

No. SC89704

IN THE SUPREME COURT OF MISSOURI

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.

RELATOR'S BRIEF

YERETSKY & MAHER, L.L.C.

James M. Yeretsky MO#30096

Gregory F. Maher MO#41285

Craig M. Leff MO#43446

G. Stuart Englebert MO#53426

P.O. Box 26035

Kansas City, Missouri 64196

Telephone: (816) 842-5566

Facsimile: (816) 842-3534

Email: jyeretsky@ymllc.com

ATTORNEYS FOR RELATOR

**THE KANSAS CITY SOUTHERN RAILWAY
COMPANY**

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF FACTS	2
POINTS RELIED ON.....	4
ARGUMENT	5
A. Applicable Standard of Review.....	6
B. Prohibition lies to prevent a trial court from refusing to transfer a case where venue is improper.	6
C. Venue is not proper in Jackson County, Missouri.	7
D. Respondent’s denial of KCSR’s Motion to Transfer was contrary to law.....	8
E. Respondent had no jurisdiction or authority to grant plaintiffs leave to file their First Amended Petition.....	9
CONCLUSION.....	11
CERTIFICATE OF SERVICE	13
CERTIFICATE OF COMPLIANCE.....	14

TABLE OF AUTHORITIES

Cases

<i>Igoe v. the Department of Labor and Industrial Relations</i> , 152 S.W.3d 284, 288 (Mo. banc 2005)	9
<i>State ex rel. Depaul Health Center v. Mummert</i> , 870 S.W.2d 820 (Mo. banc 1994) .	1, 5, 8
<i>State ex rel. Dillard's Inc. v. Ohmer</i> , 190 S.W.3d 570 (Mo. App. E.D. 2006).....	5, 10, 11
<i>State ex rel. Linthicum v. Calvin</i> , 57 S.W.3d 855 (Mo. banc 2001).....	7
<i>State ex rel. Rothermich v. Gallagher</i> , 816 S.W.2d 194, 196 (Mo. banc 1991)	8
<i>State ex rel. Selimanovic v. Dierker</i> , 246 S.W.3d 931 (Mo. banc 2008)	5
<i>State ex. rel Shelton v. Mummert</i> , 879 S.W.2d 525 (Mo. banc 1994).....	1
<i>State ex rel. SSM Health Care St. Louis v. Neill</i> , 78 S.W.3d 140 (Mo. banc 2002)	5
<i>State ex rel. The Budd Company v. Dierker</i> , 246 S.W.3d 931 (Mo. banc 2008)	1, 7

Statutes

Mo. Const. Art V, § 4	1
R.S.Mo. § 476.410.....	5, 8
R.S.Mo. § 508.010.....	passim

Other Authorities

Mo. S. Ct. R. 51.045	3, 8
----------------------------	------

JURISDICTIONAL STATEMENT

This extraordinary writ proceeding examines whether Respondent exceeded his jurisdiction by refusing to transfer the underlying civil action from Jackson County, Missouri to its proper forum of St. Louis County, Missouri as required by Missouri law. The Missouri Constitution, Article V, section 4, provides, “The supreme court and districts of the court of appeals may issue and determine original remedial writs.” Mo. Const. Art V, § 4. Prohibition is an appropriate remedy where a court exercises extra-jurisdictional power. *State ex rel. The Budd Company v. Dierker*, 246 S.W.3d 931, 932 (Mo. banc 2008). Mandamus is an appropriate remedy where a court fails to perform a ministerial act such as ordering the transfer of a case from a court of improper venue to a court of proper venue. *State ex rel. Depaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994); *State ex. rel Shelton v. Mummert*, 879 S.W.2d 525, 530 (Mo. banc 1994).

STATEMENT OF FACTS

This request for an extraordinary writ of Prohibition, or alternatively, Mandamus arises from Respondent's failure to grant Relator's Motion to Transfer Venue. Relator is The Kansas City Southern Railway Company ("KCSR"). Respondent was, until recently, the Circuit Court Judge presiding over the current action in the Circuit Court of Jackson County, Missouri at Independence.¹

This action involves claims for personal injury and wrongful death arising from an automobile-train accident that occurred on June 25, 2007 at a railroad grade crossing in Ruston, Louisiana. *R001-R004*.² Clifford and Kimberly McFarland allege that their daughter, Hannah McFarland, died from injuries she sustained in the collision. *R001-R002*. The driver of the automobile, Lauren Rachel Cockrell, alleges that she suffered personal injuries as a result of the accident. *R002-R003*. The McFarlands and Ms. Cockrell, the only plaintiffs in this action, were, at the time of the accident, all residents of Louisiana. *R001-R003*. KCSR, the only defendant named in plaintiffs' original Petition, is a corporation whose registered agent in the State of Missouri is CT

¹ This case was transferred from Respondent W. Stephen Nixon to the Honorable John Torrence on January 5, 2009.

² References to "R____" refer to the consecutively numbered exhibits submitted with Relator's Petition for Writ of Prohibition or Alternatively, Mandamus as contained in Relator's Index of Exhibits.

Corporation, located at 120 South Central Avenue, Clayton, St. Louis County, Missouri, 63105. *R001*.

KCSR was served with plaintiffs' original Petition on July 8, 2008. *R015*. On August 5, 2008—within 60 days of service—KCSR filed a Motion to Transfer Venue pursuant to Missouri Supreme Court Rule 51.045. *R017*. One day later, on August 6, 2008, KCSR filed its Answer. *R040*.

In its Motion and Suggestions in Support of its Motion to Transfer Venue, KCSR explained that venue was improper in the Circuit Court of Jackson County, Missouri at Independence under R.S.Mo. § 508.010.5(1) because plaintiffs were first injured outside the state of Missouri, because none of the plaintiffs resided in Missouri on the date of the accident, and because KCSR's registered agent for service of process was located in Clayton, St. Louis County, Missouri. *R015*. In their response to this Motion, Plaintiffs did not deny that venue was improper but contended that such venue defect could be cured by adding a new defendant. *R049-R052*. On September 8, 2008 plaintiffs sought leave to add as a defendant KCSR employee Kevin McIntosh, who happens to reside in Jackson County. *R055*.

On October 1, 2008, Respondent denied KCSR's Motion to Transfer. On that same date, Respondent granted plaintiffs' Motion for Leave to Amend to add Kevin McIntosh as a party defendant. *R098 and R0100*. Respondent gave plaintiffs 10 days in which to file their First Amended Petition. *R0100*. Thus, when Respondent denied KCSR's Motion to Transfer Venue, KCSR was the only defendant and had filed a timely challenge to venue.

KCSR has previously sought the relief requested here from the Missouri Court of Appeals for the Western District. The Western District denied KCSR's writ request on October 23, 2008. *R. 102*.

POINTS RELIED ON

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE CIRCUIT COURT FROM TAKING ANY FURTHER ACTION EXCEPT TO TRANSFER THE UNDERLYING CASE TO THE CIRCUIT COURT OF ST. LOUIS COUNTY BECAUSE RESPONDENT'S DENIAL OF KCSR'S MOTION TO TRANSFER AND SUBSEQUENT GRANTING OF PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR PETITION EXCEEDED HIS JURISDICTION AND AUTHORITY IN THAT UNDER SECTION 508.010.5(1), R.S.MO., VENUE IN THIS TORT ACTION IS PROPER ONLY IN ST. LOUIS COUNTY, WHERE RELATOR'S REGISTERED AGENT IS LOCATED, GIVEN THAT PLAINTIFFS' FIRST INJURIES WERE SUSTAINED IN LOUISIANA, WHERE THE ACCIDENT OCCURRED, AND NONE OF THE PLAINTIFFS WERE MISSOURI RESIDENTS.

1. *State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931 (Mo. banc 2008)
2. *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994)
3. *State ex rel. Dillard's Inc. v. Ohmer*, 190 S.W.3d 570 (Mo. App. E.D. 2006)

4. *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140 (Mo. banc 2002)
5. R.S.Mo. § 476.410
6. R.S.Mo. § 508.010
7. Mo. S. Ct. R. 51.045

ARGUMENT

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE CIRCUIT COURT FROM TAKING ANY FURTHER ACTION EXCEPT TO TRANSFER THE UNDERLYING CASE TO THE CIRCUIT COURT OF ST. LOUIS COUNTY BECAUSE RESPONDENT’S DENIAL OF KCSR’S MOTION TO TRANSFER AND SUBSEQUENT GRANTING OF PLAINTIFFS’ MOTION FOR LEAVE TO AMEND THEIR PETITION EXCEEDED HIS JURISDICTION AND AUTHORITY IN THAT UNDER SECTION 508.010.5(1), R.S.MO., VENUE IN THIS TORT ACTION IS PROPER ONLY IN ST. LOUIS COUNTY, WHERE RELATOR’S REGISTERED AGENT IS LOCATED, GIVEN THAT PLAINTIFFS’ FIRST INJURIES WERE SUSTAINED IN LOUISIANA, WHERE THE ACCIDENT OCCURRED, AND NONE OF THE PLAINTIFFS WERE MISSOURI RESIDENTS.

This action challenges Respondent’s failure to transfer the underlying action from Jackson County, Missouri to St. Louis County where venue would be proper. Because venue was improper in Jackson County, Missouri when plaintiffs filed their Petition

against KCSR, Respondent was required by law to transfer the case to a proper venue, and he lacked jurisdiction to take any further action in the case apart from such transfer. Respondent therefore exceeded his jurisdiction by denying KCSR's Motion to Transfer Venue and granting plaintiffs leave to amend their Petition.

Prohibition properly lies to prevent Respondent's extra-jurisdictional actions, and this Court should enter a permanent Writ ordering Respondent to vacate his October 1, 2008 Order granting plaintiffs leave to file their First Amended Petition, and prohibiting the Circuit Court from taking any further action in the case other than to transfer the action to the Circuit Court of St. Louis County, Missouri.

A. Applicable Standard of Review.

Venue is a matter of law defined by statute. The standard of review in this matter is therefore *de novo*. *State ex rel. The Budd Company v. O'Malley*, 114 S.W.3d 266 (Mo. App. W.D. 2002) (In determining whether the court misconstrued or misapplied the law regarding whether venue was appropriate the a *de novo* standard was applied).

B. Prohibition lies to prevent a trial court from refusing to transfer a case where venue is improper.

Prohibition is an appropriate means to correct a trial court's denial of a motion to transfer venue. Prohibition is a discretionary writ that only issues "to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 932 (Mo. banc 2008)(quoting *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001)).

As recently as March, 2008, this Court reaffirmed that improper venue is a fundamental defect and that a court that acts when venue is improper acts in excess of its jurisdiction. *State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 932 (Mo banc 2008). Consequently, when venue is improper, prohibition lies to bar the trial court from taking any further action, except to transfer the case to a proper venue. *Id.*

C. Venue is not proper in Jackson County, Missouri.

It is undisputed that venue was improper, both when plaintiffs filed their action and when Respondent denied KCSR's Motion to Transfer. Under Missouri law, the propriety of venue is prescribed by statute. *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820, 822 (Mo. banc 1994); *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 196 (Mo. 1991). R.S.Mo. section 508.010 provides that in all tort actions in which plaintiff was first injured outside the state of Missouri, and where none of the plaintiffs resided in Missouri at the time of the incident, venue against a corporate defendant is proper only in the county where the corporation's registered agent is located. R.S.Mo. § 508.010.5(1). In a wrongful death action, the plaintiff is considered first injured where the decedent was first injured by the wrongful acts or negligent conduct alleged in the action. R.S.Mo. § 508.010.11. A personal injury plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first manifested. R.S.Mo. § 508.010.14.

Under the allegations in plaintiffs' Petition, venue was proper only in the Circuit Court of St. Louis County. KCSR, a corporation, was the only defendant. All plaintiffs were deemed first injured in the State of Louisiana, where the accident occurred. Under

508.010.5(1), because none of the plaintiffs resided in Missouri at the time of the accident, venue for plaintiffs' action against KCSR was proper only in St. Louis County, Missouri, where KCSR maintained its registered agent. These undisputed facts relating to venue existed both at the time plaintiffs filed their Petition, and on the date Respondent denied KCSR's Motion to transfer.

After KCSR challenged venue, plaintiffs bore the burden of showing that venue was proper. *Igoe v. the Department of Labor and Industrial Relations*, 152 S.W.3d 284, 288 (Mo. banc 2005) (plaintiff facing venue challenge must make allegations that bring the claim within an appropriate statutory venue provision). Plaintiffs failed to do so. Instead, plaintiffs claimed that the defective venue could be remedied through the addition of a new party. This position was contrary to Missouri law, as explained below.

D. Respondent's denial of KCSR's Motion to Transfer was contrary to law.

In this case, Respondent exceeded his jurisdiction by denying KCSR's timely filed Motion to Transfer Venue. Section 476.410 of the Revised Statutes of Missouri instructs, "The division of a circuit court in which a case is filed laying venue in the wrong division or wrong circuit *shall* transfer the case to any division or circuit in which it could have been brought." R.S.Mo. § 476.410 (emphasis added). This mandate is echoed in Supreme Court Rule 51.045(a), which provides, "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." Mo. S. Ct. R. 51.045 (emphasis added). Thus, when faced with KCSR's timely filed motion to transfer, Respondent had no jurisdiction

to take any further action in the case other than to transfer the case to a proper venue. *Neill*, 78 S.W.3d at 142 (Mo. banc 2002) (court that acts when venue is improper acts in excess of its jurisdiction). Respondent therefore lacked the authority to grant plaintiffs leave to amend their Petition.³

E. Respondent had no jurisdiction or authority to grant plaintiffs leave to file their First Amended Petition.

Respondent was without jurisdiction to grant a motion for leave that purported to cure defective venue. A nearly identical situation was addressed in *State ex rel. Dillard's, Inc. v. Ohmer*, 190 S.W.3d 570, 572 (Mo. App. E.D. 2006). In that case, the plaintiffs sued a department store, asserting common-law tort claims and accusing the defendant of violating the Missouri Human Rights Act (“MHRA”). The defendant timely filed a motion to transfer the case to St. Louis County, asserting that under the MHRA, venue was proper only in the county where the alleged discriminatory acts occurred. In response, the plaintiffs sought leave to amend their petition to drop the MHRA allegations in order to cure the venue defect. The circuit court granted plaintiffs’ motion for leave and denied the defendant’s motion to transfer. The defendant sought a writ of prohibition.

³ Plaintiffs were required to seek leave in order to amend because KCSR had already filed its Answer. Mo. Sup. Ct. R. 55.33 (party may amend pleading only upon leave of court or consent of parties after responsive pleading is filed).

The *Ohmer* Court held that the trial court exceeded its jurisdiction by allowing the proposed amendment and denying the defendant's motion to transfer. The Court held that because venue was improper based on the allegations in the plaintiffs' initial petition, the only action the trial court was authorized to take was to transfer the case to its proper venue. *Id.* at 572. The Court further held that the trial court "lacked jurisdiction and authority to properly grant Plaintiffs' Motion to Amend" and therefore that prohibition was an appropriate remedy to bar the trial court's action. *Id.* at 573. The Court therefore issued a permanent writ in prohibition that ordered the trial court to refrain from taking any further action apart from transferring the case. *Id.*

The same result is warranted in this case. Respondent exceeded his jurisdiction by denying KCSR's Motion to Transfer. Respondent also exceeded his jurisdiction by granting plaintiffs leave to amend their petition to add a new defendant. Instead of ruling on plaintiffs' Motion for Leave, Respondent should have transferred the action to St. Louis County, where a judge of that circuit might rule upon any motions pursued or filed there.

In any event, Respondent's Order granting plaintiffs leave to amend did not cure the defective venue. On the contrary, Respondent's Order gave plaintiffs ten days to file an amended petition. Hence, when Respondent denied KCSR's Motion to Transfer, KCSR was the sole defendant, and venue remained improper. The denial of KCSR's Motion to Transfer and the granting of Plaintiffs' Motion for Leave to Amend therefore plainly violated Missouri law.

CONCLUSION

Venue of the underlying action was not proper in Jackson County, Missouri. Because venue was improper in Jackson County, Missouri when plaintiffs filed their Petition against KCSR, Respondent was required by law to transfer the case to a proper venue, and he lacked jurisdiction to take any further action in the case apart from such transfer. Respondent therefore exceeded his jurisdiction by granting plaintiffs leave to amend their Petition and denying KCSR's Motion to Transfer Venue. Accordingly, KCSR respectfully requests that this Court issue a Writ of Prohibition, or alternatively, Mandamus, ordering Respondent to vacate his invalid order granting plaintiffs leave to amend and ordering Respondent to take no further action in the case except to transfer the case to the Circuit Court of St. Louis County, Missouri.

Respectfully submitted,

YERETSKY & MAHER, L.L.C.

By: _____
James M. Yeretsky MO#30096
Gregory F. Maher MO#41285
Craig M. Leff MO#43446
G. Stuart Englebert MO#53426

P.O. Box 26035

Kansas City, Missouri 64196

Telephone: (816) 842-5566

Facsimile: (816) 842-3534

Email: jyeretsky@ymllc.com

**ATTORNEYS FOR RELATOR
THE KANSAS CITY SOUTHERN
RAILWAY COMPANY**

CERTIFICATE OF SERVICE

I hereby certify on this 27th day of January, 2009, two copies of the foregoing
were served by hand delivery on each of the following:

The Honorable W. Stephen Nixon
Jackson County Courthouse
415 E. 12th St.
Kansas City, Missouri 64106
(816) 881-4405
RESPONDENT

Mark E. Parrish
Nash & Franciskato Law Firm
Two Pershing Square
2300 Main Street
Suite 170
Kansas City, Missouri 64108

Richard L. Rollings, JR
379 West Lake Park
Camdenton, MO 65020
ATTORNEYS FOR PLAINTIFF

James M. Yeretsky

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), Relator hereby certifies that the brief complies with the limitations contained in Rule No 84.06(b). Relator's Brief contains 2,456 words and 219 lines as counted by Microsoft Word 2000, the program used to prepare the brief. Relator further certifies that the brief contains all the information required by Rule 55.03

Relator further certifies that they are filing with this brief a computer disk containing a copy of Relators' Brief, which was prepared using Microsoft Word 2000. The disk has been scanned for viruses and is virus-free.

James M. Yeretsky