

No. SC 83559

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel. FORD MOTOR COMPANY

Relator,

vs.

THE HONORABLE MAX E. BACON, JUDGE
OF THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI,
ASSOCIATE DIVISION

Respondent.

RELATOR'S REPLY BRIEF

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REPLY

I. RESPONDENT FAILS TO ESTABLISH FORD CREDIT IS AN OFFICE OR AGENT OF FORD MOTOR COMPANY UNDER SECTION 508.040

Respondent concedes Ford Motor Credit (“Ford Credit”) is not an office of Ford Motor Company (“Ford”). However, Respondent claims Ford Credit is an agent of Ford for the transaction of its usual and customary business relying almost exclusively on the fact Ford Credit is an indirect wholly-owned subsidiary of Ford. This fact alone, however, is not sufficient to meet the guidelines this Court set forth in State ex rel. Bunting v. Koehr, 865 S.W.2d 351 (Mo. banc. 1993).

Respondent’s argument, essentially, is that the term “agent”, as it is used in Section 508.040, is synonymous with “subsidiary.” Respondent is incorrect. See Hefner v. Dausmann, 996 S.W.2d 660, 664 (Mo. Ct. App. 1999)(“two different corporations are treated as two different persons, even if one corporation is the sole shareholder of the other”)(citing Grease Monkey Int’l, Inc. v. Godat, 916 S.W.2d 257, 262 (Mo. Ct. App. 1995)(emphasis added)).¹

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1. Respondent argues Relator’s reliance on Hefner v. Dausmann is misplaced because that case does not address agency under the venue statute. In Dausmann, the court addressed whether a corporation could be held vicariously liable for the actions of an affiliated corporation. Dausmann, 996 S.W.2d 660 (Mo. Ct. App. 1999). In answering that
(continued...)

Most significantly, Respondent fails to point to evidence in the record establishing the three elements of an agency relationship. “The absence of any one of the three elements of agency defeats the claim that agency exists.” Bunting, 865 S.W.2d at 353; State ex rel. Domino’s Pizza, Inc. v. Dowd, 941 S.W.2d 663, 665 (Mo. Ct. App. 1997). The three elements cannot be established by merely pointing out that Ford Credit is a wholly-owned subsidiary of Ford Motor Company.

Finally, Respondent’s position is inapposite to the purpose of the venue statute. The purpose is to provide a convenient and logical forum. Domino’s Pizza, 941 S.W.2d at 665. The purpose of the statute would not be served by allowing a corporation to be subject to suit in any county where a subsidiary is located.

Respondent exceeded his jurisdiction by not granting Relator’s Motion to Transfer in that the record provides no evidence establishing the three elements of agency based on the relationship of Ford and Ford Credit. Therefore, this Court should make its preliminary writ peremptory and order Respondent to take no further action other than transferring this action to a forum where venue is proper.

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1. (...continued)
question, the court analyzed whether an agency relationship existed between the two corporations. Id. at 664-666. Relator relies on Dausmann for its analysis regarding agency between affiliated corporations.

A. Ford's Usual and Customary Business Does Not Include Providing Financial Services

Respondent argues that Ford holds itself out as a leader in the financial services industry, and therefore, is engaged in providing financial services to consumers of its vehicles. Respondent relies solely on the fact Ford Credit is an indirect wholly-owned subsidiary of Ford to conclude Ford Credit's business is the "usual and customary business" of Ford Motor Company. Simply because Ford is the sole shareholder of Ford Credit does not *a fortiori* establish that the business of the subsidiary is Ford's business. See Dausmann 996 S.W.2d at 664; see also State ex rel. Ford Motor Co. v. Dierker, 766 S.W.2d 691, 694 (Mo. Ct. App. 1989) (concluding the record supported Ford's argument "that its usual and customary business is the sale of motor vehicles only to dealers," and finding "the sale to the dealer is distinct from the second sale from the dealer to the ultimate consumer," and "no part of the payment made by the ultimate purchaser is transmitted to Ford.") overruled on other grounds by State ex rel. Bunting v. Koehr, 865 S.W.2d 351 (Mo. banc 1993).

While Missouri courts have not discussed extensively the phrase "office or agent for the transaction of its [the corporation's] usual and customary business," other states have been consistent in holding that the principal place of business of a subsidiary is not imputed to a parent corporation for venue purposes, unless one entity is determined to be the alter ego of the other. See Dorsey v. J. Ray McDermott, Inc., 750 So.2d 996, 999-1000 (La. Ct. App. 1999); Ford Motor Company v. Miles, 967 S.W.2d 377, 380 (Tex. 1998) ("The ownership of

some or even all of the stock of a corporation does not establish that the corporation is an “agency” or “representative” of its stockholders within the meaning of former section 15.037 [the venue statute]”); Stambaugh v. International Harvester Company, 464 N.E.2d 1011, 1015-16 (Ill. 1984).

Stambaugh is nearly on point. In Stambaugh, the plaintiff asserted that venue was proper over the defendant manufacturer on the grounds that the dealers’ purchases from Harvester Corporation were financed by International Harvester Credit Corporation (“IHCC”), a wholly owned subsidiary of Harvester. Just like Ford Credit, IHCC also financed the purchase of the products of other manufacturers, and “Harvester and IHCC are separate corporate entities in different businesses, having distinct objectives.” Stambaugh, 464 N.E.2d at 1015. The Supreme Court of Illinois analyzed a venue statute nearly equivalent to Missouri’s Section 508.040. The Stambaugh court noted that venue was proper over a corporation where the corporation was “conducting its usual and customary business.” Stambaugh, 464 N.E.2d at 1014 (quoting Baltimore & Ohio R.R. Co. v. Mosele, 368 N.E.2d 88 (1977)). However the court rejected plaintiffs’ contention that IHCC established venue over Harvester [the manufacturer]:

The acts of the subsidiary will not per se be imputed for purposes of venue to the defendant. . . .

To uphold venue over the defendant in St. Clair County would have the effect of negating the principle of convenience upon which section 5 of the Act is based and would be to allow the

institution of actions in locations with little connection with the defendant and with no connection with the activities which give rise to the suit.

Id. at 1015-16 (quotations omitted).

In this case, Respondent contends the exact same relationship discussed in Stambaugh is sufficient to establish venue over Ford Motor Company. Ford Credit has no involvement in the subject matter of this lawsuit. The venue principle of “convenience” applies in Missouri, as in Illinois. Domino’s Pizza, 941 S.W.2d at 665. To allow plaintiffs to paint the parent-subsidary relationship with a broad brush while ignoring the elements of agency as required by Bunting would defeat the very purpose of the venue statute.

The parent-subsidary relationship by itself is not enough for Respondent to conclude Ford Motor Company’s usual and customary business includes financial services. The record establishes Ford’s usual and customary business is not providing financial services, but rather, is the design, manufacture, final assembly and distribution of automobiles. (Affidavit of Ehlert, ¶ 3).

B. None of the Three Elements of Agency are Present Between Ford and Ford Credit

1. The Power to Alter Legal Relations

Respondent argues Ford Credit has the power to alter relations between Ford and third parties by accepting or rejecting applications for financing and altering the terms of financing. Respondent fails to identify a single legal relationship any consumer may have with Ford as manufacturer of the vehicle which is affected by the consumer's decision to finance their vehicle through Ford Credit. Ford Credit's decision regarding a consumer's financing application has no effect on the manufacturer-consumer relationship, just as similar decisions made by other Missouri lending institutions, through which consumers may choose to finance their vehicle purchase, have no effect on the manufacturer-consumer relationship.

In Bunting, this Court rejected an argument analogous to the one made here by Respondent. See Bunting, 865 S.W.2d at 354. In that case, the plaintiff claimed a dealer's contractual obligation to inform the purchaser of the manufacturer's warranty and notify the manufacturer of the identity of the new holder of the warranty was sufficient evidence to support a finding that the dealer could alter the legal relationship between the manufacturer and the consumer. Id. The court rejected this contention, finding the dealer's obligations were "not the same as the power to alter a legal relationship between the manufacturer and the purchaser." Id. The power to alter legal relations was absent, the court stated, because the manufacturer:

- (1) sells the product to the dealer for resale; (2) unilaterally
- imposes the terms of the warranty prior to the sale to the dealer;

(3) forbids the dealer from altering the terms of the warranty in any way; (4) requires the dealer to extend the warranty as part of the sale and notify the manufacturer of the new holder of the warranty; and (5) makes the warranty a part of the purchaser's bargain when he or she purchases the product.

Id.

The evidence before Respondent established that Ford Credit has even less of an effect on the manufacturer-consumer relationship than the warranty analyzed in Bunting. A consumer who purchases a Ford vehicle makes that purchase from a dealer, not Ford. (Affidavit of Ehlert, ¶ 4; Affidavit of Lee, ¶ 7.) Ford is not a party to any purchase or lease agreement entered into between the dealer and the consumer. (Affidavit of Lee, ¶ 10). Further, a consumer is not required to finance a purchase of a Ford vehicle using Ford Credit, but rather, the consumer can use a lender of his/her choice. (Affidavit of Lee, ¶ 8). Ford is not a party to any lease agreement reached between Ford Credit and the consumer. (Affidavit of Lee, ¶ 10) (emphasis added). This evidence is not disputed by Respondent and clearly establishes Ford Credit lacks the power to alter the legal relationship between Ford and third parties. Respondent's reliance solely on the fact that Ford Credit may be chosen by a consumer to finance available purchases from a dealer is insufficient. The lack of evidence on this element by itself required Respondent to transfer this case to a proper venue.

2. Fiduciary Relationship

Next, Respondent argues Ford Credit is a fiduciary of Ford, relying on an alleged “profit maintenance agreement” between the companies. Respondent reliance on this agreement to establish the fiduciary element is misplaced. In order for a fiduciary relationship to exist, Ford Credit must act “primarily for the benefit” of Ford. See Domino’s Pizza, 941 S.W.2d at 666. In Domino’s, the court found a non-party franchisee was not an agent of Domino’s Pizza for venue purposes. Id. at 667. Contracts between Domino’s and its franchisees contained “restrictions and controls” for the purpose of maintaining the reputation and quality of both Domino’s pizza and its franchisees. Id. at 666. Despite these restrictions, the court concluded “[t]he franchisees are independent businesses whose object is to make a profit from selling and delivering pizza to their customers.” Id. Further evidence of the lack of a fiduciary relationship was the fact that the “[franchisees] are not required to segregate any of the money and treat it as Domino’s.” Id. The court concluded the franchisee was acting “primarily for their own benefit, not Domino’s.” Id.

Ford presents analogous facts to establish that Ford Credit does not act primarily for the benefit of Ford. Ford does not receive the interest or principle payments made by consumers or dealers, rather, the payments are received by Ford Credit. (Affidavit of Lee, at ¶ 11). These moneys are not segregated and treated as receivables or held in trust for Ford Motor Company. (Id. at ¶ 12.) (emphasis added.) Ford Credit does not segregate money from each installment contract with the purchaser of a Ford vehicle and forward a percentage to Ford. (Id. at ¶ 11, 12.) Like the franchisee, Ford Credit is acting primarily for its own benefit,

not for the benefit of Ford. Respondent cites no evidence that Ford Credit acts “primarily for the benefit” of Ford Motor Company. A fiduciary relationship is not established merely because a parent corporation may have a profit agreement with a subsidiary. Again, Respondent presents no evidence other than the fact that Ford Credit is a wholly-owned subsidiary of Ford. Under Missouri law, this is clearly not sufficient to establish a fiduciary relationship.

3. Control

Finally, Respondent argues that Ford exercises sufficient control over Ford Credit to establish an agency relationship, again relying on the alleged profit maintenance agreement. Unlike the agreement between the airline and travel agent in State ex rel. Elson v. Koehr, 856 S.W.2d 57, 61 (Mo. banc 1993), Respondent cites no agreement between Ford and Ford Credit that is “replete with conditions and restrictions on the authority of the [agent] to act on behalf of the [principal].” See Elson, 856 S.W.2d at 61. To establish an agency relationship, the control exercised by the principal must be ““actual, participatory and total.”” Dausmann, 996 S.W.2d at 665 (Mo. Ct. App. 1999) (quoting Sedalia Mercantile Bank and Trust Co. v. Loges Farms, Inc., 740 S.W.2d 188, 202 (Mo. App. 1987)). Respondent presents no evidence establishing that Ford exercises any control, much less “actual, participatory and total” control, over Ford Credit. See id. The “profit making agreement” cited by Respondent has absolutely no bearing on whether Ford exercises control over Ford Credit sufficient to establish this element for purposes of the venue statute.

The record before Respondent failed to satisfy any one of the three required elements of agency necessary to support a finding that Ford Credit is an “agent” of Ford for

purposes of venue. Respondent provides no analysis in his briefing or otherwise as to how Ford Credit meets any of the elements of agency required by the Supreme Court of Missouri's interpretation of the venue statute. Respondent's brief contains vague references to documents and ads which Respondent claims supports the argument that Ford Credit is an agent of Ford Motor Company. The documents and ads referenced by Respondent have no connection to the agency analysis required under Section 508.040.

C. The Purpose of the Corporate Venue Statute Would Be Circumvented By Allowing Suit to be Brought Against Corporations With No Connection to the Forum Other Than the Presence of a Subsidiary

In an effort to bring Ford Motor Company to a forum having no connection to this case, Respondent relied on evidence demonstrating that Ford Credit is a wholly-owned independent subsidiary of Ford. In addition, Respondent makes conclusory arguments regarding profits accrued by Ford Credit. Missouri courts have already implicitly rejected such conclusory arguments in Domino's Pizza and Bunting. See State ex rel. Bunting v. Koehr, 865 S.W.2d 351 (Mo. banc 1993) (no agency relationship between manufacturer and dealer under corporate venue statute); State ex rel. Domino's Pizza v. Dowd, 941 S.W.2d 663 (Mo. Ct. App. 1997) (no agency relationship between franchisor and franchisee under corporate venue statute.)

A finding that Ford Credit is an agent of Ford Motor Company would undermine well-established precedent regarding the interpretation of agency under the corporate venue statute. Such a finding would result in parent corporations being subjected to lawsuits in any forum in which one of its subsidiary's was conducting business, even though the subsidiary has absolutely no connection to the lawsuit. This result is contrary to Missouri's law on corporate structure and essentially eliminates the purpose of Section 508.040. See Domino's Pizza, 941 S.W.2d at 667 ("It is difficult to find [the] purpose [of the corporate venue statute] served by allowing suits with no connection with the forum.")

II. CONCLUSION

Because the record before Respondent established that none of the three elements required to establish venue over a corporation under Section 508.040 are present, Respondent exceeded his jurisdiction by not transferring this case to forum where venue is proper. Ford respectfully requests this Court to make its Writ of Prohibition permanent and order Respondent to take no further action on these matters other than transferring them to counties where venue is proper.

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CERTIFICATE PURSUANT TO SPECIAL RULE NO. 1

Pursuant to Special Rule No. 1, the undersigned does hereby certify that this brief contains the information required by Rule 55.03, that it complies with the limitations of Special Rule No. 1(b) and contains 2610 words. The undersigned further certifies the enclosed disk has been scanned for viruses and is virus-free.

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