

Appeal No. SC89704

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In The

SUPREME COURT OF MISSOURI

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STATE OF MISSOURI ex rel. THE KANSAS CITY SOUTHERN  
RAILWAY COMPANY

Relator

vs.

THE HONORABLE W. STEPHEN NIXON, JUDGE OF THE CIRCUIT COURT  
OF JACKSON COUNTY, MISSOURI

Respondent

and

RACHEL LAUREN COCKRELL, CLIFFORD McFARLAND,  
and KIMBERLY McFARLAND

Plaintiffs

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RESPONDENT'S BRIEF

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## TABLE OF CONTENTS

	Page
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES. ....	3
STATEMENT OF FACTS. ....	5
ARGUMENT.....	7
POINT I. RESPONDENT DID NOT EXCEED HIS JURISDICTION OR AUTHORITY IN GRANTING THE MOTION TO AMEND. ....	7
A. Summary of Argument. ....	7
B. Standard of Review. ....	8
C. Writs of Mandamus and Prohibition. ....	8
D. Personal and Subject Matter Jurisdiction Exist. ....	9
E. The Venue Statutes Allowed the Addition of Defendant McIntosh. ....	11
F. Rule 51.045 and § 476.410 Allowed the Addition of Defendant McIntosh. ....	18
G. Relator’s Theory Creates Problems.....	21
H. Requiring Transfer Wastes Resources.....	23
CONCLUSION. ....	25
CERTIFICATE OF SERVICE. ....	26
RULE 84.06(c) AND (g) CERTIFICATE.....	27
APPENDIX. ....	28

Table of Contents. . . . . 29

A. Order Granting Motion for Leave to Amend Petition to Add a  
Party Defendant. . . . . A1

B. Order Denying Motion to Transfer Venue. . . . . A3

C. R.S.Mo. 508.010. . . . . A5

D. R.S.Mo. 508.012. . . . . A8

**TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

	Page
<i>Breeden v. Hueser</i> , No. WD68069, 2008 Mo.App.LEXIS 904, 2008 WL 2572854 (Mo.App.W.D. June 30, 2008). . . . .	21
<i>In re Marriage of Hendrix</i> , 183 S.W.3d 532 (Mo.banc 2006).. . . . .	11
<i>J.C.W. v. Wyciskalla</i> , No. SC89404, 2009 Mo.LEXIS 11 (Mo.banc January 27, 2009)..	9- 12
<i>State ex rel. Breckenridge v. Sweeney</i> , 920 S.W.2d 901 (Mo.banc 1996).. . . . .	20
<i>State ex rel. Bugg v. Roper</i> , 179 S.W.3d 893 (Mo.banc 2005). . . . .	19, 20
<i>State ex rel. City of Jennings v. Riley</i> , 236 S.W.3d 630 (Mo.banc 2007). . . . .	8
<i>State ex rel. City of St. Louis v. Kinder</i> , 698 S.W.2d 4 (Mo.banc 1985).. . . . .	12
<i>State ex rel. DePaul Health Ctr v. Mummert</i> , 870 S.W.2d 820 (Mo.banc 1994). . . . .	11-13, 20
<i>State ex rel. Dillard’s, Inc. v. Ohmer</i> , 190 S.W.3d 570 (Mo.App.E.D. 2006). . . . .	12
<i>State ex rel. Linthicum v. Calvin</i> , 57 S.W.3d 855 (Mo.banc 2001).. . . . .	14, 17
<i>State ex rel. Mo. PSC v. Joyce</i> , 258 S.W.3d 58 (Mo.banc 2008). . . . .	8
<i>State ex rel. Selimanovic v. Dierker</i> , 246 S.W.3d 931 (Mo.banc 2008). . . . .	8, 11, 18
<i>State ex rel. SSM Health Care St. Louis v. Neill</i> , 78 S.W.3d 140 (Mo.banc 2002).. . . . .	12
<i>State v. Taylor</i> , 238 S.W.3d 145 (Mo.banc 2007).. . . . .	11, 13
Mo. Ct. R. 51.045.. . . . .	11, 18, 20, 21, 23
Mo. Ct. R. 55.33.. . . . .	18

Mo. Ct. R. 67.02... 22

R.S.Mo. § 476.410... 11, 18, 20, 21, 23

R.S.Mo. § 508.010... 7, 11, 12, 14, 16, 18, 20-22, 25

R.S.Mo. § 508.012... 7, 12, 16-18, 21-25

## STATEMENT OF FACTS

Plaintiffs filed the underlying action, *Rachel Cockrell, et al. v. The Kansas City Southern Railway Company*, Case No. 0816-CV18142, in the Circuit Court of Jackson County, Missouri, on June 24, 2008, hereinafter the Jackson County Action. (R001; SR000001).<sup>1</sup> The Plaintiffs in the Jackson County Action, Rachel Lauren Cockrell, Clifford McFarland, and Kimberly McFarland, were all residents of the State of Louisiana on the date of the underlying collision, June 25, 2007. (R001-R002). Relator, the Kansas City Southern Railway Company, hereinafter KCS, was the only defendant named in the original Petition. (R002). KCS is a Missouri corporation with its principal place of business located in Jackson County, Missouri and its registered agent located in St. Louis County, Missouri. (R002).

KCS filed its Motion to Dismiss or, Alternatively, to Transfer Venue, hereinafter Motion to Transfer, on August 5, 2008. (R017; SR000001). KCS filed its Answer on August 6, 2008. (R040; SR000002). Plaintiffs filed their Motion for Leave to Amend Petition to Add a Party Defendant, hereinafter Motion to Amend, on September 8, 2008.

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1. Reference to the Exhibits filed by Relator with its Petition in Prohibition or Alternatively, Mandamus will be by page numbers such as R001 and R055. Reference to the Exhibits filed by Respondent with the Suggestions in Opposition to Petition in Prohibition or Alternatively, Mandamus will be by page numbers such as SR000001 and SR000005.

(R055; SR000002). The Motion to Amend sought leave to amend the petition to add Kevin McIntosh, a resident of Jackson County, Missouri, as a defendant. (R055-R056). Plaintiffs also filed their Suggestions in Opposition to Defendant's Motion to Transfer Venue on September 8, 2008. (R049; SR000002). Respondent granted the Motion to Amend on October 1, 2008. (R0100; SR000004). That same day, Respondent denied the Motion to Transfer. (R098; SR000003). Plaintiffs filed their Amended Petition on October 8, 2008. (SR000004; SR000005). Defendant Kevin D. McIntosh was served on October 18 2008. (SR000004).

KCS filed its Petition in Prohibition or Alternatively, Mandamus in the Court of Appeals, Western District, on October 9, 2008. The Western District entered its Order denying the Petition on October 23, 2008. KCS filed its Petition in Prohibition or Alternatively, Mandamus in this Court on October 31, 2008.

KCS does not dispute that Missouri courts have subject matter and personal jurisdiction over it. KCS argues only that Respondent did not have authority to allow Plaintiffs to file their Amended Petition. Further, the Relator's Brief does not include any argument that venue is improper in Jackson County, Missouri with Defendant McIntosh added to the underlying action.

## **ARGUMENT**

### **POINT I. RESPONDENT DID NOT EXCEED HIS JURISDICTION OR AUTHORITY IN GRANTING THE MOTION TO AMEND**

#### **A. Summary of Argument**

It is clear that once the Amended Petition was filed and Kevin McIntosh, a resident of Jackson County, was added as a defendant, venue was proper in Jackson County under § 508.010.5(2). The Relator's Brief does not include any argument disputing venue in Jackson County if Defendant McIntosh was properly added as a defendant. KCS's only argument is that Respondent did not have jurisdiction or authority to grant the Motion to Amend once the Motion to Transfer was filed. However, the question before this Court is not whether Respondent had jurisdiction because improper venue is not a jurisdictional defect. The issue this Court must decide is whether a statute or rule prohibited Respondent from granting the Motion to Amend prior to ruling on the Motion to Transfer.

The 2005 amendments to § 508.010 and the adoption of § 508.012 show a clear legislative intent that the addition or removal of any plaintiff or defendant affect the determination of venue. Further, because venue is now determined as of the time the plaintiff was injured rather than when an action is "brought", there is no longer any statutory prohibition on a trial court granting leave to add a defendant prior to ruling on a motion to transfer for improper venue. As a result, Respondent did not abuse his discretion in granting the Motion to Amend and denying the Motion to Transfer.

## **B. Standard of Review**

“The standard of review for writs of mandamus and prohibition, including those pertaining to motions to transfer venue, is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes.” *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo.banc 2007); *State ex rel. Mo. PSC v. Joyce*, 258 S.W.3d 58, 61 (Mo.banc 2008). “A trial court is without discretion to disturb a plaintiff’s choice of proper venue.” *State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 933 (Mo.banc 2008).

## **C. Writs of Mandamus and Prohibition**

A writ of prohibition is used to prevent a future act, so that “an appellate court should employ prohibition when a circuit court has erroneously denied transfer or has erroneously granted transfer but transfer is not complete. In such proceedings, the writ should be directed at the transferring judge.” *Joyce*, 258 S.W.3d at 60. In contrast, a writ of mandamus is used to compel the undoing or rescission of a completed act, so that:

an appellate court should employ mandamus when a circuit court has erroneously granted transfer and transfer is complete. Because the case is no longer pending before the transferring court, the act must be undone by the receiving court. The writ should direct the presiding judge of the receiving court to retransfer the case. *Joyce*, 258 S.W.3d at 60. In the present case, Respondent denied the motion for transfer. Therefore, a writ of prohibition would be the appropriate remedy had Respondent’s actions warranted relief.

#### **D. Personal and Subject Matter Jurisdiction Exist**

While this matter does involve Respondent's authority to deny the motion to transfer venue, the issue involved is not jurisdictional. In the present case, Respondent clearly had both subject matter and personal jurisdiction.

As discussed in *In re Marriage of Hendrix*, 183 S.W.3d 582 (Mo. banc 2006), Missouri courts recognize two kinds of jurisdiction: subject matter jurisdiction and personal jurisdiction. These two kinds of jurisdiction -- and there are [\*4] only two for the circuit courts -- are based upon constitutional principles. Personal jurisdiction is, for the most part, a matter of federal constitutional law. Subject matter jurisdiction is governed by article V of the Missouri Constitution. *J.C.W. v. Wyciskalla*, No. SC89404, 2009 Mo.LEXIS 11, \*3-\*4 (Mo.banc January 27, 2009) (footnote omitted). KCS is a Missouri corporation in good standing. (R002, R038, R040). As a result, the Circuit Courts in Missouri clearly have personal jurisdiction over KCS.

Additionally, the trial court clearly had subject matter jurisdiction over the underlying matter. As this Court recently explained:

the subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution. Article V, section 14 sets forth the subject matter jurisdiction [\*8] of Missouri's circuit courts in plenary terms, providing that "[t]he circuit courts shall have original jurisdiction over *all* cases and matters, civil and criminal.

Such courts may issue and determine original remedial writs and shall sit at times and places within the circuit as determined by the circuit court."(emphasis added.)

*J.C.W.*, 2009 Mo.LEXIS 11, \*7-\*8. This Court also recognized that the doctrine of "jurisdictional competence" has no validity under the Missouri Constitution.

Because the authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction, there is no constitutional basis for this third jurisdictional concept for statutes that would bar litigants from relief. [\*10] Elevating statutory restrictions to matters of "jurisdictional competence" erodes the constitutional boundary established by article V of the Missouri Constitution, as well as the separation of powers doctrine, and robs the concept of subject matter jurisdiction of the clarity that the constitution provides. If "jurisdictional competence" is recognized as a distinct concept under which a statute can restrict subject matter jurisdiction, the term creates a temptation for litigants to label every statutory restriction on claims for relief as a matter of jurisdictional competence. Accordingly, having fully considered the potential ill effects of recognizing a separate jurisdictional basis called jurisdictional competence, the courts of this state should confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction; there is no third category of jurisdiction called "jurisdictional competence."

*J.C.W.*, 2009 Mo.LEXIS 11, \*9-\*10. Issues regarding a circuit court’s power generally arise “when there is no question as to the court’s authority to decide the general issue before it, but there is a question whether the issue or parties affected by the court’s judgment are properly before it for resolution at that time.” *In re Marriage of Hendrix*, 183 S.W.3d 532, 588 (Mo.banc 2006); *J.C.W.*, 2009 Mo.LEXIS 11, \*8-\*9.

In 1989, the General Assembly modified the Missouri statute on commencement of civil suits and “severed the concepts of venue and jurisdiction.” *State v. Taylor*, 238 S.W.3d 145, 149-50 (Mo.banc 2007); *State ex rel. DePaul Health Ctr v. Mummert*, 870 S.W.2d 820, 822 (Mo.banc 1994). Since that time, Missouri courts have recognized that “[v]enue and personal jurisdiction address entirely different concerns”. *Mummert*, 870 S.W.2d at 822. “Jurisdiction describes the power of a court to try a case, while venue relates to the locale where the trial is to be held. . . . Venue determines, among many courts with jurisdiction, the appropriate forum for the trial.” *Taylor*, 238 S.W.3d at 149. As a result, improper venue is not a jurisdictional defect and any limit on Respondent’s authority to grant the Motion to Amend must be found either in the venue statutes or in § 476.410 and Rule 51.045 dealing with transfer for improper venue.

#### **E. The Venue Statutes Allowed the Addition of Defendant McIntosh**

“Venue is determined solely by statute. [Citation omitted]. When interpreting a statute, the primary rule is to give effect to legislative intent as reflected in the plain language of the statute.” *State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 932 (Mo.banc 2008). Effective August 28, 2005, Missouri’s general venue statute, § 508.010,

was significantly amended, various other venue statutes were repealed, and § 508.012 was added. No Missouri appellate court has discussed § 508.012 and very few Missouri decisions have addressed the impact of the amendments to § 508.010.

KCS relies on *State ex rel. Dillard's, Inc. v. Ohmer*, 190 S.W.3d 570 (Mo.App.E.D. 2006), and *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140 (Mo.banc 2002), for the proposition that Respondent did not have the jurisdiction or authority to grant Plaintiffs' Motion to Amend or deny the Motion to Transfer. (Relator's Brief, p. 8-10). However, both *Neill* and *Ohmer* were decided based on Missouri's venue provisions prior to the 2005 amendments. *Ohmer*, 190 S.W.3d at 571-72 ("The underlying action was originally filed . . . on July 26, 2005. . . . Plaintiffs based their claim of venue on Section 508.010(2), RSMo. 2000"); *Neill*, 78 S.W.3d 140 (decided June 25, 2002). Further, both *Ohmer* and *Neill* rely on *State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4 (Mo.banc 1985), in stating that "a court that acts when venue is improper acts in excess of its jurisdiction." *Neill*, 78 S.W.3d at 142 (citing *Kinder*, 698 S.W.2d at 6); *Ohmer*, 190 S.W.3d at 572 (citing *Neill* and *Kinder*, 698 S.W.2d at 6). *Kinder* was decided prior to *State ex rel. DePaul Health Ctr v. Mummert*, 870 S.W.2d 820 (Mo.banc 1994), at a time when Missouri had not yet severed the concepts of venue and personal jurisdiction.

As this Court recently affirmed, there are only two types of jurisdiction in the Missouri circuit courts, subject matter jurisdiction and personal jurisdiction. *J.C.W. v. Wyciskalla*, No. SC89404, 2009 Mo.LEXIS 11, \*3-\*4 (Mo.banc January 27, 2009). In

1989, Missouri “severed the concepts of venue and jurisdiction.” *State v. Taylor*, 238 S.W.3d 145, 149-50 (Mo.banc 2007). As a result, improper venue does not relieve a trial court of either subject matter or personal jurisdiction.

Prior to the 2005 amendments, Missouri’s venue statutes did limit a court’s authority to take actions when a motion to transfer for improper venue had been filed. This was true because venue was determined when the action was “brought”. This Court, in *Mummert*, explained that:

the propriety of venue is prescribed by statute. [Citation omitted]. The applicable statute, Section 508.010, provides in part:

[\*823] Suits instituted by summons shall, except as otherwise provided by law, be brought . . . when there are several defendants, and they reside in different counties, the suit may be brought in an such county.

By the terms of the statute, venue is determined as the case stands when brought, not when a motion challenging venue is decided. When suit was brought, none of the defendants resided in the City of St. Louis. Under Section 508.010, venue was improper in the City of St. Louis at that time.

*Mummert*, 870 S.W.2d at 822-23. The limitations resulting from this holding were recognized in Judge Limbaugh’s dissent, where he stated “I disagree that venue is determined ‘as the case stands when brought.’ The import of the holding is to preclude plaintiffs from curing defects in venue.” *Mummert*, 870 S.W.2d at 823 (Limbaugh, J., dissenting).

The affect of venue being decided when suit was “brought” was further explained in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo.banc 2001), where this Court held that:

The word "brought" in the legal context means "to advance or set forth in a court." AMERICAN HERITAGE DICTIONARY 209 (2d Collegiate ed. 1991). Although a suit is "brought" against the original defendants when the petition is initially filed, in like manner, it is also "brought" against subsequent defendants when they are added to the lawsuit by amendment.

*Calvin*, 57 S.W.3d at 858. However, this Court reaffirmed that venue was not affected by the addition of intervenors or third-party defendants. *Calvin*, 57 S.W.3d at 858, n. 3.

These cases held that because venue was decided when a case was “brought”, the authority of a trial court to grant leave to add additional defendants after a motion to transfer for improper venue had been filed was limited. The 2005 amendments to § 508.010 removed this limitation. Section 508.010 now provides, with respect to tort actions:

4. Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.

5. Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured outside the state of Missouri, venue shall be determined as follows:

(1) If the defendant is a corporation, then venue shall be in any county where a defendant corporation's registered agent is located or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiff's principal place of residence on the date the plaintiff was first injured;

(2) If the defendant is an individual, then venue shall be in any county of the individual defendant's principal place of residence in the state of Missouri or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county containing the plaintiff's principal place of residence on the date the plaintiff was first injured.

\* \* \*

9. In all actions, venue shall be determined as of the date the plaintiff was first injured.

10. All motions to dismiss or to transfer based upon a claim of improper venue shall be deemed granted if not denied within ninety days of filing of the motion unless such time period is waived in writing by all parties.

11. In a wrongful death action, the plaintiff shall be considered first injured where the decedent was first injured by the wrongful acts or negligent conduct

alleged in the action. In any spouse's claim for loss of consortium, the plaintiff claiming consortium shall be considered first injured where the other spouse was first injured by the wrongful acts or negligent conduct alleged in the action.

\* \* \*

14. A plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first manifested.

R.S.Mo. § 508.010. Additionally, the following section was added in 2005.

At any time prior to the commencement of a trial, if a plaintiff or defendant, including a third-party plaintiff or defendant, is either added or removed from a petition filed in any court in the state of Missouri which would have, if originally added or removed to the initial petition, altered the determination of venue under section 508.010, then the judge shall upon application of any party transfer the case to a proper forum under section 476.410, RSMo.

R.S.Mo. § 508.012.

These sections include two significant changes from prior venue statutes. First, venue is no longer determined when the action is “brought”. Instead, venue is always “determined as of the date the plaintiff was first injured.” R.S.Mo. § 508.010.9. Second, the legislature had expressed a clear intention that the addition or removal of parties at any time prior to commencement of trial results in a redetermination of venue. R.S.Mo. § 508.012. The change in the time when venue is determined removes the statutory basis for limiting a trial court’s authority to grant leave to add additional defendants. Further,

§ 508.012 indicates a legislative intention to allow a plaintiff to add parties to affect venue. Taken together, there is simply no longer a basis in Missouri's venue statutes for prohibiting a court from granting a motion to add a defendant prior to ruling on a motion to transfer for improper venue.

Chief Justice Stith recognized the legislature's authority to make these type of changes in her opinion concurring in part and dissenting in part in *Calvin*.

The legislature could have entitled section 508.010, for example, "Suit by summons, when brought against particular defendants," and begun that statute with a phrase such as "Venue shall be determined when suit is brought and may be redetermined whenever a plaintiff adds an additional defendant, as follows: . . .". It did not, however, choose to write the venue statute in this manner.

*Calvin*, 57 S.W.3d at 863 (Stith, J., concurring in part, dissenting in part). The Chief Justice, then Judge, further stated that "Should the legislature at some point decide that addition of any new defendant, or even any new party, should allow a redetermination of venue, then it can adopt a new statute so stating." *Calvin*, 57 S.W.3d at 864 (Stith, J., concurring in part, dissenting in part). The legislature has now provided that venue is to be redetermined when any new party is either added or removed. It makes no sense to believe the legislature wanted to prohibit a trial court from allowing the addition of a party that would effect the determination of venue when § 508.012 specifically states that the addition of any party does cause a redetermination of venue.

“When interpreting a statute, the primary rule is to give effect to legislative intent as reflected in the plain language of the statute.” *State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 932 (Mo.banc 2008). The legislative intent of § 508.012 is clearly to allow the addition of parties to alter the determination of venue. This intent is also shown by the requirement that venue be determined as of the time the plaintiff was injured rather than when an action is “brought”. Further, venue is not jurisdictional so that improper venue does not eliminate either subject matter or personal jurisdiction. As a result, there is no basis for finding that § 508.010 prohibited Respondent from granting Plaintiffs’ Motion to Amend prior to ruling on the Motion to Transfer filed by KCS. Respondent did not abuse his discretion and this Court’s Preliminary Writ of Prohibition should be quashed.

**F. Rule 51.045 and § 476.410 Allowed the Addition of Defendant McIntosh**

It is true that § 476.410 and Rule 51.045 require a circuit court, upon timely motion, to transfer a case when it has been filed in the wrong venue. However, neither § 476.410 nor Rule 51.045 prohibits the trial court from allowing amendment of the pleadings to address any defects in venue.

Missouri has a strong public policy of freely allowing amendment of pleadings. Mo. Ct. R. 55.33(a). Even prior to the 2005 amendments to the venue statutes, this Court recognized that it was sometimes permissible for amended pleadings to be filed prior to a trial court ruling on a motion to transfer for improper venue. In discussing a situation

where a plaintiff sought to file an amended petition as a matter of right, this Court explained:

Rule 55.33(a) provides, in pertinent part, that a pleading may be amended once as a matter of course at any time before a responsive pleading is served. As defendants did not file a responsive pleading, but merely a motion, Bugg was entitled to amend his pleading as a matter of course. The amended petition should have been filed. Once an amended pleading is filed, any prior pleadings not referred to or incorporated into the new pleading are considered abandoned and receive no further consideration in the case for any purpose. [Citation omitted]. In his amended petition, Bugg does not refer to or incorporate any prior pleading. Therefore, in this case, the issue of venue is to be determined on the basis of the amended petition.

*State ex rel. Bugg v. Roper*, 179 S.W.3d 893, 894 (Mo.banc 2005) (footnote omitted).

This Court went on to explain that:

Such a conclusion is not contrary to *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820, 823 (Mo. banc 1994), which holds that "by the terms of the statute, venue is determined as the case stands when brought, not when a motion challenging venue is decided." As explained in *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901 (Mo. banc 1996), "This passage from *DePaul* is not on point. The venue statute and, in turn, the Court's reference to the statute in *DePaul* pertain to the residence of parties defendant to a lawsuit, not the condition

of the pleadings." It is noted that the statute on which *DePaul* is based was amended in the last legislative session to eliminate reference to where suit is brought. See section 508.010, 2005 Mo. Laws 644.

*Roper*, 179 S.W.3d at 894, n. 1.

This Court's decision in *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901 (Mo.banc 1996), indicates that it was the venue statutes, not § 476.410 or Rule 51.045, that placed limitations on the amendment of pleadings prior to a ruling on a motion to transfer. In discussing the prior version § 508.010 and the ruling in *Mummert*, this Court explained:

The statute requires only that challenges to venue based upon a party's residence must be determined as of the time suit was filed.

In the absence of a statutory mandate, we have no reason to penalize plaintiffs for defects in the substance of the original petition, as opposed to penalizing them for joinder of parties defendant whose residence defeats venue. To do so, moreover, would be inconsistent with the long-standing policy to freely grant leave to amend.

*State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 903 (Mo.banc 1996).

If § 476.410 and Rule 51.045 required a motion to transfer be determined based on the pleadings at the time the motion was filed, it would not have mattered if the amendment was as a matter of right or pursuant to leave of court. As a result, it is clear that the limitations imposed on the amendment of pleadings arose from the venue statutes

and the requirement that venue be determine when an action was “brought”, not from § 476.410 or Rule 51.045. Since § 508.010 has been amended and no longer requires determination of venue at the time the case was “brought”, there is no statute or rule that prohibits a trial court from granting leave to add a defendant prior to ruling on a motion to transfer. Respondent, therefore, did not abuse his discretion in granting the Motion to Amend prior to denying the Motion to Transfer and this Court’s Preliminary Writ of Prohibition should be quashed.

### **G. Relator’s Theory Creates Problems**

KCS argues that a trial court does not have jurisdiction or authority to grant leave to add a defendant after a motion to transfer for improper venue has been filed. (Relator’s Brief, p. 8-10). The result of KCS’s theory, when the plain meaning of § 508.012 is considered, is that whether a plaintiff may take actions to correct venue defects will not be decided on any rational basis related to venue. Instead, the decision will depend on whether a defendant is being added or dismissed and whether a defendant has filed an answer.

First, if the sole defendant files a motion to transfer but does not file an answer, the plaintiff would be able to file an amended petition and add a defendant without requiring leave of court. “Rule 55.33(a) allows a pleading to be amended once as a matter of course ‘at any time before a responsive pleading is served’ and does not require leave of court to add a new party.” *Breedon v. Hueser*, No. WD68069, 2008 Mo.App.LEXIS 904, \*31, 2008 WL 2572854 (Mo.App.W.D. June 30, 2008). In contrast, if the defendant files

both a motion to transfer and an answer, as was done in this case, the plaintiff would require leave before being able to file an amended petition to add a defendant. As a result, the first plaintiff would possibly be able to correct a defect in venue while the second plaintiff would not. In contrast, if the plaintiff filed suit against multiple defendants, one of which created a problem with venue, the plaintiff would be able to dismiss that defendant regardless of whether any defendant had filed an answer. *See* Mo. Ct. R. 67.02(a).

Section 508.012, which KCS does not even discuss, requires redetermination of venue upon the addition or removal of any plaintiff or defendant. R.S.Mo. § 508.012. This section clearly allows the plaintiff to change the determination of venue by the addition or dismissal of a defendant. However, if the filing of a motion to transfer for improper venue prevents changes in parties that require leave of court but not changes that can be made as a matter of right, then some plaintiffs will be able to correct venue defects while others will not and the determination will be based on irrelevant factors without any support in § 508.010.

KCS also complains because the Plaintiffs were allowed ten days to file the Amended Petition when Respondent granted the Motion to Amend and denied the Motion to Transfer. (Relator's Brief, p. 10). A copy of the Amended Petition was attached to the Motion to Amend, (R055, R058-R086), so that both Respondent and Relator were aware of the contents of the Amended Petition at the time the Motion to Amend was granted. The Amended Petition was filed on October 8, 2008, (SR000004; SR000005), and

Defendant McIntosh was served on October 18 2008. (SR000004). KCS seeks to elevate form over substance and has cited no authority supporting its argument. Respondent did not abuse his discretion in denying the Motion to Transfer prior to the actual filing of the Amended Petition. KCS could have renewed its Motion to Transfer if the Plaintiffs had failed to file the Amended Petition as allowed by Respondent or had failed to obtain service on Defendant McIntosh.

#### **H. Requiring Transfer Wastes Resources**

KCS' theory that transfer to St. Louis County is required in this case would also waste time and resources. Section 508.012 does not require a finding that venue is improper in the current county as a prerequisite for transfer after a party is added or removed. Therefore, if this case was transferred to St. Louis County and the Circuit Court of St. Louis County then granted leave to add Defendant McIntosh as a defendant, § 508.012 would then allow transfer back to Jackson County.

Section 476.410 applies when “a case is *filed* laying venue in the . . . wrong circuit”. R.S.Mo. § 476.410 (emphasis added). Similarly, Rule 51.045 applies to “An action *brought* in a court where venue is improper”. Mo. Ct. R. 51.045(a) (emphasis added). In contrast, § 508.012 applies when the addition or removal of a party has “altered the determination of venue under section 508.010”. R.S.Mo. § 508.012. Nothing in the wording of § 508.012 requires a determination that venue is improper in the current forum after a party is added or removed as a requirement for transfer to another county with proper venue. As a result, if this case were transferred to St. Louis County after

which leave was granted to amend the petition, § 508.012 would then allow transfer back to Jackson County. Requiring transfer only to have the case transferred back after the addition of a party would be a waste of judicial resources and a waste of the parties' time and money. Respondent properly exercised his discretion in allowing the addition of Defendant McIntosh and denying the Motion to Transfer.

## CONCLUSION

Under § 508.010 and § 508.012, venue is no longer determined at the time an action is “brought” or based solely on the parties at the time the action was “brought”. The legislature has mandated that venue is to be much more fluid and is to be redetermined when parties, including plaintiffs, defendants, third-party plaintiffs, or third-party defendants, are added or removed from a petition. R.S.Mo. § 508.012. Cases restricting a trial court’s authority to allow the addition of a defendant prior to a ruling on a motion to transfer were based on the wording of earlier venue statutes and are not supported by the current version of § 508.010 and conflict with the legislative intent expressed in § 508.012. As venue is not jurisdictional and is no longer determined when an action is “brought”, Respondent clearly had authority to grant the Motion to Amend and to deny the Motion to Transfer. Respondent did not abuse his discretion and this Court’s preliminary writ of prohibition should be quashed.

Respectfully Submitted,

---

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Attorneys for Respondent and Plaintiffs

### **CERTIFICATE OF SERVICE**

I hereby certify that I have served one copy of Respondent's Brief together with a copy of the CD-ROM required by Supreme Court Rule 84.06(g) on the following counsel of record and Respondent by depositing in the United States Mail, postage prepaid, on or before this 20<sup>th</sup> day of February, 2009.

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Attorneys for Relator and  
Defendant Kevin D. McIntosh

The Honorable W. Stephen Nixon  
Jackson County Courthouse  
308 W Kansas  
Independence, MO 64050

Respondent

---

Richard L. Rollings, Jr.

## **RULE 84.06(c) AND (g) CERTIFICATE**

I hereby certify that this Respondent's Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and that the entire brief contains 5,810 words. I hereby further certify that the CD-ROM disks containing the brief and filed with the Court and served on Respondent and the Attorney for Relator were scanned for viruses by an anti-virus program and are virus-free according to such program.

---

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## **APPENDIX**

**APPENDIX**  
**Table of Contents**

	Page
A. Order Granting Motion for Leave to Amend Petition to Add a Party	
Defendant. ....	A1
B. Order Denying Motion to Transfer Venue. ....	A3
C. R.S.Mo. 508.010. ....	A5
D. R.S.Mo. 508.012. ....	A8

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE, MISSOURI

RACHEL LAUREN COCKRELL

Plaintiffs,

vs.

Case No: 0816-CV18142

DIVISION 5

THE KANSAS CITY SOUTHERN  
RAILWAY COMPANY

Defendant.

**ORDER GRANTING MOTION FOR LEAVE  
TO AMEND PETITION TO ADD A PARTY DEFENDANT**

UPON FULL CONSIDERATION, the Court, having reviewed Plaintiffs' Motion For Leave to Amend Petition to Add a Party Defendant filed on September 8, 2008, and the Court having reviewed all evidence, pleadings and arguments of record related to said motion, and being fully advised in the premises,

IT IS HEREBY ORDERED that said motion is GRANTED.

IT IS FURTHER ORDERED that Plaintiff shall file its signed original first amended petition on or before ten (10) days from the date of this Order.

Dated: OCTOBER 1, 2008

  
\_\_\_\_\_  
W STEPHEN NIXON  
Judge

**Certificate of Service**

This is to certify that a copy of the foregoing was mailed postage pre-paid or hand delivered to the following on OCTOBER 1, 2008.

Copies to:

Appendix Document A

R0001-R0100

A1

5

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*/s/ Sue Akers*

---

Judicial Administrative Assistant

R0001-R0101

A2

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE, MISSOURI

RACHEL LAUREN COCKRELL

Plaintiffs,

vs.

Case No: 0816-CV18142

DIVISION 5

THE KANSAS CITY SOUTHERN  
RAILWAY COMPANY

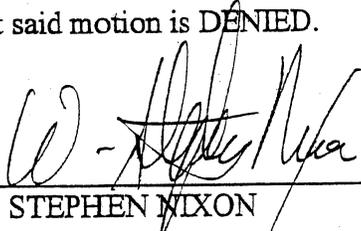
Defendant.

**ORDER DENYING  
MOTION TO TRANSFER VENUE**

UPON FULL CONSIDERATION, the Court, having reviewed Defendant's Motion to Motion to Dismiss or, Alternatively, To Transfer Venue filed on August 5, 2008, and the Court having reviewed all evidence, pleadings and arguments of record related to said motion, and being fully advised in the premises,

IT IS HEREBY ORDERED that said motion is DENIED.

Dated: OCTOBER 1, 2008

  
\_\_\_\_\_  
W STEPHEN NIXON  
Judge

**Certificate of Service**

This is to certify that a copy of the foregoing was mailed postage pre-paid or hand delivered to the following on OCTOBER 1, 2008.

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Appendix Document B

R0001-R098

A3

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R0001-R099

A4

# *Missouri Revised Statutes*

## **Chapter 508**

### **Venue and Change of Venue**

#### **Section 508.010**

August 28, 2008

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#### **Venue for nontort and tort suits--principal place of residence, defined.**

508.010. 1. As used in this section, "principal place of residence" shall mean the county which is the main place where an individual resides in the state of Missouri. There shall be a rebuttable presumption that the county of voter registration at the time of injury is the principal place of residence. There shall be only one principal place of residence.

2. In all actions in which there is no count alleging a tort, venue shall be determined as follows:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

(3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;

(4) When all the defendants are nonresidents of the state, suit may be brought in any county in this state.

3. The term "tort" shall include claims based upon improper health care, under the provisions of chapter 538, RSMo.

4. Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.

5. Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured outside the state of Missouri, venue shall be determined as follows:

(1) If the defendant is a corporation, then venue shall be in any county where a defendant corporation's registered agent is located or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiff's principal place of residence on the date the plaintiff was first injured;

(2) If the defendant is an individual, then venue shall be in any county of the individual defendant's principal place of residence in the state of Missouri or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county containing the plaintiff's principal place of residence on the date the plaintiff was first injured.

6. Any action, in which any county shall be a plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found.
7. In all actions, process shall be issued by the court in which the action is filed and process may be served in any county within the state.
8. In any action for defamation or for invasion of privacy, the plaintiff shall be considered first injured in the county in which the defamation or invasion was first published.
9. In all actions, venue shall be determined as of the date the plaintiff was first injured.
10. All motions to dismiss or to transfer based upon a claim of improper venue shall be deemed granted if not denied within ninety days of filing of the motion unless such time period is waived in writing by all parties.
11. In a wrongful death action, the plaintiff shall be considered first injured where the decedent was first injured by the wrongful acts or negligent conduct alleged in the action. In any spouse's claim for loss of consortium, the plaintiff claiming consortium shall be considered first injured where the other spouse was first injured by the wrongful acts or negligent conduct alleged in the action.
12. The provisions of this section shall apply irrespective of whether the defendant is a for-profit or a not-for-profit entity.
13. In any civil action, if all parties agree in writing to a change of venue, the court shall transfer venue to the county within the state unanimously chosen by the parties. If any parties are added to the cause of action after the date of said transfer who do not consent to said transfer then the cause of action shall be transferred to such county in which venue is appropriate under this section, based upon the amended pleadings.
14. A plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first manifested.

(RSMo 1939 § 871, A.L. 1965 p. 659, A.L. 2005 H.B. 393)

Prior revisions: 1929 § 720; 1919 § 1177; 1909 § 1751

CROSS REFERENCES:

Action against carrier for loss or damage to shipment, RSMo 537.250

Action against nonresident motorist, RSMo 506.290

Administrative decisions, proceedings to review, Chap. 536, RSMo

Administrative rules, action to test validity, Chap. 536, RSMo

Applicability of statute changes to cases filed after August 28, 2005, RSMo 538.305

Dissolution of marriage, divorce and maintenance actions, Chap. 452, RSMo

Injunction to stay suit or judgment, RSMo 526.090

Mortgage foreclosure action, RSMo 443.200

Venue in wrong circuit or division circuit court, may transfer case where it could have been brought, RSMo 476.410

(1952) Objection to venue can be waived and unless fact of improper venue is raised by party entitled to assert it before trial it is waived. Entry of general appearance constitutes waiver. *Jones v. Church (A.)*, 252 S.W.2d 647.

(1953) Venue of action in county where one or more of several defendants reside does not require that a joint cause of action be asserted against all defendants. If causes which may be joined under § 507.040 are asserted against the defendants, subdivision (2) of this section fixes venue. State ex rel.

Campbell v. James (Mo.), 263 S.W.2d 402.

(1954) A foreign corporation may be sued under § 508.040 in any county where it has an office if it is the sole defendant but if it is joined as a codefendant with others it must be sued in the county where its registered office is maintained or in a county where one of the defendants resides. State ex rel. Whiteman v. James, 364 Mo. 589, 265 S.W.2d 298.

(1956) Action for declaratory judgment and injunction against former partners of plaintiff and stakeholder based on contract for settlement of partnership, where there were both resident and nonresident defendants, held properly brought in county of stakeholder's residence although joint cause of action against stakeholder and other defendants was not stated. Durwood v. Dubinsky (Mo.), 291 S.W.2d 909.

(1956) Where all parties to action were residents of Kansas and defendant was served in Missouri, there apparently being collusion between defendant and plaintiff's counsel, court had discretion to dismiss on ground of forum non conveniens. Elliott v. Johnston, 365 Mo. 881, 292 S.W.2d 589.

(1958) Where summons in separate maintenance action was served on defendant who was nonresident of county while he was in the county defending a criminal nonsupport proceeding instigated by his wife, the evidence was insufficient to establish fraud so as to invalidate the service. Glaize v. Glaize (A.), 311 S.W.2d 575.

(1959) Where plaintiff resided in one county and two defendants in another, service on one defendant in his home county did not confer jurisdiction over him, even though the other defendant was served in the county in which plaintiff resided. State ex rel. McCarter v. Craig (Mo.), 328 S.W.2d 589.

(1959) In suit by Pulaski County residents against three defendants where one was nonresident of the state and other two were residents of Howell County, but the only defendant served was found in Pulaski County, Pulaski County was the proper venue for the action against the one defendant served. State ex rel. Kissinger v. Allison (A.), 328 S.W.2d 952.

(1960) Circuit court of Jasper County was without jurisdiction of appeal from action of attorney general in formulating ballot title for constitutional amendment since service of summons was ineffectual to confer jurisdiction over defendant's person and, if the action was in rem, the situs of ballot title was in Cole County. State ex rel. Dalton v. Oldham (Mo.), 336 S.W.2d 519.

(1960) Venue in a suit against a foreign insurance company and an individual is governed by § 508.010 which provides that when there are several defendants and they reside in different counties, suit may be brought in any such county. Section 351.375 has no application to foreign insurance companies. State ex rel. Stamm v. Mayfield (Mo.), 340 S.W.2d 631.

(1961) Where a corporation of one county was sued by a resident of another county the corporation could not bring in by a third party petition another defendant who resided in the same county in which the corporation resides since the court of the county of plaintiff's residence would not have jurisdiction over him under the venue statutes. State ex rel. Carney v. Higgins (Mo.) 352 S.W.2d 35.

(1962) The objection to venue is a personal privilege and it was waived where, after plaintiffs in two cases had dismissed as to the one defendant in each case who resided in the county where suit was filed, the defendant consented to a consolidation of the two actions, accepted an assignment to a trial division and requested a continuance. In such circumstances the objection that one defendant was made a defendant solely for the purpose of fixing the venue was waived. Hutchinson v. Steinke (A.), 353 S.W.2d 137.

(1962) Where individual and foreign business corporation were joined as co-defendants in action brought in Jackson County venue was improper only as to individual defendant, a resident of Franklin County, since the corporation maintained its registered office and registered agent in St. Louis City although it maintained a general business office in Kansas City and did not object to venue. State v. Jensen (Mo.), 359 S.W.2d 343.

(1987) For actions against the Missouri Highway and Transportation Commission special venue is fixed in Cole County by 1927 judicial interpretation of section 226.100 since office is established in Jefferson City and thus venue in action against Commission pursuant to this section was improper. State ex. rel. Missouri Highway and Transportation Commission, 731 S.W.2d 461 (Mo.App.).

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# *Missouri Revised Statutes*

## **Chapter 508**

### **Venue and Change of Venue**

#### **Section 508.012**

August 28, 2008

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#### **Transfer of case based on addition or removal of a plaintiff or defendant prior to commencement of trial.**

508.012. At any time prior to the commencement of a trial, if a plaintiff or defendant, including a third-party plaintiff or defendant, is either added or removed from a petition filed in any court in the state of Missouri which would have, if originally added or removed to the initial petition, altered the determination of venue under section 508.010, then the judge shall upon application of any party transfer the case to a proper forum under section 476.410, RSMo.

(L. 2005 H.B. 393 § 3)

CROSS REFERENCE:

Applicability of statute changes to cases filed after August 28, 2005, RSMo 538.305

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