

TABLE OF CONTENTS

Table of Contents..... 1

Table of Authorities 2

Point Relied On..... 3

Argument 4

Conclusion.....12

Certificate of Compliance With Special Rule No. 114

Certificate of Service.....15

TABLE OF AUTHORITES

OTHER AUTHORITIES

<i>State ex rel. Bowden v. Jensen</i> , 359 S.W.2d 343 (Mo. 1962)-----	3
<i>State ex rel. DePaul Health Center v. Mummert</i> , 870 S.W.2d 820 (Mo. 1994)-----	4

TREATISES

Section 508.010 RSMo. (1999)-----	3
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POINT RELIED ON

I. Relators are entitled to a Writ of Prohibition to compel Respondent to vacate his Order of February 1, 2001 denying Relators' Motion To Transfer Venue and to transfer plaintiff's case to a proper venue, which in this case would be either St. Francois County or Butler County, Missouri. Venue in the Circuit Court of the City of St. Louis is improper under the general venue statute, §508.010 RSMo. (1999), in that:

- A. No defendant named in this action resides in the City of St. Louis. Relator Harold Linthicum is a resident of the state of Arkansas. Relator Delmar Giles, d/b/a Bluff City Shows, resides in Butler County, Missouri. The remaining named defendants are foreign corporations. Plaintiff's cause of action accrued in St. Francois County, Missouri; and
- B. Fixing venue at the time Plaintiff filed her original Petition against Linthicum rather than according to the presence and status of the parties at the time Respondent ruled on the challenge (i.e., when the case was *brought* against Giles, the defendant making the challenge), has permitted Plaintiff arbitrarily to select her forum in derogation of Defendant Giles' venue rights as provided by statute, including the right to challenge the propriety of venue.

§508.010 RSMo.(1999)

State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. 1962)

ARGUMENT

I. INTRODUCTION

In their previously submitted Relators' Brief, Relators presented a straightforward question for this Court's review: when is venue determined if more than one defendant is named later in an action? Although the Respondent's Brief repeats, over and over again, the by now familiar refrain "venue is determined when the case is filed," that statement merely begs the question this Court is asked to decide, namely, whether Missouri's general venue statute contains the timing provision as to later-sued defendants being read into it by Missouri courts as a result of the holding in *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. 1994). Review of the statute reveals that it plainly does not. Nor, Relators submit, does the decision in *DePaul* support such an interpretation.

The Respondent's Brief does not dispute that venue was *improper* in this case at the time the challenge to venue was being decided. This fact alone distinguishes the instant case from *DePaul*, a distinction more fully discussed below. The question, then, is whether venue should have been fixed at the time Plaintiff filed her original Petition naming a single, non-resident defendant, or whether it is more reasonable to decide venue according to the presence and status of the parties at the time Respondent ruled on the merits of the challenge – that is, when the case was *brought* against the defendant making the challenge. Respondent's Brief fails to address this central question.

Rather, Respondent's Brief merely reiterates a series of points that are not in dispute: that venue was proper when the case was first filed against Linthicum; that a

trial court acts in excess of its jurisdiction if it transfers a case properly venued to begin with; that Plaintiff followed the Missouri venue statute and Rules of Civil Procedure “to the letter” in filing first against Linthicum and then seeking and obtaining leave to amend her Petition to name additional defendants; that “pretensive non-joinder” is not a legal concept in Missouri, and so on. None of these points are in dispute and none of them address the real question confronting this Court, which is whether Missouri venue law should be clarified with respect to later-sued defendants like Relator Giles so that the venue rights of *all* defendants are preserved by eliminating the legal loophole created by what Respondent believes is the “first filing” rule established by *DePaul*. Relators submit that *DePaul* absolutely does not stand for the proposition that venue is fixed *as to later-sued defendants* when the case is first brought against a single defendant. The gamesmanship and forum shopping described in the Relators’ Brief – practices made possible only by the existence of the legal loophole created by Missouri trial courts’ misreading of *DePaul* – compel clarification of the law on this point.

For the reasons stated in the Relators’ Brief and for those stated below, Relators submit that this Court should eliminate the current loophole in Missouri venue law created by the misinterpretation of the holding in *DePaul*. Accordingly, Relators respectfully request that this Court make permanent its Preliminary Writ of Prohibition entered on April 19, 2001.

II. VENUE IS IMPROPER AS THE CASE CURRENTLY STANDS

The Respondent's Brief argues that venue is proper in the City of St. Louis because it was proper at the time the case was first filed against Linthicum, a non-Missouri resident. It relies on the "first filing" rule that Respondent apparently believes was established by the holding in *DePaul*. According to Respondent, *DePaul* stands for the proposition that even in cases involving later-sued defendants (whose presence in the case *defeat* venue rather than cure defects in venue), venue is determined when the case is first filed, commenced, or "brought", to use the language from *DePaul* that Respondent goes to such unnecessary lengths to define.

The plain fact is, *DePaul* involved a different venue question than the one presented here. In *DePaul*, all of the defendants being sued were named in the action from the outset. As it turned out, venue was improper in the City of St. Louis when the case was first filed there. Plaintiff attempted to cure the defect by dismissing one of the defendants. This Court determined that venue should have been fixed at the outset rather than after the defendant who defeated venue was dismissed.

The *DePaul* facts are very different from those presented here. Here, unlike in *DePaul*, not all of the defendants were named in the action from the outset. Thus, the challenge to venue was made as a result of a defendant being added to the case. Holding that venue was determined when the case was first filed deprived Relator Giles of his opportunity to challenge venue altogether – a fact not true in *DePaul* where all defendants had that opportunity from the outset.

Moreover, whereas in *DePaul* this Court ruled on the question of whether the *dismissal* of a party could serve as a basis to challenge venue, here the Respondent was

asked to rule on whether the *addition* of a party whose presence in the action defeated venue could provide a basis to challenge venue. The distinction is significant. In *DePaul*, all relevant defendants were named in the initial suit and had equal opportunities to challenge venue. This Court found that it was not appropriate, *under those facts*, to determine venue after the dismissal of the party defeating venue. Here, all relevant parties were *not* named in the initial suit and did *not* have equal opportunities to challenge venue. Significantly, in the instant matter, the addition, rather than the dismissal, of a party on the amended pleadings should have defeated venue under Missouri law.

Relators submit that Respondent has misinterpreted this Court's holding in *DePaul* which stated that "venue is determined as the case stands when *brought*, not when a motion challenging venue is decided." That holding applied to very different facts and clearly did not contemplate a situation where the addition of a party defeated venue at the time the challenge was being decided. For this reason, the Court is asked to clarify its holding in *DePaul* so as to eliminate the confusion as well as the gamesmanship practiced as a result of taking the *DePaul* holding out of context and using it in situations in which it clearly was not intended to apply.

Respondent apparently felt compelled to rule as he did *even though* he was aware of the gamesmanship being practiced by plaintiff. As stated in the Relators' Brief, Respondent acknowledged that it appeared "that plaintiff initially named only the non-resident defendant in order to obtain venue in the City of St. Louis and intended to bring suit against all of the remaining defendants." (Relators' Brief, A. 47-48) *DePaul* should

be clarified so that venue is determined according to the presence and status of the parties at the time a challenge to venue is decided – or when the case is *brought* against the defendant making the challenge. Under this test, then there is no question that venue in the City of St. Louis is improper as the case currently stands. Relators urge this Court to adopt the better practice as followed by the other jurisdictions discussed in the Relators’ Brief and determine venue according to the case as it currently stands, and not as to how it looked when Plaintiff brought in a non-resident and left out the other defendants just so that she could choose her forum.

III. PLAINTIFF MANIPULATED THE MISSOURI VENUE STATUTE AND RULES OF CIVIL PROCEDURE EVEN WHILE FOLLOWING THE LAW “TO THE LETTER”

In response to Relators’ assertion that Plaintiff manipulated the venue statute, the Rules of Civil Procedure, and the *DePaul* holding so as to secure venue where it otherwise would not have existed, Respondent states that “nothing could be further from the truth.” Indeed, Respondent contends that Plaintiff followed the Missouri venue statute and Rules of Civil Procedure “to the letter.” The plain fact is, following the law “to the letter” under the circumstances of this case and those cited in Relators’ Brief *permits* the type of manipulative forum shopping that plainly occurred in this case. Had Plaintiff *not* followed the law “to the letter,” quite simply there would be no issue for this Court to decide. It is the consequences of plaintiffs like Penny following the law “to the letter” that has created the need for this Court to interpret the venue statute at issue. Once again, Respondent’s assertion that Plaintiff did not manipulate the law because she

followed it “to the letter” begs the question this Court is being asked to decide: should the legal loophole created by the misinterpretation of the *DePaul* decision (a loophole that permits manipulation and trickery even while following the law “to the letter”) be eliminated? For the reasons stated in Relators’ Brief, Relators submit that it should.

**IV. THIS COURT NEED NOT RECOGNIZE “PRETENSIVE NON-JOINDER”
IN ORDER TO PROHIBIT THE GAMESMANSHIP EVIDENCED IN THIS
CASE**

The Respondent’s Brief makes a point of arguing that “pretensive non-joinder” is not recognized by Missouri courts. It also devotes undue attention to explaining the concept of pretensive joinder, which, of course, is recognized in Missouri. The fact is, Relators readily acknowledged in their Relators’ Brief that “pretensive non-joinder” is not a legal concept in Missouri. This term merely serves to describe a practice whose intended outcome, like the practice of pretensive joinder, is to manipulate the venue statute and promote the kind of forum shopping the venue statute is intended to prevent. Put another way, this Court need not recognize “pretensive non-joinder” in order to recognize, and prohibit, the gamesmanship evidenced in this case and in those cited in Relators’ Brief. By eliminating the legal loophole created by the “first filing” rule being erroneously read into the *DePaul* decision, this Court can eliminate the incentive for plaintiffs like Penny to engage in the particular type of forum shopping that so obviously has occurred in this case.

V. **ADOPTING THE RULE PROPOSED BY RELATORS WOULD NOT CONVERT VENUE INTO A “COMPLEX ISSUE”**

Respondent argues that determining venue according to the presence and status of the parties at the time a challenge to venue is decided would “convert venue into a complex issue involving a myriad of defendants and possible defendants which would be relitigated every time a defendant was added.” As a result, according to Respondent, trial courts will “certainly entertain more venue challenges based on pretensive joinder.” Trial judges “will be forced to evaluate claims against any possible defendant, with some defendants arguing a claim can be stated against a certain defendant while others contend the joinder is pretensive.” In essence, Respondent advances a “floodgates” argument, one wholly without merit.

Under the rule proposed by Relators, venue need not be relitigated every time a defendant is added. If the case remains in the venue where the cause of action accrued, for example, then any number of defendants may be added without the possibility of a challenge to venue, since venue is always proper where the cause of action accrued. If, on the other hand, the case remains in the venue where any of the defendants reside, then again any number of defendants may be added without the possibility of a challenge to venue, since venue is always proper in the county where any defendant resides. The only time venue would be challenged would be if, as here, the addition of a defendant made venue *improper* under the terms of the general venue statute. The addition of Relator Giles, a Missouri resident, meant that venue was no longer proper in the City of St. Louis because the statute permits venue in the county of plaintiff’s choice only where *all*

defendants are non-residents. Thus, the issue is not really so complex as Respondent suggests. A trial judge would not be forced to “determine all legitimate possible parties at the outset of litigation,” but rather, would entertain challenges to venue only where venue was improper at the time the challenge was being decided.

Nor would the rule proposed by Relators require, as Respondent suggests, a “subjective analysis of plaintiff’s motive.” Relators agree that plaintiffs are guilty of no impropriety for selecting the venue most attractive *provided their choice is correct under the governing statute*. The question is, what test will be used to determine that the choice is correct?

Respondent argues that the *DePaul* test “derives from the terms of the statute” and is a bright line test with its aim fixed “once and for all” on the status of the parties when suit is commenced. However, neither the statute nor the *DePaul* decision itself contains language suggestive of a “bright line test” or a “once and for all” determination. Respondent’s argument demonstrates the extent to which *DePaul* has been misread, underscoring the need for clarification. Relators submit that determining venue as the case currently stands is fair and reasonable, and eliminates the trickery characterized by the facts of this case.

VI. CONCLUSION

This Court should correct the abuses alluded to above and in the Relators' Brief by interpreting the general venue statute so that the propriety of venue is determined according to the presence and status of the parties at the time a challenge to venue is decided. In this way, all defendants are afforded the right to challenge venue, not just the defendant originally named. Forum shopping of the kind evidenced in this case would be eliminated. Accordingly, Relators respectfully request that this Court make permanent its Preliminary Writ of Prohibition entered on April 19, 2001.

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CERTIFICATE OF COMPLIANCE WITH
SPECIAL RULE NO. 1

The undersigned certifies that this Relators' Brief complies with the limitations contained in special Rule No. 1(b), contains 2,537 words, and that the floppy disk filed with this Relators' Brief in accordance with Special Rule No. 1(f) has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of June, 2001, one copy of Relators' Brief and one copy of the disk required by Special Rule No. 1(f) were served upon each of the following via United States mail, correct postage prepaid:

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SC83558 Reply Brief