rule

55.05. Under fact pleading, although a claimant need not allege evidentiary facts, the plaintiff must allege ultimate facts and cannot rely on mere conclusions. *M & H Enterprises v Tri-Delta Chemicals, Inc.*, 984 S.W.2d 175 (Mo.Ct.App. 1998). "Modern litigation is too expensive in time and money to be allowed to proceed upon mere speculation and bluff. Unnecessary expense should be eliminated by requiring parties, as early as possible, to abandon claims or defenses that have no basis in fact." *State ex rel. Harvey*, 955 S.W.2d at 548.

Under Missouri law, a petition must state facts in support of each essential element of the cause pled. If the petition offers only conclusions and not facts, a motion to dismiss should be granted. *Gevers Heating & Air Conditioning Company v R. Webbe Corp*., 885 S.W.2d 771, 773 (Mo.Ct.App. 1994). Thus, Missouri Courts have held that mere allegations of "evil", "improper" or "unlawfulness" are conclusions and not statements of fact and are to be disregarded. See *State ex rel. Aimonette v C & R Heating and Service Co.*, 475 S.W.2d 409 (Mo.Ct.App. 1071). This is also true with respect to allegations that merely allege joint venture or agency without supporting factual allegations. See *Terre Du Lac Ass'n v Terre Du Lac, Inc.*, 737 S.W.2d 206, 217 (Mo.Ct.App. 1987)(joint venture); *Downey v Mitchell*, 835 S.W.2d 554, 556 (Mo.Ct.App. 1992)(agency).

In the present mater, the allegations of the first amended petition and the proffered second amended petition failed to offer any **facts** whatsoever in support of the conclusion of agency. Indeed, in their memorandum, Relators admitted they had no factual basis for the allegations and wanted to conduct discovery to determine whether any basis existed. As the *Harvey* Court noted: "Modern litigation is too expensive in time and money to be allowed to proceed upon mere speculation and bluff." *State ex rel. Harvey*, 955 S.W.2d at 548. The only claim filed by Relators against Bette Willis is, based upon Relators own admission, based upon nothing more than speculation and bluff.

Missouri Rule 55.03(b) states, unequivocally, that a signature on a pleading acts as a representation to the court that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are **likely** to have evidentiary support after a reasonable opportunity for further investigation or discovery." (emphasis added). In the present matter, Relators admitted in their memorandum that there was no factual support for their claim of agency and that they wished to conduct discovery on the issue. If the Missouri Rules of Civil Procedure are to be taken seriously, the Court must enforce this requirement and not permit allegations to be presented merely to allow parties to engage in fishing expeditions. This is particularly true in this matter where the effect would be to harass a person who has been widowed by the accident at issue.

Relators further argue that, even if there was no proper claim against Bette Willis at the time of filing the action in Saint Louis County, Relators had a reasonable legal opinion that a case could be made against the resident defendant. Thus, they argue, venue is still proper in Saint Louis County (See brief of relator at 11; 15). In support of this argument, Relators cite this court to *State ex rel. Breckenridge v Sweeney*, 920 S.W.2d 901 (Mo.banc 1996).

The *Breckenridge* case is the polar opposite of this matter. In *Breckenridge,* plaintiffs filed a claim against a resident defendant alleging that the defendant had been called to the hospital at 10:10 to deliver a baby by caesarean section. The baby was not delivered until 10:55 and suffered from cerebral palsy as an alleged result. *Breckenridge,* 920 S.W.2d at 902. Plaintiff obtained an affidavit stating that based upon those facts, a proper claim of malpractice existed against the resident defendant. (Id. at 920 S.W.2d at 903.) The expert's opinion was based upon the doctor being called at 10:10. After discovery, it was determined that the resident defendant was not called until 10:24 or 10:25. The Court noted, however, that this evidence was not available until after suit had been filed and that, at the time suit was filed, plaintiff had a reasonable belief that the 10:10 time was accurate and, thus, the claim was not pretensive.

In the present matter, Relators have alleged no facts in support of agency. Relators merely made a conclusory allegation, admittedly without facts to support

it. They now argue that, under *Breckenridge*, they had a good faith basis for this claim, as they needed to take discovery to determine if there are any facts to support their claim. *Breckenridge* is clearly inapposite, provides no aide to Relators and, if anything, goes against their argument in that it requires a good faith basis for the allegations before filing. Relators could not have had a realistic basis that they had a claim for agency against Mrs. Willis lacking any facts to support it and relying only on long overruled cases.

Relators also argue that the second amended petition contained the required elements of control to set forth a claim for agency. The second amended petition was not signed as required by Rule 55.03.

The Missouri Rules of Civil Procedure permit a party to file an amended pleading once as a matter of course prior to an answer being filed. Rule 55.33. Otherwise, a pleading only may be amended by leave of court. (Id). Courts have held that, where are party files a motion for leave to amend, a copy of the pleading must be attached to the motion, otherwise the motion should be denied. See *Roskam Baking Co., v Lanham*, 299 F.2d 895 (6th Cir. 2002).

A pleading must be signed. Rule 55.03. Due to the lack of signature on the proffered second amended petition, it failed to comply with the pleading requirements and should be considered a nullity. As no proper second amended

petition was attached to the letter from counsel, the trial court could not grant leave to amend.

Further, the second amended petition only added an allegation of control, but set forth no additional facts to support Relators' claim of agency. A court is not required to grant leave to file an amended pleading when the action would be futile. *Yocum v Piper Aircraft Corp*., 738 S.W.2d 145, 147 (Mo. Ct. App. 1987). Lacking any additional facts to properly allege an agency relationship, the second amended petition did not cure the defects in the amended petition and the court cannot be deemed to have erred in denying leave. Id.

Respondent also notes that the dismissal of a party is not a proper basis for relief by mandamus. The Missouri Rule of Civil Procedure expressly states that an original writ should not issue where an adequate remedy is afforded by appeal. Rule 84.22. Mandamus usually does not lie to review the sufficiency of pleadings and ruling related thereto and the only exception is where appellate review is not adequate. *State ex rel. Pisarek v Dalton*, 549 S.W.2d 904, 905 (Mo.Ct.App. 1977). To grant mandamus under these circumstances would infringe upon the normal appellate process by extending extraordinary remedies beyond their purpose. Id.

Respondent further notes that public policy would dictate against granting writs with respect to granting a motion to dismiss. Many cases are resolved by the parties without resort to trial and the issues presented may, thus, resolve

themselves short of protracted litigation. Encouraging the filing of writs where a motion to dismiss has been granted would clog the appellate courts with numerous writs filed in cases whose issues would more than likely be resolved without trial or appeals. Even where the matters proceeded to appeal, a complete record would exist with respect to the issues in the matter, discovery may take place and the issues would be more clearly defined by additional amended pleadings. This permits the parties and the courts a superior opportunity to resolve the real issues rather than taking a case in piecemeal fashion.

II

RELATORS ARE NOT ENTITLED TO AN ORDER IN MANDAMUS REQUIRING RESPONDENT TO RETRANSFER THIS MATTER TO SAINT LOUIS COUNTY BECAUSE THE TRIAL COURT DID NOT IMPROPERLY GRANT BETTE WILLIS' MOTION TO TRANSFER BASED UPON THE PROPREITY OF VENUE IN SAINT LOUIS COUNTY IN THAT: (A) THE TRIAL COURT DID NOT ERR IN GRANTING BETTE WILLIS'S MOTION TO DISMISS; AND (B) THE CLAIMS AGAINST BETTE WILLIS WERE PRETENSIVE.

Standard of Review

"Mandamus is a discretionary writ, and such a writ will only be issued where there is a clear, unequivocal, specific right to be enforced. *State ex rel. Mo Growth Assoc., v State Tax Comm'n*, 998 S.W.2d 786 (Mo. banc 2001). Mandamus lies to compel a trial court to perform a ministerial duty. *State ex rel. Bunting v Koehr*, 865 S.W.2d 351 (Mo. banc 1993). A writ of mandamus will issue where a court has exceeded its jurisdiction or authority. *State ex rel. Keystone Laundry & Dry Cleaners v McDonnell*, 426 S.W.2d 11, 14 (Mo. 1969). The writ may lie both to compel a court to do what it is obligated to do by law and to undo that which the court was prohibited by law from doing. (Id.)

In a mandamus proceeding, the burden rests on the petitioning party to show that the trial court exceeded its jurisdiction. See *State of Missouri ex rel. Ford Motor Company v. Westbrook*, 12 S.W.3d 386, 391 (Mo. banc 2000). There is an overwhelming presumption of the part of the reviewing court that the trial court acted correctly. (Id.)

Argument

Relators' arguments under point two are largely a rehashing of what was argued under their first point. [3] As stated in point one, the trial court correctly granted Mrs. Willis' motion to dismiss as she was not a proper party to the action under the allegations set forth in Relators' petition.

Respondent further restates and incorporates by reference from point one his argument with respect to Relators' contentions concerning the pretensive nature of Relators' joinder of Bette Willis. Relators admittedly had no facts to support their joinder of Mrs. Willis to the action and could not have had a reasonable belief that joinder was proper. The case law cited by Relators to the trial court had been overturned more than thirty years previously and there were no facts to support an

[3] Respondent notes that Relators make the additional argument that their response to the motion to transfer was timely filed. Examination of the court file did reveal that the trial court received and filed a faxed copy of the response on May 14, 2004. The local rules of Saint Louis County in effect permitted faxed filings.

allegation of agency. Under these facts, Relators had no claim under existing law nor a reasonable belief of such a claim.

III

RELATORS ARE NOT ENTITLED TO AN ORDER IN MANDAMUS REQUIRING RESPONDENT TO RETRANSFER THIS MATTER TO SAINT LOUIS COUNTY BECAUSE THE TRIAL COURT HAD JURISDICTION TO TRANSFER THE CASE AFTER GRANTING THE MOTION TO DISMISS IN THAT: (A) RULE 51.045 THEN IN FORCE EXPRESSLY DIRECTED A COURT TO TRANSFER A CASE TO THE CORRECT VENUE WHERE A MOTION TO TRANSFER HAS BEEN FILED AND THE COURT'S FINDINGS ARE IN FAVOR OF THE MOTION; (B) MISSOURI STATUTES, IN PARTICULAR §476.410, PERMIT THE COURT TO TRANSFER THE CASE TO A CORRECT VENUE; AND (C) THERE WAS NO WAIVER OF VENUE BY ANY OF THE DEFENDANTS

Standard of Review

"Mandamus is a discretionary writ, and such a writ will only be issued where there is a clear, unequivocal, specific right to be enforced. *State ex rel. Mo. Growth Assoc., v State Tax Comm'n,* 998 S.W.2d 786 (Mo. banc 2001). Mandamus lies to compel a trial court to perform a ministerial duty. *State ex rel. Bunting v Koehr,* 865 S.W.2d 351 (Mo. banc 1993). A writ of mandamus will issue where a court has exceeded its jurisdiction or authority. *State ex rel. Keystone*

Laundry & Dry Cleaners v McDonnell, 426 S.W.2d 11, 14 (Mo. 1969). The writ may lie both to compel a court to do what it is obligated to do by law and to undo that which the court was prohibited by law from doing. (Id.)

In a mandamus proceeding, the burden rests on the petitioning party to show that the trial court exceeded its jurisdiction. *See State of Missouri ex rel. Ford Motor Company v. Westbrook*, 12 S.W.3d 386, 391 (Mo. banc 2000). There is an overwhelming presumption of the part of the reviewing court that the trial court acted correctly. (Id.)

Argument

Relators' final argument is that the trial court lacked jurisdiction to transfer this matter after it granted the motion to dismiss because Bette Willis no longer had an interest in the litigation. Relators further argue that the Estate of Herbert Willis by its Executor waived venue as the result of its failure to file a timely motion to transfer. The Court should reject these arguments.

First, with respect to the waiver issue, it must be noted that the trial court had previously granted the Estate additional time to file responsive pleadings. In its order of June 2, 2004, the Court expressly stated that the Estate had until July 2, 2004 to file responsive pleadings. (See Exhibit 4). This was done by agreement of counsel. (Id). By July 2, 2004, however, the trial court already had issued its order transferring the case to Laclede County. Thus, it can hardly be argued that the

estate waived an argument as to venue when, by the time for filing its pleadings came, the case had already been ordered transferred.

The trial court further had jurisdiction to transfer the matter even after granting the motion to dismiss. At the time, Bette Willis filed her motion to transfer, Rule 51.045 then in effect stated: "An action brought in a court where venue is improper shall be transferred to a court where venue is proper if a motion for such transfer is timely filed." There is no debate that the motion of Mrs. Willis was timely filed.

The Rule then continued, allowing an opposing party to file a reply denying the allegations in the motion to transfer. " If a reply is filed, the court shall determine the issue. If the issue is determined in favor of the movant….a transfer of venue shall be ordered to a court where venue is proper." (Id.)

In the instant action, Bette Willis filed her motion to transfer and Relators filed their reply. Under the rule, the trial court then was to determine the issue and, if the issue was determined in favor of the movant, transfer the matter. The requirement of transfer is stated in the mandatory "shall," rather than the permissive "may", making transfer a matter in which the court had no discretion.

Although venue is not the same as jurisdiction, improper venue is a fundamental defect and a court that acts when venue is improper acts in excess of its jurisdiction. *State ex rel. SSM Health Care v Neill*, 78 S.W.3d 140, 142 (Mo.

banc 2002). In the present matter, once the trial court dismissed Mrs. Willis, venue was no longer proper in Saint Louis County and the trial court, as required, transferred the matter to a proper venue.

Relators argue that, once the motion to dismiss was granted, the trial court was no longer empowered to grant her motion to transfer. Relators cite no cases in support of this argument. Instead, the cases discuss subject matter jurisdiction and waiver of venue issues. Respondent notes that the Rules of Civil procedure with respect to venue are not so limited, and do not prohibit the a court from granting a motion for improper venue where a timely motion has been filed. Indeed, the rule specifically states that if the issues raised in the motion to transfer are found in favor of the movant, the motion "shall" be granted. In the present matter, the issue was one of pretensive joinder. The trial court, finding the issues in favor of Bette Willis, granted both the motion to dismiss and, as required by rule, the motion to transfer.

The trial court also could have granted the motion *sua sponte*. Under §476.410, a court is required to transfer a case to a division or circuit in which it could have been brought. Although there are cases that indicate that such a transfer is typically accomplished after motion, see *State ex rel. Elson v Koehr*, 856 S.W.2d 57, 59 (Mo. banc 1993), the statute has no such requirement. Instead, the plain

language of the statute implicitly permits the court to transfer a case on its own motion.

Relator may cite this Court to cases that have held that the court exceeded its jurisdiction in transferring a case where the issue of venue was waived. See *Brackett v Laney*, 920 S.W.2d 597 (Mo.Ct.App. 1996). In the present matter, however, venue was not waived by either of the defending parties and Bette Willis did challenge venue. Cases involving waiver are, therefore, inapposite.

CONCLUSION

Based upon the above, Respondent hereby requests this Court quash its preliminary order in mandamus, deny Relators' request for a permanent order in mandamus and for any other and further relief as the Court deems just and proper.

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AFFIDAVIT OF SERVICE

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

Comes now Jon R. Sanner, and after being duly sworn upon his oath states that he did on the _____ day of _____, 2005 place in the United States mail in Clayton, Missouri an envelope containing two copies of the Brief of Relator and that proper postage was affixed on said envelopes and that they were plainly addressed to:

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_____

Subscribed and sworn to before me, a Notary Public, this _____ day of _____2005.

_____
NOTARY PUBLIC

My Commission Expires:

CERTIFICATE OF COMPLIANCE

I, one of the attorneys for Relator, certify that the number of words in the brief of Relator is 6673, as directed by MRCP 84.06(c) which is based on a word count of the word processing system. The name and version of the word processing software used to prepare the brief is Microsoft Word 2000.

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