

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.

REPLY BRIEF OF RELATOR

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**THE KANSAS CITY SOUTHERN RAILWAY
COMPANY**

TABLE OF CONTENTS

TABLE OF CONTENTSii

TABLE OF AUTHORITIES.....iii

ARGUMENT 1

 A. A trial court presiding over a case where venue is improper has jurisdiction only to transfer the case to a proper forum and can take no other action..... 2

 B. Section 508.12 does not authorize a trial court to cure defective venue by granting plaintiffs leave to join a new party defendant..... 3

 C. Section 508.010.9’s requirement that venue be determined on the date the plaintiff was first injured has limited applicability and provides no justification for Respondent’s denial of KCSR’s motion to transfer venue..... 7

CONCLUSION 9

CERTIFICATE OF SERVICE 11

CERTIFICATE OF COMPLIANCE 12

TABLE OF AUTHORITIES

Cases

<i>State ex rel. Dillard's, Inc. v. Ohmer</i> , 190 S.W.3d 570 (Mo. App. E.D. 2006)	3, 5
<i>State ex rel. Director of Revenue, State of Missouri v. Gaertner</i> , 32 S.W.3d 564 (Mo. banc 2000)	2
<i>State ex rel. Green v. Neill</i> , 127 S.W.3d 677 (Mo. banc 2004).....	3
<i>State ex rel. Linthicum v. Calvin</i> , 57 S.W.3d 855 (Mo. banc 2001).....	4
<i>State ex rel. Selimanovic v. Dierker</i> , 246 S.W.3d 931 (Mo. banc 2008)	1, 3, 5
<i>State ex rel. SSM Health Care St. Louis v. Neill</i> , 78 S.W.3d 140 (Mo. banc 2002)	3

Statutes

R.S.Mo. § 476.410.....	passim
R.S.Mo. § 508.010.....	1, 7, 8
R.S.Mo. § 508.012.....	4, 5, 7

Other Authorities

David Achtenberg, “Venue in Missouri After Tort Reform,” 75 U.M.K.C. L. Rev. 593 (2007)	8
Mo. S. Ct. R. 51.045	1, 2, 5, 8

ARGUMENT

Despite his arguments to the contrary, Respondent had neither the authority nor the discretion to deny KCSR's Motion to Transfer Venue or to grant plaintiffs leave to amend their Petition to add a new defendant. Respondent ignores this Court's prior rulings—one issued in 2008—holding that *improper venue is a fundamental defect*, that any court that acts when venue is improper acts in excess of its authority, and that prohibition lies to prevent a trial court from taking any action other than transferring the case to a proper venue. *State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 932 (Mo. banc 2008). This limit on judicial authority derives from the plain language of R.S.Mo. section 476.410 and Missouri Supreme Court Rule 51.045, as well as multiple opinions from this Court.

Respondent's reliance on the 2005 Amendments to R.S.Mo. section 508.010 and the enactment of R.S.Mo. section 508.012 is misplaced. These statutes do not, as Respondent argues, liberalize venue rules or enlarge the authority of a circuit judge presiding over a case where venue is improper. On the contrary, the amendments to section 508.010 significantly restrict a plaintiff's choice of venue, and section 508.012 was enacted specifically to prevent plaintiffs from manipulating venue by the strategic joinder and dismissal of defendants. Neither of these statutes disturbed this Court's longstanding declaration that improper venue is a fundamental defect that leaves a circuit judge only one option—transfer the case to a proper venue. Respondent therefore

violated the law and exceeded his jurisdiction by denying KCSR's Motion to Transfer Venue, and prohibition lies to correct this error.

A. A trial court presiding over a case where venue is improper has jurisdiction only to transfer the case to a proper forum and can take no other action.

Missouri law strictly limited the actions Respondent could lawfully take given the procedural facts of this case. Once KCSR filed its Motion to Transfer Venue, Respondent was to take no further action in this case but to grant the motion. This limit on Respondent's authority and jurisdiction derives in part from Section 476.410 of the Revised Statutes of Missouri. That section provides, "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).

Contrary to Respondent's assertion, the legislature's severance of personal jurisdiction and venue and its enactment of section 476.410 did not authorize Respondent to ignore his mandatory duty to transfer an action filed in the wrong venue. In *State ex rel. Director of Revenue, State of Missouri v. Gaertner*, 32 S.W.3d 564 (Mo. banc 2000), this Court held that section 476.410 vests a circuit court with only *limited* jurisdiction to transfer any case filed in an improper venue to a court where venue is proper. *Id.* at 567-

568. In three cases decided after *Gaertner*, this Court has reaffirmed the principles that venue remains a fundamental defect, that a trial court has jurisdiction only to transfer the case to a proper forum, that a court that acts when venue is improper acts in excess of its jurisdiction, and that prohibition lies to preclude the circuit court from taking any other action other than transferring the case. *See Selimanovic*, 246 S.W.3d at 932; *State ex rel. Green v. Neill*, 127 S.W.3d 677, 678 (Mo. banc 2004); *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 142 (Mo. banc 2002). Notably, this Court's opinion in *Selimanovic* was based on the 2005 amendments to section 508.010. 246 S.W.3d at 932.

When faced with KCSR's timely Motion to Transfer Venue, Missouri law gave Respondent the authority and jurisdiction to take only a single action: transfer the case to St. Louis County, Missouri. Respondent violated his duty, first by denying KCSR's Motion when KCSR was the sole defendant in the case and venue was plainly improper under section 508.010, and second by attempting to remedy defective venue by entering a separate order granting plaintiffs leave to amend their Petition to add a new defendant. *See State ex rel. Dillard's, Inc. v. Ohmer*, 190 S.W.3d 570, 572 (Mo. App. E.D. 2006) (trial court presiding over case where venue is improper exceeded his jurisdiction by granting plaintiff leave to amend petition to remedy venue defects).

B. Section 508.12 does not authorize a trial court to cure defective venue by granting plaintiffs leave to join a new party defendant.

Respondent argues that R.S.Mo. Section 508.012 allowed him to remedy defective venue through the addition of a new defendant, Jackson County resident Kevin McIntosh. This argument misinterprets the language and purpose of section 508.012 and ignores

clear judicial authority that limits the powers of a judge presiding over a case where venue is improper.

Respondent's argument that section 508.012 is a safety net that allows courts to remedy their own jurisdictional venue defects by allowing joinder of a new defendant completely disregards the text of section 508.012 and the limited purpose it serves. Section 508.012, entitled "Transfer of case based on addition or removal of a plaintiff or defendant prior to commencement of trial," states:

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 original 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 (emphasis added).

Section 508.012 merely codified this Court's holding in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). In *Calvin*, the Court addressed a common two-step maneuver in which plaintiffs timed the joinder of defendants strategically to manipulate venue. *Calvin*, 57 S.W.3d at 856. Typically, a petition would be filed against a defendant or defendants in a venue that was proper as to those defendants. The plaintiff would then file an amended petition adding parties who, if named in the initial petition, would have rendered venue improper. Claiming that venue was judged only as the case stood when "brought," the plaintiff would argue that venue was determined solely on the

identity of defendants named in the initial pleading and thus unaffected by later joinder of new defendants. The *Linthicum* Court effectively ended this practice. The Court held that for venue purposes, a new action is “brought” each time a new defendant is added through an amended petition. *Id.* at 858. Thus, the Court recognized that venue, even if proper when the case was initially filed, could be destroyed by the addition of a new defendant.

By enacting section 508.012, the legislature expressly approved and codified the *Calvin* decision. In fact, the Legislature extended *Calvin*’s holding to situations where a party named in an initial petition is later dropped. *See* R.S.Mo. § 508.012. Thus, transfer is mandatory not only if the case is “filed” in the wrong venue, but also upon the later joinder or dismissal of parties whose presence in or absence from the initial petition would have rendered venue improper when the case was filed. R.S.Mo. § 508.012.

For two primary reasons, section 508.012 has no application in this case and cannot be used to validate Respondent’s refusal to follow the mandate of 476.410 and Rule 51.045. First, section 508.012 serves a limited purpose, namely to require the *transfer* of a case in which venue has been destroyed by the addition or deletion of a party. Nothing in section 508.012 purports to empower a court lacking proper venue to cure its own fundamental defect by allowing the joinder of a new defendant. And because a circuit court presiding over a case where venue is lacking has no jurisdiction to take any action other than to transfer the case to a proper forum, *Selimanovic*, 246 S.W.3d at 932, Respondent’s order granting plaintiffs leave to add McIntosh exceeded his jurisdiction and was a nullity. *Ohmer*, 190 S.W.3d at 572.

Section 508.012 in no way alters section 476.410; rather, it expands the applicability of that statute. Section 476.410, entitled “Transfer of case filed in wrong jurisdiction,” continues to require a circuit court to transfer a case “filed” in an improper venue. Section 508.012 specifically references section 476.410 and extends its mandatory transfer provisions to cases in which venue, initially proper, is later destroyed by the joinder or dismissal of parties. If anything, section 508.012 places further limits on a trial court’s jurisdiction. If venue becomes improper because of the addition or subtraction of parties, the trial court has no jurisdiction to perform any act other than the transfer of the case to a proper forum. Respondent’s argument that section 508.012 expanded his authority over a case of improper venue finds no support in the language of that statute.

Second, 508.012 had no application in this case because Respondent denied KCSR’s Motion to Transfer when KCSR was the only party defendant and before plaintiffs had added McIntosh via their amended Petition. Though Respondent granted plaintiffs leave to amend their Petition to add McIntosh as a defendant the same day he denied KCSR’s Motion to Transfer, McIntosh was not at that point a defendant; plaintiffs’ First Amended Petition was not filed until seven days later, *after* Respondent had already denied KCSR’s Motion (SR000005). Respondent’s denial could not have been based on section 508.012 because the amended pleading had not even been filed at the time Respondent denied KCSR’s venue motion. There can be no dispute that venue was improper when Respondent denied KCSR’s Motion to Transfer because KCSR was the sole defendant.

Respondent's argument that transferring the case to St. Louis County would be futile because plaintiffs' joinder of McIntosh would allow the case to be transferred back to Jackson County is plainly wrong. Section 508.012 applies only if the joinder of a party renders venue improper. If this case were transferred to St. Louis County, where venue is proper as to KCSR, adding McIntosh as a defendant would not destroy venue, and transfer pursuant to section 508.012 would therefore be unwarranted.

Respondent's suggestion that the transfer provisions of section 508.012 are triggered regardless of whether the change of parties renders venue improper ignores the plain language of the statute and would lead to absurd results. Section 508.012 references a change in parties that would have "*altered* the determination of venue under section 508.010." R.S.Mo. § 508.012 (emphasis added). Further, section 508.012 specifically incorporates section 476.410, which governs the transfer of cases from a "wrong" circuit to a proper one. If venue is proper, section 476.410 does not apply, and transfer to a "proper forum" would be unnecessary. Thus, the only reasonable interpretation of section 508.012 is that transfer is required only if the adding or dropping of parties, if made in the initial Petition, would have rendered venue improper.

C. Section 508.010.9's requirement that venue be determined on the date the plaintiff was first injured has limited applicability and provides no justification for Respondent's denial of KCSR's motion to transfer venue.

Respondent's argument that venue is no longer evaluated as the case stands when "brought" overextends the limited effect of R.S.Mo. section 508.010.9, which says that

“venue shall be determined as of the date the plaintiff was first injured.” R.S.Mo. § 508.010.9. This language logically refers only to the time for determining certain time-variable predicates for venue that may be ascertained on the date of injury, chiefly the residency of the parties. *See* David Achtenberg, “Venue in Missouri After Tort Reform,” 75 U.M.K.C. L. Rev. 593 at 613-14 (2007). For instance, under section 508.010.9, the plaintiffs in the present case could not have created venue in Jackson County, Missouri by moving there after the accident but before filing suit because their residency for venue purposes was fixed on the date of the accident.

Section 508.010.9 cannot logically apply to other variables such as the *identity* of parties to a lawsuit. Section 508.010 clearly requires that venue be determined based on the parties to a lawsuit and their respective residences. But the parties to a lawsuit are not identified when the plaintiff is first injured, but only when a petition is filed with the court. Thus, although the residency of parties named in a petition is determined on the date the plaintiff was first injured, the venue determination can be made only after the action has been commenced and the plaintiffs and defendants identified.

This interpretation is entirely consistent with section 476.410 and Rule 51.045. Section 476.410 continues to require the transfer of a case “filed” in the wrong venue, while Rule 51.045 requires transfer of an action “brought in a court where venue is improper.” Section 508.010 itself, entitled, “Suits by summons, where brought,” uses the terms “filed,” “brought,” and “commenced” interchangeably when referring to the appropriate venue for an action. R.S.Mo. § 508.010. Respondent’s argument that

section 508.010.9 somehow authorized him to deny KCSR's timely Motion to Transfer Venue is therefore without merit.

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,

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CERTIFICATE OF SERVICE

I hereby certify on this 3rd day of March, 2009, two copies of the foregoing were served via first class U.S. mail, postage prepaid on each of the following:

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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 2,621 words 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.

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